



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 20.07.2019

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.8 of 2016

Petitioner : Ganga Maya Gurung

versus

Respondents : The State of Sikkim and Another

Petition under Article 226 of the Constitution of India

Appearance

Mr. N.B. Khatiwada, Senior Advocate (Legal Aid Counsel) with Ms. Gita Bisa, Advocate (Legal Aid Counsel) for the Petitioner.

Dr. Doma T. Bhutia, Additional Advocate General with Mr. Thupden Youngda, Government Advocate and Ms. Pollin Rai, Assistant Government Advocate for the Respondent No.1.

Mr. M.N. Dhungel, Advocate for the Respondent No.2.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Claiming abrogation of her fundamental rights as guaranteed under Article 14 of the Constitution of India and violation of the principles of natural justice, the Petitioner herein seeks a direction to the Respondent No.1 not to disturb her possession on a plot of land measuring 20 feet x 25 feet at Deorali School Road, Gangtok, East Sikkim. That, the Respondent No.1 be restrained from acting contrary to the rights of the Petitioner and to stay the Order of the Respondent No.1 requiring demolition of a structure on the said plot of land constructed by her.

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2. The facts as projected by the Petitioner are that she is a 50% physically challenged person with permanent impairment of both her upper limbs as certified by the concerned authority at the Safdarjung Hospital, New Delhi vide a Disability Certificate, dated 11.10.1991. In 1974 she was married to one Lhendup Dorjee Bhutia from whom she allegedly separated in the year 1988. In the year 1991, a kitchen accident rendered her disabled and in order to maintain the three minor children from her husband, she sought for and was granted maintenance from him, vide a Magisterial Order, dated 30.03.1992 (Annexure P-2). Pursuant to the passing away of her husband in 1992, the Court of the learned District and Sessions Judge, Sikkim at Gangtok granted her Guardianship of her three minor children in August, 1993.

3. In this backdrop, in November, 1993 she moved an application before the Office of the Respondent No.1 seeking allotment of a housing site, around Gangtok area but was unable to follow up the matter on account of her disability. During this time she also met a person who she decided to share her life with but the relations did not last. Meanwhile her children also attained majority and in the year 2000 she transferred the property of her late husband to her children by issuing a "No Objection Certificate" towards this end. Her children have since deserted her. Thereafter, despite several pleas made by her to the concerned Minister and even the Chief Minister from the year 2005 through 2015, seeking allotment of a housing site, her pleas fell on deaf ears. She however

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identified a site at Deorali School Road for allotment to her and constructed a shed thereon. In April 2015, the Assistant Town Planner-I, Urban Development and Housing Department (for short "UD&HD") finally turned down her request *inter alia* on grounds of insufficient proof of occupancy of the site and that the land in question was previously allotted to one Smt. Ganga Pradhan in the year 1984 and was disputed. In January 2016 the Petitioner received a Demolition Order from the UD&HD, requiring her to demolish the shed at the said site. She responded vide a letter dated 20.01.2016, requesting that the Order be recalled. That she has come to learn that her application was in fact considered in April, 2015 and site inspection was carried out but later the site was offered to the Respondent No.2 in terms of an amicable settlement arrived at between the Respondent No.1 and Respondent No.2 in connection with another Writ Petition, which thereby stood disposed of. Hence, being aggrieved she has put forth her prayers as detailed hereinabove.

4. In response, it was averred by the Respondent No.1 that the allotment of house sites is governed by the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 wherein Section 6 of the Act mandates that the Government shall not allot more than one housing site to one family in the State. The husband of the Petitioner had been allotted a house site in Deorali on 26.12.1975, by the concerned Government Department at the relevant time upon which he constructed a five storeyed RCC

