

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

S.B: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

R.S.A. No.09 of 2019

S.T. Gyaltzen,
S/o late Lobzang Gyaltzen,
Yangyang Kothi,
P.O. Yangyang,
South Sikkim. Appellant/Plaintiff

Versus

Kalu Tamang,
S/o late Dorjee Tamang,
Kopibari, Upper Syari,
P.O. & P.S. Deorali,
East Sikkim.Respondent/Defendant No.2.

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

Appearance:

Mr. B. Sharma, Senior Advocate with Mr. D.K.
Siwakoti and Ms. Prarthana Ghataney,
Advocate for the Appellant/Plaintiff.

Mr. B. K. Gupta, Legal Aid Counsel for the
Respondent/Defendant No.2.

Date of Hearing: 06.08.2021, 07.08.2021 & 17.08.2021

Date of Judgment: 04.09.2021

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This appeal has been preferred by the plaintiff against the judgement and decree both dated 30.03.2019 passed by the learned First Appellate Court.
2. The original suit for declaration, specific performance of contract, mandatory injunction, and

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other consequential reliefs under Section 10 and 39 of the Specific Relief Act, 1963 read with Section 9 and 151 of the Code of Civil Procedure, 1908 (CPC) was filed by the appellant (the plaintiff) against three defendants including the present respondent who was defendant no.2 therein. For clarity the parties will be referred as the plaintiff and defendants. The plaintiff had prayed for:

“(a) A decree declaring that the plaintiff is the rightful owner of the land in possession of the defendants entitled to recover the same from them;

(b) A decree for specific performance of the contract dated 1.2.2011 signed on 05/02/2011 along with the undertaking dated 5/2/2011;

(c) A decree for mandatory injunction against the defendants 1, 2 and 3 directing them to demolish kutcha mud houses on plot No. 207 and shift to demarcated housing sites on plot No.222 and on their failure the plaintiff will be entitled to remove all the kutcha mud houses with the help of the court by executing the Decree that may be passed in favour of the plaintiff and against the defendant Nos. 1, 2 & 3;

(d) A decree recovery of possession of the suit land by evicting the Defendant nos. 1 to 3 therefrom;

(e) A decree for the cost of the suit and decree for any other relief or reliefs to which the plaintiff may be found entitled to under the law.”

3. It was the case of the plaintiff that he had negotiated the deal for purchase of the suit land through Kalden Bhutia (P.W.2) his constituted attorney and purchased 9.22 acres of land from one late Sonam Topgay Kazi after executing a registered sale deed dated 04.10.2010 (exhibit- P1). The plaintiff contended that he owned large area of dry field covered by plot nos. 205, 207, 208, 209, 2011, 220, 221, 222, 220/813 and 220/814 measuring 9.14 acres. The plaintiff stated that out of plot no.221 two plots measuring (60 feet x 60 feet) and (80 feet x 60 feet) were alienated in favour of his relative, Hissey Doma Yongda and his daughter, Kesang Diki Gyaltzen. The plaintiff averred that the defendants had '*kutcha*' mud houses in plot no.207 and the defendant no.2's mud house covered plinth area measuring about 40 feet x 25 feet. The total area of land that had the houses of the defendants was the suit land. The plaintiff stated that after various negotiations an amicable settlement was arrived at between the appellant and the defendants. According to the plaintiff this agreement was entered into prior to the execution of the sale deed on 04.10.2010 (exhibit-P1). It was asserted that pursuant to the agreements the plaintiff

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also paid various sums of money to various persons as enumerated in the plaint. Although the rest of the families who had entered into the agreements moved to plot no 222 owned by the plaintiff, the defendants declined to do so. Ultimately this dispute led to the filing of the suit against the defendants.

