

# THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Appellate Jurisdiction)

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SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE  
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## **R.F.A. No. 02 of 2022**

1. Uwendra Thapa @ Nordy,  
S/o Late Neel Kamal Thapa,  
Resident of Jorethang, South Sikkim,  
Presently residing at Lower Sichey,  
P.O. Sichey & P.S. Sadar,  
East Sikkim,  
Pin Code - 737 101.
  
2. Smt. Suchitra Thapa,  
Wife of Shri Uwendra Thapa @ Nordy,  
Resident of Lower Sichey,  
P.O. Sichey & P.S. Sadar,  
East Sikkim,  
Pin Code - 737 101. .... Appellants

***versus***

1. Shri Tsewang Dorjee Rinzing,  
Son of Shri. Rinzing Lama,  
R/o Tateng Retreat, Kazi Road,  
P.O. Gangtok & P.S. Sadar,  
East Sikkim,  
Gangtok,  
Pin Code -737 101.
  
2. The Branch Manager,  
Union Bank of India,  
Jorethang Branch,  
P.O. & P.S. Nayabazar,  
South Sikkim,  
Pin Code - 737 121.
  
3. The SDM/Sub-Registrar, Jorethang,  
Government of Sikkim,  
P.O. & P.S. Nayabazar,  
South Sikkim  
Pin Code - 737 121.

4. The District Collectorate,  
Office of District Collectorate,  
Government of Sikkim,  
P.O. & P.S. Namchi,  
South Sikkim. .... Respondents

**Appeal under Order XLI, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908.**

*[against the judgment passed by the Id. District Judge, West Sikkim at Gyalshing, in Title Suit Case No. 01 of 2022 dated 25.06.2022 in the matter of Tsewang D. Rinzing vs. Uwendra Thapa @ Nordy & Others]*

**Appearance:**

Mr. Tej Bahadur Thapa, Senior Advocate with Ms. Gita Bista, Ms. Pratikcha Gurung and Mr. Dipendra Chettri, Advocates for the Appellants.

Mr. Jorgay Namka, Senior Advocate with Ms. Rinchen Ongmu, Mr. Lahang Limboo, Mr. Avinash Dewan and Deempal Tamang, Advocates.

None for Respondent No.2.

Mr. Yadev Sharma, Government Advocate for Respondent Nos. 3 & 4.

Date of Hearing: 22.5.2024, 21.6.2024, 28.6.2024, 4.7.2024,  
29.8.2024, 5.9.2024, 11.9.2024 and 23.9.2024

Date of Judgment: 30.10.2024

**J U D G M E N T**

**Bhaskar Raj Pradhan, J.**

The learned District Judge vide the impugned judgment and decree declared the respondent no.1 (the plaintiff) the owner of the suit land and that he was in possession thereof, when admittedly, the suit land had not been transferred and mutated in the plaintiff's name. The suit land was admittedly owned by late Sarita Thapa – the mother of the appellant (the defendant no.1). The plaintiff had claimed to be the owner of the suit land based on an

oral “family arrangement” between him and late Sarita Thapa, whereby he had lent Rs.4,00,000/- to her and she had handed over the original Sale Deed (exhibit-P6) of the suit land owned by her, to his wife.

**2.** The defendant no.1 is not satisfied with the impugned judgment. Mr. Tej Bahadur Thapa, learned Senior Advocate for the defendant no.1, has advanced extensive arguments both on facts and law. According to him, the impugned judgment is unsustainable. It is his case that the averments in the plaint are bereft of any documentary or unimpeachable oral evidence. The evidence led by the plaintiff is beyond the pleadings and contradictory thereto. The plaintiff has made improvements and embellishments to his case. The burden of proof upon the plaintiff has not been discharged. There is variance between his pleadings and proof. He drew attention of this Court to sections 59 to 74 of the Indian Evidence Act, 1872. He also drew attention of this Court to Article 54, 58 and 65 of the Schedule to the Limitation Act, 1963. He emphasised on the relevance of section 34 of the Specific Relief Act, 1963. According to the learned Senior Counsel, the suit was also undervalued and barred by law under Order VII Rule 11 read with section 151 of the Code of Civil Procedure, 1908. He relied upon ***Smriti Debbarma (Dead) Through Legal Representative v. Prabha Ranjan***

***Debbarma and others*<sup>1</sup>, *Vijay vs. Union of India and others*<sup>2</sup>, *Madholal Sindhu v. Asian Assurance Co. Ltd. & others*<sup>3</sup>, *Om Prakash Berlia & Another v. Unit Trust of India & others*<sup>4</sup>, *Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana*<sup>5</sup>, *Pankajakshy v. Devaki Ramakrishnan*<sup>6</sup>, *Union of India v. Ibrahim Uddin & Another*<sup>7</sup>, *Ouseph Varghese v. Joseph Aley & others*<sup>8</sup>, *Union of India v. Vasavi Co-op. Housing Society Ltd. & others*<sup>9</sup>.**

**3.** In ***Smriti Debbarma*** (supra), the Supreme Court opined that burden lies on the party who asserts the existence of a particular state of things on the basis of which the relief is claimed as mandated in terms of section 101 of the Evidence Act, 1872 which states that burden on proving the fact rests with party who substantially asserts in the affirmative and not on the party which is denying it. In terms of section 102, if both parties fail to adduce evidence, the suit must fail.