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building. In February 2000, the Petitioner gave her consent by issuance of a "No Objection Certificate" for transfer of the said allotted site along with the building in favour of her daughter Tshering Choden Bhutia, which was accordingly executed. In 2003 the Petitioner made an application to the Hon'ble Chief Minister for allotment of a house site adjacent to the plot presently in dispute, the allotment was however made in favour of one C.K. Rai on 02.06.2010. Vide an application dated 15.06.2013 the Petitioner sought site allotment abutting the site of C.K. Rai but in March 2015 she claimed to be in possession of the said vacant land wherein she had constructed a *kutcha* structure and sought regularization of the said site in her name. The Respondent No.1 declined her request vide its response dated 28.04.2015. That, the Respondent No.2 had filed Writ Petition (C) No.1 of 2013 challenging allotment of a site to one Smt. Beena Rai at "SNT Complex" and later agreed to an amicable settlement if allotted a plot for himself. A site measuring 20 feet x 25 feet was identified and offered to him near the Working Womens' Hostel, Deorali School Road and accepted by him, however, the Petitioner had constructed a *kutcha* shed measuring 10 feet x 8 feet = 80 square feet on the said site identified and converted it into a store but did not live there. The Respondent No.1 consequently issued a Demolition Order dated 16.01.2016, requiring her to demolish the unauthorized construction and vacate the premises within seven days from the date of the Order. Hence the petition be dismissed.



5. The Respondent No.2 conceded that he had agreed to the proposal of the Respondent No.1 for allotment of the site measuring 20 feet x 25 feet at Deorali with the purpose of amicably settling Writ Petition (C) No.1 of 2013 filed by him against an allotment made by Respondent No.1 to a third party. That thereafter on such allotment which was duly accepted by him, he had paid the Site Salami of Rs.1,25,000/- (Rupees one lakh and twenty five thousand) only and withdrawn the said Writ Petition.

6. In Rejoinder, the Petitioner contended that she had severed all ties with her late husband and after her children attained majority they had deserted her. According to her, the definition of "family" as per the Act of 1985 as defined in Section 2(c) has been amended by the Sikkim State Site Allotment Rules, 2012 hence the legal objection raised under the provision of Section 6 of the Act of 1985 has no application to her case. While drawing attention to the mandate of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "Disabilities Act of 1995") the Petitioner averred that this has not been complied with as no preferential allotment has been made in her favour. While admitting that the property in Deorali was transferred in her daughter's name in the year 2000, she submitted that she had done so as it was not her property. The grounds taken by the Respondent No.1 to deny her rights are *mala fide* and contradictory to the principles of natural justice and Articles 14



and 21 of the Constitution of India, hence the prayers in the instant Writ Petition be allowed.

7. Learned Senior Counsel while advancing his arguments for the Petitioner relied on the provisions of Section 3, Section 34, Section 37(a) and (c) and Section 38 of the Rights of Persons with Disabilities Act, 2016 (for short "Disabilities Act of 2016") and urged that the law mandates preferential treatment to persons with disabilities thus she has the first right to allotment of the concerned site. That the Sikkim State Site Allotment Rules, 2012 are violative of Article 21 of the Constitution of India and the Petitioner is deprived of her right to shelter as guaranteed under Article 19(1)(g) [*sic(e)*] and Article 21 of the Constitution of India towards which reliance was placed on ***U.P. Avas Evam Vikas Parishad and another v. Friends Co-op. Housing Society Ltd. and another***¹. That, despite approval accorded and endorsed by the then Hon'ble Chief Minister on her representation, this was ignored by the Department and the allotment made in favour of the Respondent No.2. It was reiterated that the property which was allotted to her late husband in the year 1975 has already been transferred in the name of her children in the year 2000 and she was a mere guardian of the said property. Such allotment made in 1975 to her husband when she had not even met him cannot be an embargo on the Respondent No.1 to allot the land to her, besides which, she is not the legal wife of late Lhendup Dorjee

¹AIR 1996 SC 114



Bhutia as per Section 5(1) [*sic(i)*] of the Hindu Marriage Act, 1955. That she was not arrayed as a party in Writ Petition (C) No.1 of 2013 although the land in her possession was allotted to Respondent No.2 and hence the Order passed in the Writ Petition does not bind her. It was further urged that reservation for the disabled is horizontal reservation which cuts across all vertical categories including SC, ST, OBC and General as held by the Hon'ble Supreme Court in ***Justice Sunanda Bhandare Foundation v. U.O.I. and another***² and thus applies to her case. She is an economically weaker woman when pitted against the Respondent No.2 hence her petition be allowed in the interest of substantial justice.

