HIGH COURT OF SIKKIM
GANGTOK.

Regular Second Appeal against the Judgment dated 30/07/2005 and Decree dated 16/08/2005 passed by the Ld.Districst Judge,(South & West) Namchi in First Title Appeal No.01/2005.

Regular Second Appeal No.02 of 2005

Chewang Dorjee Lama.
R/O Shyari,
P.O.& P & S. Gangtok,
East Sikkim. ..... Appellant.

Versus

Lerap Dorjee Bhutia & Ors,
S/O Late Tempo Bhutia,
R/O Namchi Bazar,
P.O.& P.S.Namchi
South Sikkim. ....Respondents.

" DECREE IN SECOND APPEAL "

This Appeal coming up for final hearing on 21st day of April,2006 before the Hon'ble Justice A.P.Subba, Judge of this Court in presence of Shri K.T.Bhutia, learned Counsel assisted by Ms.Bandana Pradhan, learned Counsel for the Appellant, Mr.A.Moulik, learned Senior Counsel assisted by Mr N.G.Sherpa counsel for respondents Nos.1 to 4.

On hearing, the appeal is allowed and the Judgment dated 30/07/2005 and Decree dated 16/08/2005 of the 1ST Appellate Court is set aside, thus affirming the Judgment and Decree dated 22/02/2005 of the trial Court.

COST OF APPEAL

Appellant	Amount	Respondents	Amount
Court fees	2400.00	Stamp for power	2
Stamp for memo of appeal	10.00	Stamp for petition	12
Stamp for power	02.00	Pleaders fee	N/A.
Stamp for petition	1		
Pleaders fee	N/A		
Cost	--		

Given under my hand and seal of the Court on this the 2nd day of June, 2006 at Gangtok.

Prepared by:-

(KUNZANG CHODEN)
DEPUTY REGISTRAR
HIGH COURT OF SIKKIM
GANGTOK.

(S.W.LEPCHA)
REGISTRAR GENERAL
HIGH COURT OF SIKKIM
GANGTOK.

F A.

7/6/06.

IN THE HIGH COURT OF SIKKIM

Regular Second Appeal No. 2 of 2005

Chewang Dorjee Lama,
Resident of Shyari,
P.O. & P. S. Gangtok,
East Sikkim. ... ***Appellant***

Versus

1. Lerap Dorjee Bhutia,
S/O Late Tempo Bhutia,
R/O Namchi Bazar,
P.O & P.S. Namchi,
South Sikkim.

2. Sachitanand Thakur,
S/O Shri Ramsurat Thakur,
R/O Namchi Bazar,
P.O.& P.S. Namchi,
South Sikkim.

3. Anil Thakur,
S/O Late Jagar Thakur,
R/O Namchi Bazar,
P.O.& P.S. Namchi,
South Sikkim.

4. Jawahar Prasad,
R/O Namchi Bazar,
P.O.& P.S. Namchi,
South Sikkim. ... ***Respondents***

5. M. K. Rai @ Panchabir Rai
@ Tinzir , Tinzir Busty,
P.O. & P.S. Namchi,
South Sikkim.
... ***Proforma Respondent.***

For the Appellant : Mr. K. T. Bhutia, learned Counsel assisted by Miss Neeru Sharma, learned Counsel.

For the Respondents 1 to 4 : Mr. A. Moulik, learned Senior Counsel assisted by Mr. N. G. Sherpa, learned Counsel.

Present : The Hon'ble Shri Justice A. P. Subba, Judge.

Date of Judgment : 02.06.2006

JUDGMENT

A. P. Subba,J.

Plaintiff in Civil Suit No.2 of 2004 is the Appellant in this Second Appeal, which is directed against the Judgment dated 30.7.2005 and Decree dated 16.8.2005, passed by the learned District Judge, (South and West) at Namchi, in First Title Appeal No.1 of 2005 reversing the Judgment and Decree dated 22.2.2005 passed by the Senior Civil Judge, South Sikkim at Namchi in the above Civil Suit. The facts giving rise to the dispute between the parties, may briefly be stated as follows: -

2. The Appellant inherited landed properties covered by plot numbers 230, 231, 232 and 408 situated at Namchi Bazar, South Sikkim, on the demise of his late father Shri Tonyot Lama. Having joined service under the Government of Sikkim in the year 1954, the Appellant was always on the move on account of transfers and postings to different stations. For this reason and also for the reason that he had settled down in Gangtok, East Sikkim, during the service period, the above land inherited by him at Namchi was left under the care and enjoyment of his only sister, Late Pempa Doma Bhutia and her late husband Tempo Bhutia. Since the said Tempo Bhutia lived as 'gharjuwai', he and his wife late Pempa Doma Bhutia lived with Late Doma Bhutia, the mother of the Plaintiff/Appellant at Namchi in the wooden house built on

plot No.231. In the year 1988, when the Appellant happened to be at Namchi for a brief period, on transfer to that place, the Respondent No.1 who is his nephew, being the son of his late sister Pempa Doma Bhutia, approached him for selling him the piece of land covered by plot No.231 on which a wooden house was constructed and in which they were living. Conceding to the request, the Appellant sold the said piece of land covered by plot number 231 along with the wooden house standing thereon to the Respondent No.1 by registered sale deed dated 2.11.1988. At the relevant time, it came to the notice of the Appellant that the Respondent No.1 had also raised some kutcha sheds beyond five feet of the piece of land sold to him. On objection being raised by the Appellant, the Respondent No.1 dismantled the structure in the year 1991.

In the year 2000, the Appellant came to know that the Government was acquiring some land for various developmental projects at Namchi and compensation was being paid for the same. Since the Appellant had land at Namchi, he made enquiries, and in course of such enquiry, he obtained certified copy of the sale deed and khatiyan parcha from the Office of the District Collector, South Sikkim, in respect of the land belonging to him. From these documents, it transpired that plot numbers 230 and 232 which were retained by the Appellant while selling away plot number 231 to Respondent No.1 in the year 1988, were also included fraudulently in the sale deed dated 2.11.1988, besides plot number 231 and after having done this, portion of plot No.230 was also sold to

Respondent Nos. 2 to 4. The Appellant also came to know that the Respondent No.1 had, by misrepresenting himself as the true owner, also received compensation paid by the Government in respect of the Appellant's land so required. On coming to know of all this, the Plaintiff/Appellant in the year 2004 filed a Civil Suit being Title Suit No.2 of 2004 in the Court of the Civil Judge, (South and West) at Namchi against the Respondent No.1 and four others for declaration, possession, injunction and other consequential reliefs in respect of the plot numbers 230 and 232 situated at Namchi Bazar, South Sikkim.

