

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Appellate Jurisdiction)

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

R. S. A. No. 07 of 2019

Ezera Tamang,
S/o Tshering Tamang,
R/o Pakshep,
P.O & P/S Mangan,
North Sikkim.

..... **Appellant**

Versus

1. Suk Bahadur Tamang,
S/o Late Purna Bahadur Tamang,
R/o Pakshep, P.O & P/S Mangan,
North Sikkim.
2. District Collector/District Magistrate,
District Administrative Centre,
Mangan, North Sikkim.

..... **Respondents**

**An Appeal under section 100 of the Code of Civil Procedure,
1908.**

Appearance:

Mr. Zangpo Sherpa and Ms. Zola Megi, Advocates for the Appellant.

Mr. J. B. Pradhan, Senior Advocate with Mr. Bhusan Nepal and Mr. Loknath Khanal, Advocates for the Respondent No.1.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Yadev Sharma, Government Advocate for the Respondent No. 2.

Date of hearing : **15.11.2021**
Date of pronouncement : **21.12.2021**

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This is a second appeal against the impugned judgment and decree passed by the learned Appellate Court reversing the rejection of a suit by the learned Trial Court. Four substantial questions of law formulated by this Court are required to be examined.

The relevant facts

2. Suk Bahadur Tamang (plaintiff/appellant) filed a suit for declaration, injunction, confirmation of title and other consequential reliefs in the Court of the learned Civil Judge (Jr. Division) North Sikkim at Mangan (the learned Trial Court) being Title Suit No. 01 of 2016 (the suit) against the District Collector/District Magistrate (defendant no.1) and Ezera Tamang (defendant no.2) in the year 2016.

The plaintiff's case

3. The plaintiff's case was that when he was 10-11 years old in the year 1978-79, his father late Suk Raj Tamang along with his family moved to Pakshep and started staying in the house of late Purna Bahadur Tamang. Late Suk Raj Tamang used to work as late Purna Bahadur Tamang's domestic help. The plaintiff's father died in the year 1990. Late Purna Bahadur Tamang executed a document dated 04.12.1994 (Exhibit-1) (for convenience referred to as the adoption deed), adopting the

plaintiff as his son and also expressing his desire to give away his entire immovable properties to him. In the year 1995 late Bhalu Tamang, elder brother of late Purna Bahadur Tamang also executed a document dated 13.11.1995 (Exhibit-2) expressing his intention to transfer his entire landed properties to the plaintiff recognising him as the adopted son of late Purna Bahadur Tamang. In the year 1999, both late Bhalu Tamang and late Purna Bahadur Tamang jointly executed a document (Exhibit-3) accepting the plaintiff as their son and acknowledging that the plaintiff had renovated the old house of late Purna Bahadur Tamang at his own expense. It is the plaintiff's case that thereafter late Purna Bahadur Tamang applied for a certificate of identification (*for short* COI) for him which was issued by defendant no.1. In the year 1995 both late Purna Bahadur Tamang and late Bhalu Tamang handed over their landed properties to the plaintiff which was self acquired. Late Purna Bahadur Tamang thereafter died in the year 2004 and late Bhalu Tamang in the year 2011. The plaintiff performed their 49th day death rites "*Ghewa*". Both late Purna Bahadur Tamang and late Bhalu Tamang were issueless.

4. The plaintiff averred that he has purchased a plot of land bearing khatiyani no. 113 plot no. 55/216 from one Dhan Bahadur Tamang for constructing a house which was mutated in his name. There does not seem to be any dispute with regard to this property.

5. The plaintiff averred that in the year 2013 a complaint was filed against him for cancellation of his COI. His COI was ultimately cancelled by the defendant no.1.

6. The plaintiff took an alternative plea of adverse possession regarding the landed properties of late Purna Bahadur Tamang and late Bhalu Tamang having come into his possession in the year 1995 and 1996 and his possession being open and adverse to the true owners or legal heirs.

7. The plaintiff also averred that in the year 2014, the defendant no.2 along with Sherab Tamang (D-2/1), son of late Mangal Singh Tamang filed a suit against the plaintiff which was subsequently withdrawn. Thereafter a complaint was filed before the defendant no.1 on 30.07.2014 by the defendant no.2 and Sherab Tamang (D-2/1) for cancellation of his khatiyani parcha issued in the name of the plaintiff, Dawa Tamang, Jit Bahadur Tamang and Jeewan Tamang. A stay order granted in this proceeding was subsequently set aside by the learned Sessions Judge. The defendant no.2 filed another complaint before the defendant no.1 for cancellation of the COI of the plaintiff's son and daughter in which proceeding they have filed their show cause. In the second week of May, 2015 the plaintiff came to know about a notice published on 03.05.2016 in Sikkim Herald with regard to de-mutation process to be carried out by the defendant no.1 in respect of the plaintiff's properties. It is the plaintiff's case that as he was the rightful owner of the landed properties of late Purna

