

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 19th FEBRUARY, 2018

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

RSA No. 01 of 2015

Appellant : Durga Prasad Shrestha,
Son of late Arjun Pradhan,
Resident of Pelling,
West Sikkim.

versus

Respondents : 1. Special Secretary,
Tourism Department,
Government of Sikkim,
Gangtok, East Sikkim.

2. District Collector,
West District,
Gyalshing,
West Sikkim.

3. Shri Makar Dhoj Subba,
Son of late Kalu Ram Subba,
Resident of Rimbi,
West Sikkim.

4. Shri Sancha Man Subba,
Son of late Kalu Ram Subba,
Resident of Rimbi,
West Sikkim.

Appeal under Section 100 of the
Code of Civil Procedure, 1908.

Appearance

Mr. B. Sharma, Senior Advocate with Mr. Bhola Nath Sharma,
Advocate for the Appellant.

Mr. Karma Thinlay, Senior Government Advocate with Mrs. Sabina
Chettri, Legal Retainer (Tourism & Civil Aviation Department) and
Mrs. Pollin Rai, Assistant Government Advocate for the State
Respondents No.1 and 2.

Mr. Tashi Rapten Barfungpa, Legal Aid Counsel for the Respondent No.3.
None for the Respondent No.4.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal has wound its way to this Court on the Appellant being aggrieved by the concurrent findings of the learned Civil Judge, West Sikkim at Gyalshing, in Title Suit No. 2 of 2014 and the learned District Judge, West Sikkim at Gyalshing, in Civil Appeal No. 1 of 2014, which dismissed his suit seeking Declaration, Confirmation of Possession, Mutation and other Consequential reliefs.

2. Before the learned Trial Court, the Appellant was the Plaintiff while the Respondents herein were the Defendants, in the same order of appearance.

3. The facts averred by the Appellant before the learned Trial Court were that, he is the owner in possession of two plots of land bearing Khasra No.366 measuring an area of 0.2020 hectare and Khasra No. 366/506, measuring an area of 0.0760 hectare, falling under Singlitam Block, Malli Elaka, Gyalshing, West Sikkim, from 1978 having purchased the property from one Sancha Man Subba (Respondent No.4), son of Kalu Ram Subba, resident of Darap, West Sikkim, in the year 1978, the said property being the share of Respondent No.4, inherited from his father. The sale was

effected between them by executing Exhibit 1 – 'Dhan Rashid' on 15.7.1978, scribed by one Karna Singh Subba, since deceased. That, Exhibit 1 remained unregistered as valid partition of the inherited properties between the brothers, Respondents No.3 and 4 remained incomplete, but the Appellant remained in continuous and undisputed physical possession of the said properties since purchase and paid all government taxes to the concerned departments in the name of Kalu Ram Subba. That, around 1989-90, the Appellant received compensation from the concerned Department on account of damage caused to his property due to construction of a power project at Rimbi. In October 2002, the Appellant came to learn that the Respondent No.3 was attempting to transfer the above properties in his name to avail compensation from the Government who proposed to acquire the property. The Appellant vide letter dated 25.10.2002 protested this step and apprised the District Collector of the facts as above to which no response was forthcoming. To the contrary, Respondent No.3 lodged a false complaint in November 2005 before the concerned Panchayat President of Darap, West Sikkim, where on being summoned the Appellant attended and explained his stand before the Panchayat by way of documents pertaining to the scheduled property, the Respondent No.3 failed to put in an appearance. In November 2005, the Appellant came to learn that the scheduled properties excluding a certain portion had been sold to the Tourism Department, Government of Sikkim, to which he again protested to the concerned Department vide letter dated 16.11.2005 enclosing title deeds of the scheduled property. The same month Respondent No.3

lodged a complaint before the District Collector, West Sikkim, that the scheduled properties was sold by him to the Government but the Appellant was erecting a house therein. The matter was referred to the Lok Adalat, in vain. The Appellant then issued a Section 80 Notice under the Code of Civil Procedure, 1908 (hereinafter 'CPC') to the Tourism Department but this was followed by a false complaint against the Appellant by the Tourism Department before the District Collector, West Sikkim, upon which the District Collector registered a case against him under the Sikkim Public Premises (Eviction of Unauthorized Occupant and Rent Recovery) Act, 1980 and issued Notice. The Respondents have thereafter continuously threatened to dispossess the Appellant illegally from his property and hence, the Title Suit filed by him which was decided against him as also the Appeal, which went against him.

