

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

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

R.S.A. No. 04 of 2024

Shri Ongdi Sherpa,
S/o Late Nima Sangay Sherpa,
R/o Dentam Bazar,
West Sikkim-737113.

..... Appellant

Versus

- 1. Shri Nim Temba Sherpa,
S/o Late Nima Ongdi Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.
- 2. Shri Passang Namgyal Sherpa,
S/o Late Nima Ongdi Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.
- 3. Shri Passang Norbu Sherpa,
S/o Late Nima Ongdi Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.
- 4. Shri Sangay Sherpa,
S/o Dawa Temba Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.
- 5. Shri Lakpa Sherpa,
S/o Nim Temba Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.
- 6. Shri Mingma Gyalshen Sherpa,
S/o Dawa Temba Sherpa,
R/o Lower Shanku Busty,
West Sikkim-737113.

..... Respondents

R.S.A. No. 04 of 2024
Shri. Ongdi Sherpa vs. Shri Nim Temba Sherpa & Ors.

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

*Appeal against Order dated 31.10.2023 passed by the learned District
Judge, Gyalshing, Sikkim in Title Appeal No.03 of 2023, Ongdi
Sherpa vs. Nim Temba Sherpa & Ors.*

Appearance:

Mr. Karma Thinlay, Senior Advocate with Mr. Yashir
N. Tamang and Mr. Zamyang Norbu Bhutia,
Advocates for the Appellant.

Ms. Gita Bista, Advocate (Legal Aid Counsel),
Ms. Pratikcha Gurung and Mr. Dipendra Chettri,
Advocates for Respondents.

Date of Hearing : 11.09.2025
Date of Judgment : 25.09.2025

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. Ongdi Sherpa-the appellant (the plaintiff) having suffered two judgments against him by the Trial Court as well as the Appellate Court has sought to question the verdicts once again. The solitary substantial question of law framed by this Court in the present regular second appeal is:

“Whether the learned First Appellate Court by ignoring material evidence given by Court Witness No.1, Surja Maya Sunwar, endorsed the finding of the Learned Trial Court?”

2. The above question arose since in the opinion of the learned Trial Judge the question of possession of the suit property was a crucial issue raised by the plaintiff as well as the defendants.

Facts

3. Title Suit No. 02 of 2021 (the suit) was filed by Ongdi Sherpa-the appellant (the plaintiff) who was a resident of Dentam Bazar, West Sikkim against six respondents (the defendants) who were residents of Sankhu Block, West Sikkim. Nim Temba Sherpa (D.1/D.W.1), Passang Namgyal Sherpa (D.2) and Passang Norbu Sherpa (D.3) were the sons of late Nima Ongdi Sherpa and arrayed as defendant nos. 1, 2 and 3 respectively. Sangay Sherpa (D.4) and Mingma Gyaltsen Sherpa (D.5/D.W.2) were sons of Dawa Temba Sherpa who were arrayed as defendant nos. 4 and 5 respectively. Lakpa Sherpa (D.6) son of Nim Temba Sherpa (D.1/D.W.1) was defendant no.6.

4. The suit was for declaration that the plaintiff is lawful and bonafide owner of the suit property i.e. land bearing plot no.747 and 752 measuring about 0.0620 and 0.0980 square feet situated at Dentam, West Sikkim. The suit also sought for permanent injunction restraining the defendants

from interfering in peaceful possession, user and enjoyment of the plaintiff and transferring or alienating the suit property to anyone in any manner whatsoever.

5. In the plaint the plaintiff claimed ownership based on “parcha khatiyān” issued to him in the year 2009 and thereafter a computerised “parcha” in the year 2019. It was the plaintiff’s case that his father late Nima Sangay Sherpa became the owner of the suit property after a partition during the 1950-52 land survey operation between the four natural sons of late Phul Dachi Sherpa. Besides the averments regarding the plaintiff’s ownership he also asserted:

“6. It is pertinent to mention that since last 20 years, the suit property is looked after by ‘Kuthia’, who was authorised by the above-named plaintiff.”