**4.** In ***Vijay*** (supra), the Supreme Court held that the law laid down by it in ***Suraj Lamp*** (supra) was considered in several judgments without any change and recently restated in ***Munishamappa vs. M. Rama Reddy & Others***<sup>10</sup>. In ***Suraj Lamp***

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<sup>1</sup> 2023 SCC OnLine SC 9

<sup>2</sup> 2023 INSC 1030

<sup>3</sup> 1945 SCC OnLine Bom 44/ AIR 1954 BOM 305

<sup>4</sup> 1982 SCC OnLine Bom 148 / AIR 1983 BOM 1

<sup>5</sup> (2012) 1 SCC 656

<sup>6</sup> AIR 2011 Ker 30

<sup>7</sup> (2012) 8 SCC 148

<sup>8</sup> (1969) 2 SCC 539

<sup>9</sup> (2014) 2 SCC 269

<sup>10</sup> Civil appeal no.10327 of 2011

(supra), the Supreme Court held that a transfer of immovable property by way of sale can only be by a deed of conveyance and in the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. According to the Transfer of Property Act, 1882, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the Transfer of the Property Act, 1882 enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

**5.** Questioning the birth certificate (exhibit-P29) of the child of Yangchen Dolma Rinzing (PW-2), the learned Senior counsel relied upon **Madholal Sindhu** (supra) in which the Bombay High Court held that the proof of signature of its executor is not proof of correctness of its contents and where the correctness of the contents of a document produced in Court is in issue, that should be proved by calling the executor of the document as a witness. In **Om Prakash Berlia** (supra), the Bombay High Court opined that the expression “contents of a document” in section 63 of the Evidence Act, 1872 refers only to contents and not truth thereof.

**6.** In *Pankajshy* (supra), the Kerala High Court opined that a claim for possession on the basis of an oral sale can never be recognised under law.

**7.** In *Ibrahim Uddin* (supra), the Supreme Court held that it is not permissible to claim the relief of declaration without seeking consequential relief in view of section 34 of the Specific Relief Act, 1963.

**8.** In *Ouseph Varghese* (supra), the Supreme Court examined a case where the plaintiff had sought to prove an oral agreement of sale. It was held that the first question that arises for decision is whether the agreement pleaded in the plaint is true. The burden of proving the agreement is naturally on the plaintiff. The agreement in question as mentioned is said to be an oral agreement. Therefore, the plaintiff's task is all the more difficult. It was also held that before a Court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence.

**9.** In *Vasavi Co-op. Housing Society* (supra), the Supreme Court held that in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The legal

position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against them, in the absence of establishments of the plaintiff's own title, the plaintiff must be non-suited.

**10.** Mr. Jorgay Namka, learned Senior Counsel for the plaintiff, vehemently supported the impugned judgment. According to him, the present case falls within the exception to section 54 of the Transfer of Property Act, 1882 as the oral agreement was in fact a family arrangement. He further contends that the Courts have provided relief based on possession and part performance under section 53A of the Transfer of Property Act, 1882. It is contended that as the plaintiff was already in unencumbered physical possession, relief of possession was not essential. The defendant no.1 had made changes in the records of right fraudulently despite lack of ownership document which was in the possession of the plaintiff. He relied upon ***Nair Service Society Ltd. v. Rev. Father K.C. Alexander & others***<sup>11</sup>, ***Kale v. Dy.***

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<sup>11</sup> 1968 SCC OnLine SC 97/ AIR 1968 SC 1165

***Director of Consolidation*<sup>12</sup>, *Ravinder Kaur Grewal v. Manjit Kaur*<sup>13</sup>, *Vemareddi Ramaraghava Reddy & others v. Konduru Seshu Reddy & others*<sup>14</sup>, *Sri U. Vijaya Kumar & Another vs. Smt. Malini V. Rao*<sup>15</sup>, *Meharchand Das v. Lal Babu Siddique*<sup>16</sup>, *Arulmigu Chokkanatha Swamy Koil Trust v. Chandran*<sup>17</sup>, *Venkataraja v. Vidyane Doureradjaperumal*<sup>18</sup> and *Gurunath Manohar Pavaskar v. Nagesh Siddappa Navalgund*<sup>19</sup>.**

**11.** The contention of the learned Senior Counsel for the plaintiff regarding part performance and section 53A of the Transfer of Property Act, 1882 is incorrect, as admittedly, there was no contract to transfer for consideration in immoveable property by writing as contemplated under section 53A.

**12.** In *Nair Service Society Ltd.* (supra), the issue before the High Court was whether the plaintiff could maintain a suit for possession without proof of title basing himself mainly on his prior possession. The Supreme Court held that under section 9 of the Code of Civil Procedure itself, all suits of a civil nature are triable excepting suits of which their cognizance is expressly or impliedly barred. The

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<sup>12</sup> (1976) 3 SCC 119

<sup>13</sup> (2020) 9 SCC 706

<sup>14</sup> 1966 SCC OnLine SC 112 / AIR 1967 SC 436

<sup>15</sup> (2016) SCC OnLine Kar 2128

<sup>16</sup>(2007) 14 SCC 253

<sup>17</sup> (2017) 3 SCC 702

<sup>18</sup> (2014) 14 SCC 502

<sup>19</sup> (2007) 13 SCC 565

Supreme Court also reiterated the principle laid down in ***Perry vs. Clissold***<sup>20</sup> that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. It was also held that prior possession is a good title of ownership against all who cannot show a better title.