4. The Respondents No.1 and 2 filed a joint Written Statement denying and disputing the claims of the Appellant and asserting that in the year 2002 the Defendant No.3 who was in possession and enjoyment of his partition share of ancestral property, voluntary sold out the same and handed over its possession to the Defendant No.1 in 2003. That, consideration was also paid for the said transaction through the Respondent No.2 in May 2003. That, the property never belonged to Respondent No.4 and alleged that Exhibit 1 is a document manufactured between the Appellant and the Respondent No.4 for the purposes of this suit. It was denied that Notice under Section 80 of the CPC was ever issued

by the Appellant to the Respondents No.1 and 2 and hence, the suit be dismissed.

5. Respondents No.3 and 4 failed to file any Written Statement, but the Respondent No.3 was listed and appeared as a witness for the Respondent No.1.

6. The learned Trial Court framed the Issues hereunder for determination, viz;

Issue No.1 - Whether the plaintiff is the owner of the suit land? (*Onus on the plaintiff*)

Issue No.2 - Whether the defendant No.4, Sancha Man Subba ever had the right, title and interest over the suit land? (*Onus on the plaintiff*)

Issue No.3 - Whether the defendant No.3, Makar Dhoj Subba had a right, title and interest to sell out the suit property to the defendant No.1? (*Onus on defendant No.1 and 2*)

Issue No.4 - Whether the defendant No.3 was in actual physical possession of the suit land when the same was acquired by the defendant No.1 i.e. the District Collector, West District for the Tourism Department, Government of Sikkim? (*Onus on defendant No.1 and 2*)

Issue No.5 - To what relief or reliefs the parties are entitled to? (*Onus on plaintiff*)

7. To establish his case, the Plaintiff examined himself and his son Keshav Pradhan as well as one Kul Bahadur Subba, M. B. Tamang, Bharat Bhoj Subedi and Pradeep Chettri. The Defendant No.1 examined the Joint Director, Tourism Department, the

Defendant No.3 and Shiv Kumar Subba, the then Revenue Officer in the office of the District Collectorate, West Sikkim.

8. Issues No. 1 and 2 being interrelated were taken up together and the learned Trial Court concluded that there was no evidence to establish right, title and interest of Respondent No.4 over the suit land, thus the only foundation connecting the suit land to the Plaintiff was also destroyed. The learned Trial Court also concluded that adverse possession could not be established by the Appellant. While deciding Issue No.3 in favour of the Defendants, it determined that there was nothing on record to suggest that the Defendant No.4 was opposed to the transaction executed between the Defendant No.3 and Defendant No.1, thereby making it discernible that the Defendant No.3 was well within his rights to sell out the suit property to Defendant No.1. Issue No.4 was decided against the Defendants but with the observation that the transaction made by him with Defendant No.1 would not be effected, since no law prescribes that the owner need be in physical possession of the land at the time it is being acquired by another. The suit of the Plaintiff ultimately stood dismissed while deciding Issue No.5.

9. Assailing this Judgment, an Appeal was preferred before the learned District Judge who after considering the evidence on record found no infirmity or illegality in the impugned Judgment and thereby upheld the same. The Appellant now stands before this Court on Second Appeal being admitted on the following substantial question of law;

“Whether the Courts below erred in deciding the case by resorting to the provisions of the Transfer of Property Act, 1882, when Exhibit-1 was executed on 15.07.1978 prior to extension and enforcement of the Transfer of Property Act, 1882 in Sikkim, and therefore, wrongly interpreted Exhibit-1 in view of the other exhibited documents being Exhibit-6, Exhibit-11 and Exhibit-14.”

10. The arguments raised by learned Senior Counsel for the Appellant were that Exhibit 1 was executed on 15.7.1978 at which time the Transfer of Property Act, 1882 (hereinafter ‘TP Act’) was neither extended nor enforced in the state of Sikkim and transfer of immoveable property was governed by the “Rules relating to Transfer of Immoveable Property (Based on the Law of Contract and Transfer of Property Act of India)” dated 18.1.1950. These Rules provide that all contract for sale of immoveable property must be in writing, signed by the parties and attested by not less than two witnesses. If earnest money has been paid it should be mentioned clearly in the document with clear description of the property and boundaries given. The contract would be binding and enforceable in a Court of law. That, in this context, there is no confusion regarding the identity of the suit property, since the parties have throughout contested the suit with the underlying fact that the sold property is the property described in the Schedule to the Plaint. The office of the Respondent No.1 also considered the scheduled property as the suit property which remained undisputed by the Defendant No.1 and the Defendant No.2, while the Defendant No.3 has described the suit property vide Exhibit 11 and Exhibit 14 as ‘Pokhrel Bari’, which fortifies the claim of the Appellant who identified the suit property as ‘Pokhrel Bari’. Thus, the only short coming in Exhibit 1 is that it is

