



R.F.A. No. 03 of 2018  
Kharga Bahadur Rizal vs. Suraj Rai

**THE HIGH COURT OF SIKKIM: GANGTOK**  
**(Civil Appellate Jurisdiction)**

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SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE  
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**R.F.A. No.03 of 2018**

Shri. Kharga Bahadur Rizal,  
S/o late Bhawani Shankar Rizal,  
R/o Sang Chalamthang,  
P.O. & P.S. Singtam, East Sikkim.

.... Appellant

**Versus**

Shri. Suraj Rai,  
S/o late Krishna Bir Rai,  
R/o Sang Chalamthang,  
P.O. & P.S. Singtam, East Sikkim.

.... Respondent

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**Appeal under Order XLI, Rule 1 and 2 of the Code of  
Civil Procedure, 1908.**

**Appearance:**

Mr. A. K. Upadhyaya, Senior Advocate with Ms.  
Rachhitta Rai, Advocate for the Appellant.

Ms. Laxmi Chakraborty, Advocate for Respondent.

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Date of hearing : 20.03.2021, 27.03.2021 and 09.04.2021

Date of judgment: 03.06.2021.

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

**Bhaskar Raj Pradhan, J**

1. The appellant who was the sole defendant in Title Suit No. 07 of 2014 has preferred the present Regular First Appeal No. 03 of 2018 against the impugned judgment and decree dated 30.06.2018 passed by the learned District

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Judge, Special Division-II, East Sikkim at Gangtok (the learned District Judge) decreeing the suit in favour of the respondent who was the original plaintiff.

**2.** The suit for declaration of title, possession, injunction and other consequential reliefs was filed by the plaintiff in the year 2014. The plaintiff's case was that he was the only son of late Krishna Bir Rai and late Santa Maya Rai of Sang Chalamthang, East Sikkim. Late Krishna Bir Rai expired on 10.01.1982 and his mother late Santa Maya Rai on 13.08.2013. The plaintiff's paternal grandfather late Dhan Bahadur Rai had three sons and the plaintiff's father was the eldest. Late Dhan Bahadur Rai owned landed properties including one piece of land measuring 1.900 hectares at Sang Chalamthang Block. Before his death, Dhan Bahadur Rai partitioned his properties in Sikkim amongst his three sons and in such partition, the land measuring 1.900 hectares at Sang Chalamthang Block had been given to late Krishna Bir Rai. The plaintiff further asserted that in the manual land record of Sang Chalamthang Block, the land measuring 1.900 hectares stood recorded in the name of his father as plot nos. 46, 47, 49, 51, 54, 61 and 62 measuring .2780, .0540, .3620, .3200, .0560, .7940 and .0360 hectares, respectively under '*Khatiyen*' no. 28 of Chalamthang Block. After the demise

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of his father in 1982 the plaintiff and his mother had numerous problems including monetary. Due to this, the plaintiff had to abandon his studies after class VII and leave for Assam in 1996 in search of a job. In 2002, the plaintiff returned to Sikkim as his mother's health was deteriorating. After staying home for some months in the year 2002, the plaintiff left for North Sikkim in search of a job. From middle of 2002 to October 2011, the plaintiff worked hard doing jobs which came his way including roadside labour at various far-flung areas in North Sikkim. With his small savings, he took his mother to doctors for her treatment whenever he was allowed to do so by his employers. The plaintiff asserted that his mother was an illiterate housewife who remained a recluse and bedridden most of the time after the demise of her husband. Sometime in the month of December 2005, late Santa Maya Rai called the plaintiff and gave him one '*Sifaris Patra*' (recommendation letter) and asked him to investigate it. The plaintiff noticed that it was written on 27.10.2004 by the defendant. He had recommended for transfer of title of the land situated below his dry field and bamboo field as well as the government canal at Chalamthang Block to the name of the mother of plaintiff as it had, as per defendant, got wrongly recorded in his name. After going through the


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*'Sifaris Patra'* the plaintiff tried to contact the defendant several times, but the defendant avoided him. As the plaintiff was hard pressed for time and preoccupied with his job in remote areas of North Sikkim and in treating his ailing mother, he could not pursue on the said *'Sifaris Patra'*. He left it to be dealt in the future since the possession of the land was always with him and his mother and its *'Parcha Khatiyan'* in the name of his deceased father. In 2010, when the plaintiff learnt that the Office of the East District Collectorate was issuing computerized *'Parcha Khatiyan'* to old landowners of Chalamthang Block, he too made an application for it, which was issued on 21.11.2011. It was then when he noticed that only his ancestral lands covered by plot nos. 49, 51 and 54 measuring .3620, .3200 and .0560 hectares were shown in the name of his late father. Out of .7940 hectares of plot no.61 only .4600 hectares was shown recorded. In so far as the balance of the ancestral land was concerned, nothing was mentioned. The plaintiff thus made inquiries from the panchayat, village level office, East District Collectorate and the revenue department of the Government of Sikkim. It was at this time that the plaintiff learnt that the defendant had, by misrepresentation and fraud committed on the concerned authorities, taking undue advantage of his ailing

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mother and his absence from his home, surreptitiously transferred title of plot no. 49, 51 and 54 measuring .3620, .3200 and .0540 hectares in his own name without the knowledge and consent of the plaintiff although he was aware that it was his ancestral land. The plaintiff also came to learn that the remaining .0020 hectares of plot no.54 was acquired by the government for construction of road in 1995, 1996 and the compensation was paid to the plaintiff through his mother. He also learnt that .3117 hectares of plot no.61 was transferred in the name of the plaintiff's mother without his consent and that plot was now recorded as plot no.61/487. Despite his best effort, the plaintiff could not find out where the remaining portion of .0233 hectares of plot no.61 had disappeared. The plaintiff thus approached the concerned panchayat and village level officer who summoned the defendant. The defendant appeared before the panchayat and village level officer on 19.06.2013 but he refused to part with the suit land on the ground that he had purchased it from his late mother for Rs.3000/- which she had earlier taken as a loan and not returned. The '*panchayat*' and village level officer directed the parties to approach the appropriate court. On 20.06.2013 the plaintiff submitted a written complaint to the District Magistrate. The District Magistrate sent it to

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the subordinate Sub-Divisional Magistrate to register a miscellaneous case in his court and disposed the same on 31.07.2013 directing them to either settle the matter amicably or approach the competent court. After this the plaintiff's mother became critical and finally expired on 13.08.2013. The plaintiff made efforts to settle the matter with the defendant but failed. On advice of an Advocate, he obtained a search report (exhibit 10) vide an application dated 26.11.2013 after which it was confirmed that the defendant had wrongly transferred the suit land in his name behind the back of the plaintiff.

