THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 01.05.2012

CORAM

HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PERMOD KOHLI
HON'BLE MR. JUSTICE S.P. WANGDI, JUDGE

R.F.A. No. 07 of 2011

1. Shri Furden Tshering Bhutia
2. Shri Karma Sonam Bhutia
   @ Karma Tshering Bhutia
3. Shri Norbu Sonam Bhutia
   @ Norbu Tshering Bhutia
4. Shri Sandup Bhutia
5. Shri Dadul Bhutia

   All sons of late Karma Tshering Bhutia
   @ Sepchung Bhutia
   Resident of Bermiok Tocal
   P.O. Bermiok P.S. Temi, South Sikkim

... Appellants/Plaintiffs

-versus-

1. Smt. Payzee Bhutia (Sherpa)
   S/o Shri Passang Sherpa
   R/o Mungrung busty
   P.O. & P.S. Namchi, South Sikkim.

2. Smt. Diki Palmo Bhutia
   W/o Dr. Thinley Nidup Bhutia
   Resident of Bermiok Tocal, Thangsing Block
   P.O. Bermiok P.S. Temi, South Sikkim

3. Dr. Thinley Nidup Bhutia
   Resident of Bermiok, Thangsing Block
   P.O. Bermiok P.S. Temi, South Sikkim

4. The Secretary to the
Land Revenue Department
Government of Sikkim
Gangtok, East Sikkim.

5. The District Collector
South District, Namchi
South Sikkim

6. The Sub-Divisional Magistrate
Office of the District Collector
South District, Namchi.

...Respondents

For Appellants	:	Mr. B. Sharma, Senior Advocates with Mr. Bhola N. Sharma, Advocate.
For respondent Nos. 1 to 3	:	Mr. S.S. Hamal and Mr. Tashi Wongdi Bhutia, Advocates.
For respondent Nos. 4 to 6	:	Mr. J.B. Pradhan, Additional Advocate General with Mr. S.K. Chettri, Asstt. Govt. Advocate.

J U D G M E N T

Permod Kohli, CJ

This Regular First Appeal has been placed before the Division Bench pursuant to an order dated 29.03.2012 passed by the learned Single Judge (one of us, Justice Wangdi) as the case involves interpretation of one of the important land laws of the State. It may be useful to notice that when the matter was heard by the learned Single Judge for the first time on 02.12.2011

notice on the question of condonation of delay was issued to the respondents. It seems that the respondents did not file any reply to the condonation of delay application, as no such objections are available on record. The case was again taken by the learned Single Judge for consideration on 24.02.2012, when it was recorded that the case involves serious questions of interpretation of laws prohibiting transfer of immovable property by a person belonging to the Bhutia-Lepcha to one belonging Non-Bhutia-Lepcha and, other cognate laws. Referring to a judgment of this Court dated 29.08.1998 in ***Writ Petition No. 49 of 1996*** in the matter of ***Palden Sherpa vs. State of Sikkim & Ors.***, the learned Single Judge was of the opinion that the application for condonation of delay and the appeal be heard comprehensively on both the questions of merit and limitation. It was under these circumstances, the parties are heard both on the questions of limitation and merit of the appeal.

2. On consideration of the merit of the appeal, we are of the considered opinion that the judgment of the trial Court suffers from perversity in law and facts and deserves to be set aside for the reasons to be recorded hereinafter while dealing with the merits of the appeal. It is in this view of the matter the application for condonation of delay is being considered and disposed off at the first instance.