Bahadur Tamang and late Bhalu Tamang, the defendant no.1 could not have sought to de-mutate the landed properties. On such pleadings, the plaintiff prayed for:

- a) Declaring that the notice of de-mutation issued by defendant no.1 is against the principle of natural justice and the said notice is liable to be cancelled/quashed.
- b) Declaring that suit properties are the personal properties of the plaintiff and cannot be the subject matter of de-mutation.
- c) Declaring that the plaintiff is the absolute owner of suit properties and has perfected his title over the suit properties by way of adverse possession.
- d) Declaring that the defendant no.1 has no jurisdiction or cause of action to de-mutate the suit properties of the plaintiff.
- e) Declaring that defendant no.2 is not the legal heir of late Purna Bahadur Tamang and Bhalu Tamang and has no right to inherit the Schedule-'A' or Schedule-'B' properties owned by the plaintiff.
- f) Any other relief/reliefs.

The defendant no.1's case

8. In the written statement the defendant no.1 pleaded that the plaintiff's COI had been cancelled on due verification when he could not prove his relationship with late Purna Bahadur Tamang. The cancellation of the COI vide order dated 26.08.2013

was not assailed. The landed properties of late Purna Bahadur Tamang was mutated in the plaintiff's name on the basis of the illegally obtained COI. The status of the Sikkim Subject, the father of late Suk Raj Tamang was not clear and it is in the process of re-verification. The adoption deed (Exhibit-1) was not registered under the Sikkim State Registration of Document Rules, 1930.

The defendant no.2's case

9. The defendant no.2 in his written statement, contested the claim of the plaintiff. He disclosed his relationship with late Purna Bahadur Tamang and late Bhalu Tamang and stated the suit properties were ancestral properties and his uncle Sherab Tamang (D-2/1) and his mother Raj Kumari Tamang (D-2/2) were the rightful heirs. With regard to the mutation proceedings he asserted that late Purna Bahadur Tamang expired on 29.04.2004 and only thereafter the plaintiff fraudulently recorded his properties in his name on 14.09.2005. Similarly, after late Bhalu Tamang expired on 11.04.2011 the plaintiff fraudulently recorded his property in his name. It was asserted that as soon as he and his family came to know about the fraudulent act of the plaintiff, Sherab Tamang (D-2/1) filed Title Suit No. 01 of 2014 which was subsequently withdrawn with liberty to file afresh. The defendant no.2 also averred that the plaintiff has not challenged the cancellation of his COI and having one is mandatory to own, possess or retain property in Sikkim.

The issues

10. The learned Trial Court on the basis of the pleadings framed seven issues in the following manner:-

1. Whether the Plaintiff has right, title and interest over the suit properties? (onus on Plaintiff).
2. Whether the suit properties are the ancestral properties of late Purna Bahadur Tamang and late Bhalu tamang? (onus on Plaintiff)
3. Whether the suit filed by the Plaintiff is bad for non/misjoinder of necessary parties? (onus on Plaintiff)
4. Whether Defendant No.2 has right to inherit Schedule-A or Schedule-B property, alongwith the legal heirs of the suit property (sic)? (onus on Defendant No.2)
5. Whether the Defendant No.1 has any cause of action or jurisdiction to demutate the suit property owned and possessed by the Plaintiff? (onus on Defendant No.1)
6. Whether the Plaintiff is legally adopted vide documents dated 04.12.1994, 16.04.1999 and 13.11.1995 by late Purna Bahadur Tamang and late Bhalu Tamang? (onus on Plaintiff) and
7. Other reliefs, if any.

11. The learned Trial Court seems to have incorrectly put the onus of issue no.2 on the plaintiff to establish that the suit properties were the ancestral properties of late Purna Bahadur Tamang and late Bhalu Tamang although it was the plaintiff's assertion that the suit properties were their self acquired properties. It seems the learned Appellate Court also did not realise this fundamental error.

The plaintiff's witnesses

12. Besides himself the plaintiff also examined Jagat Bahadur Tamang (PW-2), Ex-Panchayat member, Bir Bahadur Tamang (PW-3)-the scribe of the adoption deed (Exhibit-1), Nima Dorjee Tamang (PW-4) and Pema Dorjee Tamang (PW-5) who deposed about the making of the adoption deed, Exhibit-2 and Exhibit-3. None of the plaintiff's witnesses deposed about the notice of demutation challenged and sought to be set aside by the plaintiff.

