
(2015) 09 SIK CK 0005

In the Sikkim High Court

Case No : Regular First Appeal No. 08 of 2014 and C.O. No. 01 of 2015 in R.F.A. No. 08 of 2014

Shiva Bahadur Dahal

APPELLANT

Vs

Dambar Chettri and Others

RESPONDENT

Date of Decision : 18-09-2015

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : (2015) 09 SIK CK 0005

Hon'ble Judges : Meenakshi Madan Rai, J

Bench : Single Bench

Advocate : S.S. Hamal, Tashi Wongdi Bhutia and Chunkila Bhutia, for the Appellant; N. Rai, Senior Advocate, Tamanna Chettri and Wangmu Bhutia, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Meenakshi Madan Rai, J—This Appeal assails the Judgment and Decree of the Learned District Judge, Special Division-II, Gangtok, in Title Suit No. 14 of 2013 dated 31.3.2014, by which the Learned Trial Court dismissed the Suit of the Appellant. A Cross Objection has been filed by the Respondents No. 2 and 3, assailing the decisions of the Learned Trial Court in Issues No. 4, 8, 10 and 11. Both the Appeal and the Cross Objection are being disposed of by this Common Judgment.

2. The facts shorn of details are that the Appellant (Plaintiff before the Learned Trial Court) is the son of Late Ratna Bahadur Dahal. The Respondents No. 1, 2 and 3 (Defendants No. 2, 3 and 4 before the Learned Trial Court) are his nephews being the sons of his sister, Pavitra Chettri, who was arrayed as Defendant No. 1 in the aforesaid Title Suit and passed away during the course of the trial, (Hereinafter referred to as Defendant No. 1). It is averred by the Appellant that the Defendant No. 1 was married twice, Respondent No. 1 being her son through her first husband, Gopal Chettri (Poudyal), while the

Respondents No. 2 and 3 are her sons through her second husband, Deewan Singh Bora of Uttarakhand, whom she married in the year 1962 and resided with outside Sikkim, leaving behind Respondent No. 1 in the care of her father, Late Ratna Bahadur Dahal.

3. That, Late Ratna Bahadur Dahal, owned several plots of land at 7th Mile, Samdur Block, East Sikkim including Plot No. 336 measuring .8640 hectares from which vide a Gift Deed dated 23.12.1989, land measuring .1330 hectares was gifted by him to the Respondent No. 1, inter alia with the Eastern boundary as hereunder;

"East - NH 31"A" & Sellers Dry Field (50" from the centre of the Road)..."

That, when spot verification was carried out for the purposes of registration, the boundaries of the gifted land were identified with the Eastern boundary being defined as;

"East - From the centre of the NH 31"A" 50 feet for road reserve followed by Donor's own land measuring 128"x30" i.e. 3840 sq. ft...."

4. That, subsequently without the Appellant's knowledge, the Gift Deed dated 23.12.1989 was registered and the gifted land mutated in the name of Defendant No. 1 (who had married a non-Sikkimese), in violation of the Sikkim State Rules Registration of Document, 1930. Consequently, there can be no registration or mutation of lands in the name of the Respondents No. 2 and 3. That, the document is interpolated.

5. Ratna Bahadur Dahal also executed two separate Gift Deeds in favour of the Appellant's sons, Pradeep Dahal and Gopal Dahal, out of the same land, while the remaining area of .4810 hectares measuring 0.4750 and 0.0060 hectares were mutated in the Appellant's name after Ratna Bahadur Dahal's demise. No other Gift Deeds besides the above three, were executed by Ratna Bahadur Dahal.

6. It is the Appellant's claim that in June, 2011 the Respondent No. 3, started constructing an RCC building on a portion of the Appellant's land measuring 128" x30" (Schedule "B" land i.e. Suit Land), at the same time claiming another area of 128"x 23" (Schedule "A" land), situated towards the East of his land as belonging to the Defendant No. 1, Respondent No. 2 and Respondent No. 3. This was objected to by the Appellants' sons vide a Complaint before the Respondent No. 4, who issued an order restraining the Respondent No. 3 from further construction. The Defendant No. 1 claimed the land to be her's and stated that portions thereof were subsequently partitioned and gifted by her to the Respondents No. 2 and 3, vide separate Gift Deeds registered on 18.2.2011 and prayed that the order be vacated.