**3.** It is the plaintiff's case that as the suit land is his ancestral property the transfer of title of the suit land by the defendant vide O.O. No. 11528/Chalamthang/Block/DC dated 11.02.2011 is illegal, obtained by misrepresentation and fraud without the plaintiff's knowledge and consent and liable to be quashed. It is the further case of the plaintiff that even the plaintiff's mother did not have any legal right to execute the sale deed in respect of suit land without the written permission of the plaintiff. The plaintiff avers that since 2011 the defendant has been in adverse possession of the suit land which he is refusing to handover to the plaintiff although the land rent is still being paid by the plaintiff. The plaintiff avers that

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the cause of action for the suit arose on 21.11.2011 when he received the computerized 'Parcha Khatiyon' and learnt for the first time that the suit land was not recorded in his name or in the name of his late father; on 31.07.2013 when the Sub-Divisional Magistrate directed the plaintiff to move the Civil Court; on 21.12.2013 when it was confirmed to the plaintiff through the hand written search report that the title of suit land was transferred to the defendant vide Office Order No. 11528/Chalamthang/Block/DCE/dated 11.02.2011. According to the plaintiff the cause of action continues. The plaintiff, therefore, prays for the following reliefs:

- a) *For a decree declaring that the said land is the ancestral property of the plaintiff;*
- b) *For a decree declaring that on the demise of Late Krishna Bir Rai on 10-01-1982 his only son the Plaintiff alone has inherited the said land;*
- c) *For a decree declaring that the suit land is the part and parcel of the said land;*
- d) *For a decree declaring that Plaintiff have the right, title and interest over the suit land;*
- e) *For a decree declaring that the O.O. No.11528/Chalamthang/Block/DCE dated 11/02/2011 of the Office of the District Collectorate East at Gangtok vide which the defendant has transferred the title of the suit land in his name is without the authority of law, illegal, null, void ab-initio and not legally binding on the plaintiff;*
- f) *For a decree cancelling the title of the defendant over the suit land in favour of plaintiff;*

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- g) *For a decree for restoration of khas possession of suit land to the Plaintiff after evicting the defendant his men and agent there from;*
- h) *For a decree of permanent injunction against the defendant not to interfere in any manner whatsoever either with the right, title interest or with the khas, peaceful possession of the suit land of the Plaintiff on eviction of the defendant there from by the decree of the Hon'ble court;*
- i) *For all costs of the suit;*
- j) *Any other relief or reliefs to which the plaintiff may be found entitled to under the law and equity.”*

**4.** To substantiate his pleadings, the plaintiff examined himself, one Dilli Ram Giri (P.W.2) an 82 year old man and a former Panchayat Member from the same village who knew the plaintiff's family. He also examined one Rinchen Dorjee Bhutia (P.W.3) who was attached to the District Collectorate in different capacities and Jassang Lepcha (P.W.4) the Pastor of Shiloh Christian Pentecostal Church. Amongst the various documents the plaintiff produced original copy of the 'Parcha Khatiyon' (exhibit 3) in the name of his father late Krishna Bir Rai reflecting plot nos. 46, 47, 49, 51, 54, 61 and 62 as his landed property. The plaintiff also produced the original copy of the map (exhibit 4) reflecting the land holding of Krishna Bir Rai resident of Sang Chalamthang Busty, East Sikkim for survey operation of 1979-80. He produced the attested copy of death certificate (document X) which records 10.01.1982 as the



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date of death of late Krishna Bir Rai. Exhibit 7 was the 'Sifaris Patra' (recommendation letter) dated 27.10.2004 issued by the defendant recommending the transfer of certain lands to the name of Santa Kumari Rai after verification done by Village Level Officer, Sang. The plaintiff also produced the 'Parcha Khatiyan' dated 21.11.2011 (exhibit 8) which showed plot no. 46, 47, 61 and 62 in the name of Krishna Bir Rai, son of Dhan Bir Rai excluding the suit land. Exhibit 11 to exhibit 15 and 17 to 29 were the land revenue receipts in the name of Krishna Bir Rai evidencing payment of land taxes till the year 2011. Exhibit 46 produced by the plaintiff was the 'Parcha Khatiyan' reflecting plot no. 61 in the name of late Santa Maya Rai transferred vide O.O. No. 11528/CHALLAMTHANG/DC(E) Dated:11/21/2011 vide O.O. No.14896/CHALLAMTHANG/DC(E) Dated: 4/25/2013. The plaintiff also produced the 'Parcha Khatiyan' (exhibit-47) dated 22.06.2016 issued in the name of Dhan Bahadur Rai by the R.O.-cum-Assistant Director, Land Revenue & Disaster Management Department, Government of Sikkim. 'Parcha Khatiyan' (exhibit 47) reflects that late Dhan Bahadur Rai owned several plots of land at Chalamthang bearing khasra no. 32, 33, 35, 46, 49, 52, 54, 67, 68, 69, 107 and 121. This 'Parcha Khatiyan' (exhibit-47) seems to have been issued




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only for the purpose of reference when sought for in the year 2016. It further reflects that the total area of the 12 plots owned by late Dhan Bahadur Rai was 18.72 acres.