not attested by two witnesses as required by the afore stated Rules. That, the learned Appellate Court held Exhibit 1 to be an invalid document relying upon the Judgment of **Bishnu Kumar Rai v. Minor Mahendra Bir Lama and Ors.**¹, however, the facts pertaining to Exhibit 1 are distinguishable from the document in question in **Bishnu Kumar Rai (supra)**. Moreover, even if Exhibit-1 is not a registered document and it is found that the same is required to be registered, then Notification No.385/G dated 11.4.1928 and Notification No. 2947/G dated 22.11.1946 come to the rescue of the Appellant, towards which an application has been preferred before this Court under Section 151 of the CPC.

11. That, Exhibit 1 having been executed when the suit land was not registered in the name of the executant Sancha Man Subba, the learned Appellate Court ought to have considered Sections 41, 43, 44 and 51 of the TP Act while deciding the matter. It was further agitated that the case of the Appellant falls squarely under Section 53 'A' of the TP Act, as the executants had willingly executed Exhibit 1 whereupon the Appellant took possession of the suit land, improved it and also constructed houses and a building thereon thereby establishing his possession. To fortify this submission, reliance was placed on the ratiocination of this Court in **Uday Sapkota v. Lakshimi Prasad Sapkota**². That, Exhibit 1 *vis-a-vis*, Exhibit 11 may be considered by invoking Section 103 of the CPC and Exhibit 1 be considered valid as Defendant No.3 and Defendant No.4 have not

¹ AIR 2005 Sikkim 33

² AIR 2013 Sikkim 21

contested the suit. To buttress his arguments, reliance was placed on **Smt. Leela Krishnarao Pansare and others v. Babasaheb Bhanudas Ithape and others**³, **Union of India v. Ibrahim Uddin and Another**⁴, **M/s Technicians Studio Pvt. Ltd. v. Smt. Lila Ghosh and another**⁵, **P. Chandrasekharan & Ors. V. S. Kanakarajan & Ors.**⁶, **Gowardhan v. Ghasiram and others**⁷, **Swarnendu Das Gupta v. Smt. Sadhana Banerjee**⁸. That, the learned Appellate Court simply held that the learned Trial Court rightly decided Issues No.1, 2 and 3 but failed to discuss Issue No.4, hence making it a fit case for remand towards which reliance was placed on **Kinchok Tshering Lepcha vs. Kunzang Bhutia : RSA No.2 of 2012** and **Furden Tshering Bhutia and others vs. Payzee Bhutia (Sherpa) and Others**⁹. Learned Senior Counsel for the Appellant would further argue that even if the Appellant failed to prove adverse possession, Notification No. 1208/L & F dated 16.5.1950, holds that good title also derives from continuous adverse possession of over 12 years. It is submitted that suit be decreed in favour of the Appellant by setting aside the Judgment and Decree of the learned Trial Court and the first Appellate Court, for the ends of justice.

12. Refuting the arguments of the Appellant, learned Senior Government Advocate for the Respondents No.1 and 2, raised the contention that reasoned findings have been arrived by the learned Trial Court and the first Appellate Court with regard to Exhibit 1.

³ AIR 2014 SC 2867

⁴ (2012) 8 SCC 148

⁵ AIR 1977 SC 2425

⁶ AIR 2007 SC 2306

⁷ AIR 2002 MP 130

⁸ AIR 2015 Cal 46

⁹ AIR 1954 SC 526

That in fact, Exhibit 1 has not been proved by the Plaintiff and hence, when the document itself is not proved then the substantial question of law being formulated cannot be considered. He has placed reliance on this aspect on ***Neelu Narayani (Dead) through LRS. And Others v. Laskhmanan (D) through LRS. And others***¹⁰ and ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Others***¹¹. That, it is evident that Exhibit 1 was rejected on account of the document being a vague document and failing to abide by the provisions of Section 54 of the TP Act, which requires that the document pertaining to sale be a registered document. That, the concurrent findings of the learned Courts ought to remain undisturbed.