7. That, the Respondent No. 4 vacated the Stay Order inter alia, after arriving at an erroneous finding that the Defendant No. 1 and Respondents No. 2 and 3 had encroached an area of only 643 square feet of Pradeep Dahal's land when in

reality they had encroached on both the Schedule "A" and Schedule "B" land.

8. Hence, the prayer of the Appellant before the Learned Trial Court, for restoration of possession of the Schedule "B" land to him to be vacated by the Defendant No. 1, Respondents No. 2 and 3, duly dismantling the building of the Respondent No. 3, and for other consequential reliefs as enumerated in Paragraph 40 of the Plaint.

9. The Defendant No. 1 and Respondents No. 2 and 3, denied and disputed the allegations made by the Appellant and inter alia, contended that Deewan Singh Bora was not the second husband of Defendant No. 1 but only a family friend. That, the Gift Deed vide which Late Ratna Bahadur Dahal gifted land to Respondent No. 1 and transferred it in the name of the Defendant No. 1 in 1990, has been interpolated by insertion of the words "& Sellers d. fd " on the Eastern boundary by the Appellant. That, the Defendant No. 1 and the Respondents No. 2 and 3 infact claim adverse possession over the entire area measuring .8640 hectares under Plot No. 336. That, the house of the Appellant is at a distance of 50 meters from the construction of Respondent No. 3, therefore, it is unbelievable that the Appellant learnt of the construction only in June, 2011 when it had commenced in January, 2011. Hence, the Suit be dismissed.

10. Respondents 1, 5 and 6 did not file any written statement before the Learned Trial Court.

11. The Learned Trial Court settled twelve Issues for determination and after considering the verbal and documentary evidence on record, concluded that the Defendant No. 1 was not married to Deewan Singh Bora, neither were the Respondents No. 2 and 3 sons of Deewan Singh Bora. That, the portion of Plot No. 336 was gifted by Late Ratna Bahadur Dahal to his daughter Pavitra Chettri and not to the Appellant and the Gift Deed dated 23.12.1989 and the Gift Deeds dated 14.12.2010 in favour of Respondents No. 2 and 3 were valid documents binding on the Appellant. That, the Appellant was not a Citizen of Nepal. It was also found that the construction of the RCC building by Respondent No. 3 was confined to his share of .0385 hectares and was not within the strip of land measuring 128"x30". That, the Defendant No. 1 and Respondents No. 2 and 3 cannot claim adverse possession over the Suit Land. That, the Suit was maintainable and summed up that the Appellant had failed to establish his case and dismissed it.

12. Mr. N. Rai, Learned Senior Counsel, making his submissions on the Cross Objection, inter alia, assailed the decision of the Learned Trial Court on the Issues cited supra, on grounds that it suffers from non appreciation of facts and the Judgment passed against the Respondents in the said Issues be reversed and a Decree be passed in this Appeal in favour of the Respondents No. 2 and 3.

13. The rival contentions of Learned Counsel on the Appeal and the Cross-Objection were heard at length and given due consideration. The evidence on record and documents relied on by the parties have also been perused and

considered by me.

14. The Issue No. 1 and 2 being interrelated were taken up together by the Trial Court and decided in favour of the Defendant No. 1, Respondents No. 2 and 3. The said Issues read as follows:-

Issue No. 1:

Whether Pavitra Chettri/Bora (since deceased) was married twice in her lifetime with Late Gopal Chettri (Poudyal) of Central Pendam, East Sikkim and with Late Deewan Singh Bora of Bhimtal, Nainital, Uttarakhand?