**5.** The defendant filed his written statement denying substantially all the assertions of the plaintiff. The defendant asserted that late Santa Maya Rai was also known and recognized as Santa Kumari Rai. The defendant claimed that in the year 1981, Santa Kumari Rai *alias* late Santa Maya Rai offered to sell two plots of her land bearing plot nos. 87 and 88/215 recorded as per 1950-52 survey operation to the defendant for paying back the debt which she incurred in providing necessary treatment to her deceased husband late Krishna Bir Rai. According to the defendant the sale of the land was made by the plaintiff's mother for legal necessity to meet the expenses incurred for the treatment of her husband. It was asserted that the defendant had paid the consideration amount of Rs. 3,701/-. The defendant asserts that the suit land is self-acquired land of late Krishna Bir Rai. It is asserted that the plaintiff's mother had personally appeared before the Registrar on the date of registration and affixed her signature on the sale deed. The sale deed was presented for registration and upon compliance of requisites formalities the registration was allowed on 30.08.1982 after which the

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defendant was issued manual '*Parcha*' with respect to the said land. It is the defendant's case, while denying the plaintiff assertion that he had left for North Sikkim in search of job, that the plaintiff was a vagabond who keeps moving from one place to another and it was only recently that he had come back to reside at his parental house. The defendant disputed that late Santa Maya Rai *alias* Santa Kumari Rai was an illiterate person and submitted that she was capable of reading and writing and accordingly affixed her signature on the sale deed executed on 08.03.1981 in the presence of witnesses. The defendant asserted that in the year 2004 when the revenue officer detected some mistake in the measurement of his land, he consented to return the excess land in favour of the plaintiff's mother by executing the '*Sifaris Patra*'. The defendant asserts that after the registration of sale deed he applied for mutation of the plots and consequently the Registrar issued manual '*Parcha*' for plot no. 87 and 88/215. In 2006, the defendant applied for computerized record of rights and obtained the same in respect of seven plots of land, out of which, plot no.49, 51 and 54 were purchased from the plaintiff's mother. The defendant claimed that the plaintiff had full knowledge of the transfer and therefore, the suit was time barred. The defendant asserts that he has been in exclusive



and uninterrupted possession of the suit land for the last 32 years and by virtue of such long occupation the defendant has already perfected his right, title and ownership over the suit land by way of adverse possession. It is contended that the plaintiff, even after attaining the age of majority, failed to take necessary steps to agitate the matter on time. It is further submitted that the plaintiff had himself admitted that the defendant was in adverse possession of the suit land.

**6.** The defendant examined himself as (D.W.1). He examined B.B. Lopchan (D.W.2) a former panchayat and resident of Sang Khola to establish that late Krishna Bir Rai was ill during the relevant period and that the plaintiff's mother, Santa Kumari Rai had told him in the first week of May 2003 that she had sold two plots of land to the defendant, but no correction had been done in terms of payment of land rent. According to him, he advised her to bring her grievance in writing pursuant to which on 16.05.2003, Santa Kumari Rai came to his house with a written document titled '*Lekha Pari*' (exhibit D1-G) wherein she had mentioned that she had already sold two pieces of land to the defendant in the year 1982 and the registration and mutation had already been completed. Since the land rent payable by her was still not corrected, she requested

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the change of the record of the '*Parcha*' in the name of the defendant from the old record. B.B. Lopchan (D.W.2) deposed that in the month of January 1982, he had learned from the villagers that late Krishna Bir Rai had expired at Singtam Hospital and was buried at Sang Khola. The defendant also examined Nim Tshering Lepcha (D.W.3), also a former panchayat and resident of Chalamthang, who stated that he knew the plaintiff's parents as his co-villagers. According to him, late Dhan Bhadur Rai, the plaintiff's grandfather had left Chalamthang for Nepal with his sons. However, late Krishna Bir Rai, the plaintiff's father returned to Chalamthang after purchasing land from one Rangalal Sanyasi. Nim Tshering Lepcha (D.W.3) also stated that late Krishna Bir Rai had suffered from illness and had been bedridden in the year 1980-82 and died at Singtam Hospital. He deposed that the suit land was not the plaintiff's ancestral land as there were no land records in his name. Karma Loday Bhutia (D.W.4) posted in the district administrative centre as a Revenue Officer was also examined by the defendant. He produced the original '*Parcha Khatiyan*' of Chalamthang Block containing serial no. 1 to 48 as per survey record of 1951-52 in the original. According to him, exhibit D1-D/A (a) reflects that the name of Santa Kumari Rai w/o of Krishna Bir Rai had been

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struck off and thereafter, the name of the defendant had been written in the year 1983 after registration of the land. Karma Loday Bhutia (D.W.4) was confronted with the certified copy of sale deed (exhibit D1-B) dated 08.03.1981, executed by Santa Kumari Rai in favour of the defendant by the defendant. He stated that as per the certified copy of the sale deed (exhibit D1-B) it had been executed by Santa Kumari Raini in favour of the defendant. However, during cross-examination Karma Loday Bhutia (D.W.4) could not say if the certified copy of the sale deed (exhibit D1-B) was genuine or not; he had no idea about its registration proceeding; he had not seen the original as well as its office copy and further he had also not seen the file of its registration.