3. The judgment impugned in the appeal is dated 22.10.2008. The present appeal was filed in this Court on 30.11.2011, which was returned to the appellant for rectification of the defects and after rectification the same was re-presented on 01.12.2011. There has been a delay of 1042 days in filing the appeal. Undoubtedly the delay is considerable. The appellants averred in paragraph 2 of the application that the appellant/plaintiff No. 1 came to learn on 18.10.2011 through the learned counsel Shri Bandan Rai about the dismissal of the Title Suit No. 07/2004, and immediately applied for the certified copy of the judgment on 18.10.2011 and the copy of the judgment was made available on 21.10.2011 and the appeal came to be filed on 30.11.2011. It is further stated in the application that the appellants had also filed another Title Suit No. 3/2009 against Smt. Payzee Bhutia (Sherpa), defendant No. 1 in the suit, the subject matter of the present appeal. The parties in the Title Suit No. 3/2009 intended to rely upon some documents filed in Title Suit No. 7/2004 and asked for summoning of the records. The trial Court called for the records of Title Suit No. 7/2004 mistakenly mentioned as Title Suit No. 8/2004. It is stated that except the suit No. 7/2004 no other suit was pending between the parties. The Peshkar of the Court reported to the trial Court that the record is not traceable. It was only after about two years

the file of Title Suit No. 7/2004 was traced and produced before the trial Court in suit No. 3/2009. One of the appellants, namely, Furden Tshering Bhutia also filed an affidavit sworn on 28.11.2011 alleging therein that the District Judge had not pronounced the final judgment on 22.10.2008 and the appellant came to know of the fact that the judgment stand pronounced on 22.10.2008 only on 18.10.2011 when the record of the Title Suit No. 7/2004 was placed before the trial Court in Civil Suit No. 3/2009. He has further stated that prior to that i.e. 18.10.2011 the final judgment was not written and pronounced by the learned District Judge. This affidavit remained un-controverted by the respondents in the appeal nor any objection has been filed to the application for condonation of delay.

4. We have also carefully scrutinized the interim orders in the trial Court record which was summoned by this Court. From the interim orders, it is revealed that arguments were heard on 19.05.2007, 19.06.2007, 21.08.2007 and concluded on 29.09.2007. However, according to the record the judgment was pronounced on 22.10.2008. During this period the case was adjourned 7 (seven) times on the ground that the “Judgment is not ready/Judgment not ready”.

5. It is shocking to note that 3 (three) interlocutory orders dated 26.02.2008, 25.03.2008 and 30.04.2008 seems to be typed

at the same time and first two out of the 3 (three) orders are without the signatures of the Presiding Officer. Similarly, last 3 (three) orders dated 30.08.2008, 26.09.2008 and 22.10.2008 appears to have been typed and signed simultaneously. Even from the record of the trial Court it appears that learned Judge took almost a year to pronounce a ten pages judgment, which is recorded to be pronounced on 22.10.2008.

6. Mr. S.S. Hamal, learned counsel appearing for the respondents No. 1 to 3 though unable to support the judgment on merits vehemently opposed the application for condoning delay on the ground that the delay is inordinate and there being no sufficient cause the application is liable to be dismissed.

7. We have heard the learned counsel for the parties on the question of limitation besides the merits at length.

8. A party who is negligent or careless in asserting his rights deserves no indulgence from the Court, particularly when some valuable right has accrued to other party on account of inaction on the part of such party. Law of Limitation takes away the remedy on account of delay. However, it is not a thumb rule. The Rule of Limitation is principally based upon public policy; however, where the material on record suggests that the delay is not attributable to the party approaching the Court for legal

remedy, the Court is entitled to condone the delay on finding sufficient cause. Mr. Hamal while opposing the application for condonation of delay has relied upon the judgment of the Hon'ble Supreme Court in ***Lanka Venkateswarlu vs. State of A.P. & Ors.*** reported in ***AIR 2011 SC 1199***. In this case the High Court of Andhra Pradesh condoned the delay of 883 days in filing the petition seeking for setting aside the order of dismissal of appeal, which had abated on account of failure of the appellant to bring on record the legal representative of the sole respondent in the case despite the knowledge. From the facts noticed by Hon'ble Supreme Court it is revealed that in the appeal being A.S. No. 8 of 1985 pending before the High Court of Andhra Pradesh the sole respondent died on 25.02.1990 which fact was brought to the notice of the Court by filing a memo with intimation to the counsel for the appellant. The appellant failed to take any steps to bring on record the legal representative and the matter was again listed for hearing before the Court on 24.04.1997. The factum of the death of respondent in the year 1990 was again brought to the notice of the Court and the appellant's counsel was granted time to take steps to bring on record the legal representative of the sole respondent. The matter was posted on 16.06.1997, but no steps were taken by the respondents to comply with the order. On 06.02.1998 the Court directed the

