

**THE HIGH COURT OF SIKKIM AT GANGTOK**  
(Civil Appellate Jurisdiction)

DATED : 15.07.2013

**CORAM****HON'BLE THE CHIEF JUSTICE  
MR. JUSTICE PIUS C. KURIAKOSE**R.F.A. No. 2 of 2013Nar Bahadur Khatiwada,  
S/o Late Dal Bahadur Khatiwada,  
R/o 5<sup>th</sup> Mile Tadong, Gangtok,  
East Sikkim.

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**Appellant/Plaintiff.**

- versus -

1. State of Sikkim,  
Through the Secretary,  
Land Revenue Department,  
Government of Sikkim,  
Gangtok, East Sikkim.
4. Sub-Registrar/District Collector,  
East District Collector,  
Gangtok, East Sikkim.

..... **Respondents/Defendants.**

For Appellant/Plaintiff : M/s. N. Rai, A. Moulik, B. Sharma, Sr. Advocates  
with Rajendra Upreti, Jyoti Kharka, U.P. Sharma,  
Gita Bista and Sushant Subba, Advocates.

For Respondents/Defendants : M/s. J. B. Pradhan, Addl. Advocate General and  
Karma Thinlay Namgyal, Sr. Govt. Advocate with  
S. K. Chettri, Asstt. Govt. Advocate.

Mr. Thinlay Dorjee Bhutia, Legal Retainer for L.R.  
& D.M. Department, Government of Sikkim.



Mr. P. K. Rai, O. S. D., L.R. & D.M. Department,  
Government of Sikkim.

## **J U D G M E N T**

### ***Pius, CJ***

The unsuccessful plaintiff in Title Suit No.08 of 2012 on the files of the Court of the District Judge, Special Division-II, East Sikkim at Gangtok is the appellant in this First Appeal. The respondents/defendants are – (i) the State of Sikkim through the Secretary, Land Revenue Department, Government of Sikkim and (ii) Sub-Registrar/ District Collector, East District, Sikkim. Parties will be referred to hereinafter, for the sake of convenience, as “appellant/plaintiff” and “respondents/defendants” respectively. The appellant’s case as pleaded by him has been narrated in great detail by the Court below in the impugned judgment and hence for the seek of brevity, I am adverting to them only briefly.

2. According to the appellant, on 10.12.1986 a gift deed was executed by Late Kazi Lhendup Dorjee Khangsarpa (L. D. Kazi for short,) in his favour in respect of the suit property, which is an extent of 0.35 acres corresponding to 0.0845 hectares of land bearing plot No. 713 at Gangtok Bazar, East Sikkim bounded within the following 4 (four) boundaries –

East : 31 A National High Way.

West : Masjid Compound.

North : Road to old West Point School and Masjid.

South : Building of Dr. (Mrs.) Changchup, D. Chankapa and T.T. Chankapa.

According to him, the above gift deed was presented on the day of execution before the Sub-Registrar, East Sikkim for registration, who after receipt of the same, deferred the registration to 11.01.1987 issued public notice inviting objection, if any, regarding the proposed registration. The appellant says that even though nobody filed any objection in response to the public notice given by the Sub-Registrar, the Sub-Registrar on 24.07.1987 and 15.03.1988 refused to register the gift deed on the reason that the transaction was not permissible in the absence of express sanction from the State Government in view of Revenue Order No.1. The appellant made an appeal against the order of the Sub-Registrar to the Appellate Authority (the Secretary, Land Revenue Department, Government of Sikkim). The Appellate Authority by its Order dated 15.03.1988 would uphold the Order of the Sub-Registrar, nevertheless observing that the suit property is not an agricultural property indicating that the same is urban property falling within the limits of Gangtok town.