**7.** The defendant asserted that Santa Kumari Rai had sold the suit land on 08.03.1981 for consideration value of Rs.3700/- vide the certified copy of the sale deed (exhibit D1-B). He also identified the signature of the two witnesses Chandra Lall Sharma and Ratna Bahadur Gurung, the Sub-Divisional Magistrate and of Santa Kumari Rai in the certified copy of the sale deed (exhibit D1-B). He asserted that on 24.01.1981 Santa Kumari Rai executed an acknowledgment letter (exhibit D1-A) stating that she had sold two pieces of land for consideration amount of

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Rs.3701/-. He identified the signature of Santa Kumari Rai and the witnesses Nima Lepcha, Hari Prasad Lohar and Chandra Lall Sharma. According to the defendant, vide notice (exhibit D1-C) dated 11.03.81 issued by the Registrar, East District, claims and objections were invited on or before 11.04.1981 against the registration of the land. It is the case of the defendants that after the period of notice, sale deed was duly registered vide book no.1 volume no.II, item no.207 for the year 1982. The defendant states that upon registration of the sale deed the land records in the revenue section of the District Collector was corrected and in place of the name of Santa Kumari Rai, his name was entered with respect to the suit land. The '*Parcha Khatiyan*' (exhibit D1-D) was thereafter, issued to him (attested photocopy). The defendant further submits that upon correction of the record and entry made in the '*Khasra*' record, a map (exhibit D1-E) with respect to the suit land pertaining to the settlement operation of the year 1950-52 was issued in his favour. Thereafter, '*Parcha Khatiyan*' (exhibit D1-F) (certified to the true copy for the suit land dated 28.06.83) was issued in his favour. The defendant also produced a '*Lekha Pari*' document (exhibit D1-G) and identified the signature thereon as that of Santa Kumar Rai. According to the defendant in the year 2003



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Santa Kumari Rai had come to him and informed him that although she had already sold the land to him the rent of the land is still not been corrected and asked him to do the needful. It is stated that accordingly he advised her to approach the panchayat president. After a lapse of some weeks, Santa Kumari Rai handed over the '*Lekha Pari*' document (exhibit D1-G). It is submitted that in the year 2004 the Revenue Officer, during the measurement of his land, detected that some extra land belonging to Santa Kumari Rai had been inadvertently transferred in his name during the mutation proceedings, which land he immediately returned to plaintiff's mother. He submits that in the year 2006 the Revenue Officer, on his application, issued a computerized '*Parcha*' (exhibit D1-H) which included the suit land purchased from Santa Kumari Rai. The defendant states that he has paid the land rent in respect of all his plots vide exhibit D1-I dated 24.03.2012 for the years 2004 to 2011.

**8.** The learned District Judge framed five issues on 03.02.2015 and took it for consideration and finally decreed the suit in favour of the plaintiff granting the several reliefs sought for.

**9.** The present appeal has been filed by the defendant for setting aside the decree granted in favor of the plaintiff.



10. Mr. A.K. Upadhyaya, learned Senior Counsel for the appellant submits that the suit was hopelessly barred under Article 60 of the Limitation Act, 1963, as, though the sale deed was dated 01.09.81, the suit was filed only in the year 2014. It was submitted that the suit also suffered from non-joinder of parties. The learned Senior Counsel submits that the plaintiff had not been able to prove that the suit was ancestral property. In so far as Issue no. 4 is concerned, the learned Senior Counsel submitted that the learned District Judge had put the onus wrongly upon the defendant. He finally argued that the defendant had been in adverse possession of the suit land. It was submitted that the defendant had perfected his title on the suit land by way of adverse possession. He relied upon ***Vasantiben Prahladi Nayak & Ors. vs. Somnath Muljibhai Nayak & Ors.***<sup>1</sup> and ***State of Madhya Pradesh vs. Nomi Singh & Anr.***<sup>2</sup>.

11. Ms. Laxmi Chakraborty, learned Counsel on behalf of the respondent, vehemently defended the conclusions arrived at by the learned District Judge. She submitted that the certified copy of sale deed and other documents relied upon by the defendant had not been proved by him and the plaintiff on the other hand had been able to prove all the facts asserted. The learned Counsel sought to rely

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<sup>1</sup> (2004) 3 SCC 376

<sup>2</sup> (2015) 14 SCC 450

upon the judgment of the Supreme Court in ***Uttam Chand (Dead) Through Legal Representatives vs. Nathu Ram (Dead) Through Legal Representatives & Ors.***<sup>3</sup> .

**12.** This Court shall now examine each of these issues: -

**Issue no.1**


*Whether the suit is barred by limitation? (Onus on the defendant).*

**13.** The learned District Judge held that Article 60 of the Limitation Act, 1963 would not be applicable as asserted by the defendant. It was held that in fact, Article 65 would be applicable, and the period of limitation provided was 12 years when the possession of the defendant became adverse to the plaintiff. It was further held that as the plaintiff had prayed for cancellation of the sale deed on the grounds that the defendant had played fraud to transfer the suit land in his name, Section 17 of the Limitation Act, 1963 would be attracted and the period of limitation in such cases would not begin until the plaintiff had discovered the fraud or the mistake. On facts, it was held that the plaintiff learnt that the suit land had been transferred in the name of the defendant only in the year 2011 and thus the suit was not barred by limitation.

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<sup>3</sup> (2020) 11 SCC 263.

**14.** Article 60 relates to the period of limitation to set aside a transfer of property made by the guardian of a ward. The pleadings in the plaint make it clear that the plaintiff was not claiming minority during the time of transfer. The suit was filed by the plaintiff alleging that the defendant had committed fraud, misrepresented and taken undue advantage of his mother to surreptitiously transfer the title of the suit land in his name without the plaintiff's knowledge. The plaintiff had also averred that he had come to learn about this fact only in the year 2011. This fact was asserted by the plaintiff in his evidence. The plaintiff deposed that after his father's death in 1982, due to various problems, he left for Assam in the year 1996. He deposed that he returned only in the year 2002. After staying for some months, he left home for North Sikkim. From 2002 to 2011, he was away in far-flung areas of North Sikkim. This fact has been corroborated by Dilli Ram Giri (P.W.2). Although the defendant denied this assertion of the plaintiff there is no evidence on record which reflects that the plaintiff had prior knowledge. In fact, it was also the defendant's assertion that the plaintiff was a vagabond who keeps moving from one place to another and it was only recently that he had come back to reside at his parental house.