appellant to comply the order within one week and in default the appeal shall stand dismissed as against the sole respondent. Again due to non-compliance of the order, the appeal was dismissed as abated on 06.02.1998. An application for setting aside the dismissal was filed in the year 2000 but without any application for condonation of delay, which came to be filed in the year 2003 seeking condonation of 883 days. There were some ancillary applications with regard to restoration of appeal, etc. All the applications were finally allowed by the High Court vide order dated 19.08.2003 condoning the delay and setting aside the abatement etc. The High Court was of the opinion that there is utter negligence, however, the High Court condoned the delay. It was under these circumstances while setting aside the judgment of the High Court, the Hon'ble Supreme Court observed as under:-

> "26. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. ....."

9. Mr. B. Sharma, learned senior counsel appearing for the appellants, however, relied upon a judgment of the Hon'ble Supreme Court in ***Collector, Land Acquisition, Anantnag and***

another vs. Mst. Katiji and others reported in ***AIR 1987 SC 1353,*** particularly, the following observations: -

> "3. .....
> 1. .....
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
> 3. .....
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
> 5. .....
> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

10. In a recent judgment in ***Maniben Devraj Shah vs. Municipal Corporation of Brihan Mumbai*** (*Civil Appeal Nos. 2970-2971 of 2012*) decided on 09.04.2012, the Hon'ble Supreme Court while considering the question of condonation of delay in filing the *lis* made the following observations: -

> "18. What needs to be emphasized is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statues, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other

> hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/ instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.:

11. The appellants/applicants have placed on record the entire interim orders passed in Civil Suit No. 3/2009 wherein the record of this case (original file) had been summoned. From the interim orders it appears that almost two years the record of the case was not traced and it was only on 18.10.2011 the file of present case was produced in the said suit, even when the record was ordered to be summoned on 04.11.2009. Above interim orders coupled with the orders passed by the trial Court in the present case reveal that for almost one year the judgment was not delivered after concluding the arguments and the file of the case remained untraced for two years. In the light of above facts and our observations that some of the orders seem to have been typed and signed on the same day and some of the orders did not bear the signature of the Presiding Officer, the allegations made in the affidavit sworn on 28.11.2011 that the judgment was not pronounced on 22.10.2008 cannot be brushed aside. The record demonstrates a very sad state of affairs. The manner in which

the judgment remained undelivered for a period of almost one year and the file remained untraced for two years do suggest that the appellants/plaintiffs cannot be accused for the delay in obtaining copy of the judgment particularly when the respondents have chosen not to controvert the allegations made in the application and the accompanying affidavit.

12. On consideration of the totality of the circumstances, including the merits of the case to which we shall revert hereinafter, we are of the considered opinion that there is sufficient cause for condoning the delay otherwise justice shall be defeated if the totally un-merited judgment is allowed to sustain. For the cause of justice we condone the delay in filing the present appeal.

13. Now coming to the merits of the case, it is useful to briefly notice the facts of the case.

14. The suit property belonged to one Late Topching Bhutia @ Topchen Bhutia. He had one son, namely, Karma Tshering Pintso Bhutia @ Sepchung Bhutia and three daughters, namely, (i) Smt. Payzee Bhutia (Sherpa), defendant No. 1 in the present suit, Wife of Shri Passang Sherpa, (ii) Smt. Dorjeeden Bhutia, Wife of Raju Lama of Kalimpong, West Bengal and (iii) Smt. Singi Bhutia, who is said to be wife of Tibetan National. The

plaintiffs are the sons of Karma Tshering Pintso Bhutia @ Sepchung Bhutia, who died on 08.12.1981 at Bermiok Tokal, South Sikkim. The grandfather of the plaintiffs, Topching Bhutia @ Topchen Bhutia (Lama) died on 22.02.2003 at Bermiok, South Sikkim at the age of 95 years. It is averred that the suit property is ancestral property of the plaintiffs having devolved upon them after the death of their father and grandfather respectively. The plaintiffs have also stated that their grandfather Topching Bhutia during his life time had given his residential house along with the suit land to his only son i.e. the late father of the plaintiffs vide a "Bandobast" (letter of agreement) dated 30.04.1980 and the plaintiffs are regularly paying tax in respect of the suit land in the name of their grandfather.