**13.** In ***Vemareddi Ramaraghava Reddy***, the Supreme Court held that section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of section 42 of the Specific Relief Act.

**14.** In ***Sri U. Vijaya Kumar*** (supra), the Karnataka High Court held that the proviso to section 34 of the Specific Relief Act, 1963 is imperative and makes it obligatory on every Court not to make any declaration in cases where the plaintiff being able to seek further relief, omits to do so. A suit should be dismissed if the plaintiff, being able to seek further relief, omits to do so. Therefore, objection to the

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<sup>20</sup> (1907) A.C. 73

maintainability of a suit on the ground that it does not seek consequential relief, must be taken up with promptitude. The proviso becomes available only when the plaintiff is able to seek further relief against the defendant.

**15.** The series of judgments referred to by the learned Senior Counsel for the plaintiff to supplement his contention that the oral transaction between the plaintiff and late Sarita Thapa was in fact a “family arrangement” may not be necessary to examine in detail as the oral transaction suggested in the plaint does not qualify as “family arrangement” as held by Supreme Court as well as the High Courts.

**16.** In *Meharchand Das* (supra), the Supreme Court examined a case between a landlord and a tenant in which the tenancy was admitted and the suit property was a tenanted one. Therefore, the possession of the appellant/defendant therein was not disputed. It was held that thus under section 34 of the Specific Relief Act, 1963 the plaintiff who was admittedly not in possession of the suit premises, a suit for mere declaration of title without claiming possession was not maintainable.

**17.** In *Arulmighu* (supra) and *Venkatarama* (supra), the Supreme Court held that a suit filed for declaration of title

by the plaintiff who was not in possession of property was not maintainable without further relief of possession.

**18.** In *Gurunath Manohar Pavaskar* (supra), the Supreme Court held that revenue records are not documents of title and it only raises a presumption. The burden to prove title to the land is on the plaintiff.

**19.** Although, in the evidence recorded by the learned District Judge, the witnesses are given specific numbers except one who has not been assigned any witness number, however, some of them have been referred to by different numbers. To avoid any confusion, the witness numbers in the impugned judgment is reflected.

### **The Plaintiff**

**20.** The plaintiff filed a suit in the year 2018 essentially seeking a declaration that he was the owner of the suit property and in its unencumbered actual physical possession. The plaint was based on the plaintiff's assertion that in the year 2004 he had lent Rs.4,00,000/- to late Sarita Thapa at his sister's residence at Neelkamal Apartments, Siliguri, to meet her medical expenses as she was suffering from cancer and was being treated. In lieu thereof, late Sarita Thapa handed over to him the original Sale Deed (exhibit-P6) of the suit land by which she had purchased it in the year 1979. He pleaded that late Sarita

Thapa handed over actual physical possession of the suit land in June 2004 after which he appointed Mani Kumar Subba (PW-6) as its caretaker/chowkidar. It is the plaintiff's case that while attending the death rites of his nephew at Jorethang on 24.09.2018, he learnt that the defendant no.1 had mutated the suit land in his name in the year 2008 and mortgaged it to take a loan of Rs.30,00,000/- which compelled him to file the suit. The plaintiff had stated that as late Sarita Thapa was critical during 2004 when the oral transaction took place, therefore, no steps were taken to transfer and mutate the suit land in his name.

**21.** The plaintiff prayed for the following reliefs:

- (i) *A decree declaring that the suit land/property belongs to the Plaintiff, free from all encumbrances;*
- (ii) *A decree declaring that the Defendant No.1 had illegally transferred/mutated the suit property and thereafter illegally mortgaged the suit property with Defendant No.3, in connivance with each other.*
- (iii) *A decree declaring that the suit land/property is in physical possession of the Plaintiff;*
- (iv) *A decree cancelling all the ownership documents of Defendant No.1 with respect to the suit property;*
- (v) *A decree directing the Defendant No.1 and 2 to immediately repay the loan borrowed by them from Defendant No.3 as the loan transaction between the Defendant No.1 and 3 are void ab – initio;*
- (vi) *Costs of the proceedings;*
- (vii) *Any other relief/s as this Hon'ble Court may deem fit and proper in the circumstances of the matter.*

**Written statements of defendants no.1 and 2**

**22.** The defendants no.1 and 2, in their joint written statement, took the stand that the relationship between the plaintiff and his wife's younger sister - late Sarita Thapa,

was never pleasant. The suit land had been purchased by late Sarita Thapa on 01.09.1979, after which she and family members fenced it and constructed other infrastructures therein. Mani Kumar Subba (PW-6) had been authorized by his parents to construct a godown in the suit land and to take care of it from time to time. Late Sarita Thapa expired in the year 2004 and late N.K. Thapa on 22.10.2006. The defendants no.1 and 2 denied that late Sarita Thapa had been given Rs.4,00,000/- by the plaintiff. The suit land was transferred to his name thereafter. He had taken a loan of Rs.30,00,000/- mortgaging the suit land as he desired to start a business. Mani Kumar Subba (PW-6) had at one time started claiming that he was the owner of the suit land until he was threatened with eviction by his parents. Mani Kumar Subba (PW-6) was also an attesting witness to a document relating to transfer of title and mutation in the name of the defendant no.1. In order to show possession, the plaintiff affixed a signboard on the suit land compelling him to file a complaint dated 12.01.2019 before the Jorethang Police, which however, was not received by them.