3. In the said suit, all the Respondents filed written statements. The Respondent No.1 in his separate written statement contended that the Appellant had sold Schedule 'B' land (i.e., plot Nos.230 and 232), and plot No.231 along with the house in the plot No.231 vide, sale deed dated 02.11.1988 and had not only admitted the registration of the schedule land in the year 1988, but had also conceded that small portion of land which was missed out earlier was also included in the name of the Defendant. It was accordingly contended that the Respondent No.1 had acquired right, title and interest over the schedule property by virtue of registered sale deed and the Appellant's own endorsement dated 10.8.1995. It was further contended that the suit of the Plaintiff/Appellant was also barred by principles of adverse possession.

4. The Respondent Nos. 2 to 4 in their joint written statements denied that they had purchased the land from the

Respondent No.1. They only claimed to be the tenants in occupation of the properties of the Respondent No.1 on rent. They however contended that the suit was barred by the law of limitation, non-joinder, mis-joinder of the parties, principles of waiver, estoppel and acquiescence.

5. In his separate written statement, the Respondent No.5 stated that he had extended his assistance as sought for by the parties for effecting registration of an old wooden house standing in the Appellant's land in favour of the Respondent No.1, on condition that the Respondent No.1 would break down the kutcha structure adjoining the house. He however denied any knowledge about the rest of the property in dispute.

6. On the basis of the above pleadings of the parties, the learned trial Court framed the following issues:-

(I) Whether the plaintiff is absolute owner of schedule 'A' property covered by plot Nos.230, 231 and 232 of Namchi Revenue Block?

(II) Whether the plaintiff sold only 0plot No.231 with a house thereon to defendant No.1 vide sale deed dated 02.11.88?

(III) Whether the defendant No.1 fraudulently and surreptitiously inserted plot Nos.230 and 232 in the sale deed dated 02.11.88?

(IV) Whether the defendant No.1 sold a portion of plot No.230 to defendant Nos. 2 to 4 if so, whether the transaction is valid or the defendants are in possession as tenants?

(V) Whether the plaintiff is entitled to declaration for recovery of compensation paid to defendant No.1 by UD&HD for acquisition of portion of plot No.230?

(VI) Whether the plaintiff is entitled to recovery of possession of plot No.232 and portion of plot No.230 as described in schedule 'B' of the plaint?

(VII) Whether the defendant No.1 had acquired actual physical possession with right and title of suit property described in schedule 'B' land ever since the execution of sale deed dated 02.11.1988?

(VIII) Whether the defendant No.1 perfected right, title over the schedule 'B' property by adverse possession?

(IX) Whether the plaintiff is entitled to relief claimed for?

7. On consideration of the materials on record, and on hearing the parties, the learned trial Court decreed the suit of the Plaintiff vide, Judgment and Decree dated 22.2.2005. On appeal being filed by the Respondent No.1 in the Court of the learned District Judge, (South and West) at Namchi, the learned District Judge set aside the Judgment and Decree passed by the learned Civil Judge.

8. Aggrieved by the above Judgment and Decree passed by the First Appellate Court, the Plaintiff/Appellant has come up in the present Appeal.

9. At the time of admission of the Appeal, the following substantial questions of law were framed: -

1. Whether the findings given by the first appellate court on the basis of the conclusions arrived at, are based on misreading of the evidence on record and thus perverse?

2. Whether the first appellate court placed the burden of proof wrongly on the appellant on any of the issues while deciding the appeal.

10. Mr. K. T. Bhutia, learned Counsel assisted by Miss Neeru Sharma, learned Counsel appearing on behalf of the Appellant and Mr. A. Moulik, learned Senior Counsel assisted by Mr. N. G. Sherpa, learned Counsel appearing on behalf of the Respondent Nos. 1 to 4, were heard.

11. On the substantial question of law at Sl.No.1 above, Mr. K. T. Bhutia, learned Counsel submitted that, while the findings recorded by the learned trial Court were based on proper appreciation of evidence on record, it was not so in the case of the Judgment of the first Appellate Court. According to him, the impugned judgment does not display conscious application of mind and the findings recorded by it being based on misreading of evidence on record, were perverse and liable to be set aside. Mr. A. Mouilk, learned Senior Counsel, on the other hand, submitted that the Plaintiff/Appellant was not entitled to any of the relief's, as the evidence adduced by him was insufficient to discharge the burden of proof, which lay on him, and to establish the case. It was, therefore, his submission that the Plaintiff/Appellant cannot be allowed to succeed on the weakness of the defendant's case, and as such, the Appeal was liable to be dismissed.

12. In support of the submission that the learned first Appellate Court misread the evidence, Mr. K. T. Bhutia, learned Counsel, drew the attention of this Court to the Parcha Khatian marked Ext.P1, the survey map (Ext.P2), the sale deed dated 2.11.1988 marked Ext.P3, and another Parcha Khatian produced by the Defendant marked Ext.B and contended that, these were

the documents which were misread by the learned second Appellate Court in arriving at the conclusions which are impugned.

13. In order to appreciate the above submission of the learned Counsel, it is desirable to refer to the above documents and also to reproduce the relevant part for convenience of reference, as follows: -

The Parcha Khatian Ext.P1, shows the plot numbers along with area as standing in the name of Chewang Dorjee Bhutia, the Plaintiff/Appellant as follows:-

Plot Numbers	**Hectare**
230	**.1380**
231	**.0140**
232	**.0280**
408	**.0975**

The map (Ext.P2) goes to show that plot numbers 231, 232 and 230 comprise of a compact piece of land, surrounded by the following boundaries: -

East .... Dry field of Nak Tshering Lepcha
West.... Dry field of Tshering Lhamu
North .... Dry field of Bikden
South .... Dry field of Ongdup

The sale deed Ext.P3 contains the following relevant particulars : -

Name of seller – Shri Chewang Dorjee Bhutia

Name of purchaser – Shri Lerap Dorjee Bhutia

Description of property under sale together with its boundary - An old wooden house along with the kitchen

BOUNDARY:-

East ..... Dry field of Nak Tshering Lepcha & Self
West ..... Self
North .... Self
South ... Dry field of Rinchen Bhutia
Khatian Plot No./Nos ... 231, 230, 232. Area ..... 0.0530 Hects.