The defendant no.1's witnesses

13. The defendant no.1 examined Ong Tshering Lepcha (DW-1/1), the Head Surveyor in the year 1979 and Revenue Officer-cum-Assistant Director in the year 2017. He deposed about the mutation of landed properties of late Purna Bahadur Tamang in the name of the plaintiff in the year 2005. He deposed that the plaintiff had not disclosed that he was the adopted son of late Purna Bahadur Tamang. He deposed about the complaint regarding the illegal COI of the plaintiff in the year 2013; that the plaintiff himself surrendered the COI and subsequently it being

cancelled. He further deposed about the re-verification process of the status of the Sikkim Subject of late Suk Raj Tamang. He deposed that the plaintiff had mentioned that Jit Bahadur Tamang, Jeewan Tamang and Dawa Tamang were legal heirs of late Purna Bahadur Tamang and late Bhalu Tamang.

14. N. K. Pradhan (DW-1/2), the then sub-inspector, crime branch deposed about the re-verification of the plaintiff's COI.

The defendant no.2's witnesses

15. The defendant no.2 examined himself and reiterated his stand in the written statement. His witness Sherab Tamang (D-2/1) and Raj Kumari Tamang (D-2/2) deposed that the suit properties were their ancestral properties. When they came to learn about the fraudulent transfer in the name of the plaintiff, they tried to persuade him not to sell it or record it in his name but he did not listen. They admitted that they had inherited some of the ancestral properties from their father.

The learned Trial Court's judgment

16. The learned Trial Court vide judgment and decree dated 28.03.2018 dismissed the suit of the plaintiff. The learned Trial Court held that the plaintiff had no right, title and interest over the suit properties on examination of the adoption deed, Exhibit-2 and Exhibit-3 and holding that they were important documents but not registered (issue no.1); the suit properties were the ancestral properties of late Purna Bahadur Tamang and late Bhalu Tamang (issue no.2); the suit filed by the plaintiff was bad

for non/mis-joinder of necessary parties as late Mangal Singh Tamang had not been made a party (issue no.3); the defendant no.2 had failed to satisfy the onus upon him to prove that he had the right to inherit the suit properties along with other legal heirs (issue no.4); the defendant no.1 had the cause of action as well as jurisdiction to de-mutate the suit properties owned and possessed by the plaintiff (issue no.5); and that plaintiff had failed to establish that he was adopted by late Purna Bahadur Tamang and late Bhalu Tamang vide adoption deed, Exhibit-2 and Exhibit-3.

The impugned judgment of the learned Appellate Court

17. The learned Appellate Court reversed the judgment of the learned Trial Court. The learned Appellate Court held that as the plaintiff had established that he was adopted by late Purna Bahadur Tamang, he was entitled to inherit the properties of late Purna Bahadur Tamang which was seen to have been given to him vide the adoption deed (issue no.1); the Schedule-A properties were not the ancestral properties of late Purna Bahadur Tamang and late Bhalu Tamang but they are self acquired properties (issue no.2); the suit filed by the plaintiff was not bad for non/mis-joinder of necessary parties (issue no.3); defendant no.2 did not have any right to inherit Schedule-A property as it was inherited by plaintiff as his adopted son; Exhibit-2 can be interpreted as a licence given by late Bhalu Tamang to the plaintiff. As the properties of late Bhalu Tamang

was also given to the plaintiff, neither Sherab Tamang (D-2/1) nor the defendant no.2 had any right to claim it (issue no.4); the defendant no.1 did not have any cause of action or jurisdiction to de-mutate the suit properties owned and possessed by the plaintiff (issue no.5); the plaintiff was legally adopted vide the adoption deed; registration is not mandatory and long duration of recognition as an adopted son cannot be ignored; Exhibit-2 to the extent it purports to declare that late Bhalu Tamang had adopted the plaintiff is to no effect (issue no.6); the plaintiff was always recognised in the locality as late Purna Bahadur Tamang's adopted son (issue no.8). The learned Appellate Court held that the plaintiff was entitled to the reliefs prayed for by him at prayers (a), (b), (c), (d), (e) and (g). With regard to the prayer (c), the learned Appellate Court held that the said prayer to the extent of adverse possession shall be ignored. At this juncture, it is relevant to note that in the present appeal the defendant no.2 has filed ***I.A. No. 02 of 2020*** seeking to place on record the certified copy of the appeal dated 07.05.2018 referred by the plaintiff before the learned Appellate Court. The application is allowed; the certified copy of the appeal is taken on record and examined.

Consideration

18. This Court vide order dated 12.11.2019 formulated four substantial question of law. This Court shall now examine and answer each of those questions.

“1. Whether the learned lower Appellate Court was justified in holding that the plaintiff was able to establish adoption by Purna Bahadur Tamang?”

19. Section 101 of the Indian Evidence Act, 1872 provides that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 102 of the Indian Evidence Act, 1872 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 103 of the Indian Evidence Act, 1872 provide that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Section 104 of the Indian Evidence Act, 1872 provides that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. These four sections must be always in the mind of the learned Trial Court while deciding issues and casting the burden of proving it.