**3.** According to the appellant, thereafter, he, the Donee and L.D. Kazi, the Donor filed Writ Petition No.6 of 1988 arraying the defendants as respondents challenging the order of the Appellate Authority before the High Court of Sikkim. The High Court of Sikkim allowing the writ petition quashed the Order of the Appellate Authority and issued a direction to the respondents to register the gift deed in



favour of the appellant. The appellant avers that against the judgment of the High Court of Sikkim in Writ Petition No.6 of 1988, the respondents preferred Special Leave Petition No.9706 of 1989 before the Hon'ble Supreme Court. The above Special Leave Petition was later registered as Civil Appeal No.6706 of 1995. The appellant submits that the civil appeal was dismissed by the Hon'ble Supreme Court, taking the view that the issue involved therein had become purely academic in view of the subsequent event of the State Government acquiring the suit property under the provisions of the Land Acquisition Act and the compensation for the suit property being paid already to the Donor, Shri L.D. Kazi.

**4.** The appellant points out that even as the Civil Appeal was dismissed, the Hon'ble Supreme Court had left open the question of law involved to be decided in an appropriate case. He further points out that the notification for acquisition of the suit property was promulgated by the State Government during the pendency of Writ Petition No. 6 of 1988 and that though he and the Donor together filed the Writ Petition No. 18 of 1988 challenging the land acquisition proceedings, the Donor, L.D. Kazi withdrew his name from the writ petition leaving him alone to pursue the legal battle against the respondents. It is pointed out that Writ Petition No.18 of 1988 was dismissed on 11.08.2004 in view of the apparent finality attained by the land acquisition proceedings. The appellant points out further, that against the judgment of this Court dismissing Writ Petition No. 18 of 1988, he preferred a Special Leave



Petition, which was dismissed by the Hon'ble Supreme Court on 12.09.2005, observing that the appellant does not have *locus standi* to maintain the Special Leave Petition in view of the subsequent event of the acquisition being completed and compensation being paid to the Donor, L.D. Kazi, observing nevertheless that the appellant will be free to pursue the remedy available to him on the dispute relating to the gift.

5. According to the appellant, though he approached the Registrar, East District on 25.02.2005 seeking registration of the gift deed, the Registrar would again refuse the registration by his Order dated 07.11.2005. The appellant also points out that though he filed a contempt petition alleging disobedience of the direction of this Court to register the document, the contempt petition was later got dismissed as withdrawn.

6. Separate written statements were filed by the defendants No.1 and 2. The 1<sup>st</sup> defendant-State would contend, *inter alia*, through its written statement that the suit is not maintainable and that the appellant has no *locus standi* to file the suit as he has no cause of action in his favour for instituting the suit. It was contended that the suit is bad for non-joinder of necessary party. It was also contended that as the value of the suit property is well above Rs.6,52,463.00, the suit is beyond the pecuniary limit of the Court's jurisdiction. It was also contended that the suit is bad for non-issuance of notice under Section 80 CPC. Various contentions touching the merits of the claim were also

raised and it was also contended that all the issues raised in the suit are concluded by the judgment of the Hon'ble Supreme Court. In the separate written statement filed by the 2<sup>nd</sup> defendant-Sub-Registrar, contentions are similar to those of the Government were raised and the learned District Judge on the basis of the rival pleadings would formulate the following issues for trial:-

1. Does the plaintiff have locus standi to file this suit?
2. Is the suit barred by the principles of res-judicate?
3. Is the suit bad for non-joinder of necessary party?
4. Has the suit been properly valued and does this court has pecuniary jurisdiction to entertain the present suit?
5. Is the suit maintainable?
6. Whether the gift deed has been executed delivering the possession of suit land by Kazi Lendup Dorji Khangsarpa in favour of the plaintiff prior to the initiation of the land acquisition proceeding by the defendants?
7. Whether the defendants are duty bound to register the gift deed dated 10.12.1986 executed by Kazi Lendup Dorji Khangsarpa in favour of the plaintiff in respect of the suit property?
8. Whether the defendants by acting upon the Judgment dated 24.05.1989 passed in Writ Petition No.6 of 1988 has recognized the plaintiff as the rightful owner of the suit property?
9. Whether the plaintiff has acquired right, title and interest over the suit properties under the unconditional and irrevocable gift deed dated 10.12.1986 executed by Kazi Lendup Dorji Khangsarpa?
10. Whether the respondents could initiate land acquisition proceeding against Kazi Lendup Dorji Khangsarpa when he had already gifted the suit land

to the plaintiff relinquishing his right, title, interest and possession over the suit property?