13. Learned Counsel for the Respondent No. 3, contended that he had in fact sold the property which was his partition share to the government and received remuneration towards which he has no arguments.

14. Respondent No.4 did not make an appearance.

15. The parties were heard at length and their rival submissions considered. All evidence and documents on record have been carefully perused by me, as also the impugned Judgments and citations at the Bar.

¹⁰ (1999) 9 SCC 237

¹¹ (1999) 3 SCC 722

16. On examining Exhibit 1, it is a 'Dhan Rashid' dated 15.07.1978, in the Nepali vernacular (Devnagari script), scribed by one Karna Singh Subba and alleged to have been signed by Sancha Man Subba (Respondent No.4), purportedly the Seller. The document also bears the signature of the alleged scribe but not of the alleged purchaser, i.e., the Appellant. A 'Dhan Rashid', broadly translated to English would be a Money Receipt. The document details that the Respondent No.4 acknowledges receipt of a sum of Rs.2001/- (Rupees two thousand and one) only, from the Appellant and declares that the Appellant can register and take the vendor's share of partitioned property situated at Singlitam Block. That, the document has been signed of his own free will. At this juncture, it is worth noticing that Exhibit 1 is a document which bears neither the plot numbers nor the boundaries or the area of the purported suit land. The details of this document shall be dealt with subsequently.

17. Exhibit 6 is a letter in the Nepali vernacular dated 26.07.2002, addressed to the District Collector (Respondent No.2), Gyalshing, West Sikkim, by Makar Dhoj Subba (Respondent No.3) of Darap, West Sikkim, praying that an area of 21 x 40 feet be set aside from the land named 'Pokhrel Bari' recorded in the name of his late father, Kalu Ram Limboo and being acquired by the government for the purpose of constructing a Rock Garden, to enable construction of a house. In the event of absence of such a provision he is unwilling to part with the aforesaid property.

18. Exhibit 11 is another letter in the Nepali vernacular addressed to the Panchayat "Sabhapati", Darap Gram Panchayat, West Sikkim, by Makar Dhoj Subba (Respondent No.3) submitting that the property which had fallen in his partition share inherited from his father, late Kalu Ram Limboo, had been given by him for the purpose of constructing the Rimbi Rock Garden, however, the Appellant was forcibly constructing a house therein. That, the Appellant had invested a sum of Rs.2000/- (Rupees two thousand) only, in 'Pokhrel Bari' but when he sought to return it, the Appellant refused to accept the amount. That, the Appellant had also taken compensation amount of Rs.4800/- (Rupees four thousand and eight hundred) only, for damages to the property due to construction of a power project.

19. Exhibit 14 is an Application in the Nepali vernacular dated 18.11.2005, addressed to the District Collector, West Sikkim, by the Respondent No.3, informing therein, *inter alia*, that the Appellant was forcibly constructing a house on the property known as 'Pokhrel Bari' which fell in the share of the Defendant No.4 and requested the District Collector to stop the said construction. These documents are adverted to in the substantial question of law formulated hereinabove and have thus been broadly translated hereinabove for clarity.

20. The contention of Learned Senior Counsel for the Appellant to the extent that at the time of execution of Exhibit 1, i.e., on 15.7.1978, the TP Act was not extended or enforced in

Sikkim at the relevant time cannot be faulted. The TP Act was extended to the State of Sikkim on 22.7.1983 and enforced on 1.9.1984 in terms of Clause (n) of Article 371F of the Constitution of India. The basis of the argument of Learned Senior Counsel for the Appellant emanates from the fact that Article 371F of the Constitution was inserted by the 36th amendment Act, 1975, making special provisions for the State of Sikkim. Clause 'k' of Article 371F provides as follows;

“(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;”

The appointed day being April 26, 1975. However, the argument that the provisions of Section 54 of the TP Act were not enforceable for the self same reason is not sustainable as the 'Rules related to Transfer of Immoveable Property' dated 18.1.1950 would reveal and are extracted herein below;

"Rules related to Transfer of Immoveable Property"

(Based on the law of Contract and Transfer of the Property Act of India (sic))