20. The plaintiff sought to rely upon the adoption deed to prove his adoption. The plaintiff deposed that he was adopted by late Purna Bahadur Tamang vide the adoption deed. During cross-examination the plaintiff admitted that his father’s name is recorded therein as Suk Bahadur Tamang; the adoption deed is

not a registered document and it is also not a deed of adoption; the adoption deed is seen to be signed at two places with the name Suk Bahadur Tamang. The thumb impression is his but he does not know who has signed as Suk Bahadur Tamang.

21. Jagat Bahadur Tamang (PW-2) the Panchayat member of Pakshep ward during the periods 1997 to 2002 and 2002 to 2007 deposed that late Purna Bahadur Tamang told him that he was going to make the adoption deed on 04.12.1994 which was prepared by Bir Bahadur Tamang (PW-3). After preparation late Purna Bahadur Tamang, his elder brother late Mangal Singh Tamang, Sherab Tamang (D-2/1) son of Mangal Singh Tamang affixed their thumb impressions on it. He also identified their thumb impressions. During cross-examination he, however, admitted that the adoption deed was not executed in his presence.

22. Bir Bahadur Tamang (PW-3) deposed that on 04.12.1994 late Purna Bahadur Tamang called him to his house and requested him to prepare the adoption deed which he did. The adoption deed was thereafter signed by late Purna Bahadur Tamang and other witnesses. He did not identify the thumb impression of late Purna Bahadur Tamang and other witnesses. During cross-examination he admitted that the plaintiff was his brother-in-law.

23. On examination of the evidence on record certain striking aspects have been noticed. The adoption deed is scribed in

Nepali. It is in four parts. The first part is a purported declaration by late Purna Bahadur Tamang adopting Suk Bahadur Tamang's son Suk Bahadur Tamang as his religious son. The second part is a purported declaration by Suk Bahadur Tamang of having given his son in adoption to his relative for adoption. The third part relates to a purported declaration by one Chemden Tamang declaring that he will not do any misdeed with his brother. The fourth and the last part is a purported declaration by the plaintiff declaring that his religious father and brother has to make a document after which he would go wherever he is directed to by them. At the back of the adoption deed are the names of four executants. The order of the four names reflects that it was purporting to be in the same order as that of the four declarants in the adoption deed. Late Purna Bahadur Tamang's name features as the first signatory. There is a thumb impression. The plaintiff is the only one who has identified the thumb impression of late Purna Bahadur Tamang and he is an interested witness. The identification by Jagat Bahadur Tamang (PW-2) is clouded in view of his admission that he was not present when it was prepared. Bir Bahadur Tamang (PW-3) did not identify late Purna Bahadur Tamang's thumb impression.

24. The adoption deed purports to have signatures of other witnesses as well, none of whom were examined except Jagat Bahadur Tamang (PW-2) and Bir Bahadur Tamang (PW-3). Sherab Tamang (D-2/1) was examined by defendant no.2. He

was the grandson of late Balman Tamang and son of late Mangal Singh Tamang. He did not depose about signing the adoption deed. During cross-examination he denied any knowledge that his uncle late Purna Bahadur Tamang had adopted the plaintiff. The plaintiff did not draw the attention of Sherab Tamang (D-2/1) to his purported signature or the signature of his father late Mangal Singh Tamang on the adoption deed.

25. Although the plaintiff admitted that his father late Suk Raj Tamang had died in the year 1990 there is no explanation as to why the adoption deed contained the second declaration purporting to be of the plaintiff's father by the name of Suk Bahadur Tamang and not Suk Raj Tamang declaring in the year 1994 that he was willingly giving his son for adoption. Admittedly, the thumb impression appearing under the name Suk Bahadur Tamang purporting to be father of the plaintiff is that of the plaintiff. The plaintiff could not identify the signature of one Suk Bahadur Tamang appearing in the place where he was required to sign.

26. Admittedly, the adoption deed was not registered. From the records of this case it seems to have surfaced for the first time in the suit proceedings filed in the year 2016. There is no absolute clarity on this thought. Although the learned Appellate Court held that registration was not necessary, it did not examine the cumulative effect of the Government of Sikkim Notification No. 385/G dated 11.04.1928, notification no. 2947/G dated

22.11.1946, the Sikkim State Registration of Documents Rules, 1930 and Notification No. 2341-4/G dated 17.06.1930.

27. The State of Sikkim was a Kingdom prior to the merger in the year 1975 when it became a State of the Union of India. Post the merger Article 371 F of the Constitution of India provided in sub-clause (k) that all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force until amended or repealed by a competent legislature or by other competent authority notwithstanding anything in the Constitution. By virtue of this clause the old laws of Sikkim were protected and continue to be in force until amended or repealed. By virtue of sub-clause (n) the President has also, by public notification, extended enactments which was in force in a state of India at the date of the notification.