The other Parcha Khatian (Ext.B) produced by the Defendant shows the following :-

Plot Numbers	Hectare
231	.0140
230/546	.0260
232/547	.0130

14. Having thus noticed the contents and particulars of the above documents, we may now see the extent of reliance placed on these documents by the Courts below, in support of the conclusions. Taking note of the particulars mentioned in the above sale deed, the two Parcha Khatians, as well as the survey map, with particular reference to the boundaries mentioned therein, the learned trial Court in paragraph 25 of the Judgment observed as follows: -

> **"25: ..... Therefore, logically from perusal of Exhibits-2 and 3 and after considering the oral evidence on record it is clearly found that at the time of execution of Exhibit-P-3 plot Nos.230 and 232 were perhaps not included....."**

15. The facts and circumstances on which the learned trial Court placed its reliance, in order to come to the view expressed above, as already noticed, are the boundaries and the description of the property given in the sale deed Ext.P3, more particularly the description **"An old wooden house along with**

kitchen." Also taken note of along with above circumstances is, the evidence of Diki Namgyal (PW2), that the old house along with the kitchen stands on plot No.231.

16. Regarding the boundary of the land and the evidence on record, the learned trial Court observed as follows: -

> **" Another interesting factor which appears in Ext.P3 is the description of the property under sale with its boundaries. It is simply described as "an old wooden house along with kitchen." Nowhere does the description state that it includes any other property apart from "an old wooden house and the kitchen" which as per the evidence is only plot No.231. The description of the plot No.230 and 232 is nowhere in evidence in Exhibit-P-3. Next is the boundary of allegedly sold plot Nos. 231, 230 and 232 measuring 0.0530 hectors. The boundary is indicated as follows: -**
>
> **East - D.F. of Nak Tshering Lepcha and self,**
> **West - Self,**
> **North - Self,**
> **South - D.F. of Rinchin Bhutia.**
>
> **Therefore, what appears from Exhibit-3 is that plot Nos.231, 230 and 232 should have a dry field belonging to Nak Tshering Lepcha and plaintiff on the East, property of plaintiff in the West and North and the dry field of one Rinchen Bhutia in the South. When this is so compared to Exhibit-P-2 which is a certified copy of the map of showing the landed property of the plaintiff from the 1979-80 survey it is found that plot Nos.230, 231 and 232 have the following boundaries: -**
>
> **East - Land of Nak Tshering,**
> **West - Land of Lalay and Tshering Lama,**
> **North - Land of Biden and**
> **South - Land of Ongdup.**
>
> **Therefore, clearly the boundary of plot Nos.230, 231 and 232 taken together nowhere corresponds to the boundary as indicated in**

> **Exhibit-P-3. If indeed all three plot Nos. were sold vide Exhibit-P-3 then the boundaries on the west, North and South ought not to be reflected as that of plaintiff and Rinchen Doma. ....."**

17. Thus, taking note of the above circumstances and the evidence on record, the learned trial Court while deciding issue Nos.2 and 3, came to the conclusion, that the Plaintiff sold only plot No.231 with the house standing thereon to Defendant No.1 vide, sale deed dated 2.11.1988 and that the Defendant No.1 fraudulently and surreptitiously inserted plot Nos. 230 and 232 in the sale deed dated 2.11.1988.

18. The learned first Appellate Court, on the other hand, while taking a different view on the above materials on record, firstly, took note of the area of the land, secondly, it took note of the boundaries of the land and thirdly, it took note of the conduct of the Plaintiff/Appellant, and on consideration of all these, came to the conclusion that the Plaintiff had not been able to prove his case by clear and cogent evidence. The relevant observation, which occurs in paragraph 20 of the impugned judgment, is as follows: -

> **"..... Therefore I have not been able to comprehend myself with the findings of the learned trial Court. I find that the plaintiff has not been able to prove his case by clear and cogent evidence with regard to the facts pleaded in the plaint. ....."**

19. The reason given by the learned Appellate Court in support of the above conclusions, may be found in paragraph 12 of the impugned Judgment. It has been observed therein that, the area mentioned in the sale deed Ext.P3, is 0.0530 hectares,

whereas, plot No.231 mentioned in Parcha Khatian, Ext.P1 filed by the Plaintiff, measures only .0140 hectares and not 0.0530 hectares. However, as per another Khatian Parcha marked 'B' filed by the Defendant No.1, the total area of the three plots of land i.e. plot Nos.230, 231 and 232 is 0.0530 hectares, as mentioned in the sale deed, and accordingly came to the conclusion that the measurement of the three plots of land given in Khatian Parcha Ext.B exactly corresponds with the measurement given in the sale deed.

20. As regards boundaries, the learned first Appellate Court observed as follows: -

> **"Secondly, with respect to the boundaries also the plaintiff has similar problem. If he relied upon the map exhibit-2 filed by the plaintiff himself then the four boundaries of plot number 231 would be :-**
>
> **East : Land of seller,**
> **West : Land of seller,**
> **North : Land of seller and**
> **South : Land of seller.**
>
> **But if he contends that the correct boundaries of plot number 231 is as per the sale deed exhibit-3 then the same would be : -**
>
> **East : Dry field of Nak Tshering and self,**
> **West: Land of self,**
> **North : Land of self,**
> **South : Dry field of Rinchen Bhutia.**

21. The learned Appellate Court has then observed as follows :-

> **"Here the plaintiff has not been able to explain as to how and why the four boundaries mentioned in exhibit-3 do not tally with the boundaries shown in the map exhibit-2.**

Neither the plaintiff could say that the four boundaries in the said sale deed exhibit-3 were false or fabricated nor the plaintiff could offer any explanation about the discrepancies with regard to the boundaries found in the two documents."