1. All contracts for 'sale' of immoveable property must be in writing signed by the parties and attested by not less than two witnesses. If an earnest money has been paid it should be mentioned clearly in the document. Clear descriptions of the property with boundaries must be given. The contracts will be binding on the properties and enforced in court.
2. A sale or mortgage of immoveable property must be in writing, signed by the vendor or by the parties in case

of mortgage, and attested by not less than two witnesses. If one of the parties or both are illiterate their thumb impression must be attested by the scribe..... It must also contain the following matters;

- a) Consideration in cash or kind, and when paid or delivered.
- b) Circumstances, if any
- c) Assessment of the land (rent)
- d) Full description of the property with boundaries.
- e) Full name of the parties with their father's name and residence.
- f) Any other matter, which is necessary to incorporate in the document. Once the document is executed and consideration passes the contract is complete and is enforceable. It must be in the model prescribed form attached to these rules so far as prescribed form attached to these Rules as practicable (sic) and be drawn in duplicate each party keeping the copy.

NOTES: "Biyaj" "Masikata" and "Siraney Thaliao" ar mortgages

3.
4.
5.

6. Sec – 54 Transfer of Property Act.

Sale of immoveable property

"Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upward in the case of reversion or other intangible thing can be made only by a registered instrument.

Sd/-

(J.S. Lall, I.C.S)

18.1.50

Dewan of Sikkim State"

These Rules point to the fact that not only was it based on the TP Act but Section 54 was specifically mentioned implying its

application for all relevant purposes. It would be apposite to recapitulate that this Court while referring to non-extension of the Specific Relief Act in Sikkim held as follows in ***Durga Prasad Pradhan v. Palden Lama and Another***¹²;

"5. It is true that the Specific Relief Act, 1963, does not apply in Sikkim and there is no statutory law in Sikkim on this subject. But it is now beyond doubt that even if an enactment does not extend and apply to any area *ex proprio vigore*, but the enactment contains provisions which are statutory embodiment of the rules of equity and justice, such provisions have been, are and may be applied by the Courts to transactions beyond such area, in the absence of any such law operating therein. As is well-known, the T.P. Act, 1882 did not and even now does not, extend to the whole of India, but those principles contained therein, which embody rules of equity and justice, have been applied by the Courts in the areas beyond the local extent of the Act. As pointed out by the Supreme Court in *Namdeo v. Naramada Bai* (AIR 1953 SC at 230), "it is axiomatic that the Courts must apply the principles of justice, equity and good conscience to transactions which come up before them for determination, even though the statutory provisions of the Transfer of Property Act are not applicable to these transactions" and that "it follows, therefore, that the provisions of the Act, which are but a statutory recognition of the rules of justice, equity and good conscience also govern those transfers"."

It follows that the absence of enforcement the TP Act at the relevant period would not prevent the Courts from applying the rules of equity and justice embodied therein.

21. That having been said, we may now examine the contents thereof of Exhibit 1, which roughly translated would be as follows;

"....."

I, Sancha Hang Subba, resident of Darap Block, am writing this document to the effect that I have received a sum of Rs.2001/- from Shri Durga Prasad Pradhan,

¹² AIR 1981 Sikkim 41

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resident of Pelling. In terms of the Money received my share of the partition property at Singlitham Block comprising of two plots of dry fields can be registered and taken by the 'Mahajan'. I have signed this Dhan Rashid of my own free will and signed and sealed it.

.....”

Learned Senior Counsel for the Appellant would urge that the document Exhibit 1 is a contract of sale as evident from the arguments forwarded. Assuming that it is so, the Rule supra requires all contracts pertaining to immoveable property must be in writing, signed by the parties and attested by not less than two witnesses. Exhibit 1 would reveal that the Respondent No.4 has received a sum of Rs.2,001/- (Rupees two thousand and one) only, from the Appellant, but none of the required criteria as per the Rules are fulfilled. The document has not been signed by any witness nor is there a description of the property as learned Counsel for the Appellant would have me believe, nor boundaries detailed. That being so, it is clear that the document cannot be treated as a contract for sale or an agreement to sell. For the sake of argument, assuming that Exhibit 1 is an agreement to sell, this document would necessarily have to be succeeded by a deed of conveyance, which would require registration in terms of Notification No. 385/G of 1928, which will be dealt with later and which has ofcourse not been complied with. Although, an argument has been extended by learned Senior Counsel for the Appellant that the property has been undisputedly accepted as 'Pokhrel Bari', it would indeed be serendipity as the extent of the said 'Pokhrel Bari' is unknown. Speculation can only be made as to whether 'Pokhrel Bari' includes the entire property owned by late Kalu Ram Subba or whether it

comprises of only two plots of dry fields (which bear no details), as mentioned in Exhibit 1. On such speculation and unfathomable description of the property no Court would be in a position to grant relief. Thus the document fails to qualify as an agreement to sell or a sale deed. It is relevant to mention that the document in no way reflects possession of the property by the Appellant. He has merely been permitted to register and thereafter take the property.