6. The plaintiff asserted that on 03.12.2019, 17.10.2020, 11.12.2020 and 15.07.2021 the defendants’ trespassed into the suit property.

7. The defendants in their joint written statement stated that they were related to the plaintiff. The defendants claimed that late Nima Ongdi Sherpa was the absolute owner of the certain landed properties at Sankhu Block,

West Sikkim during 1950-52. Plaintiff's father late Nima Sangay Sherpa did not have any landed properties at Sankhu Block, West Sikkim. Plaintiff and his family members somehow recorded the suit property in the name of late Nima Sangay Sherpa which actually and rightfully belonged to late Nima Ongdi Sherpa. The defendants alleged that this was done during the second survey operation of 1977-1982 and the "parcha khatiyen" (exhibit-2) relied upon by the plaintiff was prepared without the knowledge of the defendants.

8. The defendants' case was that the suit property was in the absolute possession of late Nima Ongdi Sherpa during his lifetime and later after his death in continued possession of the defendants who had employed and kept a "kutiadar" namely late Gambhir Man Sunar to look after the suit properties. Late Gambhir Man Sunar used to look after the property and reside in a house constructed therein. Late Gambhir Man Sunar was "kutiadar" for almost 14 years till 2020 under the defendants.

9. The defendants alleged that on 14.10.2020 the plaintiff trespassed into the suit property cut trees, other vegetation and cardamom plants and the total amount of

cardamom destroyed was to the extent of around 120 kg valued at Rs.75000/-. The defendants complained to the panchayats of lower Sankhu Ward on 16.10.2020 and since the panchayat could not settle the matter, on their suggestion, the defendants approached the Dentam Police Station on 18.10.2020 with a complaint. The Station House Officer (SHO) of Dentam Police Station suggested that both the plaintiff and defendants should not enter the suit property until the matter is settled. On 01.10.2021 the defendants filed a Right to Information (RTI) application at the District Administrative Centre at Gyalshing regarding mutation and registration of suit property. The Office of the District Collectorate as well as the Sub-Divisional Magistrate vide replies dated 18.10.2020 and 11.10.2021 stated that they had no records of transfer and mutation of the landed properties in the name of late Nima Sangay Sherpa.

Issues

10. The learned Trial Court framed six issues:

- (i) Whether the suit is maintainable?
- (ii) Whether the suit property belonged to late Phul Dachi Sherpa or late Nima Ongdi Sherpa?

- (iii) Whether the suit property was partitioned in favour of late Nima Sangay Sherpa?
- (iv) Whether the suit property was wrongly mutated from the name of late Nima Ongdi Sherpa to the name of late Nima Sangay Sherpa?
- (v) Whether late Nima Sangay Sherpa and his descendants and the plaintiff are in possession of the suit property or whether late Nima Ongdi Sherpa and his descendants and the defendants are in possession of the suit property?
- (vi) Whether the reliefs claimed can be granted?

Plaintiffs' witnesses

11. The plaintiff examined himself (P.W.1), Phurba Sherpa (P.W.2), Pemchodar Sherpa (P.W.3) and Amber Gurung (P.W.4). Ongdi Sherpa (P.W.1) exhibited the original computerised “parcha khatiyān” of 2019 (exhibit-1), photo copy of “parcha khatiyān” dated 1978 in the name of late Nima Sangay (exhibit-2) and photo copy of “parcha khatiyān” dated 2009 in the name of late Nima Sangay (exhibit-3).