22. The above conclusions of the learned Appellate Court have been assailed by the learned Counsel for the Appellant, on the ground that the reasoning given, is based on a total misreading of the evidence on record. It is his specific submission, that the case of the Respondent No.1 being that he purchased plot Nos. 230, 231 and 232, the total area of the land purchased by him would come to .1800 hectares and not 0.0530 hectares as held by the learned Appellate Court. It is his further contention that the plot numbers mentioned in the Khatian Parcha Ext.B, submitted by Respondent No.1, which the learned Appellate Court so heavily relied on, do not tally with the plot numbers mentioned in the sale deed Ext.P3 and similarly the measurement of the land also do not tally with each other.

23. The above submission made by the learned Counsel, appears to be well supported by the document and other materials on record. A perusal of the Parcha Khatian Ext.P1 (submitted by the Plaintiff/Appellant), shows that the plot Nos. 230, 231 and 232 which are recorded in the name of the Plaintiff/Appellant, measures .1800 hectares in total and not 0.0530 hectares as mentioned in the Sale Deel Exbt. P3). The measurement, 0.0530 of course, corresponds with the measurement of the three plot numbers, namely, plot Nos. 231, 230/546 and 232/547 given in the Parcha

Khatian (Ext.B), submitted by the Defendant/Respondent No.1. However, one cannot loose sight of the fact that the plot numbers mentioned in this Parcha Khatian (Ext.B), are different from the plot numbers mentioned in the sale deed Ext.P3, as well as in Parcha Khatian Ext.P1, with which we are concerned. Out of the three plot numbers which find mention in the Parcha Khatian (Ext B), only plot No.231 corresponds with the corresponding plot number mentioned, while the other two plot Nos.230/546 and plot No.232/547 do not correspond with plot Nos.230 and 232. Therefore, even though the plot No.231 is identical, the other two plot Nos.230/546 and 232/547 not being plain plot Nos.230 and 232, go to suggest that these two numbers do not indicate and represent the plot Nos.230 and 232 in their original shape and it accordingly follows that the area of land falling within these plot numbers cannot be the whole area falling within the original plot Nos.230 and 232. It is, therefore, evident that the conclusion of the learned Appellate Court, that since the total measurement of the land covered by the three plots of land mentioned in Parcha Khatian Ext.B comes to 0.0530 hectares and corresponds to the area mentioned in the sale deed (Ext.P3), the land sold must be area of the land covered by the plot numbers mentioned in the sale deed, would be contrary to the contents of the document on record. No reason has been given as to why and how the plot Nos.230 and 232, which find place in Parcha Khatiyan (Ext.P1) and sale deed (Ext.P3) both submitted by the Plaintiff/Appellant and the plot Nos.230/546 and 232/547 which find mention in Parcha Khatiyan

(Ext.B) (submitted by the Defendant/Respondent) can be taken as identical and as containing same areas of land.

24. No doubt, the area of plot No.231 as per Khatian Parcha Ext.P1, does not also correspond with the total area of the land mentioned in the sale deed (Ext.P3), but to say that for this reason alone, the area mentioned in Parcha Khatian (Ext.B) should be the one mentioned in the sale deed (Ext.P3), would not be in consonance with the materials on record. It is a well-settled rule of interpretation that, where there is conflict between boundaries and area, the boundary shall prevail over the area. Reference in this regard may be made to the decision of Madras High Court in ***Subbaya Chakkiliyan v. M. Muthia Goundan AIR 1924 Madras 493*** where it has been held *that*

> **".....Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements..." (emphasis added).**

Similarly in ***T. Rajlu Naidu v. M.E.R.Malak AIR (1939) Nagpur 197*** it has been held as follows: -

> **"In case of a discrepancy between dimensions and boundaries the area specified within the boundaries will pass, whether it be less or more than the quantity specified." (emphasis added).**

From the above, it becomes clear that the well-established rule of interpretation is that, the boundary must prevail

over area in case of conflict between dimension and boundaries. Therefore, in order to ascertain the correct position, it would not be enough to consider only the plot numbers and its area. The boundary must also be taken into consideration. It would thus be necessary to make a reference to the description of the boundary mentioned in the related documents, for coming to a reasonably correct conclusion on the issue.

25. The boundaries of plot Nos. 230, 231 and 232 mentioned in the sale deed, (Ext.P3), in the Parcha Khatian (Ext.1) and another Parcha Khatiyan (Ext.B), and the survey map (Ext. P2) have already been highlighted above. From what has been highlighted, it may be noted that the boundaries mentioned in the sale deed (Ext.P3) corresponds with the boundary of plot No.231 mentioned in the survey map (Ext.P2) on all sides, except in the south. The boundaries thus mentioned being land of the seller in the east, west and north go to indicate that the land sold by the owner was only portion of the whole land under his ownership. In other words, the owner did not part with the whole land owned by him. Otherwise, there would have been no occasion to mention the boundary in the east, west and north as the land of the seller.

26. The only boundary that does not tally, is the boundary mentioned in the south. It is thus a case of the boundaries described being partly correct and partly incorrect. It is well settled rule of interpretation, as remarked in Taylor on Evidence, that when the description of a plot of land is partly correct and partly incorrect, and the description which is partly correct is sufficient to identify the

subject matter intended to be conveyed under the instrument, the incorrect part will be rejected on the maxim ***falso demonstratio non nocet*** which means that a false description does not vitiate the document. Quoting the above rule from Taylor on Evidence, the then Sind Judicial Commissioner's Court in ***Naraiandas and Others vs. Tekchand and Others (AIR 1923 Sind 42)*** has observed that

> **"When a description is partly correct and partly incorrect and the former part is sufficient to identify the subject matter intended while the latter does not apply to any subject, the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself."**

Similarly, the Calcutta High Court in ***Bhola Nath Chattopdhyay v. Mrityunjoy Chattopdhyay (AIR 1934 Calcutta 851)*** has held that

> **"Where the boundaries are vague and indefinte the area should prevail but <u>where the boundaries are specified and definite, the land that is conveyed must be the land within those specified boundaries and the area must be taken as having been given approximately</u>. The recitals about area in the body of the document cannot be read as divorced from what is stated in the boundaries."** (*emphasis added).*

To the same effect is the law laid down by the Privy Council in ***P.K.A.B. Co.op. Society v. Govt. of Palestine reported in AIR (35) 1948 PC 207***. It was held as follows: -