22. Learned Senior Counsel for the Appellant had argued that the provisions of Section 53A would be applicable to the facts of this case. For one, this argument flies in the face of his earlier contention that the provisions of the TP Act were not extended at the relevant time and were inapplicable herein. Secondly, Section 53A of the TP Act lays down as follows;

"53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

It is settled law that when a document fails to enable a Court to ascertain its terms with reasonable clarity, the benefit of the doctrine of part performance cannot be applied. The Appellant thus cannot take shelter under Exhibit 1 for the enforcement of part performance for the reasons as laid out hereinabove. What emerges therefore, on pain of repetition is that Exhibit 1 can neither be treated as an agreement to sell or a sale deed. In an actual sale, property transfers from the seller to the buyer, which evidently has not occurred in this matter as revealed by Exhibit 1, the Appellant cannot claim transfer of the property to himself, devoid as the document is not only of description and boundaries of the property but lacking proof of transfer. In an agreement to sell, transfer of the property takes place at a future date subject to some conditions being fulfilled the condition of registration remained pending.

23. Strength was also sought to be drawn by the Appellant from the Notification No. 385/G dated 11.4.1928 referred to *supra*, and Notification No. 2947/G dated 22.11.1946, to contend that even if Exhibit 1 is an unregistered document, it can be registered and validated in terms of the said Notification. For clarity in the matter these Notifications are reproduced below;

"SIKKIM STATE

GENERAL DEPARTMENT

Notification No. 385/G;

All Kazis, Thikadars and Managers of Estates.

In continuation of the previous rules on the subject, His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under :-

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“Any document such as mortgage and sale deeds and other important documents and deeds, etc. will not be considered valid unless they are duly registered.

The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.

Exception :- Handnotes duly stamped shall be exempt from registration penalty”.

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Gangtok
The 11th April, 1928

Gyaltzen Kazi
General Secretary to
H.H. the Maharaja of Sikkim.”

“SIKKIM STATE

GENERAL DEPARTMENT

Notification No. 2947/G;

Amendment of para 2 of Notification No. : 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty upto fifty times the usual registration fee.

Issued by order of H.H. the Maharaja of Sikkim”.

Gangtok
The 22nd Nov., 46

T. Tsering
(Offs) General Secretary to
H.H. the Maharaja of Sikkim.”

24. If Exhibit 1 was accepted as an agreement to sell, this document would require no registration for the reason that the Notification No. 385/G does not spell out that an agreement to sell is to be registered. It provides in rather nebulous terms that “other important documents” will not be considered valid until they are duly registered. What an important document constitutes of is a moot point since sauce for the Goose may not necessarily be sauce for the Gander. In other words “important” is a relative term. In

such a situation, in my considered opinion, there ought to be no further speculation and the only conclusion that can be arrived at in the absence of a specific rule in Sikkim, at the relevant time, is that an agreement to sell requires no registration. Had Exhibit 1 fulfilled the requirements of a sale deed and been accepted as such by this Court, which it has not, then the sale deed would have had to be registered. But the aforesaid Notifications allow for validation and admission in Court to prove title or other matters only if the Court opines that it ought to have been registered. It is evident from the foregoing detailed discussions that Exhibit 1 cannot be validated or admitted in Court as it fails to fulfil the criteria of a sale deed. Therefore, these Notifications are of no assistance to the Appellant, the document being sans the legal requirements. These discussions also set to rest the prayer of the Appellant under Section 151 of the CPC, which consequently stand rejected.

25. The fact that the contents of Exhibit 1 have remained unproved in terms of Section 61 to Section 66 of the Indian Evidence Act, 1872 also cannot be overlooked. In view of the fact that Exhibit 1 serves no purpose to fortify the Appellant's case, it would stand to reason that the document sought to be filed by the Appellant by invoking the provisions of Order XLI Rule 27 of the CPC, would also be of no assistance and the prayer thus rejected.