11. Whether the defendants wrongly and knowingly made the payment of compensation to the erstwhile owner of the suit property Kazi Lendup Dorji Khangsarpa after he relinquished his right, title, interest and possession of the suit property?
12. Whether the plaintiff has acquired right, title and interest by way of adverse possession over the suit land?
13. Any relief or reliefs as the plaintiff is entitled to.
14. Whether taking over the forcible possession of the suit land by defendant No.1 and 2 and allegedly transferring the possession of U.D. & H.D. pending disposal of the instant suit is valid in the eye of law.

**7.** On the above issues, parties went for trial and at trial evidence on the side of the appellant/plaintiff consisted of the oral evidence of 4 (four) witnesses including that of himself as P.W.1. The documentary evidence on his side consisted of Exhibits 1 to 28. Exhibit 1 is the Deed of Gift and Exhibit 7 is the Gift Deed document (the format which was submitted before the Sub-Registrar for registration of Exhibit1). Exhibit 9 is a copy of the judgment passed by the High Court of Sikkim in Writ Petition No.6 of 1988 (the judgment pertaining to the joint writ petition filed by L.D. Kazi and the present plaintiff seeking a direction for registration of the gift deed). Exhibit 12 is the order dated 24.11.2004 passed by the Hon'ble Supreme Court in Civil Appeal No.6707 of 1995 disposing of the appeal filed by the State against Exhibit 9 judgment. Exhibit 17 is the application submitted by L.D. Kazi seeking registration of the gift deed. Exhibit 19 is a copy of order passed by the High Court of Sikkim in an application filed by the plaintiff for calling




of records pertaining to registration of certain other documents under comparable circumstances and in respect of comparable property. Under Exhibit 19, the High Court disposed of the application in view of a concession made by the learned Advocate General that the registrations of the documents, which were sought to be called for, were made unauthorisedly. Exhibit 20 is a copy of Annexure-G submitted by the petitioner in Writ Petition No.6 of 1988 and the same is a statement showing the registration of lands granted in favour of persons other than Bhutia and Lepcha where sale/gift deed was executed by Bhutias and Lepchas.

**8.** The evidence on the side of the defendants/respondents consisted of the oral evidence of D.W. 1, who was the Additional Secretary in the Land Revenue Department, Government of Sikkim and he gave oral evidence on the basis of records. The documents on the side of the defendants/respondents consisted of D-1 to D-26. Exhibit D-3 is the notice under Section 4(1) of the Land Acquisition Act, 1894 issued regarding the proposal to acquire the land covered by the gift deed. Exhibit D-5 is a copy of the declaration under Section 6(1) promulgated in respect of the Land Acquisition relating to the land covered by the gift deed.

**9.** Exhibit D-9 is described in the appendix of the impugned judgment as certified copy of the notice under Section 12(2) of the Land Acquisition Act but actually Exhibit D-9 is a letter sent by the District





Collector, East to the Secretary, Land Revenue Department informing him of the decision taken by the High Court of Sikkim in Writ Petition No.48 of 1987. However, it is stated in this letter that L.D. Kazi had sent a telegram to the District Collector, informing the District Collector that he had received a notice Under Section 12(2) of the Land Acquisition Act sent by registered post to him only on 24.05.1988 and that he would be meeting District Collector in the matter shortly.

**10.** Exhibit D-13 is a copy of the compliance report dated 24.12.2008 submitted by the S.D.M., SDPO etc. wherein it is reported that the land, in question, is already taken over pursuant to the District Collector's order dated 24.12.2008 for taking over possession. Exhibit D-16 is referred in the appendix of the impugned judgment as certified copy of the compliance report of order dated 24.12.2008 but actually D-16 is a report submitted by Sub-Divisional Magistrate, East to the District Collector, East in which it is stated that though the land in question has come under the possession of the Land Revenue & Disaster Management Department, it is also reported that one person, namely, Shri N. B. Khatiwada (plaintiff) has not yet vacated the premises as shown in the sketch map 'C'. Exhibit D-19 is a copy of the order issued by the District Collector, East authorizing Sub-Divisional Magistrate, East and Sub-Divisional Police Officer, Gangtok to dispossess Shri N.B. Khatiwada completely from the acquired land. Exhibit D-20 is a compliance report submitted by the Sub-Divisional Magistrate pursuant to Exhibit D-19. It is stated therein that the land has come to the actual



possession of the Department and that all occupiers including Shri N.B. Khatiwada have been evicted. Exhibit D-26 is a copy of the handing and taking over memo.