12. The plaintiff claimed to be absolute owner of the suit property lawfully inherited from his father-late Nima Sangay Sherpa who had in turn inherited from his father-

late Phul Dachi Sherpa. The plaintiff claimed that the suit property was earlier recorded in the name of his father-late Nima Sangay Sherpa and thereafter, in his name in the year 2019. The plaintiff stated that he had verbally authorised the family of late Gambir Man Sunar to reside in the suit property as “kutia”. It was the plaintiff’s case that the family members of late Nima Ongdi Sherpa have inherited vast portions of land from him and that the defendants have since 2019 started claiming the suit property and trespassed into it. During his cross-examination he admitted that on 14.10.2020 he had entered into the suit property and uprooted the cardamom plantation and trees. He also admitted that the defendants had on 16.10.2020 complained to the panchayat and on 18.10.2020 to the Dentam Police Station about it. He also admitted that at the time of issuance of the computerised “parcha khatiyen” of 2019 (exhibit-1) in his name he did not call the defendants. The plaintiff admitted that the suit property may have been in the name of late Nima Ongdi Sherpa prior to 1978 as the property was still not partitioned.

13. Phurba Sherpa (P.W.2) deposed that he was the plaintiff’s cousin. His grandfather-late Phul Dachi Sherpa

had eight children out of which four were daughters. His father and the plaintiff's father were co-owners of landed property along the boundary of the suit property. His paternal uncle-late Nima Ongdi Sherpa never claimed the suit property as his during his life time. During cross-examination he admitted that late Gambir Man Sunar used to stay in the suit property; he had a temporary shelter earlier and now a house therein. He also admitted that he did not know whether late Gambir Man Sunar made the house on the consent of the defendants.

14. Pem Choder Sherpa (P.W.3) deposed that he is plaintiff's younger brother; he used to know the "kutia" whose family were living at the suit property at present. His name was Nawley Kami. In the year 1992 Nawley Kami approached him to allow him to occupy the suit property and he had verbally permitted them to stay there. After the death of their father in the year 2000, the landed properties recorded in his name were divided among the sons and the suit property was given to the plaintiff. He admitted during cross-examination that late Gambir Man Sunar had constructed a house and the suit property in 2019 and that permission to do so was not given by them. He also

admitted that permission to construct a house was given by the defendants.

15. Amber Gurung (P.W.4) claimed that the 1952 survey was the base survey for Sikkim however; it is no longer relevant and according to a notification issued in the year 1984 the old land records of 1951 ceased to be in operation. According to him the land “parcha” is now issued in computerised format based on the 1977 survey.

Defendants’ witnesses

16. The defendants examined Nim Temba Sherpa (D.1/D.W.1), Mingma Gyaltsen Sherpa (D.5/D.W.2), Daya Ram Sharma (D.W.3), Dirga Singh Chettri (D.W.4) and Danu Sherpa (D.W.5).

17. Nim Temba Sherpa (D.1/D.W.1) deposed that Nima Ongdi Sherpa was the absolute owner of the certain landed properties at Sankhu Block, West Sikkim during 1950-52 survey operations and the father of the plaintiff-late Nima Sangay Sherpa did not have any landed properties in his name during that time. Late Nima Ongdi Sherpa was the absolute owner of the landed properties at Sankhu Block during the survey operation of 1977-82 and the plaintiff and his family members some how managed to record the

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suit property in the name of late Nima Sangay Sherpa. This was done without consultation with the defendants. The suit property was in the possession of the defendants who had kept a “kutiadar” late Gambir Man Sunar to look after it. Late Gambir Man Sunar and his family members resided in the suit property for almost 14 years till 2020 under the defendants who had planted huge number of cardamom plants and trees therein. On 14.10.2020 the plaintiff trespassed inside the suit property, cut trees, other vegetation and cardamom plants. The total value of 120 kg of cardamom plant destroyed by the plaintiff was Rs.75000/-. He also deposed about complaining to the Panchayat on 16.10.2020 and thereafter to the Dentam Police Station on 18.10.2020. He deposed that late Nima Ongdi Sherpa and the defendants were never aware that the plaintiff and his family members had procured the “parcha” in the name of late Nima Sangay Sherpa and thereafter in his name. During cross-examination he admitted having gone to the Sub-Divisional Magistrate after the suit property was encroached. He also admitted that he did not know whether his grandfather-late Phul Dachi Sherpa owned any immovable properties. Although he had alleged that plaintiff and his family members had somehow

transferred the suit property to their names he had not produced any evidence to show fraudulent transfer.