8. While resisting the arguments of the Petitioner, learned Additional Advocate General would submit that it is evident from the Order, dated 30.03.1992 of the Court of the Civil Judge-cum-Judicial Magistrate, East and North Sikkim at Gangtok, relied on by the Petitioner herself, that, she was indeed married to late Lhendup Dorjee Bhutia. Her claims that in the year 1975 she did not know her husband is incorrect, as the Order *supra* reveals that she was married to her husband in the year 1974 while site allotment came to be made in his favour in December 1975. She has voluntarily handed over the property to her daughter vide Annexure R-2 in October 2000 duly executing a "No Objection Certificate," along with her husband's first wife. Vide the document they have volunteered to grant mutation in

²AIR 2014 SC 2869

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favour of Miss Tshering Choden Bhutia, daughter of Lhendup D. Bhutia and Ganga Maya Gurung with regard to the property measuring 12 feet x 10 feet which had been allotted to their late husband who passed away in the year 1992. In the document, both the wives of late Lhendup Dorjee Bhutia have admitted that they are his legal heirs and successors to the property. Now having given the property to her daughter she cannot seek another allotment in her favour. That the definition of "family" as per the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 clearly covers the Petitioner and she cannot claim rights under the Disabilities Act of 1995, as due compliance has been given by the Respondent No.1 to the provision of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985. A second allotment cannot be made to the Petitioner after an allotment was already made to her husband in terms of the Act. If she claims desertion by her children then she ought to invoke the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and not claim a second allotment. That, in view of the categorical arguments, the petition be dismissed.

9. Learned Counsel for the Respondent No.2 submitted that the allotment to the Respondent No.2 has not been challenged in the instant petition and therefore cannot be set aside. Besides in view of the scarcity of land in the State there has to be an equitable distribution and a second allotment does not accrue to the Petitioner when a first allotment was clearly



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made to her in terms of the provision of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 and she has willingly handed it over to her daughter.

10. I have considered the rival contentions put forth by learned Counsel at length and meticulously examined all the documents on record.

11. The question that arises for consideration before this Court is;

Whether the Petitioner is entitled to allotment of a housing site in view of a previous allotment made to her husband? In such a circumstance, can she invoke the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 or would the provisions of Section 6 of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 be applicable?

12. While addressing the question formulated, it would be relevant to delve into the provisions of the Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 (hereinafter the "Act of 1985"). Section 2(c) of the Act of 1985 defines "family" as follows;

"2. Definitions:

(a)

(b)

(c) "*family*" means father, mother, their minor children and includes major children living jointly with the parents."

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The Sikkim State Site Allotment Rules, 2012 (hereinafter the "Rules of 2012") at Rule 2(1)(e) reiterates the composition of "family" as defined in Section 2(c) of the Act of 1985 tweaking it by inserting the words "applicant's wife or husband." The said provision reads as follows;

"2. (1) In these rules, unless the context otherwise requires:-

- (a)
- (b)
- (c)
- (d)
- (e) *"Family" means applicant's wife or husband as the case may be, minor children and also includes major children living jointly with the parents;"*

From a reading of the provisions of Section 2(c) of the Act of 1985 and Rule 2(1)(e) of the Rules of 2012, it is evident that the intent and purport of the provisions remain the same inasmuch as although the Act of 1985 says "family" means the persons as described in the Act, the Rules of 2012 provides that "family" means the applicant's wife or husband etc., as already extracted *supra*. On the heels of these two provisions, it is essential to notice the provisions of Section 6 of the Act of 1985 which reads as hereunder;

"6. Restriction on allotment of site:

The Government shall not allot more than one site to one family in the state."

The provisions of Section 6 of the Act of 1985 are lucid and self-explanatory. Hence on a careful conjunctive reading of the above provisions it is apparent that once an allotment is made to a family comprising of a husband, wife, their children which includes major children living with them they would not be eligible for a second allotment. Ergo, when the allotment was made to the Petitioner's husband in the year 1975 by the

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concerned Government Department, she comprised of his “family” having married her husband in the year 1974. This is evident from the Order of the learned Magisterial Court dated 30.03.1992 (Annexure P-2), a document brought forth by the Petitioner herself. This document reflects that the Petitioner had represented three of her minor children as their guardian and sought maintenance from her husband under Section 488 of the Code of Criminal Procedure, 1973. The Order specifically reveals as follows;

“... It is the case of the petitioners that Smt. Ganga Maya Gurung and the Opposite party was **married in the year 1974 according to local customs.** ...”

(emphasis supplied)

Having pleaded so before the learned Magisterial Court, in my considered opinion she cannot now reprobate and state that she is not the legal wife of her husband in terms of Section 5(i) of the Hindu Marriage Act 1955. In ***Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited***³ the Hon'ble Supreme Court has *inter alia* held as follows;

“**34.** A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, ...”