**Written statements of defendant no.3**

**23.** The defendant no.3 in his written statement took the stand that loan had been disbursed to the defendant no.1 for his business against the mortgage of the suit land

after conducting proper search. It was stated that the suit land was found free from all encumbrances and charges at the time of mortgage and that it was found that the defendant no.1 was in its continuous physical possession. The defendant no.3 also took the stand that during the visit and inspection of the suit land by the Bank Officials and approved valuers no sign board was available at the suit land as claimed by the plaintiff. Further, Mani Kumar Subba (PW-6) who was present at the vicinity of the suit land informed them that it belongs to the defendant no.1. The loan was sanctioned in favour of the defendant no.1 after being fully satisfied.

**Written statements of defendants no.4 and 5**

**24.** A joint written statement filed by defendants no.4 and 5 also opposed the suit filed by the plaintiff as being devoid of merits and bad in law and facts. They took a stand that the suit land was mutated in favour of the defendant no.1 after verifying the facts as to whether he was the legal heir and successor of late Sarita Thapa. According to the written statements, defendant no.1 was directed to produce the original parcha khatiyani of the suit land in the name of late Sarita Thapa along with other relevant documents. The affidavit in support of the written statements filed by

defendants no.4 and 5 was sworn by Tshering Bhutia (PW-8) on oath as true to the best of his personal knowledge.

### **The issues**

**25.** The learned District Judge framed five issues as under:

- “(i) Whether the plaintiff and the mother of defendant no.1 had entered into any transaction/agreement involving the suit property? (onus on the plaintiff and the defendant no.1).*
- (ii) Whether the plaintiff came into possession of the suit property in June, 2004 and whether he subsequently transferred it in his name? (onus on the plaintiff).*
- (iii) Whether the suit is barred by law of limitation? (onus on the plaintiff and defendants).*
- (iv) Whether the suit is barred by any other law of the land pertaining to registration of immoveable property applicable in the State of Sikkim and (Onus on the defendants No.1, 3, 4 and 5).*
- (v) Whether the suit property was erroneously mortgaged by defendant nos. 1 and 2 with defendant no. 3 or not? (onus on the plaintiff and defendants nos. 1, 2 and 3).”*

### **The parties and their witnesses**

**26.** Before this Court ventures to examine the issues, it would be relevant to note the relationship between the parties and the key witnesses. Plaintiff is a retired judicial officer and was married to late Mani Dorjee who was the elder sister of late Sarita Thapa (mother of defendant no.1). Yangchen Dolma Rinzing (PW-2) is the plaintiff's younger daughter and Uden Rinzing (DW-1) is his elder daughter. While Yangchen Dolma Rinzing (PW-2) supports the plaintiff's case, Uden Rinzing (DW-1) supports the version of the defendant no.1 who denies that his mother had handed

over the suit land to the plaintiff as an outright sale and that the plaintiff had lent the money to his mother. Yangchen Dolma Rinzing (PW-2) claims that she was at Neelkamal Apartments, Siliguri, when the plaintiff lent Rs.4,00,000/- to late Sarita Thapa. Kessang Rinzing Lachungpa (PW-1) and Yangchen Donka Rinzing (PW-7) are plaintiff's sisters supporting the plaintiff's case. Both of them do not have personal knowledge that the suit land is owned by the plaintiff having only heard about it. They, however, depose about the close family ties between the plaintiff, the defendant no.1 and his late parents. Jhabarmull Agarwal (PW-3), D.S. Bista (PW-4), Kamala Pradhan (PW-5) and Mani Kumar Subba (PW-6) are all plaintiffs' witnesses who depose that they were aware that the plaintiff was the owner of the suit land. Mani Kumar Subba (PW-6) in addition goes on to depose and support the plaintiff's case that he had been taking care of the suit land on plaintiff's behalf since June 2004 when late N.K. Thapa (husband of late Sarita Thapa) had handed over actual physical possession of the suit land to the plaintiff at Jorethang where the suit land is situated. Tshering Bhutia (PW-8) was the then Sub-Divisional Magistrate from whom the plaintiff learnt in the year 2018 about the mutation of the suit land by the defendant no.1 in the year 2008. Interestingly, Tshering Bhutia (PW-8) had sworn the affidavit as the defendant no.4 in support of the

joint written statement filed by defendants no.4 and 5. Interestingly, the defendants no.4 and 5 did not produce any witness to support their stand in the written statement opposing the plaint. The defendants no.1 and 2 examined themselves and Uden Rinzing (DW-1) – the elder daughter of the plaintiff along with Padam Gurung (DW-2) - whose wife used to work in the house of the plaintiff's brother. Krishna Prasad Sharma (D3) – the Branch Manager of defendant no.3, also came into the witness box in support of the stand taken by them in the proceedings that the loan of Rs.30,00,000/- had been given to the defendant no.1 for business purposes on the mortgage of the suit land after a thorough search thereof.