18. Mingma Gyaltsen Sherpa (D.5/D.W.2) and Danu Sherpa (D.W.5) also reiterated the evidence of Nim Temba Sherpa (D.1/D.W.1). Nothing substantial was elicited from Mingma Gyaltsen Sherpa (D.5/D.W.2) and Danu Sherpa (D.W.5) during their cross-examination.

19. Daya Ram Sharma (D.W.3) and Dirga Singh Chettri (D.W.4) knew both the plaintiff and the defendants as they were co-villagers. They deposed that the suit property was in the absolute possession of late Nima Ongdi Sherpa and around 50/50-55 years ago they had worked as a cultivator in the suit property employed by late Nima Ongdi Sherpa.

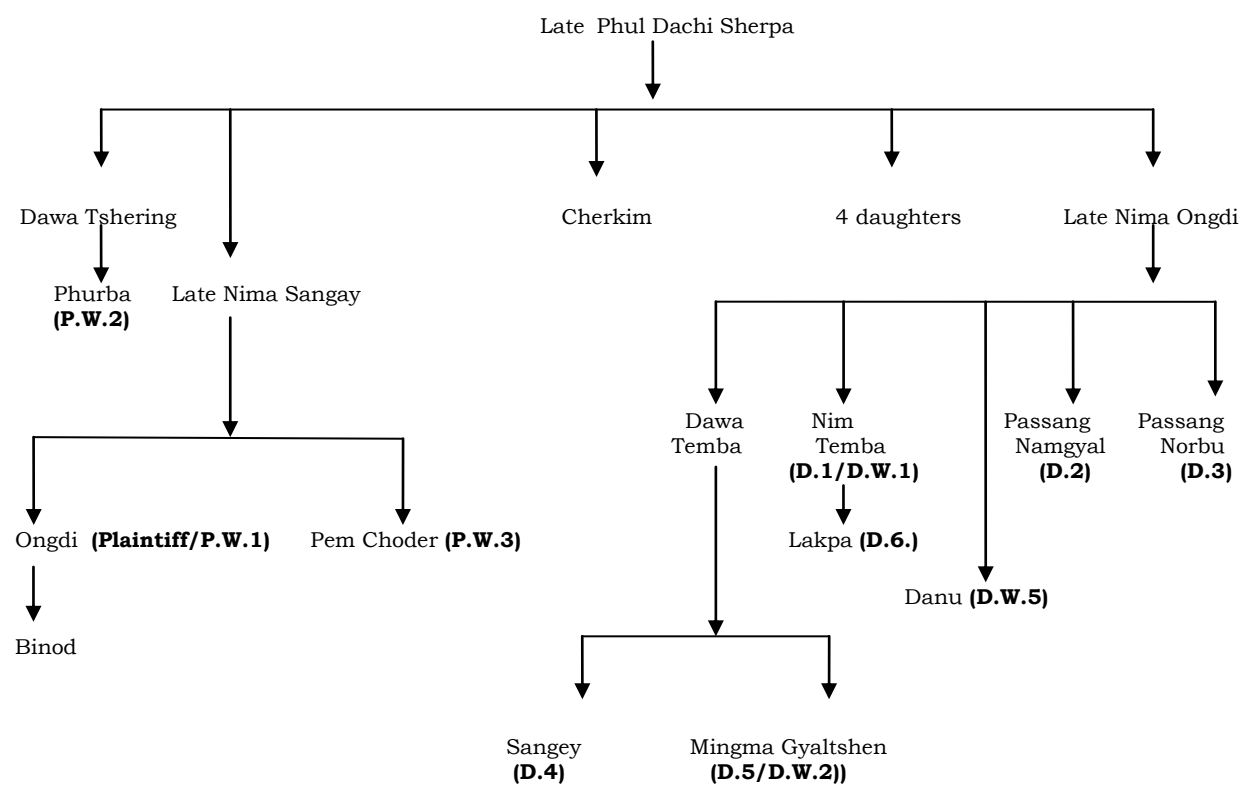
20. The defendants exhibited original “parcha khatiyan” in the name of late Nima Ongdi Sherpa (exhibit-B), original revenue receipt dated 02.05.1951 in the name of late Nima Wangdi Sherpa (exhibit-C), original revenue receipt dated 27.11.44 in the name of late Nima Ongdi Sherpa (exhibit-D), original no objection certificate issued by Nim Temba Sherpa (D.1/D.W.1) for issuance of income certificate to Gambhir Man Sunar (exhibit-E), attested copy of income certificate in the name of Gambhir Man Sunar (exhibit-F),