28. This Court shall first take up the issue of non-registration of the adoption deed. Registration of documents in Sikkim is governed by the Sikkim State Rules Registration of Documents, 1930 (*for short* the Registration Rules). The preamble of the Registration Rules provides that the registration of document is primarily intended to:

“(C) to obviate as far as may be practicable litigation respecting the authenticity of will, adoption of sons. (D) and to keep authenticated record of private documents so as to provide against any injury to the rights and property of individuals arising from the loss or destruction of deeds relating to transactions of the nature of those above specified.”

29. Rule 2 of the Registration Rules provide for four registers to be maintained by the Sub-Registrars of the four districts. Rule 4 provides that in addition to the said four books the Gangtok Registrar would keep two further books titled:

“a) Register of deposit of wills and instrument adopting a son after death.

b) Register of wills and instruments adopting a son after death.”

30. Rule 14 provides that:

“Any person desirous of registering his will or any instrument adopting a son may deliver such will or instrument either personally or by an authorised agent, in a sealed cover subscribed with the name of the depositor and the nature of the instrument to the Registrar, Gangtok, who would satisfy himself as to the identity and authority or person presenting it.”

31. A perusal of the registration rules makes it evident that it provides for registration of adoption deeds to obviate litigation respecting the authenticity of the adoption and to keep an authenticated record thereof. Any person who desired to adopt a son was to follow the procedure prescribed therein.

32. On 11.04.1928, prior to the enactment of the Registration Rules, Notification No. 385/G was issued which provided that:

“any document such as mortgage and sale deeds, and other important documents and deeds, etc. will not be considered valid unless they are duly registered.”

33. The second paragraph thereafter, was amended by Notification No. 2947/G dated 22.11.1946, after the coming into

force of the Registration Rules. The second paragraph now provides:

“an unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty up to fifty times the usual registration fee.”

34. As both defendants had raised the issue that the adoption deed was not valid for non-registration the learned Courts ought to have examined the issue. The learned Trial Court did not frame a specific issue on this however, examined the issue while deciding issue no.1. The learned Trial Court held that Exhibits-1, 2 and 3 were not registered documents and further that they were “important documents”. The learned Trial Court held, considering other aspects as well, that the plaintiff had no right, title or interest over the suit properties. The learned Appellate Court while considering issue no.6 and 8 examined Notification No. 2341-4/G dated 17.06.1930 and concluded that the notification related to *patta lease* of various elakas are not applicable to the present case. The learned Appellate Court held that registration was not compulsory.

35. Although the Registration Rules does not make it compulsory for an adoption deed to be registered, the preamble does reflect that even in the year 1930, it was considered an “important document” in as much as it provided that if it was registered, it would obviate litigation and provide an authentic

record. The Notification No. 385/G dated 11.04.1928 as amended by Notification No. 2947/G dated 22.11.1946 leaves it to the Court to opine, when an unregistered document is produced as evidence, whether it is an important document and thus ought to be registered. If the Court opines that the unregistered document ought to have been registered then it could be validated and admitted in Court to prove title or other matters contained therein on payment of penalty up to fifty times the usual registration fee.

36. The Sikkim State General Department Circular No. 2341-4/G states that the Sikkim Darbar had approved the definition of the words “Heirs” as used in the opening paragraphs of *patta lease* of various elakas of Sikkim. It further provided that the word “heirs”, (as used in the opening paragraph of elaka lease) shall also include adopted heir as a valid heir, provided such adoption is made in writing with the express consent of the Darbar and the deed of adoption is registered according to law. This Circular also indicates that an adoption deed may have been considered an “important document” which ought to have been registered. Both the learned Trial Court and the learned Appellate Court did not examine these aspects. It is held that a deed of adoption during the relevant time (i.e., 04.12.1994) would be an important document because it would have wide ramification both with regard to the personal and jural

relationship between the adoptive parent and the person adopted and matters relating to inheritance.

37. Consequently, it is held that the Appellate Court was not justified in holding that the plaintiff was able to establish adoption by late Purna Bahadur Tamang.

38. Exhibit-2 purports to be a document dated 13.11.1995 scribed by late Bhalu Tamang. The witnesses purport to be late Purna Bahadur Tamang, Jagat Bahadur Tamang (PW-2), Man Bahadur Tamang and Dhan Bd Rongkup. Only Jagat Bahadur Tamang (PW-2) from amongst the purported witnesses to Exhibit-2 deposed about it. He deposed that in the year 1997 late Bhalu Tamang produced Exhibit-2 for his signature and ratifications. Jagat Bahadur Tamang (PW-2) only identified his signature thereon. During cross-examination he admitted that Exhibit-2 was not registered. Exhibit-2 purports to be a document by which late Bhalu Tamang acknowledged that the plaintiff was his brother's adopted son and his desire to permit mutation of his landed properties in his name. The plaintiff who identified the thumb impression of late Bhalu Tamang in Exhibit-2 did not depose that he was present when late Bhalu Tamang executed Exhibit-2. Exhibit-2 also does not record the presence of the plaintiff. The identification of the thumb impression by the plaintiff, an interested witness, is suspect.