Issue No. 2:

Whether defendant No. 3, Amber Bahadur Chettri and defendant No. 4, Madan Kumar Chettri are the sons of Late Gopal Chettri (Poudyal) or Late Deewan Singh Bora?

15. Before this Court, it was contended by Mr. S.S. Hamal, Learned Counsel for the Appellant that the findings of the Learned Trial Court on Issue No. 1 and 2 are incorrect and perverse as the evidence on record does not prove that the Respondents No. 2 and 3 were the sons of Gopal Chettri (Poudyal), who had died several years prior to their birth. Mr. S.S. Hamal, relying on Exhibit-2, Exhibit-3, Exhibit-7, Exhibit-8, Exhibit-14, Exhibit-15 and Exhibit-17 argued that the documents, more specially Exhibit-7 establishes that the father of Respondent No. 1 died in the year 1953. That, if this be so then there is no question of the Respondents No. 2 and 3 being the sons of Gopal Chettri (Poudyal) as Respondent No. 3 was born in 1968, as deposed by him. That, Exhibit-2, a letter written by Defendant No. 1 to her parents reveal that she was living with Deewan Singh Bora outside Sikkim after being married to him and consequently, Exhibit-3 indicates that she had left behind property in the name of the Respondent No. 1. That, Exhibit-17, the school admission records of Ranipool School reveal the name of the father of the Respondent No. 3 as Deewan Singh Bora. That, Exhibit-6 indicates the name of Respondent No. 2 as "Amber Singh Bora". That, Exhibit-8, the evidence of Mohan Lall Chettri, witness of the Plaintiff, as also Exhibit-14 and Exhibit-15 the evidence on Affidavit of the Appellant and his son Gopal Dahal, respectively also vouches for the above fact.

16. Learned Senior Counsel Mr. N. Rai for the Respondents, disputing the contentions of Mr. S.S. Hamal, inter alia argued that Exhibit-17, could be a document fabricated for the purposes of this case, apart from which none of the witnesses of the Appellant have been able to support the allegation that the words "Madan Kr. Chh." in the document stands for the name of the Respondent No. 3. Similarly, for Respondent No. 2, it has not been proved that the document Exhibit-6 pertained to him. That, Exhibit-2 is relied on by the Appellant as having been written by Pavitra Chettri while at the same time admitting that Pavitra Chettri was fluent in Nepali, but the language in the letter is not so. Admittedly, no Marriage Certificate or any Certificate issued by a "Pundit" or photograph of

the alleged marriage have been filed, therefore it cannot be said that Defendant No. 1 had married Deewan Singh Bora and Respondents No. 2 and 3 are his sons.

17. Mr. S.K. Chettri, Learned Counsel for the Respondents No. 4, 5 and 6, had no submissions to make on Issue No. 1 and 2.

18. After perusing and considering the documents relied on by the Appellants I have to opine that none of the documents prove that Defendant No. 1, was married to Deewan Singh Bora. Exhibit-7, the statement of one Tika Lall Bahun, recorded in the Court of Munsif Magistrate on 6.9.1963, inter alia reveals that Gopal Chettri (Poudyal) died six or seven months after the partition of property between himself and his brothers, in the year 1953. If this be so, then the parentage of not only Respondents No. 2 and 3 but also of the Respondent No. 1, who deposed that he was born in 1957 would also be questionable. Exhibit-2, does not bear the name or signature of Defendant No. 1 anywhere and has not been proved as per the requirements of Law, therefore, lends no credence to the Appellant's case. Exhibit-3 appears to be a document dividing property, the Scribe therein has signed as Deewan Singh Bora. Merely because he is the Scribe of the document, he cannot be foisted with the allegation of being the husband of Defendant No. 1, who for her part has not stated in any document that she was specifically marrying or married to Deewan Singh Bora and none other. Even if Exhibit-3 is accepted in terms of Section 90 of the Indian Evidence Act, 1872, it does not shed light on the alleged marital status between the Defendant No. 1 and Deewan Singh Bora. How the document came to be in the Appellant's possession when he is not a party to it, is a question to be mulled over. Exhibit-6 also does not establish the parentage or identity allegedly of the Respondent No. 2. Exhibit-8, Exhibit-14 and Exhibit-15 lend no support to the contention that Defendant No. 1, was the wife of Deewan Singh Bora in the absence of any proof to substantiate the verbal submissions. Exhibit-17 cannot be said to refer specifically to Respondent No. 3, the document being unproved in evidence. Even the letter dated 16.7.1990 in File No. 5(87)90/5, does not establish the identity of the second husband of Defendant No. 1. Hence, on Issue No. 1 and 2 there is no error in the conclusion of the Learned Trial Court and I am in agreement with the same.