certified copy of reply of RTI dated 11.10.2021 given by Sub-Divisional Magistrate, Dentam (exhibit-G), certified copy of reply of RTI dated 18.10.2021 given by Sub-Divisional Magistrate, Gyalshing (exhibit-H), certified copy of complaint to Dentam Police dated 18.10.2020 (exhibit-I), original receipt dated 11.11.2021 issued by Computer Zone, Gyalshing (exhibit-J).

21. Surja Maya Sunar (C.W.1) was examined in terms of order 16 Rule 14 of the Civil Procedure Code, 1908 as a court witness as the learned Trial Court opined on 27.03.2023 (the day fixed for judgment) that “very little” evidence had come on the issue as to who is in possession; the “kutiadar” in the suit property is deceased and survived by his wife Suraj Maya Sunar; the issue of possession is essential in the just decision of this case; and therefore, it was necessary to summon Suraj Maya Sunar as witness as she is in a position to give evidence with respect to possession. This Court shall examine the evidence of the court witness-Surja Maya Sunar later.

22. Before seeking to answer the substantial question of law framed it may be important to understand the relationship of the parties to the present suit and some of

the witnesses. A genealogical chart herein below is prepared with the aid of the pleadings of the parties and depositions of the witnesses:



23. The learned Trial Court rejected the suit. It was held that the suit was barred by limitation and the principles of acquiescence and as such not maintainable. It was therefore, held that the relief claimed by the plaintiff could not be granted. The learned Trial Court found that the defendants were in fact in possession of the property. It was held that the suit property originally belonged to late Phul Dachi and was recorded in the name of late Nima Ongdi Sherpa. The learned Trial Court also held that probably the family properties were divided and the suit

property was inherited by late Nima Sangay Sherpa the father of the plaintiff. It was found that the suit property was inherited by late Nima Sangay Sherpa after division of family properties. However, late Nima Ongdi Sherpa and the defendants continued in possession. As the dispute was raised by the plaintiff recently, the learned Trial Court was of the opinion that it could only mean that the suit property was not meant to be given in the share of the plaintiff's father but the same was done in the mutation records due to lack of knowledge of boundaries and plots.

24. The plaintiff therefore, preferred Title Appeal Case No.3 of 2023 before the learned District Judge who re-examined all the issues and agreeing with the findings of the learned Trial Court dismissed the appeal.