**11.** The learned District Judge would evaluate the evidence adduced by the parties as above and hear the learned counsel for the parties and proceed to decide the various issues which had been formulated for trial.

**12.** On the basis of the decision of the Supreme Court in Special Leave to Appeal (Civil) No(s).21982-21986/2004, wherein the Supreme Court refused to entertain the challenge against land acquisition proceedings on the reason that those proceedings have become final due to the passage of award, payment of compensation and taking over possession, it was contended that the suit is barred by principles of *res-judicata*. The learned trial Court under the impugned judgment has answered that issue in favour of the plaintiff by finding that the present suit is not barred by principles of *res-judicata*. A contention that the suit is bad for non-joinder of necessary party was raised by the respondents on the obvious premise that L.D. Kazi ought to have been made a defendant. It was, accordingly, that Issue No. 3 – is the suit bad for non-joinder of necessary party, was raised. The trial Court would answer that issue in favour of the plaintiff taking the view that the plaintiff is not required to seek remedy against anyone other than the present defendant following a finding entered under issue No.9 that the gift deed




ought not have been revoked and for another reason that the defendants did not raise the plea of non-joinder of parties at the right time.

**13.** Issue No.4 – the issue regarding the propriety of the valuation of the suit and also the pecuniary jurisdiction of the Court to entertain the suit was answered in favour of the plaintiff by noticing an amendment of the plaint, which was successfully sought for by the plaintiff so as to bring the suit within the pecuniary limit of the Court's jurisdiction.

**14.** Issue No. 6 – Whether the gift deed has been executed delivering the possession of suit land by Kazi Lendup Dorji Khangsarpa in favour of the plaintiff prior to the initiation of the land acquisition proceedings was answered by the Court below in favour of the plaintiff noticing the evidence that the gift deed was executed on 10.12.1986 and was to be registered on 11.01.1987 and also that on the basis of the gift deed, possession was handed over by L.D. Kazi to the plaintiff.

**15.** Issue No. 1- as to whether plaintiff has *locus standi* to file the suit, was decided by the Court below against the appellant taking the view that though the gift deed was validly executed and the plaintiff-donee was put in possession, the deed was not registered as requested under Section 126 of the Transfer of Property Act. According to the Court below, the gift deed became void on account of revocation prior to registration and hence the appellant who claimed under a void gift deed cannot have any locus standi to institute a suit. The maintainability of



the suit was challenged by the defendants mainly on the premise that the mandatory notice under Section 80 C.P.C. was not issued prior to institution of the suit. Though it was found that leave had been given to the plaintiff under Section 80 CPC, the Court below would decide this issue also against the plaintiff relying on finding entered under Issue No. 9 that the plaintiff has not acquired right, title and interest over the suit property under the gift deed.

**16.** Coming to Issue No. 7 as to whether the defendants are duty bound to register gift deed dated 10.12.1986 executed by L.D. Kazi in favour of the plaintiff in respect of the suit property, the Court below would at paragraph 66 of its judgment find as follows: -

“From the above discussions, it goes without saying that once the gift deed was validly executed and properly presented the Defendants, particularly the Defendant No. 2 was/were duty bound to register the gift deed.”