19. The Learned Trial Court took up Issues No. 3, 5 and 6 together and decided them against the Appellant. The Issues are as follows:-

Issue No. 3:

Whether Late Ratna Bahadur Dahal had gifted plot No. 336 to the original defendant No. 1 (late Pavitra Chettri/Bora) or to the plaintiff, Shiva Bahadur?

Issue No. 5:

Whether the gift deed document dated 23.12.1989 in favour of the original defendant No. 1 (late Pavitra Chettri/bora) is a legal document binding on the plaintiff?

Issue No. 6:

Whether the gift deed document dated 14.12.2010 in favour of defendant No. 3, Amber Bahadur Chettri and in favour of defendant No. 4, Madan Kumar Chettri is a valid document binding on the plaintiff?

20. While making an endeavour to substantiate the case of the Appellant, Mr. S.S. Hamal contended that the Suit Land (Schedule "B") now mutated in the name of the Appellant vide Exhibit-11 does not belong to the Respondents 2 and 3 either in terms of Exhibit-A or otherwise and Respondent No. 3 is occupying it illegally since June, 2011 when he constructed an RCC building on it. That, the Respondents No. 2 and 3 are claiming their right over the Suit Land vide the Gift Deeds Exhibit-A, Exhibit-K/3 and Exhibit-P/3. That, the said claims are untenable, as Exhibit-A was obtained by suppressing the marital status of Pavitra Chettri to a non-Sikkimese, while Respondents No. 2 and 3 are not sons of Gopal Chettri (Poudyal). That, alternatively if the Gift Deed Exhibit-A is registered as per the Law of the land then the Eastern boundary shown in the document exists and does not become non-est in Law as opined by the Learned Trial Court.

21. On the other hand, the arguments advanced by Mr. N. Rai, Learned Senior Counsel for the Respondents was that the Gift Deed Exhibit-A was voluntarily made in favour of Defendant No. 1 on the basis of Document-Y duly proved by the scribe T.B. Basnett (D.W.3). It is the emphatic contention of Learned Senior Counsel that interpolation in Exhibit-A, in regard to the Eastern boundary was illegally inserted by the Appellant when he took the Gift Deed from the Defendant No. 1 on the pretext of effecting mutation of the land mentioned in Exhibit-A. That, there is no attestation by the Executants in the Gift Deed regarding the change in the Eastern boundary and the Registering Authority is not clothed with powers to effect any alteration without the consent of the parties, in terms of Rule 10 of the Sikkim State Rules Registration of Document, 1930. He urges that the name of the Donee in Exhibit-A was changed from that of Respondent No. 1 to Defendant No. 1 before its registration with the knowledge and consent of the Donor/Executant, Late Ratna Bahadur Dahal, however, the interpolation of the boundary was made without such knowledge or consent of either the Executant or the Donee. That, the Respondent No. 3 has constructed his house leaving 27 feet from the centre of the Road and PW-5 the Revenue Surveyor has stated that in the year 1989, the public used to construct their houses leaving only 27 feet for the National Highway. That, the boundaries given in Document-Y are conclusive, the validity of the document having remained unchallenged by the Appellant.