25. The learned Appellate Court examined the evidence of Surja Maya Sunar. The learned Appellate Court noticed the contradictory statement made by Surja Maya Sunar. Surja Maya Sunar deposed that she has been residing in the field of the plaintiff, paying "kut" to him, and had constructed their house with the permission from him. The learned Appellate Court also noticed that Surja Maya Sunar thereafter deposed that Nima Ongdi Sherpa brother of the

plaintiff was the owner of the suit property. it was also noticed that during her cross examination Surja Maya Sunar admitted that the present house was built only six years ago but the previous old house was built on the permission given by Nim Temba Sherpa (D.1/D.W.1) and when they had first come to the suit land 20 years ago they had approached Nim Temba Sherpa (D.1/D.W.1) who consulted his brothers and allowed them to stay. It was noticed that Surja Maya Sunar also admitted that presently she was residing at a different land under the plaintiff which is not the disputed land. The learned Appellate Court on close scrutiny opined that “Ongdi Sherpa” referred to by her in fact was the plaintiff on whose property (not the suit property) she was residing recently and prior to that she was residing in the suit property. The learned Appellate Court therefore, came to a finding that the learned Trial Court was right to hold that the defendants were in possession of the suit property.

Ownership of the suit property

26. The plaintiff's claim of ownership of the suit property was not based on any title deed. The plaintiff could not prove partition of the suit property as asserted by him in

the plaint. The plaintiff's claim of ownership was therefore through "parcha khatiyani" which is a record of rights and not title deed. The plaintiff had relied upon photo copy of "parcha khatiyani" of 1978 in the name of late Nima Sangay Sherpa son of Phurba Sherpa (exhibit-2). This "parcha khatiyani", if correct, would have been issued under the now repealed Record Writing or Kotha Purnu or Dru-Deb and Attestation Rules, for Sikkim State, 1951 (the 1951 Rules). According to the 1951 Rules entries in the "khasra" were to be made as required under Rule 8 thereof. A copy called "parcha" was to be issued to the "bustiwala" and "khatiyani" for office use under Rule 15 thereof. Therefore, the "parcha khatiyani" (exhibit-2) exhibited by the plaintiff with the permission of the learned Trial Court was not the original "parcha khatiyani" issued to late Nima Sangay Sherpa. The plaintiff was the son of late Nima Sangay Sherpa who sought to rely upon the photo copy of the "parcha" (exhibit-2) issued to his father. The plaintiff did not explain why he did not have the original "parcha khatiyani" (exhibit-2) or how he should be allowed to rely upon and exhibit photo copy of the "parcha khatiyani" (exhibit-2). Secondary evidence as defined in section 63 of the Indian Evidence Act, 1872 can be given only in the

circumstances specified in section 65 thereof. The reasoning given by the learned Trial Court for accepting the photo copy of the “parcha khatiyani” (exhibit-2) was flawed. The learned Trial Court failed to notice that the original “parcha khatiyani” is issued to the person in whose name it is recorded. Therefore, if the photo copy of the “parcha khatiyani” (exhibit-2) was in the name of the late Nima Sangay Sherpa the plaintiff ought to have explained why he did not have the original as he claimed to be late Nima Sangay Sherpa’s son.

27. The photo copy of “parcha khatiyani” dated 20.03.2009 (exhibit-3) in the name of late Nima Sangay Sherpa son of late Phul Dachi Sherpa exhibited by the plaintiff with the permission of the learned Trial Court was also incorrectly accepted as evidence for similar reasons as the “parcha khatiyani” (exhibit-2) except that the “parcha khatiyani” (exhibit-3), if correct, would have been prepared under the now existing-the Sikkim Record Writing and Attestation Rules, 1988 which repealed the 1951 Rules.

28. The computerised Record of Rights (exhibit-1) dated 29.09.2019 was exhibited in the original by the plaintiff. It records “khasra” no.747 having an area of 0.0620 hectares