**27.** Before this Court delves into the issues, it would be important to keep in mind certain settled propositions of law while deciding civil disputes. In civil proceedings, a fact is said to be established if proved by preponderance of probabilities. The degree of certainty of belief in the mind of the Court by which it convinces itself about the existence of a fact as more probable than its non-existence is the key. Thus, proving it by preponderance of the evidence requires a clear demonstration that the proposition is more likely true than not true. Section 3 of the Indian Evidence Act, 1872 provides that a fact is said to be proved when the Court

either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the fact exists. The Supreme Court has held in *Dr. N.G. Dastane vs Mrs. S. Dastane*<sup>21</sup> that a prudent man faced with conflicting probabilities concerning a fact situation will act on a supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. The Court applies this test of a prudent man for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities, the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

**28.** The plaintiff's claim to be in actual physical possession and the owner of the suit land is central to his case. When an individual or entity physically occupies and controls a property it is said to be in his or its actual possession. This type of possession is straight forward and

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<sup>21</sup> (1975) 2 SCC 326

tangible and involves a direct interaction with the property. It entails living in or actively using the property. To establish actual physical possession, the plaintiff must prove that he was in its actual occupation or through his agent to the exclusion of others. As admittedly late Sarita Thapa was the owner of the suit land, it is presumed that she had legal possession of the suit land.

***Issue no.1: Whether the plaintiff and the mother of defendant no.1 had entered into any transaction/agreement involving the suit property?***

**29.** The oral depositions of the plaintiff and his younger daughter - Yangchen Dolma Rinzing (PW-2), along with the birth certificate of her daughter (exhibit - P29) and the complaint (exhibit-17) are the only evidence relevant for the purpose of deciding Issue No.1. Those of the witnesses who they claim were present during the oral transaction sometime in June 2004 at Neelkamal Apartments, Siliguri, are no longer alive. The other witnesses of the plaintiff have no personal knowledge about the oral transaction. The defendants no.1 and 2 denies it. The plaintiff admits both in the plaint as well as in his evidence that there was no written agreement or money receipt executed.

**30.** The complaint (exhibit-17) made in the year 2018 is perhaps the earliest point of time when the plaintiff in writing asserted that he had given Rs.4,00,000/- to late

Sarita Thapa. This is after more than a decade since the alleged “family arrangement” in the year 2004. However, there is variation between what the plaintiff stated in the complaint (exhibit-17) and what he stated in the plaint. The complaint (exhibit-17) is the plaintiff’s documentary evidence and he is therefore bound by it. In the complaint (exhibit-17), he stated that he was persuaded by late Sarita Thapa, late N.K. Thapa and his wife late Mani Dorjee to give Rs.4,00,000/- to enable them to meet the medical expenses on the understanding that after her recovery the suit land would be transferred and mutated in his name. The plaintiff also asserted in the complaint (exhibit-17) that he agreed to give Rs.4,00,000/- to them reluctantly. The plaintiff, however, took a diametrically opposite view in his plaint when he asserted that due to the close relationship he had with late Sarita Thapa, he willingly gave Rs.4,00,000/- to her and she handed over the Sale Deed (exhibit-P9) and actual physical possession.

**31.** The production of the Sale Deed (exhibit-P6) and other documents belonging to late Sarita Thapa by the plaintiff is pleaded as a circumstance in favour of the plaintiff. A question is posed as to why the Sale Deed (exhibit-P6) and other property documents of late Sarita Thapa would be in the possession of the plaintiff? There is

an uncertainty in the answer given both by the plaintiff and the defendant no.1 and may be it is strewn in the complaint (exhibit-17), the plaint and the deposition of the plaintiff and the defendant no.1. In the complaint (exhibit-17), the plaintiff states that those documents were “*handed over to my wife for safe custody and for taking necessary steps for mutation later on*” and it was retrieved from her box after her death in the year 2011. In the plaint, the plaintiff asserts that the Sale Deed (exhibit-P6) was handed over to the plaintiff through his wife. In his deposition, the plaintiff states that late Sarita Thapa personally handed over her ownership documents through his wife. Although, there is substantial variation between the stand taken by the plaintiff in the complaint (exhibit-17) and the plaint, one thing is certain that these documents were in the possession of the plaintiff’s wife and not his. Admittedly, the plaintiff’s wife was late Sarita Thapa’s sister. Late Sarita Thapa was being taken care of by the plaintiff’s wife at Neelkamal Apartments. Considering the close blood relationship between them, it would not be difficult to presume that in fact those documents were handed over to the plaintiff’s wife by late Sarita Thapa for safe custody. According to the defendant no.1, these documents were missing. It is quite clear that defendant no.1 also had no idea as to how these

documents were handed over by his mother late Sarita Thapa to her sister – the plaintiff's wife.

**32.** The plaintiff led no corroborative evidence to support his contention. He pleaded that as he had retired as the Law Secretary then, he had substantial money to give the loan of Rs.4,00,000/- to late Sarita Thapa. However, he did not admittedly have or lead any documentary evidence to substantiate the same.

**33.** There is substantive variance between his statement in the plaint and his oral evidence as well. In his plaint, he asserts that late Sarita Thapa had handed over the unencumbered physical possession to him. However, this does not look possible as late Sarita Thapa admittedly was critical at that point of time and succumbed to cancer shortly thereafter. In his oral evidence, the plaintiff improved his case and deposed that although symbolic possession was given by late Sarita Thapa to him, actual physical possession was handed over by late N.K. Thapa at Jorethang a week after the oral transaction in the presence of Mani Kumar Subba (PW-6). This improvement by the plaintiff cannot be accepted as it is not supported by his pleadings. Admittedly, this handing over of actual physical possession by late N.K. Thapa at Jorethang was also not documented and reduced to in writing. If that is so, what was the need for them

including late N.K. Thapa to travel from Siliguri to Jorethang leaving behind the critical late Sarita Thapa at Siliguri to orally transfer the actual physical possession?