22. For his part Mr. S.K. Chettri, Learned Assistant Government Advocate for Respondents No. 4, 5 and 6 canvassed the argument that the evidence on record establishes that Plot No. 336 was gifted to Defendant No. 1 and not to the Appellant. That, Exhibit- A is a legal document registered in terms of Sikkim State Rules Registration of Document, 1930, therefore, the Gift Deeds in favour of Respondents No. 2 and 3 are also valid and legal. So far as the correction of

the name of the Donee is concerned, the same has been attested by Ratna Bahadur Dahal and Damber Chetri by affixing their signatures respectively, but no attestation by these persons exist with regard to the insertion of boundary and area of the concerned land. That, a Public Notice dated 14.2.1990 was issued by the office of the Registrar inviting objections to registration of the document but no objection was raised from any quarter.

23. Having heard the arguments of the Learned Counsel, I revert to the undisputed contents of File No. 5(87)90/5. Vide a letter dated 16/7/1990, Late Ratna Bahadur Dahal has informed the Additional District Magistrate that he proposed to gift the piece of land to the Defendant No. 1 at Samdur Block but the Respondent No. 1 had clandestinely drawn the Sale Deed document in his own name. That, he thus objects to the registration of the Sale Deed in the name of Respondent No. 1, unless it is amended in favour of his daughter, the Defendant No. 1.

24. Vide File notings dated 16.7.1990 in the self same file, the objection supra was considered by the concerned Authority, recording therein that, the Sale Deed document be corrected in the name of Defendant No. 1, duly deleting the name of Respondent No. 1. The records also reveal that necessary corrections was made on 23.7.1990 on the concerned document duly attested by the concerned parties and submitted for alteration and approval for registration. The relevant procedure having been complied with, registration was completed in the name of Defendant No. 1, thereby establishing transfer of the land in question from Late Ratna Bahadur Dahal to Defendant No. 1, and not to the Appellant.

25. The question that next arises for consideration is whether there are interpolations in Exhibit-A. The Respondent No. 4, who testified as P.W.4, had dealt with Exhibit-A at the relevant time. While the signatures of P.W.6 Damber Chetri appear on Exhibit-A. Their evidence does not support the alteration on Exhibit-A, pertaining to the Eastern boundary.

26. On close scrutiny of Exhibit "A", it is seen that the correction in the "Name of purchaser", this correction has been attested by Ratna Bahadur Dahal and Damber Chetri. However, the change in boundary is not attested apart from being smudged. In the absence of signatures attesting the above insertions, except in the name of the Donee, I have to opine that the boundary inserted in Exhibit-A appear to be interpolated. It cannot be over emphasised that Rule 10 of the Sikkim State Rules Registration of Document, 1930 provides as follows:-

"10. All interlocations, erasures, or alterations appearing in the document must be attested by the parties to it with their signatures before such document could be accepted for registration."

27. Therefore, I have to conclude that the findings of the Learned Trial Court with regard to the interpolation as detailed in Paragraph 75 and 79 of the impugned Judgment is a correct assessment. Although, it may be mentioned that the Issue No. 3, appears to be somewhat hastily settled for determination, as Late Ratna

Bahadur Dahal had not gifted "Plot No. 336" to the Defendant No. 1 or to the Appellant, but admittedly an area of .1330 hectares had been gifted to Defendant No. 1. Nevertheless, the Learned Trial Court while dealing with this Issue, has confined itself to discussing a portion of Plot No. 336 and not the entire plot. What thus emanates from the verbal and documentary evidence is that Late Ratna Bahadur Dahal had gifted a portion of Plot No. 336 to Defendant No. 1 and not Shiva Bahadur Dahal, who by his own admission has stated that besides the three Gift Deeds, no other Gift Deeds were executed by Ratna Bahadur Dahal, the Eastern boundary being confined to NH-31 "A".