39. Contrary to what has been held by the learned Appellate Court it was not the case of the plaintiff that he inherited the landed properties of late Purna Bahadur Tamang. It is also not the plaintiff's case that he inherited the properties of late Bhalu Tamang. The pleadings in the plaint reflect that it was the case of the plaintiff that both late Purna Bahadur Tamang and late Bhalu Tamang transferred their respective properties to him and expired thereafter. The plaintiff has not produced any deed of transfer. The adoption deed narrates that late Purna Bahadur Tamang was handing over his properties to the plaintiff. It seems the plaintiff was seeking to make out a case of gift. Oral gift is impermissible. Section 123 of the Transfer of Property Act, 1882, which was enforced in Sikkim with effect from 01.09.1984 vide S.O. 643(E) dated 24.08.1984, provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. The Supreme Court in **Gomtibai (Dead) & Ors. Vs. Mattulal (Dead)**¹; **Renikuntla Rajamma Vs. K. Sarwanamma**² and **Daulat Singh (Dead) Vs. State of Rajasthan**³ also held so.

40. The plaintiff also produced other witnesses to establish that his adoption was known in the locality. The learned Trial Court has allotted witness numbers to them which had already been

¹ AIR 1997 SC 127

² (2014) 9 SCC 445

³ (2021) 3 SCC 459

given to the previous witnesses. The learned Trial Court should not have done so. They were Kumar Tamang (PW-1), Nima Dorjee Tamang (PW-2) and Yong Lall Bagdas (PW-3).

41. Kumar Tamang was the son of Jagat Bahadur Tamang (PW-2). He deposed that in the absence of his own child late Purna Bahadur Tamang adopted Suk Bahadur Tamang and people in the locality knew and recognised him as late Purna Bahadur Tamang's son. During cross-examination he admitted that the plaintiff is Christian by religion; late Purna Bahadur Tamang and late Bhalu Tamang did not adopt the plaintiff in his presence. He volunteered to say he had heard that in the year 1985-86 when he was about 11 years old the plaintiff was adopted by late Purna Bahadur Tamang.

42. Nima Dorjee Tamang stated that when he was 18 to 19 years old he learnt from the villagers that in absence of his own child, late Purna Bahadur Tamang had adopted the plaintiff and accordingly the people of the locality recognised him as such. During cross-examination he admitted that the plaintiff was his son-in-law; that he was not present when the adoption deed was prepared; late Suk Raj Tamang and his family had never resided in the house of late Purna Bahadur Tamang.

43. Yong Lall Bagdas also stated that he had learnt from the villager that in the absence of his own child late Purna Bahadur Tamang had adopted the plaintiff and that he was known in the

locality as such. During cross-examination he admitted that late Purna Bahadur Tamang and late Bhalu Tamang did not prepare any adoption deed in his presence; and that he did not witness any ceremony or religious function in which they adopted the plaintiff.

44. The learned Appellate Court relied upon the judgment of the Supreme Court in **L. Debi Prasad vs. Tribeni Devi**⁴. The question before the Supreme Court was whether the adoption pleaded by Shyam Bihari Lal was true and valid. Relying upon its earlier judgment **Addagada Raghavamma vs. Addagada Chenchamma**⁵, it was held that it is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. The Supreme Court further held, relying upon its earlier judgment in **Lakshman Singh Kothari vs. Smt. Rup Kanwar**⁶, that in order that an adoption may be valid under the Hindu Law, there must be a formal ceremony of giving and taking. The Supreme Court noticed that in that case it had been pleaded that the adoption took place 54 years before the filing of the suit. In that context, the Supreme Court while holding that the burden of proving satisfactorily that he was the adopted son was upon the person claiming, also held that yet from the long period during which he

⁴ (1970) 1 SCC 677

⁵ (1964) 2 SCR 933

⁶ (1962) 1 SCR 477

had been received as an adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained. That the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family. In a case of a Hindu, long recognition as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the laws of his rights in his own family by being adopted in another family.

45. In the present case, the plaintiff was seeking to rely upon documentary evidence i.e., the adoption deed. In such a situation, question of presuming the adoption would not arise. Further, the plaintiff did not plead that he belonged to any religion or community. He did not also plead any custom or establish it to prove his adoption.

46. Consequently, the hearsays evidence of Kumar Tamang, Nima Dorjee Tamang and Yong Lall Bagdas without even stating the duration of the plaintiff being known as the adopted son of late Purna Bahadur Tamang does not take the plaintiff's case

further. Consequently, issue no.8 could not have been held in favour of the plaintiff.

“2. Whether the learned lower Appellate Court below erred in law in relying upon Exhibit-1 & 2 while decreeing suit of the plaintiff?”

47. It is held that the learned Appellate Court erred in law in relying upon Exhibits-1 and 2 as both the documents had not been proved by the plaintiff.