> **"In construing a grant of land <u>a description by fixed boundaries is to be preferred to a conflicting description by area</u>. The statement as to area is to be rejected as *falsa demonstratio*."** *(emphasis added).*

Therefore, the principle that emerges from the decisions cited above, is that, in case of a conflict between dimension and boundaries of a given land in dispute, it is the boundary which prevails and where the boundary described is partly correct and partly incorrect, the incorrect part of the description may be ignored, and if what remains after rejecting the erroneous part is sufficient to identify the thing and enable the Court to ascertain with legal certainty the property to which the instrument really applies, then the instrument would be allowed to take effect. Applying this principle to the case in hand, we find that the boundaries mentioned in the east, north and west are sufficient to identify the area of the land sold. These areas, unmistakably indicate that the area of land sold is bounded on the eastern, western and northern sides with the land of the seller. This clearly further indicates that the Plaintiff/Appellant has not parted with all the land owned by him in the area where the sold land is located.

27. At the hearing, Mr. Moulik attempted to explain away the discrepancy in the boundaries saying that, the sale deed Ext.P3 and the Parcha Khatian (Ext.P1) both show that the total area of land purchased by the Defendant/Respondent is .0530 hectare and not the entire land covered by plot Nos.230, 231 and 232 measuring .1800 hectare. Referring to and relying on the other Parcha Khatian (Ext.B) submitted by the Defendant, he pointed out that, as per this document, the Respondent No.1 had purchased whole of plot No.231 along with portion of plot Nos.230 and 232. It was on account of such purchase of only portion of plot

Nos.230 and 232, that upon mutation of these plot Nos. (230 and 232) in the name of the Respondent No.1, they were allotted new plot Nos. 230/546 and 232/547. It is for this reason that the boundaries of the land falling under original plot Nos. 230 and 232 were bound to vary from the boundary of the land falling in the new plot Nos.230/546 and 232/5470. As a consequence, if the total land purchased by the Plaintiff/Appellant i.e., .0530 hectares is subtracted from the total area of the land of plot Nos. 230, 231 and 232, i.e., .1800 hectare, the Plaintiff/Appellant would still be owning the remaining land measuring .1270 hectare. If it were so, the boundary of the sold land as indicated in the Sale Deed would be quite in conformity with the position as it ought to have been. However, it was made clear by the parties at the hearing, on enquiry from the Court that, no part of land has been left out in the possession and ownership of the Plaintiff/Appellant after the Defendant/Respondent No.1 took possession of the land sold to him vide, sale deed Ext.P3. The explanation sought to be given, thus falls through. That apart, the story made out by the learned Counsel does not appear to have ever been the case of the Defendant/Respondent No.1 in the trial of the suit before the learned trial Court. In paragraph 12 of the written statement filed by the Defendant/Respondent No.1, it has been stated that "the Plaintiff admitted the sale of land of the plots mentioned in Schedule B and plot No.231 by his endorsement dated 26.9.1989. Both the sale deeds dated 1.11.1988 and 3.11.1988 were registered on 26.9.1989 and in both the sale deeds,the Plaintiff has

admitted the sale of lands mentioned in the sale deed." This goes to show that the theory of purchase of only part of the land falling under plot Nos.230 and 232 cannot fit into the original version given by the Defendant/Respondent. Therefore, the story now put forward by the learned Counsel does not explain away the discrepancy in the boundary as well as in the dimension of the land in question.

28. Therefore, for the above reasons and observations, the conclusion is irresistible that the finding arrived at by the learned Appellate Court is based on a misreading of the evidence on record and thus perverse. The first substantial question of law is accordingly answered.

29. The next question of law as framed, relates to the burden of proof. The learned Counsel for the Appellant mainly pointed out two instances where the first Appellate Court had wrongly placed the burden of proof on the Appellant in disregard of well settled principle regarding burden of proof. In the first place, it is alleged that the Appellate Court placed the onus on the Plaintiff/Appellant to explain as to how and why the four boundaries mentioned in the sale deed (Ext.P3) did not tally with the boundaries shown in the survey map (Ext.2), even when the onus to explain such discrepancy lay on the Defendant/Respondent No.1. In the second place, the onus of proving the exact time when the Defendant/Respondent started construction on the suit land, was placed on the Plaintiff/Appellant, even when it was the onus

resting on the Defendant/Respondent to prove the exact time of construction of the buildings raised by him on the suit land.

30. The learned Counsel for the Defendant/Respondent, on the other hand, contended that the case of the Plaintiff/Appellant being that, the Defendant/Respondent surreptitiously incorporated plot Nos.230 and 232 in the document subsequently, the burden to prove such interpolation, manipulation, etc. lay on the Plaintiff/Appellant and, as such, the onus of proof was not wrongly placed on the Plaintiff/Appellant by the learned first Appellate Court.

30. In order to appreciate the above submission of the parties and to find out whether the first Appellate Court placed the burden of proof wrongly on the Appellant on any of the material issues, it is necessary to notice the respective cases of the parties. As already noted above, the case of the Plaintiff/Appellant is that, he had sold away only plot No.231 vide, sale deed Ext.P3 to the Defendant/Respondent No.1 and the two plot numbers, namely, plot Nos.230 and 232 were subsequently incorporated into the sale deed by the Defendant/Respondent. The case of the Defendant/Respondent, on the other hand, is that, he had purchased and the Plaintiff/Appellant had sold to him all three plots of land i.e. 230, 231 and 232 and the question of adding plot Nos.230, 232 later on as alleged, does not arise. Such being the dispute between the parties, it was the submission of Mr. Moulik as already noted above, that the burden to show that plot Nos.230 and 232 were subsequently incorporated in the document

surreptitiously by the Defendant/Respondent No.1 rests on the Plaintiff/Appellant. Thus, even going by what Mr. Moulik submits, it would be clear that the two instances on which the burden of proof was placed on the Plaintiff/Appellant were not the main issues, and so far as the onus to prove the main issue relating to sale of only plot No. 231 is concerned, the burden to prove it has been rightly placed on the Plaintiff/Appellant by the learned Appellate Court. It is to be noted that, so far as the onus to prove the main issue placed on the Plaintiff/Appellant is concerned, even the learned Counsel for the Plaintiff/Appellant has no grievance. Therefore, the burden of proof in respect of two instances indicated above, though thrust upon the Plaintiff/Appellant, it would make no difference as far as the onus of proof in respect of the main issue is concerned.