28. Based on the same reasoning as that in Exhibit-A, on perusal of Exhibit-P/3 and Exhibit-K/3, the alteration in the Eastern boundary on both documents appear to have been inserted without the attestation of either the Donor or the Donee. Hence, this addition is considered as an incorrect entry being in violation of the prescribed procedure apart from which such entries have remained unproved by any evidence. The Gift Deed documents Exhibit-A, Exhibit-P/3 and Exhibit-K/3 are valid and binding on the Appellant. In conclusion, it would suffice to state that the findings of the Learned Trial Court on Issue No. 3, 5 and 6 brook no interference.

29. Issue No. 4 requires no discussion the same having been abandoned by the Respondents, who have submitted as much in the Court.

30. While discussing Issue No. 7, the Learned Trial Court concluded that the construction of Respondent No. 3 does not fall within the Schedule "B" land. The Issue reads as under;

Issue No. 7.

Whether the construction of RCC building by defendant No. 4, Madan Kumar Chettri falls within the strip of land measuring 128"x30" (3840 square feet) of plot No. 336?

31. Mr. S.S. Hamal was of the view that the findings and observations of the Learned Trial Court on this issue cannot be sustained in the light of his arguments placed in Issue No. 3, 5 and 6. Mr. N. Rai contended that the construction of Respondent No. 3 lies within the portion of land gifted to him by his mother.

32. Mr. S.K. Chettri, Assistant Government Advocate for Respondents No. 4, 5 and 6 submitted that the Respondent No. 5, had advised the parties to approach the competent Court of Law. That, so far as the encroachment of the Highway is concerned, steps will be initiated once the Competent Authority raises an objection.

33. Having heard the arguments, in my considered opinion in view of the discussion and the resultant finding in Issue No. 3, it is clear that, the land gifted to the Defendant No. 1 extended in the Eastern boundary from the National Highway as detailed in Exhibit-P/3. Even if the construction falls within the said

plot of land, it is within the land gifted to Respondent No. 3. With regard to the short fall in the leeway for the Highway, it is upto the concerned Authority, if aggrieved, to raise their objection before the appropriate Forum, as it is admitted that the Respondent No. 3, has left only 27 feet from the National Highway up to his construction. The decision of the Learned Trial Court is thus correct.

34. Vide the Counter Objection, the decision in Issue No. 8 and 11 were assailed by the Respondents as the Learned Trial Court found that the Defendant No. 1 and the Respondents No. 2 and 3 cannot claim adverse possession on the Suit Land and as a consequence the Suit is not barred by Limitation.

35. Issue No. 8 and 11 respectively read as follows:-

Issue No. 8

Whether the original defendant No. 1, (late Pavitra Chettri/Bora), defendant No. 2. Damber Chettri and defendant No. 3. Amber Bahadur Chettri have become owners of the portion of the suit land towards the National Highway 31-A by way of adverse possession?

Issue No. 11

Whether the Suit is barred by limitation?

36. The Learned Counsel for the Appellant argued that the Learned Trial Court has rightly observed that there is no legal evidence whatsoever adduced by the Respondents to prove their claim of adverse possession over the Suit Land. Per contra, the arguments advanced by Learned Counsel for the Respondents No. 2 and 3 was that the said Respondents have been looking after the Suit property since the year 1979. It was further urged that Exhibit-A, simply proves that the Respondents have been in possession of the Suit property adverse to the Appellant and the entire world since the year 1989. According to him, Article 64 and 65 of the Limitation Act, 1963 postulates that for perfecting the Right and Title by way of an adverse possession, the person should be in possession of the land for more than twelve years and the Respondents have been in possession for more than 23 years. In the second limb of his argument on the aspect of adverse possession, Mr. N. Rai emphasised that the question of adverse possession, however, arises only if the interpolation made in the Eastern boundary of Exhibit-A is accepted by the Court as correct.