“3. Whether the learned lower Appellate Court could have held that the plaintiff has right, title and interest in respect of plot nos. 43 and 44 on the basis of irrevocable licence through Exhibit-2 when the plaintiff had pleaded adverse possession?”

48. The plaintiff has sought a declaration that he is the absolute owner of suit properties and has perfected his title over the suit properties by way of adverse possession. The plaintiff's case was that vide Exhibit-2 late Bhalu Tamang expresses his intention to transfer his entire landed properties to the plaintiff recognising him as adopted son of his younger brother. He did not make out a case of licence.

49. In *Bachhaj Nahar vs. Nilima Mandal*⁷ the Supreme Court held that in the absence of a plea by the plaintiffs based on an easementary right, the defendant did not have any opportunity to demonstrate that the plaintiff had no easementary right. In the absence of pleading and an opportunity to the defendant to deny such plaint, the High Court could not have converted the suit for title into a suit for enforcement of easementary right.

⁷ (2008) 17 SCC 491

50. Thus, it is held that the learned Appellate Court could not have held that the plaintiff had right, title and interest in respect of plot no.43 and 44 i.e., the properties of late Bhalu Tamang on the basis of irrevocable licence through Exhibit-2.

“4. Whether the learned lower Appellate Court is correct in holding that plaintiff has right, title and interest in respect of plot no. 42/174 on the basis of Exhibit-1 when the plaintiff pleaded right, title, interest over the same on the basis of adverse possession?”

51. The concept of adverse possession contemplates possession 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.

52. In *Vasantiben Prahladi Nayak & Ors. vs. Somnath Muljibhai Nayak & Ors.*⁸, 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.

⁸ (2004) 3 SCC 376

53. In *Uttam Chand (Dead) Through Legal Representatives vs. Nathu Ram (Dead) Through Legal Representatives & Ors.*⁹ 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.

54. In *Mohan Lal vs. Mirza Abdul Gaffar*¹⁰ it was held that the appellants first plea of adverse possession which was inconsistent with the second plea regarding retention of possession under Section 53-A of the Transfer of Property Act could not be sustained. Since the appellants 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.

55. The Supreme Court in *M. Venkatesh vs. Commissioner, Bangalore Development Authority*¹¹ affirmed its decision in *Mohan Lal* (supra) and held thus:

⁹ (2020) 11 SCC 263

¹⁰ (1996) 1 SCC 639

¹¹ (2015) 17 SCC 1

“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], 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.””

56. Although the plaintiff sought a prayer to declare him as the owner of the suit properties having perfected his title by way of adverse possession he did not plead who the true owner was. He

also claimed that late Purna Bahadur Tamang after having adopted him transferred his property to him. The plaintiff therefore could not have taken the contrary stand of adverse possession. It is held that the learned Appellate Court was not correct in holding that the plaintiff had right, title and interest over plot no. 42/174 belonging to late Purna Bahadur Tamang on the basis of the adoption deed when the plaintiff pleaded right, title and interest over the same on the basis of adverse possession as well.

Reliefs

57. The learned Appellate Court reversed the judgment of the learned trial court and held that the plaintiff had been able to prove his adoption. Consequently, it was held that the plaintiff had inherited late Purna Bahadur Tamang's property making out a case not even pleaded by the plaintiff. While holding so the learned Appellate Court granted the prayers for declaring the notice of de-mutation issued by defendant no.1 as being in violation of the principles of natural justice and liable to be quashed [prayer (a)]; for declaring that the suit properties were the personal properties of the plaintiff and could not be the subject matter of de-mutation [prayer (b)]; and declaring that the defendant no.1 had no jurisdiction or cause of action to de-mutate the suit properties of the plaintiff [prayer (d)]; and a decree of permanent injunction restraining the defendant no.1 from de-mutating the suit properties till all legal process of

regularising the suit properties in the name of the plaintiff is exhausted [prayer (f)]. The records reveal that the purported notice of de-mutation was not even exhibited by the plaintiff. The learned Appellate Court granted the above declarations without even perusing the purported notice of de-mutation.

58. It was the plaintiff's case that after late Purna Bahadur Tamang and late Bhalu Tamang transferred and handed over possession of their properties to the plaintiff it was mutated in his name in the year 2005 and 2011. The plaintiff has exhibited the parcha khatiyani dated 07.07.2012 (Exhibit-5). A perusal of the parcha khatiyani (Exhibit-5) reflects various office orders dated 17.08.2011, 05.01.2012 and 10.05.2012. It pertains to plot no. 42, 43 and 44/174 of Pakshep. The plaintiff is shown as son of late Purna Bahadur Tamang. Exhibit-10 is a complaint filed by Sherab Tamang (D-2/1) and defendant no.2 dated 30.07.2014 for inquiry and cancellation of parcha khatiyani (Exhibit-5) on the ground that Sherab Tamang (D-2/1) was the legal heir of late Purna Bahadur Tamang and late Bhalu Tamang.