**15.** The plaintiff had sought several reliefs in his plaint. When a suit is filed for several reliefs the question whether it is in time or not cannot be decided without examining each of the several reliefs sought for and separately considering them *vis-à-vis* the relevant articles of the Limitation Act, 1963. Prayers (a) to (e) were for various declarations. Declaratory Suits are dealt with in part III of the Limitation Act, 1963. The prayers at prayer (a) to (e) would be covered by Article 58. To obtain the said declarations, a period of 3 years is provided from the time when the right to sue first accrues.

**16.** Section 17 of the Limitation Act, 1963 deals with effect of fraud or mistake on the period of limitation. This provision embodies the fundamental principles of justice and equity. It ensures that a party is not penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so has been willfully concealed from him. It also ensures that a party who has acted fraudulently should not gain the benefit of limitation in his favour by virtue of the fraud. The plaintiff had alleged fraud. The Supreme Court has explained the word 'fraud' in many decisions. It has been held that the word 'fraud' has a very wide connotation. It cannot be construed narrowly. It is of infinite variety and may take many forms. Concealing

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facts which were material is an act of fraud. Fraud vitiates every solemn act. Fraud induces other person to take a definitive stand as a response to the conduct of the former. Misrepresentation itself amounts to fraud. If a party makes a representation which he knows to be false it is also fraud. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would amount to fraud and the transaction *void ab initio*. It was the plaintiff who had alleged fraud and misrepresentation and therefore, it was incumbent upon him to prove it.

**17.** Section 17 provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake. The pleadings in the plaint make it clear that the plaintiff had discovered the fact that the suit land had been transferred to the name of the defendant on 21.11.2011 when the plaintiff received the computerized 'Parcha Khatiyani' from the Office of the District Collectorate. It was his specific case, which he has been able to prove, that the suit land was recorded in the name of his father late Krishna Bir Rai who was still alive on the date of the purported transaction between Santa Kumari Rai and the defendant and therefore, even his mother late Santa Maya Rai could not have sold it to the defendant. The suit was filed on 16.06.2014. Thus, counting the



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period of limitation from 21.11.2011 when his right to sue first accrued, the suit with the prayers for declarations was on time.

**18.** The plaintiff had prayed for khas possession of the suit land and the eviction of the defendant from it as well. Article 65 deals with the period of limitation for a suit for possession of immovable property when the possession of the defendant becomes adverse to the plaintiff. The period of limitation is 12 years from the date of dispossession.

**19.** At this juncture it would be relevant to examine the alternative plea taken by the defendant that he had perfected his title by way of adverse possession. The concept of adverse possession is well settled. It contemplates possession which is expressly or impliedly in denial of the title of the true owner. Adverse possession is possession by a person, who does not acknowledge others' rights but denies them.

**20.** In *Vasantiben Prahladji Nayak (supra)*, the Supreme Court held that to establish ouster in cases involving claim of adverse possession the defendant must prove three elements namely, hostile intention; long and uninterrupted possession; and exercise of the right of exclusive ownership openly and to the knowledge of the owner. In cases of adverse possession, the starting point of limitation does not



commence from the date when the right of ownership arises to the plaintiff, but it commences from the date when the defendant's possession became adverse.

**21.** In *Uttam Chand (Supra)* the Supreme Court held that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of the real owner's title to the property claimed. A person claiming title by adverse possession must prove who is the true owner and if such person is not sure who the true owner is, the question of them being in hostile possession as well as of denying the title of the true owner does not arise.

**22.** It must straight away be noticed that the foremost defense of the defendant was that he had purchased the property from late Santa Maya Rai, mother of the plaintiff in the year 1981 and that she had done so due to legal necessity to pay back the loan she had taken from the defendant to meet the expenses to take care of her ailing husband late Krishna Bir Rai.

**23.** In *Mohan Lal vs. Mirza Abdul Gaffar*<sup>4</sup> it was held that the appellant's first plea of adverse possession which was inconsistent with the second plea regarding retention of

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<sup>4</sup> (1996) 1 SCC 639



possession under Section 53-A of the Transfer of Property Act could not be sustained. Since the appellant's claim is founded on Section 53-A, he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit.

**24.** The Supreme Court *M. Venkatesh vs. Commissioner, Bangalore Development Authority*<sup>5</sup> affirmed its judgment in *Mohan Lal (Supra)* and held thus:

*“20. Also noteworthy is the decision of this Court in Mohan Lal v. Mirza Abdul Gaffar [Mohan Lal v. Mirza Abdul Gaffar, (1996) 1 SCC 639] , wherein this Court held that claim of title to the property and adverse possession are in terms contradictory. This Court observed: (SCC pp. 640-41, para 4)*

*“4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period of his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.”*

**21.** To the same effect is the decision of this Court in *Annasaheb Bapusaheb Patil v. Balwant [Annasaheb Bapusaheb Patil v. Balwant, (1995) 2 SCC 543] ,*

<sup>5</sup> (2015) 17 SCC 1



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*wherein this Court elaborated the significance of a claim to title vis-à-vis the claim to adverse possession over the same property. The Court said: (SCC p. 554, para 15)*

*“15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.”*”

**25.** Thus, the defendant having claimed possession by way of a lawful title, the plea of adverse possession would not be available to him.

**26.** The prayer for khas possession and eviction of the defendant was thus not barred under Article 65 of the Limitation Act, 1963 as the possession of the defendant never became adverse to the plaintiff.

**27.** The plaintiff had prayed for cancellation of the title of the defendant over the suit land. This prayer would necessarily involve the cancellation or setting aside the sale deed which would be covered by Article 59. Article 59 provides for limitation of 3 years from the time when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside first became known to him. Again counting the date 21.11.2011 as the date when the facts



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entitling the plaintiff to have the instrument or decree cancelled or set aside first became known to him, the suit for setting aside the title of the defendant was also within time.