26. In *Bishnu Kumar Rai (supra)*, reference to which was made by learned Senior Counsel for the Appellant, Exhibit D1 the

document in question, could not be validated owing to the contents being vague. Paragraph 11 of the Judgment held as follows;

"11.

"Money Receipt

Received a cash of Rs.78,000/- (Rupees seventy eight thousand) only on a/c of consider nature of the land measuring 100' x 12' situated along and attached to the land of Mr. Govind Sharma, and other measuring 60' x 6' situated attached to the land of Sr. B. K. Rai totaling (sic) to 1560 s.ft. sold out to Sri B.K Rai, S/o G. B. Rai, Sichey Busty @ Rs.50/- per s.ft. by me. The land sold is covered by plot No. 631 owned by the undersigned.

Sd/- Basant Bir Lama,
Sichey Busty,
Gangtok."

This document Exhibit D-1 is a Money Receipt on the face of it without revenue stamp/fee and also not a registered document and without bearing the date of the execution or writing of such document on it. According to us, it is difficult to treat this document exbt. D1 as an Agreement for Sale or Deed of Sale. From the original patta parcha Khatian it is seen that the land under Khatian No. 256 covered by khasra No. 632/1147, measuring 0.23 acre stands in the name of the defendant No.2, Shri Basant Bir Lama, which is the land described in Schedule 'A' to the plaint."

Similarly, Exhibit 1 is not only a vague document but even the original title deeds for the land has not been furnished for scrutiny of the learned Trial Court. The learned First Appellate Court cannot be faulted for drawing a parallel between Exhibit 1 and Exhibit D1 discussed in ***Bishnu Kumar Rai (supra)*** although it may be noticed that both Courts below have concluded that the document is a Sale Deed requiring registration under Section 54 of the TP Act. The facts pertaining to the two documents are almost identical.

27. While dealing with the other documents alluded to by the Appellant, Exhibit 6 merely deals with the terms of sale between the Respondent No.3 and the Respondent No.1 and lends no strength to the Appellant's case. While a bare perusal of Exhibit 11 would indicate that the Respondent No.3 sought to return the amount of Rs.2000/- (Rupees two thousand) only, to the Appellant which he refused. It needs no reiteration that an agreement to sell can be rescinded particularly when the person who sold it had no legal right to alienate it. Section 41 of the TP Act, also relied on by the Appellant provides as follows;

"41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

It is an exception to the general rule that a person cannot confer a better title than he had. Being an exception, the onus is on the transferee to show that the transferor was the ostensible owner of the property and that he had after taking reasonable care to ascertain that the transferor had the power to make the transfer, acted in good faith. The care required of a transferee is that which an ordinary man of business is expected to take. If the ostensible owner is in possession of the property and he also produces the title deed, the transferee cannot be expected to make a roving and searching enquiry in the absence of any ground for suspicion that the transferor may not be the real owner. In the matter at hand

nowhere is it stated that Respondent No.4 had produced title deeds or partition deeds before the Appellant to establish his claim on the property rather vaguely described in Exhibit 1. The argument in reverse would mean that there is no proof either that Respondent No.3 was the owner at the relevant time, but it needs to be reiterated that the Plaintiff's case has to be proved on its own strength and not on the weaknesses of the Defendant's case.

28. Exhibit 14 would categorically reveal that the Appellant sought to forcibly occupy the suit land. When there is no legal document allowing the Appellant to assume such rights, he cannot presume on the basis of an invalid document that he is entitled to occupy the purported scheduled land. It would be relevant to note that in terms of the exception given in Notification No.385/G dated 11.4.1928, Exhibit 1 ought to at least have been stamped.

29. So far as the arguments pertaining to applicability of Sections 43 and 44 of the TP Act are concerned, Section 43 deals with transfer by unauthorised person who subsequently acquires interest in property transferred. It would be beneficial to extract the Section hereinbelow;

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration

A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him."

The provision of Section 43 of the TP Act makes it clear that when a person with imperfect title transfers the property for consideration and subsequently the transferor's title becomes perfect in law, the transferee is entitled to enforce the terms of the contract by equitable doctrine of feeding the grant by estoppel. In other words, the property embodied in Section 43 of the TP Act is described as the common law doctrine of "feeding the grant by estoppels". The law assumes that the transferor had no title over at least a portion of the property he had transferred, but which he has since acquired, in which case, upon the principles of elementary equity he is bound to make good his representation to the transferee. This Section, however, has no application when the transfer is vitiated or the property transferred was not transferable. The illustration thereof suffices to explain the Section and it is evident that in the matter at hand Respondent No.4 had at no point of time inherited the property in question, which I may add is also unidentifiable.