**34.** The plaintiff also stated in the complaint (exhibit-17) that the original Sale Deed (exhibit-P6) which was in the custody of his wife was retrieved from a box long after her death. According to the plaintiff, his wife died in the year 2011. The plaintiff, however, manoeuvres this fact and gives a completely different picture. The plaintiff seeks to assert that the Sale Deed (exhibit-P6) was handed over by late Sarita Thapa through his wife. However, in the complaint (exhibit-17), the plaintiff stated that the Sale Deed document (exhibit-P6) along with some papers were handed over to his wife for safe custody and for taking necessary steps for mutation later on. If, as claimed by the plaintiff in his complaint, the Sale Deed (exhibit-P6) was handed over to him by late Sarita Thapa as an outright sale there would be no question of handing it over to the plaintiff's wife for safe custody or discovering it in his wife's box after her death in the year 2011.

**35.** The plaintiff's younger daughter – Yangchen Dolma Rinzing (PW-2), echoes the same assertion made by the plaintiff in his evidence on affidavit. It is, therefore, only a duplication of oral statement and does not provide any

corroborative value. The birth certificate (exhibit-P29) of Yangchen Dolma Rinzing's (PW-2) child may only probabalize that she was in Siliguri at that time but does not prove that Rs.4,00,000/- was given to late Sarita Thapa or that there was any such transaction even if we ignore the objection raised by Mr. Tej Bahadur Thapa, learned Senior Counsel. Admittedly, although, the suit land which was in the name of late Sarita Thapa had not been transferred or mutated in favour of the plaintiff, he took no steps till 2018 from June 2004. What happened in the confines of the apartment at Neelkamal Apartments, Siliguri, around June 2004 when late Sarita Thapa was admittedly "critical" according to the plaintiff were known only to him, his late wife, late Sarita Thapa, late N.K. Thapa and his daughter Yangchen Dolma Rinzing (PW-2). With the other three no longer alive to throw light upon it, the only evidence the plaintiff relies upon is his and the evidence of his daughter Yangchen Dolma Rinzing (PW-2). Their oral evidence, however, remains only an oral assertion with no proof. Therefore, there was no material evidence on record before the learned District Judge which could persuade her to hold that there was a transaction/agreement involving the suit property even by preponderance of probabilities. The findings and the opinion of the learned District Judge on Issue No.1, is therefore, unsustainable and set aside. This Court holds that the

plaintiff has failed to prove that there was any transaction/agreement involving the suit land.

**36.** The plaintiff had pleaded that he was the owner of the suit land and the defendant no.1 had denied it. The learned District Judge, however, chose not to frame an issue of ownership quite obviously since the plaintiff had pleaded that the suit land had not been transferred and mutated in his name. There is no other way known to law by which ownership could have been established by the plaintiff without a conveyance deed as he pleaded that the transaction was an outright sale. In such view of the matter, therefore, the question of granting the first prayer of a declaration of ownership to the plaintiff could not have arisen. However, the learned District Judge even while holding that there could not be any transfer of immovable property, i.e., the suit land, which was valued much more than rupees one hundred in view of section 54 of the Transfer of Property Act, 1882, chose to declare the plaintiff the owner thereof. This was incorrect. The declaration is set aside.

***Issue No.4: Whether the suit is barred by any other law of the land pertaining to registration of immovable property applicable in the State of Sikkim?***

**37.** At this juncture, it would be relevant to examine Issue No.4 framed by the learned District Judge and the

correctness of the view that although section 54 of the Transfer of Property Act, 1882 does not permit transfer of immovable property like the suit land as it was valued more than one hundred rupees, it was permissible for the Court to nevertheless grant the declaration of ownership as prayed for by the plaintiff.

**38.** Section 54 of the Transfer of Property Act, 1882 reads as under:

**“54. “Sale” defined.** – “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

**Sale how made.**- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

**Contract for sale.**- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

**39.** In *Suraj Lamp* (supra), the Supreme Court held that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

**40.** Thus, the declaration of ownership by the learned District Judge based on an assertion of oral transaction and possession was incorrect.

**41.** There is yet another aspect to it which requires this Court's attention. It has been noticed that the plaintiff had stated that there was no deed of transfer and mutation in his favour in the plaint itself. In spite of that, the plaintiff did not pray for a direction upon the defendants no. 1 and 2 to transfer and mutate the suit land in his favour. Section 34 of the Specific Relief Act, 1963 provides as under:

**“34. Discretion of court as to declaration of status or right.** – Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. – A trustee of property is a ‘person interested to deny’ a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.”

**42.** The proviso to section 34 of the Specific Relief Act, 1963 makes it clear that if the plaintiff in a suit for declaration omitted to seek further relief than a mere declaration, although able to, then the Court shall not grant such a declaration alone.

**43.** The learned Senior Counsel for the plaintiff submitted that it is not mandatory in every case that the plaintiff would be required to seek other relief and if the plaintiff was in possession of the suit land a mere declaration of ownership would suffice relying upon various judgments of the Supreme Court as well as various High Courts. In the present case, although the plaintiff asserts

that he was in possession of the suit land, the defendants no.1 and 2 vehemently deny it. Therefore, it was incumbent upon the plaintiff to establish possession of the suit land.