and “khasra” no.752 having an area of 0.0980 hectares in the name of the plaintiff. These plots constitute the suit property. The defendants did not establish better title to the suit property except exhibiting “bustiwala ko khatiyān” (exhibit-B) in the name of Nima Ongdi Sherpa, revenue receipt dated 02.05.1951 of Nima Wangdi Sherpa of Village Sankhu Dentam (exhibit-C), revenue receipt in the name of Nima Wangdi Sherpa dated 27.11.1944, NOC dated 17.07.2010 issued by Nim Temba Sherpa (D.1/D.W.1) in favour of late Gambir Man Sunar (exhibit-E), attested copy of income certificate issued by the Government of Sikkim in favour of late Gambir Man Sunar dated 29.07.2010 (exhibit-F). None of these documents could prove conclusively anything contrary to what is stated in the computersied Record of Rights (exhibit-1) in the name of the plaintiff although the defendants asserted and substantially proved that they were in possession of the suit property. In that view of the matter it may be true that the “bustiwala ko khatiyān” (exhibit-B) exhibited by the defendants would pertain to the suit property as well. However, the defendants failed to prove that. Under section 35 of the Indian Evidence Act, 1879 an entry in any public or other official book, register or record or any 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 specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. It is noticed that the computerised record of rights (exhibit-1) was prepared on 29.09.2019 and the suit was filed on 21.08.2021. Therefore, the computerised record of rights (exhibit-1) made *ante litem motam* can be relied upon safely when such document is admissible under section 35. In the facts of the present case, on examination of the evidence led by the parties the plaintiff has been able to permit the court to presume that he may have been the owner of the suit property unless proved otherwise by better title.

29. The defendants in their written statement asserted that late Nima Ongdi Sherpa was the absolute owner of the certain landed properties at Sankhu Block, West Sikkim during the survey operation of 1950-52. The “bustiwala ko khatiyān” (exhibit-B) exhibited by the defendants does reflect that late Nima Ongdi Sherpa son of Phu Dorjee did own certain landed properties as mentioned therein. The “bustiwala ko khatiyān” (exhibit-B) does not clearly reflect

when these entries were made although the form of “bustiwala ko khatiyān” (exhibit-B) records the date 22.11.1961. The “bustiwala ko khatiyān” (exhibit-B) relates to certain properties in Lading and lavartar of Sankhu Block, Yangyang, Namchi, West Sikkim. The defendants however, could not establish that the suit property was part of the landed properties owned by late Nima Ongdi Sherpa as reflected in the “bustiwala ko khatiyān” (exhibit-B).

30. The defendants’ assertion that they were in possession of the suit property however seems correct. The defendants asserted that they had planted huge number of cardamom plants and trees in the suit property and further that on 14.10.2022 the plaintiff trespassed inside the suit property and cut the trees, vegetation and cardamom plants. The plaintiff admitted these facts during his cross examination.

31. That brings us to the substantial question of law framed by this Court on the relevance of the court witness-Surja Maya Sunar. Before we examine the deposition of the court witness it is important to appreciate the circumstance under which she was called as a court

witness. The plaintiff had pleaded that the suit property had been looked after by a “kuthia” authorised by him. However, he neither named the “kuthia” nor did he name his wife. The defendants in their joint written statement however categorically asserted that they were in absolute possession of the suit property and had employed late Gambir Man Sunar as their “kuthia”. Surja Maya Sunar appeared as a witness in the list of witnesses of the defendants. In the plaintiff’s evidence-on-affidavit filed after the joint written statement of the defendants he named the “kuthia” as late Gambir Man Sunar but did not state that his wife Surja Maya Sunar continued to stay in the suit property. However, Surja Maya Sunar was not examined by the defendants. From the deposition of Surja Maya Sunar it is clear that at the time of her deposition in court she was not a resident of the suit property. Surja Maya Sunar also admits that the plaintiff had visited her three days ago and his son Binod Sherpa had also called her on telephone. The deposition of Surja Maya Sunar does not inspire great confidence. In the same breath Surja Maya Sunar claims that both the plaintiff and father of the defendant nos.1 to 3 i.e. late Nima Ongdi Sherpa as the owner of the suit property. Surja Maya Sunar also deposes

that her previous house was built after permission was given by Nim Temba Sherpa (D.1/D.W.1) and it was he who they had approached twenty years ago and who had allowed them to stay in the suit property in consultation with his brother. The evidence of the court witness-Surja Maya Sunar must be read with caution and it may not be correct to depend solely on her deposition regarding the material fact in issue before this Court or else her confusion who she should side with may put the truth on slippery grounds. This Court is thus of the view that the learned Appellate Court has not ignored the deposition of the court witness-Surja Maya Sunar but has cautiously examined it along with the other evidence on record.