31. At this stage, it is appropriate to notice the principle governing burden of proof in civil cases both at the trial stage and at the appellate stages.

The well-established general principle with regard to the burden of proof is that, one who asserts must prove. Hence, the burden of proof rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. Accordingly, the issue must be proved by the party who asserts it and not by the party who denies it. (AIR 1982 SC 1201). Section 102 of the Indian Evidence Act clearly provides that the burden of adducing evidence rests on the party who would loose, if no

evidence is led by any of the parties. But it is to be noted that the burden to prove does not remain static and when a party adduces such evidence, as will support the prima facie case, the onus shifts on the defendant who has then to adduce rebuttal evidence to meet the case made out by the party. In this regard, reference may be made to the decision rendered in ***Union of India v. Moksh Builders & Financiers Ltd. & Others (AIR 1977 SC 409)*** wherein, the Apex Court has laid down the law as follows: -

> **" The burden of proof is, however, not static, and may shift during the course of the evidence. Thus while the burden initially rests on the party who would fail if no evidence is led at all, after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by either side i.e. on the evidence on record. Where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place, and the truth or otherwise of the case must always be adjudged on the evidence led by the parties. This will be so if the court finds that there is no difficulty in arriving at a definite conclusion. ....." (emphasis added).**

In the present case, we have already noticed above that the evidence adduced by the Plaintiff/Appellant prima facie goes to suggest that the land sold away to the Defendant/Respondent No. 1 is only plot No. 231 and as such the sale deed Ext.P3 is not in its original form and state. Thus, the prima facie case that the land sold is only plot No. 231 and the sale deed Ext.P3 does not show the correct statement of facts as recorded initially by the parties to the instrument, having been made out by the Plaintiff/Appellant by adducing necessary

evidence, the burden to show that such prima facie case made out by the Plaintiff/Appellant was not correct by adducing rebuttal evidence, shifted to the Defendant/Respondent No.1. However, as already noted above, the evidence adduced by the Defendant/Respondent in the case is not sufficient to discharge this burden. It hardly needs to be emphasized that a party must prove his case by adducing best evidence and when the best evidence has not been produced by a party adverse inference may be drawn against him even though the burden of proof lay with the other party (AIR 1968 SC 1413).

It may however be noted that as per the law laid down by the Apex Court in ***Kalwa Devadattam v. Union of India (AIR 64 SC 880)*** when both the parties have adduced evidence in support of their respective cases, the question of onus looses much of its weight and importance and in such a case the evidence is appreciated on the basis of probabilities and balance of the case of the parties. This decision was quoted with approval by the Apex Court in the later decision rendered in ***Union of India v. Moksh Builders & Financiers Ltd. And Others (AIR 1977 SC 409)****(supra).* The observation of the Court in paragraph 16 of the judgment is as follows: -

> **"..... As has been held by this Court in Kalwa Devadattam vs. Union of India (1964) 3 SCR 191 = (Air 1964 SC 880) that where evidence has been led by the contesting parties on the question in issue, abstract consideration of onus are out of place, and the truth or otherwise of the case must always be adjudged on the evidence led by the parties. This will be so if the court finds that there is no difficulty in arriving at a definite conclusion".**

32. In view of the above, it is clear that where contesting parties have led evidence in support of their respective cases, the case of the parties has to be adjudged on the evidence led by the parties without allowing the abstract doctrine of onus of proof to come in the way. In ***Kumbhan Lakshmanna & Others v. Tangirala Venkateswarlu & Others (AIR 1949 PC 278)*** Privy Council has held as follows

> **".....the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff; when he gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background:"** *(emphasis added)*.

In ***Harmes & Another v. Hinkson*** reported in ***AIR 1946 PC 156,*** the Privy Council has held that

> **".....Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no conclusion. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."**

In yet another decision rendered in ***Mohammad Aslam Khan & Others v. Feroze Shah*** reported in ***AIR 1932 PC 228*** it has been held that

> **"It is not necessary to enter upon a discussion of the question of onus where the whole of the evidence in the case is before the Court and it has no difficulty in arriving at a conclusion in respect thereof."**

33. In the present case, the learned trial Court after hearing the parties and weighing the evidence, has come to a definite conclusion, and it is found that the conclusion is well supported by the evidence on record. In view of this, the abstract question of burden of proof in respect of issues which are not the main issues, need not detain us any more.

34. As regards burden of proof, in an appeal, the principle is well-established that the onus lies on the party asking for a finding of fact to be disturbed on the ground that it is wrong. It is thus a well established rule that in every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed and that there must be some balance in their favour where all the circumstances are considered to justify the alteration in the judgment that stands (see AIR 1960 Punjab 417). In the present case at hand it has already been held that the only legitimate conclusion that can be drawn in the circumstances of the case, is that the findings recorded by the Ld. Appellate Court are based on misreading of the evidence and are thus perverse. In the circumstances the Plaintiff/Appellant must be

taken to have shown sufficient reason for upsetting the finding of fact by the Ld. Appellate Court.

35. The next question that now requires to be considered is whether any interference by this Court is called for in the circumstances of the case.

36. No doubt, the observation made above that the impugned judgment is erroneous is based on re-appreciation of evidence by this Court. Mr. Moulik, learned Senior Counsel, relying on several decisions, submitted that this Court being the second Appellate Court, it was not open for this Court to interfere with the finding of fact of the Courts below. The submission made by Mr. K. T. Bhutia in this regard, is that, this Court need not lay its hands off where findings of the Court below are found to be contrary to record, and thus perverse. The submission finds support from the decision of the Madras High Court in ***Raju and Another v. Muthuammal and Others reported in AIR (2004) Madras 134*** wherein, it has been observed that, it is the duty of the Court though sitting in second Appeal to assess the evidence on record in order to render real justice to the party, instead of throwing the case on technicalities. It has accordingly been observed that, when the first Appellate Court perversely set aside the trial Court judgment in the second appeal, the evidence can be re-assessed and nothing prevents the Court from doing so.