**28.** The plaintiff had prayed for permanent injunction against the defendant not to interfere with the right, title, interest or with the khas, peaceful possession of the suit land of the plaintiff on eviction of the defendant therefrom by the decree of the court. The limitation of such suit would be dependent on the nature of relief sought for. The relief sought makes it clear that it is only after a decree of eviction can the decree for permanent injunction not to interfere with the plaintiff's possession be granted. In such a situation, question of limitation does not arise. Thus, the suit for permanent injunction was not barred by limitation.

**Issue no. 2**

*Whether there is non-joinder of parties as the brothers of late Krishna Bir Rai, the father of the plaintiff, or their legal heirs and successors have not been made parties to the suit? (Onus on the defendant).*

**29.** The learned District Judge held that as the uncles of the plaintiff, i.e., brothers of late Krishna Bir Rai had nothing to do with the suit property their presence was of no significance. It was held that no relief was sought



against them and therefore the issue was decided against the defendant.

**30.** It is settled law that the question of impleading a party must be decided on the touch stone of Rule 10 of the Code of Civil Procedure, 1908. The provision contemplates only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. It has been held so by the Supreme Court in ***Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay & Ors.***<sup>6</sup>. On a reading of the plaint and the reliefs sought therein, the brothers of late Krishna Bir Rai or their legal heirs and successors were neither necessary nor proper parties. Thus, the learned District Judge had correctly decided the issue against the defendant.


### **Issue no.3**

*Whether the plaintiff is the grandson of late Dhan Bahadur Rai and the suit land is the ancestral property of the plaintiff? (Onus on the plaintiff).*

**31.** The learned District Judge examined the 'Parcha *Khatiyan*' (exhibit 3) in the name of the plaintiff's father late


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<sup>6</sup> (1992) 2 SCC 524



Krishna Bir Rai, land holding map (exhibit 4) and search report (exhibit 10) and held that the documents had been duly proved by the plaintiff. Considering them with the evidence of the plaintiff and his witness, Dilli Ram Giri (P.W.2), it was held that there was no doubt that the suit property was the ancestral property of the plaintiff. The issue was therefore, decided in favor of the plaintiff.

**32.** It was the plaintiff's case that he was the grandson of late Dhan Bahadur Rai, and the suit land was the ancestor property of the plaintiff. He pleaded so in the plaint. During his examination, the plaintiff asserted that the suit land was the ancestral property which originally belonged to his grandfather, late Dhan Bahadur Rai, which was later inherited by his father-late Krishna Bir Rai after partition, who enjoyed the suit land till he died in the year 1982. In his evidence on affidavit, the plaintiff asserted that his father late Krishna Bir Rai expired on 19.01.1982 and his mother late Santa Maya Rai on 13.08.2013. He further asserted that his grandfather late Dhan Bahadur Rai was the owner of the piece of land at Chalamthang Block in East Sikkim which he had partitioned, and the suit land given in favour of his father. He asserted that the suit land stood recorded in the name of his father late Krishna Bir Rai in the manual land record. To establish the same, he



exhibited the original copy of the '*Parcha Khatiyan*' (exhibit 3) in the name of his father late Krishna Bir Rai. He also exhibited the original copy of the map of the land (exhibit 4) as recorded in the '*Parcha Khatiyan*' (exhibit 3). The '*Parcha Khatiyan*' (exhibit 3) does record the said lands in the name of Krishna Bir Rai, son of late Dhan Bahadur Rai, so does the map (exhibit 4) which records that the said lands were in the name of late Krishna Bir Rai son of late Dhan Bahadur Rai in the survey operation of 1979-1980. The plaintiff also produced the '*Parcha Khatiyan*' in the name of his grandfather late Dhan Bir Rai (exhibit 47) which reflects that he owned around 18.72 acres of land at Chalamthang.

**33.** Although the plaintiff was cross-examined extensively by the defendant, the correctness and the authenticity of the '*Parcha Khatiyan*' (exhibit 3), the map (exhibit 4) as well as the '*Parcha Khatiyan*' (exhibit-47) could not be demolished.

**34.** In *M.T.W. Tenzing Namgyal & Ors. vs. Moti Lal Lakhotia & Ors.*<sup>7</sup>, the Supreme Court held that if the records of rights were not prepared under a statute a presumption of correctness may be raised only in terms of Section 35 of the Indian Evidence Act, 1872. Section 35

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<sup>7</sup> (2003) 5 SCC 1



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provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record or any electronic record is kept, is itself a relevant fact. It is also settled that the documents made *ante litem motam* can be relied upon safely when such documents are admissible under Section 35.

**35.** In Sikkim prior to 09.09.1988 when the Sikkim Record Writing and Attestation Rules, 1988 come into force 'Parcha Khatiyon' were prepared under the Kotha Purnu or Dru-Deb and Attestation Rules, 1951 as held by this court in **Jangpu Sherpa @ Jampu Sherpa vs. Phurba Lhamu Sherpa & Ors.**<sup>8</sup>. Now it is required to be prepared under the Sikkim Record Writing and Attestation Rules, 1988.