Besides, the learned Magistrate has recorded that she was married to her late husband as per the local customs. No further discussions need ensue on this point with regard to her statement *viz-a-viz* the legality of her marriage to her late

³ (2011) 10 SCC 420

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husband as the Order *supra* clarifies the position. This Court thereby proceeds on the postulation that she was married to her late husband in the year 1974 and thereby a part of his family at that point of time.

13. The rather feeble contention that the Petitioner had decided to share her life with another person has not been elucidated either in the averments or in the arguments. Although vide Annexure P-5, the Petitioner tried to establish that her children had abandoned her on account of the fact that she was involved with another man, and the document states that the Petitioner had eloped with another man but it is relevant to note that the document is neither dated nor does it bear the signature of witnesses. In my considered opinion the document appears to have been prepared only for the purposes of the instant matter and therefore requires no further consideration.

14. While reverting to the arguments of learned Senior Counsel for the Petitioner, it was contended by learned Counsel that the Act of 1985 was amended by the Rules of 2012. This is clearly a misconception. The Act of 1985 is law passed by the legislature and the Rules of 2012 have been made in exercise of the powers conferred by Section 16 of the aforestated Act to enable application or enforcement of the Act. They are not two separate Acts as sought to be interpreted by learned Senior Counsel for the Petitioner. Hence, the question of the Act of

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1985 being amended by the Rules of 2012 is a preposterous proposition and unacceptable.

15. That having been said, the Petitioner admittedly along with the first wife of her late husband voluntarily handed over the allotted site with the standing structure to Miss Tshering Choden Bhutia, the daughter of the Petitioner and her late husband. On this aspect, we may usefully refer to Annexure R-2 which is a "No Objection Certificate" addressed to the District Collector, East District at Gangtok in October, 2000 by one "Mrs. Phungchung Bhutia, 1st Wife of Late Lhendup Dorjee Bhutia" and the Petitioner, wherein both the applicants being the wives of late Lhendup Dorjee Bhutia have stated as much in the said application and that their late husband left them as his "legal heirs and successors" to his estate. It is also admitted therein that their husband owned and possessed a five storeyed RCC building situated at Deorali Bazar, East Sikkim measuring 12 feet x 10 feet and the documents thereof were enclosed. It was further stated that one Miss Tshering Choden Bhutia is the legal daughter of Lhendup Dorjee and Ganga Maya Bhutia, (the Petitioner herein) and that both the wives of late Lhendup Dorjee Bhutia had "no objection whatsoever in granting mutation of the property mentioned above in favour of Miss Tshering Choden Bhutia" and that they bind themselves "not to revoke the instant document." Pursuant thereto the UD&HD vide Annexure R-3 transferred the concerned property from the name of late Lhendup Dorjee Bhutia to his daughter Tshering Choden Bhutia. No grounds for any compulsion for alienating the property

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emanate in the document nor was it clarified before this Court. Pausing here for a moment and reverting back to the dates as made out in the petition, it is clear that the Petitioner was married to Lhendup Dorjee Bhutia in 1974, separated in 1988, was disabled in 1991, widowed in 1992 and in the year 2000 voluntarily made over the allotted property to her daughter. Thus, admittedly she was separated from her husband but divorce did not rear its head either in the pleadings or in the verbal arguments. On separation from her husband she sought maintenance and despite being physically disabled in 1991, in the year 2000 of her own accord and free will, she handed over the said property to her daughter. It is consequently relevant to mull over as to whether she can now come before the Government claiming another allotment by seeking preferential treatment on account of disability when her disability existed at the time of alienation of property to her daughter. Was it prudent on her part to have voluntarily handed over the property of her late husband to her daughter when the site on which the structure came to be erected was in fact a Government allotment? After such voluntary action, does a right accrue to her in terms of the Disabilities Acts to seek allotment? In my considered opinion, these ponderings would have to be answered in the negative. While having said so, although the arguments of learned Senior Counsel pivoted around the provisions of the Disabilities Act of 2016 and its application to the Petitioner, it may pertinently be noted that the instant petition was filed on "12.04.2016" and the Rights of Persons with Disabilities Act,

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2016 was enforced on "19.04.2017," therefore the Petitioner would be covered by the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Chapter VII of the said Act provides for affirmative action wherein Section 43 provides for "Schemes for preferential allotment of land for certain purposes" including land at concessional rates for the purposes of a house. In compliance thereof the Rules of 2012 has allotted 33% reservation for Economically Weaker Sections of the society and physically handicapped persons in the State as mentioned therein. The Rules of 2012 at Rule 5(1) lays down as follows;

"5. ...