In ***Kulwant Kaur v. Gurdial Singh Mann (AIR (2001) SCC 1273)*** the observation made by the Apex Court is as follows:

> **"While it is true that in a second appeal a finding of fact even if erroneous will generally**

> **not be disturbed but where it is found that the findings stands vitiated on wrong test and on the basis of assumption and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication – what is required is a categorical finding on the part of the High Court as to perversity. The requirements stand specified in S.103 and nothing short of it will bring it within the ambit of S.100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot be termed to be a question of law." (emphasis added).**

In ***Bondar Singh and Others v. Nihal Singh and Others (2003) Vol.4 SCC 161*** the Apex Court has in clear terms laid down the law as follows: -

> **"An appeal under Section 100 CPC can be entertained by the High Court only on a substantial question of law. If the findings of the subordinate courts on facts are contrary to the evidence on record and are perverse, such findings can be set aside by the High Court in appeal under Section 100 CPC. A High Court cannot shut its eyes to perverse findings of the courts below. In the present case the findings of fact arrived at by the lower appellate court were contrary to the evidence on record and, therefore, perverse and the High Court was fully justified in setting aside the same resulting in the appeal being allowed and suit being decreed." (emphasis added).**

37. Thus, the law laid down in the decisions cited above makes it clear that, there is no bar in undertaking the reassessment of the evidence on record in the present case, where the conclusion of the Court below is found to be based on

misreading of evidence. Accordingly, in view of what has been highlighted above, regarding the perversity of the impugned judgment, I have no hesitation to hold that, in the circumstances of the case an interference by this Court is called for in order to render real justice.

38. Even though the above is sufficient to dispose of the matter, we may also take up some of the other points argued by both parties and taken note of by the learned Appellate Court as follows:

39. One such circumstance taken into consideration by the learned Appellate Court is that, the State Government vide Extraordinary Gazette Notification No.18/510/LR(S) dated 26.10.1995 had published notice under Section 4(1) of the Land Acquisition Act 1894 by which Plot No.230 of Namchi Bazar, South Sikkim along with some other plots of land were proposed to be acquired. Admittedly, the Plaintiff/Appellant did not take any steps in response to this Notification. Invoking the maxim *Ignorantia juris neminem excusat* (ignorance of law is no excuse), the Ld. Appellate Court held that the Plaintiff/Appellant must be presumed to know the Notification in question and inference was drawn that, the Plaintiff/Appellant did not care to take any steps, since the said property was already alienated by him and had no interest in it.

40. The next circumstance taken note of by the learned Appellate Court is that, it was the admitted case of the Plaintiff/Appellant that the Defendant No.2 to 4 had hurriedly

constructed houses on plot No.230. However, the Plaintiff/Appellant had failed to mention the time as to when the Defendants had raised such construction. The inference drawn in this regard is that, the fact that the Plaintiff/Appellant raised no objection to such construction in time, also goes to suggest that the suit land no longer belonged to him after execution of the sale deed in favour of the Defendant/Respondent No.1.

41. In the third place, note has also been taken of the fact that even though the Plaintiff came to know about insertion of plot Nos.230 and 232 in the middle of the year 2000, he woke up from his slumber only in April 2001, and the slow pace in which the Plaintiff/Appellant pursued his matter was not consistent with the conduct of one whose lawful land had been grabbed, if at all.

42. The submission made by the learned Counsel for the Appellant in regard to the above inferences, is that, there was hardly any justification for application of the maxim *Ignorantia juris neminem excusat* and to hold that the Plaintiff/Appellant should be presumed to know the Notification. According to him the conclusion thus arrived on the basis of the inferences by the learned Appellate Court are all unfounded and based on mere surmises and conjectures. This submission of the learned Counsel cannot be easily brushed aside, particularly in view of the fact that the Defendant/Respondent, in the case, has not adduced any reliable and cogent evidence in rebuttal of the case made out by the Plaintiff/Appellant and in support of his case. Note must be taken of the fact that the Defendant/Respondent chose not to

place even the most material document, namely, the original sale deed which is presumed to be in his possession on the well recognized principle that he who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. The only explanation put forward by him was that it was taken away by the Plaintiff/Appellant and was in his possession. No case was made out for production of secondary evidence nor any such evidence was produced.

43. Therefore, preponderance of evidence being against the Defendant/Respondent on the main issue itself, I am inclined to agree with the learned Counsel that the above other circumstance like conduct of the Plaintiff/Appellant in taking needful steps after a long delay and his failure to mention the time when the construction were raised on plot No.230 etc.,are far fetched and cannot be considered as legitimate inferences which support the Plaintiff/Appellant's case.

44. We may now turn to the other corroborative circumstance similarly considered by the learned trial Court. The circumstance taken note of by the learned trial Court, on the other hand, are that the three plot numbers which the Defendant/Respondent claim to have purchased, had not been mentioned serially, that the Defendant/Respondent has not produced the original copy of the sale deed (Ext.P3), which in normal circumstances should have been in his possession as purchaser of the property, that in a 'Bundobast' document (Ext.4), the Defendant/Respondent No.1 had agreed to dismantle a kutcha

shed erected beyond four feet of the house purchased by him with the stipulation and that he will not aspire for any more property from the Plaintiff/Appellant. All these circumstances, as observed by the learned trial Court, have more direct bearing on the issue of sale of only plot No.231 and furnish logically sound foundation for the inferences drawn by the Ld. Trial Court. Thus the above view taken by the learned trial Court cannot be rejected as having no bearing in the case.