37. In consideration of the submissions and documents, it is evident that the claim of the Defendant No. 1 and Respondents No. 2 and 3, over the Suit property is based on the Gift Deed documents being Exhibit-A, Exhibit-K/3 and Exhibit-P/3. Once a Gift Deed exists and land is registered and mutated in its terms along with possession, it tantamounts to possession by way of Title. If the possession is such and not antagonistic to the owner, it cannot ripen into adverse possession. It is a simple proposition of Law that possession by Title and adverse possession cannot co-exist. The principles of adverse possession have been clearly elucidated by the Learned Trial Court while discussing the relevant issue

in Paragraph 108 of the Judgment, which I find no reason to reverse. Thus, no relief accrues to the Respondents on this Issue.

38. With regard to Issue No. 11, the arguments placed by Learned Counsel, Mr. N. Rai was that the Appellant seeks cancellation of the document Exhibit-A, which was executed in the year 1989 and registered in the year 1990. As per the evidence, interpolation of the Eastern Boundary was made in the year 1990 by the Appellant on the pretext of mutation of the land of Defendant No. 1 from the name of Late Ratna Bahadur Dahal, thereby proving that the Appellant was aware of the Gift Deed, Exhibit-A, in the year 1990 itself. He contends that Article 59 of the Limitation Act, 1963 is the relevant provision for the purposes of the instant matter in which the period of limitation prescribed is three years, thus, the Suit is barred by limitation. No arguments were put forth by Mr. S.S. Hamal, Learned Counsel for the Appellant or by Mr. S.K. Chettri, Learned Counsel for the Respondents No. 4, 5 and 6 on this point.

39. The Suit is for Declaration of Title, Possession and Consequential Reliefs. The prayers inter alia made by the Plaintiff in Paragraph 40 are:

"(a) For a decree declaring that plaintiff have (sic) the right, title and interest over the suit land.

(b) For a decree for restoration of khas possession of the suit land to the plaintiff located 50 ft. of road reserve area (sic) from the centre of NH-31 "A".

(c)...

(d)...

(e)...

(f)...

(g) For a decree, declaring that the Parcha Khatiyan in the name of the Defendant No. 1 wherein the portion of land measuring 1330 hectare of land from Plot No. 336 is recorded as her gift land under new Plot No. 336/532 bearing Khatiyan No. 36/93 at Samdur Block, Tadong Elaka of East Sikkim stand quashed and cancelled.

(h)...

(i)....."

40. Article 59 of the Limitation Act, 1963 reads as follows:-

41. Article 59 applies to those cases where prayer for cancellation of instrument is an essential part of the relief claimed, even though the Plaint might have been made to look like a suit for Recovery of land. (See R. Mitras Commentaries on the Limitation Act, 7th Edition 2013)

42. In Bilat Das and Others Vs. Babuji Das, AIR 1981 Patna 219 : (1981) 29

BLJR 556 , the Patna High Court held that where the main relief, claimed by the Plaintiff in the suit is a relief for cancelling or setting aside the sale deed, the other reliefs sought by the plaintiff such as confirmation from the main relief and are ancillary and consequential to the same, hence such a suit would be governed by this Article and not by the residuary Article 113. It does not apply when the cancellation of a document is not an essential part of the plaintiff's relief i.e., where the cancellation of the instrument is merely incidental or auxiliary to the main relief (e.g., recovery of some property).

43. Pausing here for a moment, it would be appropriate to discuss the meaning of the word Instrument, it has not been defined by the Limitation Act. However, as per the Stamp Act, it includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. In the Registration Act it seems to be used as synonymous with "document". In Stroud's Judicial Dictionary, it is stated: "Instrument is a writing, and generally, imports a document of a formal legal kind," and in Wharton's Law Lexicon it is defined as a formal legal writing e.g., a record, charter, deed or transfer, or agreement. Thus, the Gift Deed documents in question would be covered by the above descriptions.

44. When a suit is brought under Article 59, the burden is on the Respondents to prove that the Appellant had clear and definite knowledge of the true facts.