15. The grievance of the plaintiffs started when the defendant No. 1 made an application to the District Collector on 28.08.2001 for recording mutation of plot No. 76 measuring an area of .2660 hectare located at Thangsingh Block, Bermiok, South Sikkim claiming that the said plot had been gifted by her father, late Topchen Bhutia, to her. It is further stated that during the course of process of recording the mutation before the Sub Divisional Magistrate, South, Defendant No. 6 at Namchi the defendant No. 1 again produced a Gift Deed dated 25.01.2003 claiming 3 (three) plots covered by Khasra Nos. 76, 77 and 78

under Khatiyan Parcha No. 21 measuring 1.7660 hectare and also submitted a spot verification report dated 25.01.2003 issued from the office of the V.L.O. of Circle Bermiok, South Sikkim. The plaintiffs have challenged the spot verification report signed by some Revenue Supervisor, Bermiok alleging the same to be a fabricated document and having been prepared in collusion with the Revenue Supervisor to grab the ancestral property of the plaintiffs. The plaintiffs objected to the recording of mutation in favour of defendant No. 1 before defendant No. 6, however, defendant No. 6 entered the mutation of all the 3 (three) plots in favour of defendant No. 1 vide his order dated 30.05.2003. It is the further case of the plaintiffs that the defendant No. 1 again approached the defendant No. 6 with a verbal prayer for mutation of the land earlier recorded in her name for further mutation in the names of defendant Nos. 2 and 3 on 06.06.2003 and the defendant No. 6 passed the order of mutation in favour of defendant Nos. 2 and 3 without properly verifying the status of the donor, donee and the donee's successors, etc. It is alleged that the plaintiffs were not provided any opportunity to establish their case/right over the ancestral property. Plaintiffs had made an application dated 29.11.2002 objecting to the alienation of the ancestral property of their grandfather in favour of defendant Nos. 1, 2 and 3. The plaintiffs accordingly requested for staying the

process of mutation of the suit land vide their application dated 23.06.2003 to the defendant No. 5 and they were granted one month's time to obtain orders from the Civil Court. Thereafter, the plaintiffs served notice under Section 80 of the Code of Civil Procedure upon the defendant Nos. 4, 5 and 6 through their Advocate Shri T.B. Chhetri on 04.03.2004 challenging the orders passed by the defendant No. 6. They filed a suit No. 3 of 2004 and thereafter filed the Title Suit No. 7/2004 i.e. the present suit claiming following reliefs: -

> "a) for a declaration that the lands covered by Khasra Nos. 76, 77 and 78 measuring .2600 Hects, 1.3500 Hects and .1500 Hects standing in the name of late Topchung Bhutia @ Topchen Bhutia (Lama) are the ancestral property of the plaintiffs;
>
> b) for a declaration that defendant No. 1 after her marriage with Shri Passang Sherpa is a Sherpa and she is not entitled to the property of late Topching Bhutia @ Topchen Bhutia (Lama);
>
> c) for a declaration that the plaintiffs are entitled to right, title and interest in the property left by their grand father late Topching Bhutia @ Topchen Bhutia;
>
> d) for a declaration that the order dated 30.05.2003 passed by the learned Sub-Divisional Magistrate, Namchi (defendant No. 6) allowing mutation of Plot No. 76 under Khatian No. 21 from the name of late Topching Bhutia @ Topchen Bhutia (Lama) to the name of defendant No. 1 is arbitrary, illegal and void;
>
> e) for a declaration that the order dated 6-6-2003 passed by the learned Sub-Divisional Magistrate, Namchi (defendant No. 6) allowing mutation of Plot No. 76, 77 and 78 under Khatian No. 21 from the name of late Topching Bhutia @ Topchen Bhutia (Lama) to the names of defendant Nos 2 and 3 are arbitrary, illegal and void;
>
> f) for a declaration that the orders dated 30-5-2003 and 6-6-2003 are against the spirit and intention of Revenue Order No. 1 of 1917;
>
> g) for an order calling for the entire records from the office of the District Collector, South, Namchi

(defendant No. 5) and the Sub-Divisional Magistrate, Namchi (defendant No. 6) relating to the mutation of the suit land;

h) for a declaration for any other relief or reliefs to which the plaintiffs are entitled to;

i) for cost of the suit including advocate's fees.