30. Section 44 reads as hereunder;

"44. Transfer by one co-owner.—Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the

transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

This Section enacts the well-known principle of substitution. When one of the several co-owners transfers his share, the transferee stands in the shoes of the transferor and thereby acquires a right to join possession or part enjoyment of the property, including the right to enforce partition. This right is however subject to the conditions and liabilities affecting at the time of the transfer, the share or interest so transferred. No evidence has been furnished to indicate that Respondent No.3 was legally competent to transfer the property in dispute, the same having fallen in the share of the Respondent No.4. The Section specifically lays down that the transferor must be legally competent to transfer his share. When the property is not his share the question of legal competence obviously would not arise as in the instant case.

31. It was also argued by learned Senior Counsel for the Appellant that the first Appellate Court failed to decide Issue No.4 and accordingly the matter was fit for remand. In this context, it would do well to go through Paragraph 37 of the Judgment of the learned Appellate Court, wherein it is recorded as follows;

"37. The above evidence of the appellant and his witnesses do not establish that the appellant has acquired the title and interest over the suit property by way of adverse possession. Therefore, I have no

hesitation to hold that the learned Trial court has not erred in fact or also in law in deciding the other issues as mentioned above as well.”

In any event, remanding a matter to decide an issue in great detail when Issue No.3 has been concluded with the finding that the property belongs to Respondent No.3 thereby having a direct bearing on Issue No.4 would only prolong the *lis* with no substantial reason. The evidence on record suffices to indicate that though the Respondent No. 3 was not in physical possession, his insistence that he had inherited the property and had the right to alienate it was not contested by the Respondent No.4 nor disproved by any evidence. Does the law then debar him from alienating the property merely because he was not in physical possession, the answer would have to be in the negative.

32. Insofar as the question of adverse possession is concerned, the learned Courts below have given rather convoluted reasons for reaching a finding that there can be no adverse possession. I have to opine that the reasons for denying adverse possession do not conform to the legal position as a claim for title based on documents on one hand and a claim for adverse possession on the other hand cannot run parallel. It would suffice to state that this Court in **RSA No. 02 of 2016 (K. B. Bhandari v. Laxuman Limboo)** held as follows;

“22. The Appellant’s claim on the Suit property is based on title, on the basis of documents as already discussed. The concept of adverse possession is in opposition to a claim under title, the two claims cannot either be parallel or simultaneous.”

Reliance of the learned Senior Counsel for the Appellant, on Notification No. 1208/L&F dated 20.05.1950 that good title also derives from continuous adverse possession of over 12 years, is also evidently misplaced, in view of the foregoing discussions.

33. In conclusion, it is clear that both the Learned Courts below while examining Exhibit 1 have concluded that the document being an unregistered document transfers no title or possession to the Appellant, the document being an unregistered document in terms of Section 54 of the TP Act. The learned Trial Courts have deemed Exhibit 1 to be a Sale Deed document while reaching the above conclusion when infact it is neither an agreement to sell or a Deed of Sale being at best a 'Dhan Rashid', a Money Receipt or thereby a Hand Note, but it cannot be denied that Section 54 of the TP Act was specifically in vogue in Sikkim at the relevant time the Rules of 1950 standing testimony to this. Even if the finding of the Learned Trial Courts that Exhibit 1 was a Sale Deed document requiring registration under Section 54 of the TP Act is erroneous it cannot be denied that the Section was enforced in view of the above Rules. Thus, the finding of the learned Courts below that Exhibit 1 is a sale deed is set aside this Court having concluded that the same is a "Money Receipt". However, this finding in no way alters the fate of the Appellant's case neither is a remand to the learned Trial Court on this ground necessitated.

34. In the end result, the Appeal is dismissed for the grounds enumerated in the foregoing discussions.

- 35.** No order as to costs.
- 36.** Copy each of this Judgment be sent to the Learned Civil Judge and the Learned District Judge, West Sikkim, at Gyalshing, for information.
- 37.** Records of the Courts below be remitted forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
19-2-2018

Approved for reporting : Yes

Internet : Yes

bp