45. The Ld. Counsel for the Defendant/ Respondent had also argued that the identity of the land was not properly established by the evidence on record and that the alleged fraud relating to alteration or interpolation of the sale deed (Ext. P3) was not properly pleaded and proved. As regards the identity of the land it has already been held above that the boundary described after excluding the incorrect part is sufficient to identify the land. Regarding pleading and proof of fraud, the specific submission of Mr. Moulik is that, the allegation of subsequent insertion of plot Nos. 230 and 232 in the Sale Deed (Ext. P3) being an allegation of fraud, the plaintiff ought to have pleaded it with proper particulars as required under order 6 rule 4 C.P.C. and proved it. The Ld. Counsel placed reliance on the decision of the Hon'ble Supreme Court in A.C. Ananthaswamy and others – Appellants Vs. Boraiah (deed) by Lrs. – Respondents (2004 8 SCC 588). So far as the question of requirements of pleading and proof of fraud is concerned, there can be no second opinion that it must be pleaded and proved as provided under order 6 rule 4 C.P.C. However, the

question in the present case is whether the allegation made in the present case fall within the meaning of the term fraud. The allegation made in the case is that the insertion of the two plots of land covered by plot Nos. 230 and 232 in the sale deed (ext. P3) were allegedly made by the Defendant/ Respondent subsequently after the execution of the Sale Deed (Ext. P3). It is, therefore, obvious that the allegation made do not fall within the meaning of the term fraud as used in Section 17 (3) of the Indian Contract Act and therefore can not be taken as a fraud contemplated in proviso (1) to Section 92 of the Evidence Act. In this regard, the following observation of a Division Bench of Bombay High Court in Narsingdas Takhatmal-Plaintiff-Appellant V. Radhakisan Rambakas and others –Defendants -Respondents (AIR 1952 Bombay 425) is enlightening on the point,

> **"A mere averment of fraud without any particulars would be of no avail to a party. In order to plead fraud effectively the particulars of fraud must be given by the party, and in the absence of such particulars, there cannot be any proper averment of fraud. Even so, the fraud which is alleged must be such as enters into the transaction itself and enables the party to avoid the transaction. It must be fraud within the meaning of the term as used in S. 17 (3), Contract Act, and unless and until the allegations amount to that, there cannot be any valid plea of fraud which can be taken up by a party".**

Therefore, a fraud in order to vitiate a transaction must be a fraud at the very inception and not a subsequent conduct or representation on the part of the party or his representative-in interest. However, in the case at hand, the allegation of fraud made, relates to subsequent conduct of the Defendant/Respondent and does not enter into the transaction itself. The transaction in

question relates to sale of piece of land covered by plot No. 231 of Namchi Bazar, South Sikkim by Plaintiff/Appellant to the Defendant/Respondent No. 1 and in this regard it has already been held above that keeping in view the preponderance of the evidence in the case the plaintiff must be taken to have shown that the land sold vide sale deed (ext. P3) is only the area of land falling within plot No. 231 and not others. Such being the position non compliance of the provisions of order 6 rule 4 C.P.C. with regard to pleading of fraud do not seem to have any direct bearing on the main issue in the case.

46. Now coming to the final submission made by the Ld. Counsel for the Defendant/Respondent, the point raised is that the evidence brought on record by the Plaintiff/Appellant was insufficient to satisfactorily prove the case. Relying on the decision of Calcutta High Court in M/S. Roy and Co. and another, Appellants V. Sm. Nani Bala Dey and others, Respondents (AIR 1979 Calcutta 50) the Ld. Counsel submitted that as per the law laid down in this case the plaintiff can succeed only on the strength of his own case and not on the defendants weakness. The principle of law cited and relied on is, no doubt, a sound principle of law. It is however to be noted, as held by the then Federal Court in Gangadare Ayyar and others- Appellants V. Subramania Sastrigal and others –Respondents AIR (36) 1949 Federal Court 88 that **"when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt**

with on reasonable possibilities and legal inferences arising from proved or admitted facts".

Thus, under the principle governing standard of proof in civil cases, what would suffice is, preponderance of probability, and accordingly, a party whose evidence is more probable would succeed. In the present case, the evidence adduced by the Appellant viewed in the light of all relevant circumstances, is more probable than that of the Defendant/Respondent No.1. As noted already, the defendant has not produced even a certified copy of the sale deed Ex.P3 much less original copy of it. It is well-established rule of practice that parties must produce best evidence. The principle is well stated in ***Choudhuri Janardan Parida and Others v. Pradhan Das (AIR 1940 Patna 246***) as follows :-

> **".....When there is a document and under the law no other evidence other than the document itself or secondary evidence of its contents can be used to prove contract, the document, if available, must be produced before the Court or a case must be made out for admitting secondary evidence. <u>But if the plaintiff who sues upon that document has made alterations, interpolations in it, he has not placed the original document before the Court as the document has lost its identity by having been altered in the meantime, and as he himself has been responsible for destroying its identity, he cannot in justice and equity be allowed to adduce secondary evidence of its contents</u>....."** *(emphasis added).*

In ***Gopal Krishnaji Ketkar v. Mohamed Jahi Latif & Others (AIR 1968 SC 1413)*** the duty of adducing best evidence is emphasized to the extent that if relevant evidence is withheld by a party, adverse inference shall be drawn against such party even

when the burden of proof does not lie on such party. In such an eventuality, the party in default cannot be permitted to rely upon the abstract doctrine of onus of proof. The decision of Punjab High Court in ***Small Town Committee of Budhlada v. Firm Bhuria Mal-Parmeshwari Dass (Air 1953 Punj.94)*** makes it clear that when the evidence lies entirely in the hands of the Defendant, he cannot be allowed to succeed on the ground that no evidence has been produced by the Plaintiff. In this regard the following observation made by the Federal Court in the case cited above (AIR (36) 1949 Federal Court 88) (supra) is apposite

> **"Where the defendants are guilty of suppression of evidence which it was their duty to place before the Court, no conclusion in their favour should be arrived at merely on the ground of paucity of evidence which is of their own creation".**

Thus, in view of the above, the case of the parties must be adjudged on the evidence led by the parties and on the touchstone of preponderance of probability. When the case of the parties and the evidence on record are so examined, it would be clear that preponderance of probability is more in favour of the Plaintiff/Appellant than in favour of the Defendant/Respondent.

47. Hence, for the reasons, observations and the discussions made above, I am of the view that the Plaintiff/Appellant has been able to make out a case for interference with the impugned judgment dated 30.07.2005 and

decree dated 16.08.2005 passed by the learned District Judge (S&W) at Namchi in First Title Appeal No.1 of 2005.

48. Accordingly, the Appeal is allowed and the impugned judgment and decree passed by the learned District Judge (South and West) at Namchi is set aside, thus affirming the judgment and decree dated 22.02.2005 passed by the learned trial Court.

In the circumstances of the case, there shall be no order as to costs.

(A. P. Subba)
Judge
02.06.2006