And for this act of kindness the plaintiffs are every pray."

16. Defendant Nos. 1, 2 and 3 filed a common written statement, similarly defendant Nos. 4, 5 and 6 also filed a separate common written statement. Defendant Nos. 1 to 3 apart from raising various legal pleas including that of limitation stated that during the life time of late Topching Bhutia he was being looked after by defendant No. 1 though she was herself married. She has further stated that in the year 1977 late Topching Bhutia, out of sheer love and affection for defendant No. 1, gave the suit property to defendant No. 1 as her "Daizo" property and since then they are in possession of the property without any objection from the late father of the plaintiffs or any other person. The defendant has constructed an "Ekra House" over the suit property in the year 1990 for her residential purpose by borrowing loan. She also claimed that she perfected her title over the suit property by way of adverse possession. She has relied upon a copy of "Purcha Khatiyan" obtained by her on 23.03.1981 wherein her name is reflected in the remarks column as her "Daizo" property. It is further alleged that late Topching Bhutia who died on 23.02.2003 at the age of 95 years, during his life

time made several applications to the authorities for correction of land record of the suit property so as to incorporate the name of defendant No. 1 in his place. Reference is made to 7 (seven) such applications (Annexure D-II [Colly.]). Defendants have also relied upon the document dated 08.02.2003 titled “Antim Rai Patra” allegedly executed by late Topching Bhutia during his life time authorizing Shri Karma Deepa Lama, his brother as his attorney to execute necessary documents in his absence. These defendants also denied that late Karma Tshering Pintso @ Sepchung Bhutia was their brother or son of deceased Topching Bhutia and thus denied the status of the plaintiffs calling them as imposters.

17. Defendant No. 1 has claimed the suit property as a lawful owner on the basis of an order dated 30.05.2003 recorded by defendant No. 6. This defendant also denied the possession of plaintiffs over the suit property. It is further alleged that late Topching Bhutia during his life time disowned the plaintiffs as her grandsons and refuted their claim in writing. They have also supported the orders passed by defendant No. 6 as lawful orders. Defendant No. 1 has also denied the allegation of the plaintiffs that she is disentitled to the property of late Topching Bhutia under the Revenue Order No. 1 of 1917 having married to a Sherpa (non-Bhutia).

18. The official defendant Nos. 4, 5 and 6 in their separate common written statement stated that while recording the mutation, defendant No. 6 was not required to record the deposition of the parties in his capacity as a Registration Officer and was under no obligation to go into the merits of the disputed claims. Their further submission is that the parties were verbally informed by the defendant No. 6 that in case of their dissatisfaction on the order passed, they were at liberty to approach the proper forum to establish their right over the disputed land.

19. On the basis of the pleadings of the parties, the trial Court framed as many as 14 issues, which are reproduced hereunder: -

> "1. Whether the suit is maintainable?
> 2. Whether the suit is barred by Law of Limitation?
> 3. Whether the suit suffers from non-joinder of necessary parties?
> 4. Whether the plaintiffs have any right and interest in the property and can claim the same as the grand sons of Late Topching Bhutia @ Topchen Bhutia?
> 5. Whether the Defendant No. 1 Smt. Payzee Bhutia (Sherpa) had acquired the right, interest and title over the property of Late Topching Bhutia @ Topchen Bhutia as an absolute right of her "Daizo" (Dowry) property?
> 6. Whether the plaintiffs father Late Karma Tshering Pintso @ Sepchung Bhutia was the son of Late Topchung Bhutia @ Topchen Bhutia and therefore whether plaintiffs were at all the grand sons of Late Topching Bhutia @ Topchen Bhutia?
> 7. Whether the plaintiffs have the right to defend their right and interest in the property left behind by Late

Topching Bhutia @ Topchen Bhutia from alienation by the Defendant No. 1, who married a Sherpa?