Possession

32. It is noticed that the plaintiff had only vaguely asserted possession in paragraph 6 of the plaint by stating that since last 20 years the suit property was looked after by a “Kuthia” who was authorised by the plaintiff. The plaintiff did not list the “Kuthia” as a witness nor was he named. In his evidence-on-affidavit the plaintiff did not even assert what he had stated in paragraph 6 of the plaint. The plaintiff deposed that he had verbally

authorised the family of late Gambir Man Sunar to reside at the suit property as “Kuthia”. This was not what he had pleaded in the plaint.

33. During his cross examination the plaintiff admitted that he knew Suraj (sic) Maya Sunar who is the wife of late Gambir Man Sunar; that on 14.10.2020 he entered into the suit property and uprooted cardamom plantations and trees; he explained that he did this based on his right as the property was mutated in his father’s name and thereafter in his name; that the defendants had complained to the panchayat about it on 16.10.2020 and on 18.10.2020 a general diary was lodged by the defendants against him in Dentam Police Station where the police inspector told them not to enter the suit property until the matter is resolved; that the defendants had been claiming the suit properties to be their’s before the panchayat and the Police Station; that there was no sale deed or any transfer deed between late Nima Ongdi Sherpa and late Nima Sangay Sherpa; that when he took out the computerised “parcha” in his name he did not call the defendants; that he had not filed any documents showing the properties of late Nima Ongdi Sherpa and the defendants; that he had not made Dawa Tshering Sherpa

son of late Dachi Sherpa, the four daughters of late Dachi Sherpa and their children parties to the suit; the suit property may have been in the name of late Nima Ongdi Sherpa prior to 1978 as it had still not been partitioned.

34. It is settled law that one who asserts must prove it. The claim of possession made by the plaintiff, although vaguely, in the plaint could not be proved by him. The plaintiff himself gave no evidence to that effect in his examination in chief. Phurba Sherpa (P.W.2) and Pemchodor Sherpa (P.W.3)-the plaintiff's witnesses also did not claim that the plaintiff had possession of the suit property. The plaintiff did not produce any evidence of possession of the suit property. The plaintiff's admission during his cross-examination that on 14.10.2020 he had entered into the property and uprooted cardamom plantation and trees is an admission that in fact he was not in possession of the suit property. Plaintiff did not assert about planting cardamom in the suit property. The defendants categorically stated that they had planted the cardamom in the suit property. Quite clearly the plaintiff was not in either actual or constructive possession of the suit property.

35. It is settled law that when a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Even when the plaintiff title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with the consequential injunction. It is also well settled that where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction. (see **Anathula Sudhakar vs. P. Buchi Reddy**¹).

36. The plaintiff had filed the title suit under section 34 of the Specific Relief Act, 1963. Although he sought a declaration of ownership and permanent injunction he did not seek possession of the suit property to allow him to enjoy the declaration, if granted. The plaintiff could not prove possession and from the evidence on record it reflects that the plaintiff had no idea who was in actual possession of the suit property. Therefore, it was imperative for the plaintiff to have sought for a further relief to take back

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possession of the suit property which he failed to do. In terms of the proviso to section 34 of the Specific Relief Act, 1963 the Court is estopped from granting the declaration of ownership due to the plaintiff's failure to seek the consequential relief. The plaint therefore, must fail as not being maintainable.

37. The appeal is dismissed. The trial court records may be returned forthwith.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**
to/