4. The defendants filed joint written statements. They disputed the plaintiff's ownership of the suit land. They asserted that the real owner of the suit land was late Sonam Topgay Kazi who was then residing in United States of America. They also asserted that the suit land did not fall in plot no.207. According to the defendants the land they were in possession of was the one donated by late Rhenock Athing Kazi, the father of late Sonam Topgay Kazi to the father of defendant no.2, late Dorjee Tamang. They averred that they had been living in the suit properties as the owners and their rights had also matured by way of adverse possession. It was further averred that the plaintiff's act of transferring the land comprising of plot no. 221 to his relative and daughter was to exclude the defendants from the said plot which they were in possession of. They asserted that plot no. 221 belonged to the defendants. It was gifted to the

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father of the defendant no.2, late Dorjee Tamang by late Rhenock Athing Kazi, father of late Sonam Topgay Kazi as far back as on 11.12.1962 by a written document. The defendants are still residing there. They stated that they were simple, illiterate, and semi-illiterate villagers. They stated that the villagers were called by the panchayat members viz. Phigu Tamang (P.W.4) and Ratan Bahadur Tamang (P.W.3) to Gangtok to sign on certain papers to obtain development benefits. It was due to this that they had signed various written as well as in blank papers under undue influence but later realized that these papers were being used against them in the suit. They asserted that the defendants never signed any agreement with the knowledge about what they were being made to sign and therefore, it was null and void. They also denied the undertakings alleged to have been executed by them.

5. The plaintiff (P.W.1) examined himself, Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi who negotiated the deal for the purchase of suit land; Ratan Bahadur Tamang (P.W.3) the then Zilla Panchayat of the area; Phigu Tamang (P.W.4) the then panchayat member of the concerned ward in Syari;

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Ashok Tamang who had attested the sale deed (exhibit-P1), the agreements (exhibit-P5), undertaking (exhibit-P6) and other documents; Utpal Yongda (P.W.5) his son-in-law; G. S. Sharma (P.W.6) the concerned amin in the District Collectorate and Babita Rai (P.W.7) the defendants advocate who was examined as plaintiff's witness. All the witnesses except G. S. Sharma (P.W.6) and Babita Rai (P.W.7) had assisted the plaintiff during negotiations and the purchase of the suit land.

6. The defendants examined themselves. Sancha Bahadur Tamang (D.W.1) was defendant no.1, Kalu Tamang (D.W.2) was defendant no.2 and Norbu Tamang (D.W.3) was defendant no.3. The defendants also examined Kalu Tamang's wife Phul Maya Tamang (D.W.4) and Ganga Maya Sharma (D.W.5). Ganga Maya Sharma (D.W.5) was an 80-year-old resident of Syari who deposed that she had seen Kalu Tamang (D.W.2) residing in the suit land since 1962 when she came from Geyzing. She also deposed about Kalu Tamang's (D.W.2) father known as '*Lama Bajey*' who had told her that he used to work as a '*chowkidar*' with late Rhenock Athing Kazi who had given him the suit land in plot no. 221 and a document to that effect.

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7. The learned Trial Court framed 8 issues and decreed the suit in favour of the plaintiff. In the judgement dated 26.08.2017 it was held that the plaintiff was entitled to recover possession of the suit land from the defendants and for specific performance of the agreement dated 01.02.2011 (exhibit-P4) and 05.02.2011 read with undertaking dated 05.02.2011 (exhibit-P6). Accordingly, a decree dated 31.08.2017 was passed.

8. The defendants were dissatisfied with the judgment and the decree passed by the learned Trial Court. They preferred Title Appeal Case No. 15 of 2017. The learned First Appellate Court by its impugned judgement and decree granted the plaintiff relief against defendant nos.1 and 3 but held that he was not entitled to any relief against defendant no.2. The plaintiff has challenged only those portions of the impugned judgement and decree that relate to defendant no.2. Consequently, this court shall examine only those findings and reliefs which the appellant is aggrieved of.

9. The learned First Appellate Court disagreed with the findings of the learned Trial Court on issue no.1 i.e. *“1) Whether plaintiff is the owner of plots of land covered*

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under plot no.205, 207, 208, 209, 211, 220, 221, 222, 220/813 and 220/814?" The learned First Appellate Court held that since Kalden Bhutia (P.W.2), the constituted attorney of late Sonam Topgay Kazi had himself admitted during cross-examination that he was told by late Sonam Topgay Kazi that he could sell the rest of the suit land except the portion which had already been given to the defendant no.2, it became clear that late Sonam Topgay Kazi had already acquiesced to the continued possession of the defendant no.2 over the portion of plot no.221 which he had been claiming was gifted to his father by late Rhenock Athing Kazi in 1962 vide exhibit-A. It was thus held that the sale of that portion of plot no. 221 cannot be held to be valid. The learned First Appellate Court therefore, modified the findings of the learned Trial Court and held that except portion of plot 221 the plaintiff could be regarded as owners of the said plots by virtue of the sale deed (exhibit-P1). To examine the correctness of the findings it is important to examine the pleadings of the contesting parties, keeping in mind that the burden to prove issue no.1 was upon the plaintiff to prove that he was in fact the owner of the said plots. Mr. B. Sharma,

learned Senior Advocate for the plaintiff submitted that the defendant had not been able to prove exhibit-A as a gift deed.