8. Whether the Defendant No. 1 Smt. Payzee Bhutia (Sherpa) after marrying Shri Passang Sherpa can remain a Bhutia to claim the Bhutia property?
9. Whether the orders of the defendant No. 6, S.D.M. on 30-05-03 and 06-05-05 are based on proper adjudication and evidence in record?
10. Whether the suit property was given to the Defendant No. 1 as her "Daizo' property by her father Late Topching Bhutia @ Topchen Bhutia?
11. Whether by 'Daizo' the defendant No. 1 had perfected her right, title and interest over the suit property?
12. Whether the suit is not hit by the law of adverse possession in favour of defendant No. 1, 2 and 3 and against the plaintiffs?
13. Whether the "Bandobast" (letter of agreement) dated 30-04-80 a genuine document creating any legal rights of the plaintiffs over the suit land?
14. Whether the plaintiffs are entitled to any reliefs? "

20. After allowing the parties to lead their respective evidence, the trial Court dismissed the suit vide impugned judgment and decree dated 22.10.2008.

21. The issues No. 1 to 3 were decided against the defendants as not pressed.

22. Issues No. 4, 6 and 7 have been decided in favour of the plaintiffs. It has been held that the plaintiffs are the sons of Karma Tshering Pintso Bhutia @ Sepchung Bhutia who was the son of Topching Bhutia @ Topchen Bhutia and they have established their rights and interest in the property left behind by late Topching Bhutia @ Topchen Bhutia.

23. Issue No. 8 is also decided against defendant No. 1 holding that in patriarchal society it goes without saying that defendant No. 1 having married to a “Sherpa” she embraces the title of her husband i.e. Sherpa and not Bhutia.

24. The plaintiffs specifically pleaded that the defendant No. 1 was a Bhutia by birth, but having married to a non-Bhutia (Sherpa), she abandoned her status of belonging to Bhutia community and consequently her right to succeed or acquire the property of a Bhutia under Revenue Order No. 1 of 1917. In the trial Court this fact has not been disputed by the defendant No. 1 in the written statement. To the contrary she pleaded that she served her father during his life time even though she was married. It is claimed that the suit property was given to her by her father in the year 1977 out of love and affection.

Since she was married when the “Daizo” was allegedly given to her, she was not entitled to acquire the property even by virtue of gift or otherwise under the local law prevalent in the State of Sikkim. The trial Court though decided the issue No. 8 against the defendant No. 1 holding that after marriage she embraced the status of her husband but without deciding the impact of such marriage on the right of defendant No. 1 who claims the property of a Bhutia.

25. While deciding the issue No. 9 the trial Court summoned the relevant file being file No. 836(112)2002-2003/DRO(S) dated 03.02.2003 from the office of the defendant No. 6 and after perusal of the same held that the orders impugned in the suit have been passed by the defendant No. 6 without recording any evidence of the parties and merely on the basis of the land records and thus the impugned orders are not based on proper evidence on record. This issue was also decided in favour of the plaintiffs. We are of the opinion that the trial Court decided the issue No. 9 setting aside the orders passed by the defendant No. 6 without following the principles of law particularly the rules of evidence. From the record of the trial Court it appears that the trial Court vide its order dated 18.05.2005 summoned the file No. 836(112)2002-2003/DRO(S) dated 03.02.2003 from the office of the defendant No. 6 on the application of the plaintiffs. The record was received on 05.08.2005 as recorded in the interim order of the said date. No evidence was led by the parties to prove the record or in rebuttal thereof. The findings on this issue recorded just by summoning the record and examination thereof are in gross violation of rules of evidence. Findings though in favour of the plaintiffs are not sustainable in law.

