

THE HIGH COURT OF SIKKIM : GANGTOK

REGULAR SECOND APPEAL NO. 1 OF 2004

(Arising out of the judgment and order dated 31.5.2004 passed by S. W. Lepcha, District & Sessions Judge, East & North at Gangtok in Title Appeal no. 2 of 2004)

In the matter of

Dikila Bhutia,
d/o N.C. Bhutia,
r/o Gumpa Gurpisey,
P.O. & P.S. Namchi,
South Sikkim.

... Appellant.

VERSUS

Kazimit Lepcha,
w/o Gyatso Bhutia,
r/o Upper Thumbong,
P.O. & P.S. Sombaria,
West Sikkim.

... Respondent.

For appellant : A. Moulik, Advocate.

For respondent : Messrs B. Sharma, Jagat Rai and Ms. Rita Sharma, Advocates.

PRESENT : THE HON'BLE SHRI JUSTICE R.K. PATRA, CHIEF JUSTICE.

Date of judgment : 22nd November, 2004.


J U D G M E N T

R.K. PATRA, C.J.

The unsuccessful plaintiff in both the fora is the appellant in this second appeal.

2. She filed the suit against the respondent for declaration of title in respect of the suit land, recovery of possession of the same and for other consequential reliefs. Her case is that she purchased a vacant piece


R.K.P.



of land measuring .0500 hectares (schedule 'A') bearing plot no. 540/1243 under khatian no.226 situated at Upper Thambong Block, Sombaria, West Sikkim for consideration of Rs.24,000/- vide registered sale deed dated 13.11.1992 from the respondent's father Loden Tshering Lepcha. After registration of the sale deed the vendor handed over khas possession of schedule 'A' land to her which was duly mutated in her name and the khatian parcha was also prepared in her name. She had been regularly paying land revenue in respect of the same land. She has been in peaceful possession and enjoyment of the land until the third week of August, 1996 when the respondent encroached upon a portion of schedule 'A' land measuring 35ft. x 40ft. (hereinafter referred to as the "suit land") and started digging earth for purpose of laying foundation for a permanent structure. The appellant could know about such encroachment when her relatives at Namchi reported to her. The appellant approached the respondent and requested her not to proceed ahead with the construction work over the suit land. Initially she stopped construction work but later when she came back to Namchi the respondent again resumed construction work and illegally constructed a toilet over the suit land although she has no right, title or interest over it.

The respondent in her written statement denied the allegations of the appellant. Her case is that she is the absolute owner of schedule 'A' land which was given to her as 'daijo'. The sale deed dated 13.11.1992 is a false document because the column "advance money" was kept blank, the thumb impression of the vendor was forged, there was no signature on its reverse side and the vendee did not give her identity properly.

Rkm



3. The trial Judge dismissed the appellant's suit by recording the following findings:

- (i) The sale deed in question is not a valid document because the registering authority failed to conduct enquiry to ascertain the marital status of the vendee nor about the source of her income for purchase of the land as required under officer order 105/LR dated 25.2.1961.
- (ii) The area indicated in the sale deed differs from actual physical possession.

The appeal filed on behalf of the appellant before the District Judge met with the same fate. The lower appellate Judge dismissed the appeal holding that the sale deed is not a valid document as it was registered without complying with due procedure of law.


4. At the time of admitting this appeal the following substantial questions of law were formulated:

“1. In view of the fact that the Transfer of Property Act, 1882 has come into force in the State of Sikkim since 1.9.1984, whether the procedure laid down in office order dated 25.2.1961 is required to be followed for getting the sale deed registered.”

“2. While Article 371F(k) of the Constitution of India protects only the laws in force in Sikkim immediately before the appointed day; whether Office Order No. 105/LR dated 25.2.1961 being not a law in force in Sikkim prior to the appointed day is also protected and had to be complied with before registration of a sale deed after the appointed day (in 1992).”

5. It is relevant to mention here that the lower appellate Judge has not recorded any specific finding with regard to the execution of the sale deed although he has noted the rival submissions of the parties in


Rkm



paragraphs 7 to 16 of the impugned judgment. It is therefore necessary to determine the said issue of fact which is permissible under section 103 CPC.


6. Exhibit P is the registered sale deed. It was executed on 10.8.1992 and registered on 13.11.1992. Perusal of the said document would show that the vendor (father of respondent) sold the land mentioned therein (schedule 'A') to the appellant for consideration of Rs.24,000/-. The extent of the land and its boundaries with khatian plot number have clearly been recited therein. The intention of the vendor was apparent that with the registration of the land, the title thereof passed on to the vendee i.e. the appellant. Section 54 of the Transfer of Property Act, 1882 provides that transfer of ownership by way of sale can be made only by a registered instrument in case of immovable property whose value would be Rs.100/- and upwards. It is the case of the appellant that she purchased schedule 'A' land from Loden Tshering Lepcha (father of the respondent) as per exhibit P (sale deed) and after registration the vendor handed over possession of the land. PW-2 is one of the attesting witnesses to the sale deed. He proved his signature exhibit P-1.A thereon. PW-3 is another attesting witness. He too proved his signature exhibit P-1.C on the sale deed. He stated that exhibit P.D. is the LTI of Loden Tshering Lepcha. The respondent tried to throw doubt as to whether the sale deed was executed by Loden Tshering Lepcha by showing some documents signed by Loden Tshering Lepcha whereas in the sale deed exhibit P he had put his LTI. This controversy is of little consequence in view of the fact that the son of the vendor, D.W.- 4 had