10. The plaintiff averred that in the year 2010 he was looking for a suitable land in an around Gangtok to start his hotel business when he learned about the lands owned by late Sonam Topgay Kazi who was residing abroad. The plaintiff thus contacted Kalden Bhutia (P.W.2) of Kalimpong to negotiate the deal for him as his constituted attorney. On 07.09.2010 the plaintiff along with his constituted attorney Kalden Bhutia (P.W.2), Ratan Bahadur Tamang (P.W.2) and Phigu Tamang (P.W.3) conducted physical inspection and verification of the plots of lands and found that the defendants and ten other families had '*kutcha*' mud houses scattered in different plots of lands. After negotiations an amicable solution was arrived upon to shift the persons including the defendants living in the mud houses to plot no. 222. The defendant no.2's possession and occupation of the '*kutcha*' house in plot no. 207 is admitted by the plaintiff. The plaintiff also averred that by way of the amicable settlement the

defendant no.2 had also agreed to shift to plot no.222 where he would be provided a housing site.

11. The defendant no.2's plea in the written statement, however, was that the suit land did not fall in plot no.207 but in plot no.221 which was gifted to late Dorjee Tamang, father of defendant no.2, by late Rhenock Athing Kazi father of late Sonam Topgay Kazi. To substantiate their claim the defendant also produced exhibit-B as the '*purcha khatian*' showing defendant no.2's possession of plot no. 221. This document reflects attestation of the year 1978. Mr. B. Sharma submitted that this is a manufactured document since the area is reflected in hectares whereas in fact at the relevant time it ought to have been in acres as observed by this court in ***Shri K. B. Bhandari vs. Shri Laxuman Limboo & Anr.***¹. The plaintiff, however, has failed to prove that it is in fact a manufactured document. The cross-examination of the defendant no.2 reflects the stand of the plaintiff that the defendant no.2's name was recorded in exhibit-B by mistake. Not even a suggestion was given to the defendant no.2 that he had manufactured exhibit-B. Although it is evident that the

¹ SLR (2017) SIKKIM 41

defendant is in possession of a '*kutchha*' house on a plot of land owned by late Sonam Topgay Kazi and now sold to the plaintiff there is some amount of uncertainty as to the exact number of the plot in possession of defendant no.2.

12. Kalden Bhutia (P.W.2) was the plaintiff's witness. As per his evidence-on-affidavit he was the constituted attorney of late Sonam Topgay Kazi by which he was authorised to dispose of his properties situated in the State of Sikkim. According to him he along with the plaintiff and others inspected the lands, negotiated with the occupants of the '*kutchha*' houses scattered in different plots of land including the defendants and finally an amicable settlement was entered between the plaintiff and the occupants of the '*kutchha*' houses including the defendants who were in plot no.207 to provide for housing sites on plot no.222 by way of lease deed.

13. During his cross-examination he admitted that when he was given power-of-attorney by late Sonam Topgay Kazi he had been told that he could sell the rest of the suit land except a portion which was given to defendant no.2. Mr. B.K. Gupta, learned counsel for the

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defendant no.2 laid much emphasis on this admission. He submitted that due to this admission by Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi it was clear that he was not authorised to sell the land given to the defendant no.2. Kalden Bhutia (P.W.2) however, feigned ignorance about the details of the land given to defendant no.2. He stated that the defendant no.2 had given a portion of the land below the other land. The power-of-attorney was not produced in court by the plaintiff. Although the defendants disputed that late Sonam Topgay Kazi had in fact appointed Kalden Bhutia (P.W.2) as his constituted attorney no effort was made by the defendants to seek to produce the power-of-attorney before the learned Trial Court. It is the plaintiff's case that the defendant no.2 is not in occupation of plot no.221 and some portions of it were transferred in favour of Hishey Doma Yongda and Kessang Diki Gyaltzen by the plaintiff. Due to the categorical stand of the plaintiff, he is not entitled to a declaration that he is the owner of plot no.221 and the consequential reliefs about the lands he had admittedly alienated.