26. Issues No. 5, 10, 11, 12 and 13 were jointly taken up for adjudication and the trial Court held that the “Bandobast” (letter of agreement) dated 30.04.1980 marked Exhibit – 1 does not create any legal right upon the plaintiffs over the suit land. This finding has been arrived at by referring to the statement of Shri Pemba Tshering Bhutia, the scribe of the letter, who stated that the letter was prepared on the request of one R.D. Lama and one Kinzong Bhutia, who dictated the contents thereof but he could not recognize them and that there is no mention of the suit land in the document Exhibit -1. While deciding the issue No. 13, the trial Court held that defendant No. 1 has constructed a house over the suit land, where she was residing even before the death of her father since 1990 and being in possession and having constructed the house she has perfected her title by adverse possession. It is primarily on the findings of the issues No. 12and 13 the suit of the plaintiffs has been dismissed.

27. Regarding issue No. 11, the claim of defendant No. 1 that the property devolved upon her by “Daizo” no findings have been recorded.

28. From the judgment of the trial Court discussed in detailed hereinabove, it is found that all material issues have been decided in favour of the plaintiffs, the appellants before us. The plaintiffs have been declared to be grandsons of late Topching Bhutia and also held to be interested in the suit property, the same being ancestral. The claim of the defendant No. 1 that she acquired the property through "Daizo" no finding has been recorded in favour of defendant No. 1. The suit of the plaintiffs has been dismissed only on two accounts: (i) that the plaintiffs have failed to establish their right through the "Bandobast" (letter of agreement) dated 30.04.1980, and (ii) that the defendant No. 1 have perfected her title over the suit property by adverse possession. Both these findings are totally perverse and contrary to the facts on record and law.

29. As regards the findings on the "Bandobast" (letter of agreement) dated 30.04.1980 is concerned the trial Court did not refer to the contents of the document at all. Assuming that the document does not confer any right upon the plaintiffs in respect to the suit property, their right as successors by the usual mode of succession has not been examined and considered at all, even while holding that they are the grandsons of late Topchen Bhutia and have right and interest in the suit property. Even if no right emanates from the "Bandobast" (letter of agreement), the

plaintiffs being the grandsons of late Topchen Bhutia do acquire the rights in the suit property, being ancestral in nature in accordance with law. This question has not been delved upon by the trial Court and thus the findings are contrary to law. On the second question of claim of the defendant No. 1 having perfected her title on the basis of adverse possession, the finding is again totally perverse contrary to the facts and is impermissible in law. It is no body's case that the defendant No. 1 has hostile possession over the suit property. To the contrary defendant No. 1's claim is that the property devolved upon her by "Daizo" (Gift) made by her father during his life time. This clearly suggest that her alleged possession was permissive. She cannot claim any hostile or adverse possession under law. No evidence has been led by defendant Nos. 1, 2 and 3 regarding their hostile possession so as to lead to perfection of her title by adverse possession. It is settled law that permissive possession cannot be converted to adverse possession. Otherwise also there is no finding that defendant No. 1 was/is in possession of the suit land except a portion of it where one house is said to be constructed by her since 1990.

30. It is significant to note that the trial Court also did not decide as to who is in possession of suit property when both the parties claim to be in possession thereof. The plaintiffs have

specifically averred that they are in possession of the suit property and paying taxes in the name of their grandfather, whereas defendant No. 1 alleged simply her possession on the basis of an entry made in the year 2000 in the column of remarks regarding “Daizo”. However, no evidence has been led by the parties in regard to the actual physical possession. We are of the considered opinion that there is no substantive material or evidence on record to effectively and legally arrive at a conclusion regarding the possessory claims of the parties to the suit.

31. The issues in the case were framed on 28.05.2005. It is shocking to find that the trial Court did not comply with the mandate of law contained under rules 1 and 2 of Order X nor fixed the onus of proof in regard to any of the issues upon the respective parties as required under the law.

32. Order X of CPC dealing with examination of parties by the Court at first hearing. The relevant extract of this Order is reproduced hereunder:

> “
>
> **ORDER X –**
> **EXAMINATION OF PARTIES BY THE COURT**
>
> 1. **Ascertainment whether allegations in pleadings are admitted or denied.-** At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party

against whom they are made. The Court shall record such admissions and denials.