**44.** Admittedly, there was no transfer deed executed in favour of the plaintiff and the defendant no.1 had also mutated the suit land in his name in the year 2008. The plaintiff being aware of the law that there would be no transfer of immovable property without a valid deed of transfer has categorically stated in the plaint that they could not execute any transfer deed because of various reasons. Thus, in view of section 54 of the Transfer of Property Act, 1882 and section 34 of the Specific Relief Act, 1963 it was also necessary for the plaintiff to seek further reliefs to ensure that the transfer deed is executed by the defendant no.1 in his favour and the suit land mutated in his name without which he would have no title upon the suit land and enjoy it. Having not done so, the learned District Judge was precluded from granting the declaration of ownership to the plaintiff. Issue no.4 is, therefore, decided against the plaintiff.

***Issue No.2: Whether the plaintiff came into possession of the suit property in June, 2004 and whether he subsequently transferred it in his name?***

**45.** Issue No.2 - whether the plaintiff had come into possession of the suit land in June 2004, is relatable to the

third prayer sought for by the plaintiff, i.e., a declaration that he was in physical possession.

**46.** The plaintiff's case in the plaint was that he was in "unencumbered physical possession" of the suit property "*since June, 2004 when ownership and unencumbered physical possession of the suit property was handed over by late Sarita Thapa*".

**47.** However, the plaintiff sought to improve his case and deposed that "symbolic possession of the suit property" was made by late Sarita Thapa in Siliguri by handing over the original sale deed (exhibit-P6) of the suit property to him and that the "unencumbered actual physical possession" of the suit property was given through her husband late N.K. Thapa in the presence of Mani Kumar Subba (P.W. 6) within one week thereafter when the plaintiff and late N.K Thapa visited the suit property.

**48.** Mani Kumar Subba's (P.W.6) affidavit in evidence to the extent he seeks to support the plaintiff's deposition about late N.K. Thapa handing over the unencumbered actual physical possession of the suit property to him cannot also be accepted as it is beyond the plaintiff's pleadings in the plaint.

**49.** This was an improvement made by the plaintiff and deposed in the plaintiff's evidence on affidavit *sans* any

pleading. This evidence of the plaintiff, is therefore, contrary to the pleading. It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted.

**50.** The plaintiff sought to establish his case of possession by his and his witnesses' oral depositions and certain other evidences. He also presented certain circumstantial facts to establish possession. He asserted that after he took over actual physical possession of the suit land, he engaged Mani Kumar Subba (PW-6) as his caretaker/chowkidar who fenced the suit land and also made a godown. The plaintiff also asserted that he had put up a signboard in the suit land stating that it was his property in the year 2004. He exhibited the photographs exhibit-P13, exhibit-P14 and exhibit-P15 to establish the fact.

**51.** However, the plaintiff in cross-examination admitted that he had no document to show that he had been handed over possession of the suit land by late Sarita Thapa and late N.K. Thapa in the year 2004. He admittedly did not have any documentary proof of appointing Mani Kumar Subba (PW-6) as his chowkidar/caretaker or of fencing it or erecting a godown therein. The plaintiff admitted that Mani Kumar Subba (PW-6) had been kept by late Sarita Thapa and late N.K. Thapa, as caretaker of the suit land. The

plaintiff also admitted that the suit land was already fenced in the year 2004. He volunteered to clarify that after he took possession; he continued to engage him as caretaker and instructed Mani Kumar Subba (PW-6) to improve the suit property by way of cultivation, repairs, etc. as found necessary. This voluntary statement is not what he had pleaded in the plaint categorically. The plaintiff also admitted that he had no document to show that he had been paying Mani Kumar Subba (PW-6) any salary. The plaintiff admitted that he did not remember whether the signboard was affixed in the year 2018 under extensive cross-examination by the counsel for the defendant no.1, where he also admitted that the signboard was affixed by him after one or two years after 2004. The plaintiff's witness - D.S. Bista (PW-4) in his cross-examination held on 12.03.2021 categorically admitted that the signboard had been affixed just one two years back. This admission of the plaintiff's witness probabilizes the assertion of the defendant no.1 that the plaintiff affixed a signboard to show possession on the suit land in 2019.

**52.** In view of the clear admissions made by the plaintiff in his cross-examination, the evidence of Mani Kumar Subba (PW-6) diminishes in relevance. Furthermore, it is noticed that Mani Kumar Subba (PW-6) in cross-

examination, admitted that his evidence on affidavit was already prepared and he was asked to sign on it. Mani Kumar Subba (PW-6) could not also say what was written therein.

**53.** The evidence on affidavit of Yangchen Dolma Rinzing (PW-2) also reflects that her knowledge about her father having appointed Mani Kumar Subba (PW-6) as his caretaker/chowkidar for the suit property and her father having unencumbered physical possession was not based on her personal knowledge. Admittedly, she was married in the year 2003 and after her marriage she resided with her husband in Delhi till 2017. Admittedly, Yangchen Dolma Rinzing (PW-2) has been residing with the plaintiff since April 2018. The plaintiff's claim that he had been in unencumbered physical possession of the suit land since June 2004 and that he had kept Mani Kumar Subba (PW-6) as caretaker therein is not supported by any credible substantial evidence.

**54.** Both Kessang Rinzing Lachungpa (PW-1) and Yangchen Donka Rinzing (PW-7) - the plaintiff's two sisters, also had no personal knowledge about the possession of the suit land. Both state in their evidence on affidavit that their brother is said to have purchased land at Jorethang from late Sarita Thapa which is being taken care of by his

caretaker. Their evidence also does not support the plaintiff's claim of actual physical possession of the suit land.