**36.** Mr. A.K. Upadhyaya submitted relying upon the Supreme Court ruling in **Nomi Singh (supra)**, that the plaintiff must stand on his own legs and as he had not filed any document of title and therefore, the issue must be held against him. It is the plaintiff's case that the plaintiff's father was the owner of the suit land, and it was recorded

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<sup>8</sup> SLR (2019) Sikkim 183

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so in the '*Parcha Khatiyan*' (exhibit 3). It was not the plaintiff's case that there was a title deed in his name. The plaintiff pleads that the plaintiff had been staying out of his house in search of jobs. Dilli Ram Giri (P.W.2), the plaintiff's witness deposed the facts asserted by the plaintiff. The plaintiff has been able to establish that he is the son of late Krishna Bir Rai and grandson of late Dhan Bahadur Rai. He has also been able to prove that the suit land was recorded in the name of his father late Krishna Bir Rai in the '*Parcha Khatiyan*' in the year 1981. Besides the oral submission of the plaintiff and his witness Dilli Ram Giri (P.W.2) that late Dhan Bahadur Rai was the owner of landed properties in Chalamthang, the plaintiff has also produced the '*Parcha Khatiyan*' (exhibit 47) which reflects that late Dhan Bahadur Rai did own landed properties in Chalamthang corroborating the oral testimony of the plaintiff and his witness Dilli Ram Giri (P.W.2). However, as it is the plaintiff's own case that the landed properties owned by late Dhan Bir Rai was partitioned between Krishna Bir Rai and his siblings. It is therefore, held that the suit land was not ancestral property of the plaintiff. Thus, it is held that the plaintiff has been able to establish that he was the grandson of late Dhan Bahadur Rai who owned landed properties at Chalamthang and



further the suit land was owned by his father late Krishna Bir Rai in the 'Parcha Khatiyan' (exhibit 3). The issue decided accordingly.

**Issue no. 4**

*Whether the mother of the plaintiff had the authority to alienate the suit lands to the defendant without knowledge and consent of the plaintiff? (Onus on the defendant).*

**37.** The learned District Judge found that the defendant was not in possession of the sale deed (exhibit D1-B). The learned District Judge examined the acknowledgement letter (exhibit D1-A), 'Lekha Pari' document (exhibit D1-G) and noticed that none of the attesting witnesses to these documents including the sale deed (exhibit D1-B) had been cited by the defendant. It was also held that these documents had material discrepancies and in the absence of the witnesses, the documents were suspicious and there was possibility of them being manufactured. It was held that Section 90 of the Indian Evidence Act, 1872 would not be applicable to rescue the defendant, as the certified copy of the sale deed (exhibit D1-B) had not been produced from proper custody.

**38.** Sale is a Transfer of Property. Section 7 of the Transfer of Property Act, 1882 provides that every person competent to contract and entitled to transferable property





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or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force. The fact that late Krishna Bir Rai expired on 10.01.1982 is sufficiently clear and well established. The defendant's witnesses also admit to the fact that late Krishna Bir Rai expired in the year 1982. The '*Parcha Khaityan*' (exhibit 3) records that the suit land was owned by late Krishna Bir Rai.

**39.** The plaintiff had asserted in his plaint that even the plaintiff's mother did not have any legal right to execute the sale deed in respect of suit land without the written permission of the plaintiff. The plaintiff has filed the suit for a declaration that on the demise of late Krishna Bir Rai his only son, the plaintiff alone inherited the said land. The plaintiff had also sought for further relief of restoration of khas possession and eviction of the defendant from the suit land. The defendant however, claimed that the plaintiff's mother had sold the suit land to the defendant to pay back the debt she had incurred in providing necessary treatment to her ailing husband late Krishna Bir Rai. The defendant further stated that Santa Kumari Rai had sold the suit land

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to the defendant for legal necessity and that it was a self acquired land of Krishna Bir Rai. The assertion that the mother of the plaintiff did not have the authority to alienate the suit land was that of the plaintiff and therefore, this fact having been disputed by the defendant the onus of proving the same ought to have been put on the plaintiff and not on the defendant as was done. Similarly the defendant having asserted that the plaintiff's mother had sold the suit land to the defendant, it was for him to prove the same. However, it is quite evident from the pleadings in the plaint, the written statement and the evidence led by the plaintiff and the defendant that the parties knew exactly what the issues were and what was needed to be proved. The plaintiff had established by way of oral and documentary evidence that the suit land was registered in the year 1981 in the name of late Krishna Bir Rai, his father. The defendant has not been able to establish or produce any evidence that the '*Parcha Khatiyan*' (exhibit 3) recording the name of late Krishna Bir Rai as the owner of the suit land and the contents thereof was incorrect. In view of the entry of the name of Krishna Bir Rai in the record of right of the suit land i.e., '*Parcha Khatiyan*' (exhibit 3) at least a presumption of correctness is raised in terms of Section 35 of the Indian Evidence Act, 1872. This



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presumption is a rebuttable presumption which can be rebutted by the defendant. To do so the defendant produced a certified copy of the sale deed (exhibit D1-B). It was the case of the defendant that the sale deed was registered in the year 1982. Registration of Deeds in Sikkim is governed by the Registration of Document Rules, 1930.

**40.** Rule 7 thereof provides that:

**“PROCEDURE TO BE OBSERVED IN THE REGISTRY OF DEEDS**

*7. The person or persons executing the deed on' his or their authorised representative with one or more witnesses to the execution of it, shall attend at the Registrar's office and prove by solemn affirmation before the Registrar the' due' execution of deeds upon which the Registrar shall cause an exact copy of the deed to be entered in the proper register and after having caused it to be carefully compared with the original shall attest the copy with . his signature and shall also cause the parties or their authorised representative in attendance to subscribe their signatures to the copy and shall then return the' original with a certificate under his signature endorsed thereon specifying the date on which such deed was so registered with REFERENCE to the book containing the registry thereof .and the page and number under which the same shall have been entered therein.”*

**41.** Thus, in terms of Rule 7 the exact copy of the deed is entered in a register and the original is returned with a certificate specifying the date on which the deed was so registered with reference to the book containing the registry thereof and the page and number under which the same shall have been entered therein. The defendant has failed to produce the original of the sale deed which was