59. The Sikkim Record Writing and Attestation Rules, 1988 (*for short* the said rules) came into force on 09.09.1988. The said rules deal with the procedure for record writing and attestation. It also provides for hearing objections, appeals and correction of records of rights. The learned appellate court neither examined the purported notice of de-mutation which he struck down nor examined the said rules before granting the

declaration as above. Consequently, the plaintiff's prayer (a), (b), (d) and (f) cannot be granted.

60. The plaintiff failed to establish that he was the absolute owner of the suit properties. He also did not establish that he had perfected his title by way of adverse possession. He could not have taken such a contrary and conflicting stand. He cannot be granted the relief of declaration that the plaintiff is the absolute owner of suit properties and had perfected his title by way of adverse possession prayed for in prayer (c). He also cannot be granted a decree of permanent injunction restraining the defendant no.2, his agents, servants, attorney, representatives or assignees from dealing and interfering with the suit properties [prayer (g)].

61. The plaintiff sought a declaration that the defendant no.2 is not the legal heir of late Purna Bahadur Tamang and late Bhalu Tamang and had no right to inherit Schedule-A or Schedule-B properties owned by him [prayer (e)]. As it was a relief sought by the plaintiff it was incumbent upon him to lay down the foundational facts and grounds for the relief. The plaintiff did not do so. On the other hand the defendant no.2 asserted that the properties were ancestral properties. The learned Trial Court framed the issue as to whether the suit properties were ancestral properties of late Purna Bahadur Tamang and late Bhalu Tamang and put the onus upon the plaintiff to establish that. The defendant no.2 deposed that the suit properties were the

ancestral properties of late Balman Tamang and his great grandfather and grandfather of Sherab Tamang (D-2/1) and Raj Kumari Tamang (D-2/2). He deposed that late Balman Tamang had three sons, late Bhalu Tamang, late Mangal Singh Tamang and late Purna Bahadur Tamang. The ancestral properties including the suit properties were inherited by late Bhalu Tamang, late Mangal Singh Tamang and late Purna Bahadur Tamang. Late Bhalu Tamang and late Purna Bahadur Tamang died issueless. Late Mangal Singh Tamang had a son Sherab Tamang (D-2/1) and daughter Raj Kumari Tamang (D-2/2). Defendant no.2 is the son of Raj Kumari Tamang (D-2/2). He deposed that Sherab Tamang (D-2/1) and Raj Kumari Tamang (D-2/2) were the only surviving legal heirs of late Purna Bahadur Tamang and late Bhalu Tamang. The learned Appellate Court held that the defendant no.2 failed to establish that the suit properties were their ancestral properties and consequently granted prayer (e) in favour of the plaintiff. While doing so the learned Appellate Court noted that the defendant no.2 had himself admitted that late Mangal Singh Tamang, late Bhalu Tamang and late Purna Bahadur Tamang had received their respective shares from the landed properties left behind by their father late Balman Tamang. The defendant no.2 also admitted that his mother Raj Kumari Tamang (D-2/2) had received her share of land at Pakshep from his grandfather late Mangal Singh Tamang. Sherab Tamang (D-2/1) also deposed that late Mangal

Singh Tamang, his father, late Bhalu Tamang and late Purna Bahadur Tamang had inherited the landed properties of late Balman Tamang although both the defendant no.2 and Sherab Tamang (D-2/1) did not state which community they belonged to. Sherab Tamang (D-2/1) admitted that although he was a Christian, his uncles, late Bhalu Tamang and late Purna Bahadur Tamang, were Buddhist. The defendant no.2 was seeking a right of inheritance claiming that his uncle Sherab Tamang (D-2/1) and his mother Raj Kumari Tamang (D-2/2) were the legal heirs to the property of late Purna Bahadur Tamang and late Bhalu Tamang. The impugned judgment has no reference to any specific law of inheritance which was applicable. The Hindu Law of inheritance seem to have been applied without stating how it would apply to the parties. The finding of the learned Appellate Court to that extent is not sustainable.

62. It is fundamental that one who seeks relief must prove it. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side. The plaintiff led no evidence to establish that the properties were self acquired properties of late Purna Bahadur Tamang and late Bhalu Tamang. The evidence led by the defendant no.2 is equally wanting. Consequently, prayer (e) cannot also be granted in favour of the plaintiff.

63. The appeal is allowed. The impugned judgment and decree passed by the learned Appellate Court both dated 31.12.2018 are set aside. The suit is dismissed.

64. Pending interlocutory application also stands disposed.

65. The parties shall bear their respective costs.

66. A copy of this Judgment may be transmitted to the learned Trial Court, for information, along with its records.

(Bhaskar Raj Pradhan)
Judge

21.12.2021

Approved for reporting
Internet

:**Yes/No**
:**Yes/No**

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