14. In view of the clear admission of Kalden Bhutia (P.W.2) that he was not authorised to sell the land which was given to the defendant no.2, it is important to examine whether it was him who had sold the land to the plaintiff in clear violation of the restricted authority given by the principal. It is pleaded in the plaint that it was the plaintiff who had purchased the land from late Sonam Topgay Kazi. According to the plaintiff, before the execution of the sale deed dated 04.10.2010 (exhibit-P1) an amicable solution was found on 07.09.2010 between the plaintiff and the occupants of the mud houses including the defendants. The agreement entered thereafter, dated 01.02.2011 (exhibit-P4) between the plaintiff and defendant no.2 is a lease agreement which states that the plaintiff had purchased 9 acres and 22 decimals of land from late Sonam Topgay Kazi. This agreement is the agreement which the plaintiff seeks specific performance of along with the undertaking dated 05.02.2011 (exhibit-P6) signed by the defendant no.2 as well. This agreement (exhibit-P4) has been produced by the plaintiff. The defendant no.2 put up a case that he was simple and illiterate and so he was cheated into signing it. The

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recital in the agreement reflects that late Dorjee Tamang worked as a domestic help at the residence of late Rhenock Athing Kazi. Late Rhenock Athing Kazi had arranged the marriage between late Dorjee Tamang and late Chumkit Lepcha. He had also handed over a plot of land to them for their day to day living on “*Kut*”. Late Dorjee Tamang and late Chumkit Lepcha settled there and survived on the income from small scale farming and by cattle grazing. They had resided in the said land during the lifetime of late Rhenock Athing Kazi and after his demise at ‘*Kopi bari*’ as a tenant of late Sonam Topgay Kazi which had been later purchased by the plaintiff. The recital in the agreement as well as the evidence led by the parties makes it clear that the defendant no.2 is not an alien to the suit land. It is also clear that not only the defendant no.2 but his late father was also living in the suit lands. Admittedly, the suit land in which the defendant no.2 has a ‘*kutcha*’ house is in possession of the defendant no.2 till date. The admission by Kalden Bhutia (P.W.2) the constituted attorney holder of late Sonam Topgay Kazi that he had authorized him to sell his land except that which had been given to the defendant no.2 gains significance.

This admission is unequivocally made by the plaintiff's own witness and therefore, is binding upon him and must be accepted.

15. The plaintiff in his evidence-on-affidavit deposed that he had executed the sale deed (exhibit-P1) between the constituted attorney Kalden Bhutia (P.W.2) and himself on 04.10.2010 which was registered on 02.12.2010. Thus, clearly it was the constituted attorney who had executed the sale deed (exhibit-P1) on behalf of late Sonam Topgay Kazi for the various plots including the plot which was in the possession of the defendant no.2. The act of Kalden Bhutia (P.W.2) to sell the land which was in possession of the defendant no.2 was in clear violation of the authority given to him by late Sonam Topgay Kazi, the principal. A holder of a power-of-attorney cannot go beyond the principal. A constituted attorney can do all that he has been authorized to do and consequently cannot do what he has been specifically debarred from doing. Thus, it is held that the sale of the portion of land which was in possession of the defendant no.2 purportedly owned by Sonam Topgay Kazi by Kalden Bhutia (P.W.2) his

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constituted attorney was unauthorized and therefore, null and void.