2. Oral examination of party, or companion of party. - (1) At the first hearing of the suit, the Court-

(a) shall, with a view to elucidating matters in controversy in the suit examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.**"**

Similarly, Rule 1 (5) of Order XIV relevant in this context is reproduced hereunder:-

" **ORDER XIV.**

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues. -

(1) to (4) .....

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.**"**

33. Under Rule 1 of Order X, it is mandatory for the Court to ascertain from the parties or their pleaders in regard to the allegations contained in the plaint or written statement on the first hearing of the suit. Rule 2 to Order X further obligates the Court to record the oral examination of the party.

34. Rule 1(5) of Order XIV further provides for framing of issues after reading the plaint and the written statement and examination of the parties under Rule 2 of Order X and after hearing the parties or their pleaders. The conjoint mandate of these provisions has not been complied with, rendering the proceedings of the trial Court illegal.

35. The trial Court has also not recorded any findings as to how the mutation dated 06.06.2003 has been recorded in favour of the defendant Nos. 2 and 3 when the defendant No. 1 herself claimed the entire suit property and there is a specific finding that she has perfected her title by adverse possession.

36. We have noticed that the trial Court has not recorded the findings on all the issues framed, particularly the issue No. 8, which is of vital importance to effectively and conclusively decide the rights of the parties. The judgment is in gross violation of

Order XX Rule 5 of the CPC, which enjoins a duty upon the trial Court to record its findings with reasons upon each separate issue. Rule 5 of Order XX reads as under:

> **" ORDER XX**
> **JUDGMENT AND DECREE**
>
> **5. Court to state its decision on each issue. -** In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit.**"**

This mandate of the law has been observed more in breach than compliance thereof.

37. For all what has been stated above, the impugned judgment and decree dated 22.10.2008 is not sustainable in law and is hereby set aside.

38. After having set aside the judgment and decree and in view of deficiency of evidence, illegalities and procedural irregularities committed by the trial Court during the trial of the case including perverse findings and non recording of the findings on the vital issues we are constrained to remand the matter to the trial Court under Order XLI Rule 23A read with Rule 23 of CPC noticed hereunder: -

> **"23A. Remand in other cases.-** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the

> decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.
>
> **23. Remand of case by Appellate Court.-** Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a cop of its judgment and order to the court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.**"**

Under above provisions, the Appellate Court has ample power to remand the case for deficiency in evidence and other valid reasons when the Appellate Court is of the opinion that the matter needs to be remanded for further trial.

39. The Hon'ble Supreme Court in ***P. Purushottam Reddy and Another vs. Pratap Steels Ltd.*** reported in ***(2002) 2 SCC 686***, while considering the power of the Appellate Court observed as under: -

> **"**10. ..... In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A.**"**

40. This appeal is accordingly allowed with following directions: -

(i) The trial Court is directed to re-admit the suit under its original number in the register of civil suits.

(ii) The trial Court will fix the onus upon the parties for proving the issues already framed.

(iii) The evidence recorded during the original trial shall, subject to all just exceptions, be evidence during the trial.

(iv) The parties shall be allowed to lead further evidence in support of their respective claims/ issues.

(v) Since the suit is pending for the last more than 8 years the trial Court shall proceed to decide the suit finally not later than 6 (six) months. The dates in the case shall be fixed not later than 15 (fifteen) days and no adjournment shall be granted unless necessary and by recording reasons.

(vi) The parties will appear before the trial Court on 21.05.2012.

41. In the facts and circumstances no order as to costs.

42. A copy of the judgment be sent to the trial Court.

43. We have noticed various kinds of procedural irregularities, illegalities in the judgment. It seems that the trial Courts are not adhering to the statutory, particularly, mandatory provisions of Code of Civil Procedure, resulting in injustice to the parties. We are of the opinion that the Courts below should be apprised of abrasions noticed by us hereinabove. A copy of the judgment be circulated to all the District Judges for further circulation to all the Civil Judges.

(Permod Kohli)
Chief Justice
01.05.2012

(S.P. Wangdi)
Judge
01.05.2012