45. Bearing the above discussions in mind, on consideration of the prayers of the Appellant in the Plaint reproduced supra, it is clear that the period of limitation for filing the instant suit would be three years. What requires to be decided now is whether the Appellant came to learn of the insertions in Exhibit-A only in 2011 when his sons approached the office of the Respondents No. 4 and 5 or whether knowledge of the same can be imputed before that. Under cross-examination, the Appellant has admitted that in the year 1989, the Suit Land was gifted to Damber Chettri and that, Damber Chettri transferred it in the name of the Defendant No. 1 "immediately". P.W.2 Gopal Dahal, has also stated that "immediately" after his grandfather had gifted the land to Damber Chettri, he transferred it to the name of his mother Defendant No. 1. The evidence of these two witnesses prove that the Appellant was aware of the transfer of the Gift Deed in the name of Defendant No. 1 in the year 1990. Consequently, the period of limitation would run from the year 1990. The Suit having being filed only in the year 2012, is hence barred by limitation. On this Issue, I, therefore, have to differ with the finding of the Learned Trial Court and the finding of the Trial Court stands reversed as prayed by the Respondents.

46. Issue No. 9, which reads as follows;

Whether during the landslide in the year 1990, defendant No. 2, Damber Chettri and defendant No. 3, Amber Bahadur Chettri and their families lost all their valuables including their documents? was not contested seriously by any of the parties. The Learned Trial Court decided this Issue in the affirmative. Although,

no FIR was lodged in this regard as apparent from the evidence, it appears that the finding of the Learned Trial court is correct in as much as the contents of Document-Y, the original of which was allegedly washed away by the landslide, has been confirmed by D.W.3 T.B. Basnett, who admitted to being the Scribe of the Document. The finding of the Trial Court is thus affirmed.

47. The Respondents were aggrieved by the decision of the Learned Trial Court in Issue No. 10, which dealt with maintainability of the Suit.

48. Mr. Hamal, Learned Counsel for the Appellant, urged that there is no ground on which the Suit cannot be said to be not maintainable. While Mr. N. Rai would press the rival argument that there was non joinder of necessary parties as the sons of the Appellant, parties in the dispute before Respondent No. 4, ought to have been arrayed as parties to the Suit. That, the valuation of the Suit ought to have been Rs. 75,00,000/- (Rupees seventy five lakhs) only, as the Appellant himself has testified that the value of the Suit land was thus. In the absence of both the above circumstances, the Suit is not maintainable.

No arguments were put forth by Mr. S.K. Chettri, Learned Assistant Government Advocate on this Issue, not being relevant to him.

49. The Learned Trial Court has correctly opined that merely because the sons of the Appellant were Complainants in the matter before the Respondent No. 4., it would not be correct to insist that they should also be joined as necessary party in this Suit. In my considered opinion, from the prayers made in the Plaint at Paragraph 40(a), I do not find any necessity for inclusion of the sons of the Appellant as parties to the Suit, as the Plaintiff seeks a declaration of his right, title and interest over the Suit land and possession of the Suit Land allegedly encroached by the Defendant No. 1 and the Respondents No. 2 and 3. Pradeep Dahal would have approached the Court, if he was aggrieved by the Order of Respondent No. 4. If he has failed to approach the Court, he cannot be dragged to make a claim for his rights. No reliefs have been sought by the Appellant from Pradeep Dahal or Gopal Dahal, therefore, there appears to be no logic in arraying them as parties on either side. So far, as the valuation is concerned without a proper verification of the value of the land by experts in the field, the mere utterance of the Appellant during evidence cannot be a ground to alter the valuation. Thus, the Suit cannot be said to be not maintainable and the decision of the Learned Trial Court on this Issue requires no reversal.

50. For the foregoing reasons, I do not find the Appellant entitled to any reliefs. Consequently, the Appeal fails and is accordingly dismissed.

51. The Cross Objection raised by the Respondents No. 2 and 3 stands disposed of in terms of the findings recorded in Paragraphs 37, 45 and 49 supra.

52. Parties to bear their own costs.

53. Decree be drawn up.

54. Records of the Learned Trial Court be returned forthwith.