**55.** Jhabarmull Agarwal (PW-3) and D.S. Bista (PW-4) only assert that they have personal knowledge that the plaintiff was the owner of the suit land without any further details. The cross-examination of Jhabarmull Agarwal (PW-3) has brought out the fact that he was the purchaser of a building owned by the plaintiff. D.S. Bista (PW-4) admitted in cross-examination that although the plaintiff had told him that the suit land was his property; he had not seen any property papers; he did not know about any transaction of the suit land; and in whose name the suit land was recorded at present. Their evidence also does not further the claim of actual physical possession of the suit land by the plaintiff.

**56.** Kamala Pradhan (PW-5) deposed that Mani Kumar Subba (PW-6) was her neighbour and that he had been looking after the property of the plaintiff beside her house and that all the people in the locality were well aware that the land belonged to the plaintiff. Kamala Pradhan (PW-5) admitted that she was the sister-in-law of Mani Kumar Subba (PW-6) during her cross-examination. D.S. Bista (PW-4) also confirmed this fact during his cross-examination. Kamala Pradhan (PW-5) clarified during cross-examination that she had heard the suit land belonged to the mother of

defendant no.1 which was subsequently owned by the plaintiff. None of the plaintiff's witnesses had anything more substantial to state or produce save repeating what was told to them.

**57.** Admittedly, neither the plaintiff nor Mani Kumar Subba (PW-6) were residing in the suit land. Mani Kumar Subba (PW-6) was merely keeping an eye on it as he happened to live nearby. Mani Kumar Subba (PW-6) stated in his evidence on affidavit that he had the keys to the only entry point of the said land. However, he did not produce or exhibit the keys.

**58.** “Unencumbered actual physical possession” is a question of fact which must be proved by cogent evidence. The plaintiff has failed to produce any substantial evidence which would inspire confidence to hold that he was in unencumbered actual physical possession. All the corroborative evidences the plaintiff sought to place before the Court to make the Court believe what he stated in his plaint to be true have collapsed. His statement stands alone without proof. This Court is of the firm view that the finding and opinion of the learned District Judge declaring the plaintiff to be in possession of the suit land is also incorrect and accordingly it is set aside.

**Issue No. 5: Whether the suit property was erroneously mortgaged by defendant nos. 1 and 2 with defendant no. 3 or not?**

**59.** The next question therefore which is needed to be answered is whether the defendants no.1 and 2 had erroneously mortgaged the suit land with defendant no.3.

**60.** Admittedly, the suit land was owned by late Sarita Thapa. During cross-examination, the plaintiff admitted that the defendant no.1 was her heir and entitled to inherit her property. This Court has held that the plaintiff has failed to prove that there was any transaction with regard to the suit land as asserted by him in the plaint. The plaintiff was therefore not the owner of the suit land. This Court has also concluded that the plaintiff was unable to prove that he was in actual physical possession of the suit land. Thus, it cannot be held that the suit land was erroneously mortgaged by defendants no.1 and 2 with defendant no.3.

**Issue No.3: Whether the suit is barred by the law of limitation?**

**61.** The learned District Judge has framed an issue as to whether the suit is barred by the law of limitation. The learned District Judge has held that since the plaintiff learnt about the mutation of the suit land by the defendant no.1 and the loan taken by him by mortgaging it only on 24.09.2018 the suit was not barred by the law of limitation. The plaintiff was aware that the suit land could not be

owned by him until it is transferred and mutated in his name even if his assertion of an oral agreement is presumed to be correct. Therefore, the only right he had in the presumed circumstance was a right of specific performance of the alleged oral agreement. The plaintiff could not have been declared the owner of the suit land without a validly registered transfer deed. In that situation, Article 54 of the Limitation Act, 1963 provides a period of three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. According to the plaint, the defendant no.1 for one reason or the other never pursued the matter of transfer of the suit land in the plaintiff's name despite the plaintiff having approached him and personally requested him several times to help transfer the suit land which was recorded in his name. Although, the plaintiff does not specify when he made this request to the defendant no.1, it is quite clear that it was some time after late Sarita Thapa's death in the year 2004 and much prior to 2018. However, admittedly, the plaintiff took no such steps from 2004 till 2018 and when he did he filed the present suit for declaration instead. Without the transfer and mutation in his name, the plaintiff could not have waited for 14 long years to approach the Court of law. The plaintiff therefore could not have filed a suit for specific performance in the year 2018 as it would

have been barred by laws of limitation. Evidently, therefore, the plaintiff preferred to file a suit for declaration of title on the ground that he was in possession of the suit land. This Court has concluded that the plaintiff has failed to prove possession of the suit land. Admittedly, there is no title deed in favour of the plaintiff. As held above, the suit for declaration of ownership was not maintainable due to the mandate of section 54 of the Transfer of Property Act, 1882 and section 34 of the Specific Relief Act, 1963. Without the relief of declaration of ownership, the rest of the prayers in the suit would collapse. The issue of limitation is also decided against the plaintiff.

**62.** The appeal is allowed. The impugned judgment and decree are set aside. In view of section 35 of the Code of Civil Procedure, 1908, the cost of the present appeal shall be paid by the plaintiff to the defendant no.1.

**(Bhaskar Raj Pradhan)**  
**Judge**