(1) Thirty three percent (33%) **of the site area** will be reserved for Economically Weaker Sections (EWS) of the society, physically handicapped persons, victims of natural calamities and people with exemplary records in the area of Art, Science and Sports."

(emphasis supplied)

The relevant Rules provide for reservations for the category of persons described therein including for allotment of housing land however, admittedly, an allotment in terms of Section 2 of the Act of 1985 was already made to the Petitioner's husband.

16. Although averments in her pleadings have constantly tried to mislead the Court by stating that the property was given away to her "children" however the documents on record bear out that it was in fact handed over to one child. It is indeed unscrupulous and inequitable on the part of the Petitioner to hand over the allotted property to a major child, (who, it may be remarked, would have been eligible for allotment of Government property subject to fulfillment of

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necessary conditions) and thereafter entreat the Government for a second allotment. This is an unacceptable circumstance. Even assuming that a second allotment is made to her, can it be ruled out that she would not hand over the said allotment to another child of hers or any other person of her choice and then appear before the Government once again invoking the grounds of her disability? This would indeed be stretching the interpretation of the Disabilities Act of 1995 beyond its ambit and purport. A person once allotted a property in terms of Section 2 of the Act of 1985 and Rules of 2012 is duly covered by the embargo of Section 6 of the Act of 1985. She does not have the licence to invoke the disabilities provision repeatedly while magnanimously handing out the property previously allotted to the family. The argument that when the land was allotted in the name of Lhendup Dorjee Bhutia in the year 1975 she did not know him is a blatantly incorrect statement when the records (Annexure P-2) relied on by the Petitioner herself reveal that she was married to him in the year 1974.

17. It emanates from the averments and the arguments advanced before this Court that the Petitioner was squatting on the land by constructing a shed measuring about 80 square feet. The Respondent No.1 on inspection found that it was merely a godown and she was not living in the area. The Petitioner, before this Court, is now taking the stance of a bully and persuading the Respondent No.1 to legitimize her illegitimate claim over the property by claiming disability. Merely because she was a squatter on the property does not give her

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preferential rights nor does her disability clothe her with preferential rights in light of the foregoing circumstances and detailed discussions thereof. It is not denied that a Writ Petition filed by Respondent No.1 against Respondent No.2 was pending before this Court previously and consequently by way of a settlement between the Respondent No.1 and Respondent No.2 it was agreed that the said area measuring 20 feet x 25 feet would be allotted to the Respondent No.2 upon which the Writ Petition was withdrawn. When a person claims a right as against the Government pertaining to land, they are required to establish possession either by production of title deeds to the property or by establishing possession adverse to the Government for a period of not less than thirty years. Vague claims of stray or sporadic entries into any property which is owned by the Government will not be adequate to prove possession as is sought to be made out by the Petitioner and is to be ignored by the Court.

18. The claim of violation of Articles 14 or 21 of the Constitution of India and the principles of natural justice cannot sustain. In ***Olga Tellis and Others v. Bombay Municipal Corporation and Others***⁴ the Hon'ble Supreme Court has *inter alia* held that;

“...any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.”

The Constitution bench had considered the rights of pavement dwellers and observed that it was a part of right to life enshrined

⁴ (1985) 3 SCC 545

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in Article 21 of the Constitution. Their eviction from their dwellings which were close to their place of work would tantamount to deprivation of their right to livelihood. The Petitioner herein has not revealed as to how she earns her living or where she resides, in any event she is not living in the structure purported to have been constructed by her nor is it her case that the structure is near her place of livelihood, these details are not disclosed and are shrouded in mystery. The records would reveal that after she filed an application seeking allotment, the Government has furnished her with reasons as to why the allotment cannot be made to her. The principle of *audi alteram partem* has not been sidestepped by the State-Respondent No.1.

19. In the end result, the Writ Petition being devoid of merit deserves to be and is accordingly dismissed.

20. No order as to costs.

(Meenakshi Madan Rai)

Judge
20.07.2019