Rkm



put his signature on the sale deed in the presence of his father. There is no dispute that the sale deed was registered vide file no.(4)92-93 which was produced by the Sub-divisional Magistrate, Soreng (DW-9). At this stage some contemporaneous documents proved by the appellant in dealing with the sale transaction may be noticed. Exhibit P-1 is the money receipt (dhan receipt) executed by the vendor in token of receipt of Rs.10,000/- as advance towards part-payment of the price of the said land. Exhibit P-2 is another money receipt executed by the vendor wherein he mentioned that the balance amount out of the consideration amount of Rs.24,000/- was received by him. In view of what has been stated above the conclusion is irresistible that Loden Tshering Lepcha, father of the respondent sold schedule 'A' land in favour of the appellant by executing sale deed, exhibit P.

7. Both the courts below have declared the sale deed invalid because of non-compliance of the procedure laid down in the office order no. 150/LR dated 25.2.1961 which inter alia requires that in a case where the vendee is a woman the registering authority has to make inquiry as to her marital status as well as her source of the consideration amount. The respondent has however, in her written statement, not pleaded the alleged non-compliance of the aforesaid order. In absence of any such pleading the courts below erred in law in considering the alleged non-observance of the procedure laid down in the office order. Whether the procedure laid down in the office order was complied with or not is a question of fact. Had it been pleaded in the written statement the appellant could have taken a particular stand on that issue. Shri Moulik's contention is that the






procedure laid down in the aforesaid office order is nothing but a sort of guideline and is not relevant for the sale of the schedule 'A' land which was made in terms of the provisions of the Transfer of Property Act, 1882 which has been in force in Sikkim since 1.9.1984. It is well-settled that procedure is a means to sub-serve the ends of justice. It is a tool used to achieve justice and is not used as booby trap to obstruct the path of justice. The counsel appearing for the respondent has not been able to show any provision of the relevant office order stating that non-compliance of any of its provisions by the registering authority would automatically entail the sale deed invalid. In absence of any such rule, I am inclined to hold that the sale deed in question cannot be declared invalid merely because the registering authority did not comply with some of the provisions of the above office order.

8. In any case there appears to be substantial compliance of the procedure laid down in the office order 105/LR dated 25.2.1961. It is not in dispute that at the time of the execution of the sale deed the appellant was unmarried. In the sale deed the vendee (appellant) was described as 'Sushri' which means unmarried and daughter of N.C. Bhutia. Therefore there was no legal prohibition for her to purchase the land from the father of the respondent *inasmuch* as sale is permissible amongst the persons belonging to Bhutia and Lepcha community. The Sub-divisional Magistrate who produced the relevant record dealing with the registration of exhibit P was examined as DW-9. He deposed that he was not the registering authority during the relevant period. He admitted that during his tenure as Sub-divisional Magistrate he did not remember to have

Rm




followed the procedure laid down in office order no.105/LR dated 25.2.1961. Exhibit P-3 is the notice dated 12.8.1992 issued by the sub-registrar, Soreng calling upon all and sundry to file any claim or objection to the sale proposed by the father of the respondent in favour of the appellant. Pursuant to the notice no objection was filed by the vendor. There was no other objection filed to the notice. For the reasons mentioned above I am of the opinion that exhibit P was duly executed and was registered according to law. The appellant derived her title in respect of schedule 'A' land on the basis of the said sale deed.

9. The aforesaid conclusion answers to the question no.1 formulated. In view of what has been mentioned above, it is not necessary to examine the second question of law (supra).


10. It is the case of the respondent that the suit land does not form part of schedule 'A' land covered under the sale deed. But from the trend of cross-examination of PW-2 and PW-3 it appears that the suit land was part of schedule 'A' land. To the suggestion made to PW-2 in the cross-examination, he stated "It is not a fact that late Loden Tshering Lepcha had sold land measuring 50ft. x 50 ft. only of the suit land sold, land measuring .0500 hectares." PW-3 in his cross examination also stated "It is not a fact as per Ext.P and Ext.P.1, Late Loden Tshering Lepcha sold only land measuring 50ft x 50 ft." Had it not been the case of the respondent that the suit land was part and parcel of the schedule 'A' land, no such suggestion would have been thrown at PWs 2 and 3. From this it follows that the respondent admitted sale of some land out of schedule 'A' land to the appellant. It is the case of the respondent that no

RKM



land other than schedule 'A' land was the subject matter of sale transaction. If there was any other sale between the parties other than the land covered under exhibit P the respondent could have produced the same which she did not do. In the circumstances, I am inclined to hold that the suit land forms part of schedule 'A' land. Since the appellant has been dispossessed she is entitled to recover the same by evicting the person who is in occupation of the same.

11. In the result, the judgment and decree of both the courts below are hereby set aside. The appellant's suit is accordingly decreed in full. Appeal is allowed. Parties shall bear their costs through out.



(R.K. Patra)
Chief justice
22.11.2004

Dictation taken
&
typed by me.
Tshering Dolkar