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necessarily to be in his custody and produced only the certified copy of the sale deed (exhibit D1-B) without any explanation. The defendant's witness Karma Loday Bhutia (D.W.4), the Revenue Officer posted in the administrative centre has categorically stated that he could not say whether the certified copy of the sale deed (exhibit D1-B) produced by the defendant was genuine or not and further that he neither had any idea about the registration proceedings nor had he seen the original or the office copy and the file of registration. Even though Karma Loday Bhutia (D.W.4) was examined by the defendant, the registration proceeding and the sale deed of which the defendant sought to rely upon the certified copy were not produced. The defendant produced one acknowledgment letter (exhibit D1-A). The acknowledgment letter (exhibit D1-A) is said to have been executed on 24.01.1981 by Santa Kumari Rai. It records and refers to the plaintiff's father as "late Krishna Bir Rai". This document has been produced by the defendant to show that on 24.01.1981 Santa Kumari Rai had sold two pieces of land to the defendant for consideration amount of Rs. 3701/- to pay back the debt incurred by her as a loan, from the defendant to meet the expenses of her ailing husband late Krishna Bir Rai. The certified copy of the sale deed (exhibit

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D1-B) as well as the acknowledgment letter (exhibit D1-A) reflect that they were purportedly executed by Santa Kumari Rai in the year 1981. This fact is of great relevance. It has been established by the plaintiff that late Krishna Bir Rai had expired on 10.01.1982 which has also been admitted by the defendant as well as his witnesses. Thus, on the date of the execution of the purported certified copy of the sale deed (exhibit D1-B) and the acknowledgment letter (exhibit D1-A), the suit land was still recorded in the name of late Krishna Bir Rai who was still alive.

**42.** There is not a single document on record that shows that the suit land had been transferred in favour of late Santa Maya Rai prior to the execution of the acknowledgment letter (exhibit D1-A) and the certified copy of the sale deed (exhibit D1-B) said to be executed by Santa Kumari Rai. There is also no document to show that late Krishna Bir Rai had authorized his wife late Santa Maya Rai to dispose of the suit land. It is not even pleaded in the written statement. The defendant neither produced the original sale deed said to have been executed on 08.03.1981 nor the witnesses whose names are reflected in the purported certified copy of the sale deed (exhibit D1-B) to prove its execution or registration. Section 68 of the Indian Evidence Act, 1872 provides that if a document is

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required by law to be attested, it shall not be used as evidence until one attesting witness at least have been called for the purpose of proving its execution, if there be an attesting witness alike, and subject to the process of the court and capable of giving evidence. In the circumstances, even if one were to presume the authenticity of the certified copy of the sale deed (exhibit D1-B), it is quite clear that on the date of its execution, i.e., 08.03.1981 by Santa Kumari Rai purportedly selling the suit land to the defendant she had neither the authority nor the ownership to do so. The acknowledgment letter (exhibit D1-A) surprisingly having been executed on 24.01.1981 refers to late Krishna Bir Rai as "late Krishna Bir Rai" when he was still alive having expired one year later 10.01.1982. These facts create substantial doubts regarding the authenticity of the acknowledgment letter (exhibit D1-A) and the certified copy of the sale deed (exhibit D1-B) giving credence to the plaintiff's allegations. The mutation done thereafter, in favour of the defendant would have no value since Santa Kumari Rai had neither the authority nor the ownership to alienate the suit land which was recorded in the '*Parcha Khatiyan*' (exhibit 3) in the name of late Krishna Bir Rai. Further, as held by the learned District Judge there are numerous unexplained material discrepancies making the



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documents suspect. The defendant did not confront the plaintiff with the signatures of Santa Kumari Rai on the documents produced by the defendant i.e., certified copy of the sale deed (exhibit D1-B), and the acknowledgment letter (exhibit D1-A). The fact that the plaintiff's mother's name was Santa Maya Rai is well established by the plaintiff through her certificate of identification (exhibit 31 and exhibit 32) and the official documents i.e. (exhibits 33 to 39) prepared during the process of making the certificate of identification. In the acknowledgment letter (exhibit D1-A), certified copy of the sale deed (exhibit D1-B), notice (exhibit D1-C) '*Lekha Pari*' document (exhibit D1-G) and the '*Khatiyani*' records (exhibit D1/DA) the name of Santa Kumari Rai is mentioned. Although it is the defendant's case that late Santa Maya Rai and Santa Kumari Rai are one and the same person, the defendant failed to convincingly establish the same. The issue is decided against the defendant accordingly.

**Issue no. 5**

*Reliefs.*

**43.** The learned District Judge held that the plaintiff was entitled to the decree sought for in the suit and accordingly granted the reliefs as prayed for in prayers (a) to (h) in the

plaint. In view of what has been held above, the plaintiff is entitled to the following reliefs:

- (i) A decree declaring that the suit land was owned by late Krishna Bir Rai the father of the plaintiff.
- (ii) A decree declaring that the certified copy of the sale deed (exhibit D1-B) is null and void and that on the date of its purported execution i.e., 08.03.1981 Santa Kumari Rai had neither the authority nor the ownership of the suit land to execute the sale deed.
- (iii) A decree that all subsequent proceedings of issuance of notice, mutation and the issuance of '*Parcha Khatiyar*' in favour of the defendant about the suit land also stands null and void.
- (iv) A decree that the plaintiff as the sole surviving heir of late Krishna Bir Rai is entitled to the ownership of the suit land.
- (v) A decree for khas possession of the suit land in favour of the plaintiff and the eviction of the defendant, his men and agents therefrom.
- (vi) A decree of permanent injunction against the defendant not to interfere in any manner whatsoever either with the right, title, interest or with the khas, peaceful possession of the suit land on the eviction of the defendant therefrom.

**44.** The judgment and decree passed by the learned District Judge, Special Division-II, East Sikkim at Gangtok,





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are accordingly modified to the above extent. The appeal, however, fails and is accordingly dismissed.

**45.** Copy of this judgment be sent to the learned District Judge, Special Division-II, East Sikkim at Gangtok for information. Records of the lower court be remitted forthwith.

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

Approved for reporting : **Yes**  
Internet : **Yes**

to/