16. The issue no.6 was whether the defendants have become the owners of plot no. 221 measuring 0.3400 hectares in view of it being gifted by Rhenock Athing Kazi. The learned Trial Court held this issue against the defendants. Exhibit-A and exhibit-B were the two important documents exhibited by the defendants for this purpose. The exhibition of these documents was objected to by the plaintiff. Exhibit-B has been dealt with hereinabove. Exhibit-B is a 'purcha', a record of rights. It reflects that the owner of the land bearing plot no.221 in the year 1978 was late Sonam Topgay Kazi son of late Rhenock Athing Kazi. In the remarks column there is an entry that late Dorjee Tamang was in occupation of the said plot for past 20 years. The document was exhibited in the original and therefore constitutes primary evidence. The learned First Appellate Court examined exhibit-A as well. He found it to be not clearly legible but still readable. On reading the same he noticed that the document was signed by late Sonam Topgay Kazi and not late Rhenock Athing Kazi as pleaded in the plaint. He opined that there was

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possibility that the initials of late Sonam Topgay Kazi appeared in exhibit-A since plot no 221 was then recorded in his name. He also opined that as exhibit-A was not a registered document and it could not be accepted as a valid gift deed although titled as "*icha patra*". The learned First Appellate Court however, opined that nevertheless it would still have legal force and would amount to an irrevocable license in favour of late Dorjee Tamang. The learned First Appellate Court was of the view that the nomenclature given by the parties to a transaction or document is not decisive and the true intent and purport of a transaction or document must be gathered from the terms therein based on credible and admissible evidence. It was held that no form or consideration was required for such a license which was based on principles of justice, equity and good conscience and codified by the Easements Act, 1882. It was further held that Revenue Order no. 1 of 1970 would have no restriction in late Rhenock Athing Kazi gifting or granting license in favour of late Dorjee Tamang. Issue no.6 therefore, was decided in favour of the defendant no.2 by the learned First Appellate Court.

17. Mr. B. Sharma submitted that exhibit-A was an unreadable, unregistered, and unproved document.

18. The burden to prove issue no.6 was upon the defendants. The learned Trial Court held that the defendants had not become the owners of plot no.221 by virtue of exhibit-A. The defendants in their joint written statement had pleaded that plot no.221 belonged to them as it was gifted to the father of defendant no.2, late Dorjee Tamang by late Rhenock Athing Kazi, father of late Sonam Topgay Kazi on 11.12.1962 by a written document. The stand of the defendant no.2 in his written statement was clear. The defendant no.2 also entered the witness box. In his evidence-on-affidavit, he once again reiterated the aforesaid fact. He did not take any alternative plea save the plea of adverse possession which is admittedly not sustainable in view of his plea of ownership.

19. The law is well settled that the court cannot make out a case which was not even pleaded. It is quite evident that the learned First Appellate Court has travelled beyond the pleadings and on its conjectures and surmises and held exhibit-A to be an irrevocable

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license even if it was not a gift deed when exhibit-A was exhibited by the defendants as a gift deed.

20. Notification No.385/G dated 11.04.1928 as amended by Notification No.2947/G dated 22.11.1946 provides that *“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 50 times the usual registration fee.”*

Exhibit-A was exhibited by the defendants as a gift deed in favour of defendant no.2 by late Rhenock Athing Kazi. In that view of the matter, it was a document produced by the defendants as a title deed to prove their title to plot no.221. It was clearly thus a document which ought to have been registered as the aforesaid notification clearly lays down that such a document will not be considered valid unless it is duly registered. The learned First Appellate Court has held that it is not a registered document and not a valid gift deed. That finding is correct. If it was so, there was a prohibition, in view of the aforesaid notifications, for exhibit-A to be admitted in court *“to prove title or other matters contained in the document.”* The learned First Appellate

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Court, however, went on to examine exhibit-A with great difficulty, and held that it reflects that late Dorjee Tamang, father of defendant no.2, had been granted some land. This was clearly not permissible. The learned First Appellate Court came to such conclusion on reading the purported translation of the illegible exhibit-A. Even if one were to examine the purported translation filed by the defendants, although clearly barred, it reflects that exhibit-A purported to be a gift deed and not an irrevocable license. Furthermore, exhibit-A purports to be scribed by late Sonam Topgay Kazi and not by late Rhenock Athing Kazi as pleaded in the written statement. The learned First Appellate Court faltered again by surmising facts, reading beyond the document itself and guessing why signature of late Sonam Topgay Kazi appears thereon. Exhibit-A was not proved by defendants as required under the law. The exhibition of this document was objected to by the plaintiff. Neither the handwriting nor the signature thereof was proved by the defendants. As held by the Supreme Court in ***Life Insurance Corporation of India vs. Ram Pal Singh Bisen***² mere admission of a

² (2010) 4 SCC 491

document in evidence does not amount to its proof. In other words, mere marking of an exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Thus, the finding arrived at by the learned First Appellate Court that exhibit-A was an irrevocable license is clearly unsustainable. Neither exhibit-A nor exhibit-B supports the contention that the defendant no.2 was the owner of plot no. 221. It is thus held that the defendant has not been able to prove that plot no.221 was gifted to late Dorjee Tamang by late Rhenock Athing Kazi.

21. The learned First Appellate Court then took issue no.2 for consideration. Issue no.2 was whether the defendants have agreed to shift to plot no. 222 from plot no. 207 vide agreement dated 01.02.2011 (exhibit-P4) and whether they had agreed to vacate suit land by an undertaking dated 05.02.2011 (exhibit-P6). The burden to prove this issue was upon the plaintiff. The issue had been decided in favour of the plaintiff by the learned Trial Court. The learned First Appellate Court examined the evidence and held that the defendants had in fact signed the agreement dated 01.02.2011 (exhibit-P4) as well as the undertaking (exhibit-P6). It was noted that

the defendant no.2 had admitted that he had executed the agreement with a stipulation that he would shift to plot no.222 and endorse his signature thereon. It was noted that the defendant no.2 had admitted his signature on the undertaking (exhibit-P6). It was noted that the defendant no.2 had admitted having accepted and taken money from the appellant and that he had repaired his house with the money. It was noted that Phul Maya Tamang (D.W.4) wife of the defendant no.2 had also admitted that they were paid Rs.10,000/- by the appellant for shifting. The learned First Appellate Court therefore, concluded that the defendants had in fact signed the agreement (exhibit-P4) and undertaking (exhibit-P6) agreeing to shift to plot no.222. The learned Trial Court findings were upheld. However, in view of its findings on issue nos.1 and 6 it was held that the appellant could not stand to gain anything considering the specific admission by the constituted attorney (P.W.2) that late Sonam Topgay Kazi had directed him not to sell the portion of the land in possession of the defendant no.2.

22. The agreement (exhibit-P4) dated 01.02.2011 is under the signature of the plaintiff as the lessor and the

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defendant no.2 as the lessee. The authority of the plaintiff to sign the agreement as the lessor is derived from the sale deed dated 04.10.2010 (exhibit-P1). As this court has held that the Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi did not have the authority to execute the sale deed dated 04.10.2010 (exhibit-P1) with respect to the land which was in possession of the defendant no.2 and the sale to that extent in favour of the plaintiff was null and void, necessarily the plaintiff did not have the authority to execute the agreement dated 01.02.2011 (exhibit-P4) as the owner of the said portion. The subsequently signed undertaking dated 05.02.2011 (exhibit-P6) by the defendants would also lose significance in view of the findings on the admission made by Kalden Bhutia (P.W.2) on the agreement dated 01.02.2011 (exhibit-P4).

23. The relief under the Specific Relief Act, 1963 is a discretionary relief. In view of the clear admission made by the plaintiff's own witness Kalden Bhutia (P.W.2) as the constituted attorney of late Sonam Topgay Kazi the seller that he was not authorised to sell the portion of land given to the defendant no.2, this relief cannot be granted in favour of the plaintiff. Consequently, the

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declaration sought by the plaintiff that he was the rightful owner of land in possession of the defendant no.2 and entitled to recover the same from him cannot be granted; the relief of specific performance of the agreement dated 01.02.2011 (exhibit-P4) and undertaking dated 05.02.2011 (exhibit-P6) also cannot be granted; The decree for mandatory injunction against the defendant no.2 directing him to demolish the 'kutchra' house and shift to plot no.222 cannot also be granted; and the decree for recovery of possession of the portion of the suit land in occupation and possession of the defendant no.2 cannot also be granted to the plaintiff. It is accordingly so ordered.

24. While thus agreeing with the conclusion arrived at by the learned First Appellate Court viz-a-viz the defendant no.2, this court is unable to agree with some of the findings. The judgment of the learned First Appellate Court accordingly stands modified to the above extent. The appeal is dismissed and disposed of accordingly. In the circumstances, no order as to costs.

(Bhaskar Raj Pradhan)
Judge

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