Nevertheless, the Court below proceeds to refer to certain observations made by the Hon'ble Supreme Court in its order dismissing the Special Leave to Appel (Civil) No(s). 22982-22986/2004 filed, challenging the judgment of the High Court of Sikkim in Writ Petition No. 18 of 1988 and proceeds also to refer to the order passed by the Registrar, East Sikkim refusing registration taking the view that issue of registration has become superfluous in view of the acquisition and thereafter, refers to the contempt petition filed by the appellant/plaintiff before the High Court of Sikkim, which was dismissed as withdrawn. According to the Court below, notwithstanding its finding contained at paragraph 66 of the



judgment in view of the order of the Hon'ble Supreme Court and the order passed by the Registrar, East Sikkim, Issue No. 7 became infructuous and on that basis decided that issue against the plaintiff.

**17.** On considering Issue No. 8 whether the defendants by acting upon the judgment dated 24.05.1999 passed in Writ Petition No. 6 of 1998 have recognized the plaintiff as the rightful owner of the suit property, the Court below would refer to Exhibit 11- letter and say that the above letter sent by the 2<sup>nd</sup> defendant to late L.D. Kazi demanding back from him the compensation amount of Rs.6,52,463/- on the reason that the compensation was wrongly paid to him would observe that the above letter was written by the 2<sup>nd</sup> defendant on the basis of another letter No. 46/AG/89 dated 25.05.1989 sent by the then Advocate General of the State to the District Collector, East, wherein it is observed that L.D. Kazi was not entitled to the property based on the judgment of the High Court of Sikkim in Writ Petition No. 6 of 1988 and that the compensation amount is immediately to be got refunded by L.D. Kazi. Learned Judge would, in paragraph 73 of the judgment, observe that the defendants have "not only demanded back the compensation amount wrongly/ illegally paid to Late L.D. Kazi but also recognized the Plaintiff herein as the right owner of the suit/gifted property. The Defendants are, therefore, estopped from claiming otherwise" Nevertheless it was observed that one can have ownership on the strength of a gift deed only when it is registered and that the judgment of the High Court of Sikkim in Writ Petition No.6 of 1988 ceased to be final when the Hon'ble



Supreme Court disposed of SLP (Civil) No(s). 22982-22986 of 2004, the Court below would conclude that the plaintiff was never treated as the rightful owner of the suit property on the basis of the judgment dated 24.05.1989 passed in Writ Petition No. 6 of 1988. The ultimate conclusion under the above issue is interestingly arrived at on the basis of its own decision under Issue No.7. Thus, the above issue was also decided against the plaintiff.


**18.** Issue No.10 as to whether the respondents could initiate a land acquisition proceeding against Kazi Lendup Dorji Khangsarpa when he had already gifted the suit land to the plaintiff relinquishing his right, title, interest and possession over the suit property is also considered separately by the learned trial court. Coming to this issue, the Court below would extensively quote from paragraph 21 of the counter affidavit filed by the 2<sup>nd</sup> defendant in Writ Petition No. 18 of 1988, wherein the 2<sup>nd</sup> defendant has unequivocally averred that the title and interest of L.D. Kazi have been transferred in favour of the plaintiff and that the respondents are not at all interested in entering into the controversy of the rights of the plaintiff over the property. Reiterating its views that the right in respect of the immovable property cannot be transferred on the basis of the unregistered gift deed and that both the plaintiff and L.D. Kazi having voluntarily participated in the land acquisition proceedings “without obtaining injunction order from court of law simply claiming market value of the suit property, thus, giving consent to acquire the land by their conduct impliedly”. The plaintiff is



not entitled to claim that he is the owner. In this context, the Court below also observed that the issue of compensation claimed by L.D. Kazi was abandoned by him observing that admission by Government in affidavit in similar earlier proceedings will not be binding on Government so as to create an estoppel, the learned Judge would decide the above issue also against the plaintiff.

**19.** Coming to Issue No. 11 as to whether the defendants wrongly and knowingly made the payment of compensation to the erstwhile owner of the suit property Kazi Lendup Dorji Khangsarpa after he relinquished his right, title, interest and possession of the suit property, the Court below would refer to the observations of the Hon'ble Supreme Court in its order in SLP (C) No. 21982-21986 of 2004 and then rely on its own decision under Issue No. 9 and would proceed to decide the above issue against the plaintiff.

**20.** Issue No. 12, as to whether plaintiff has acquired right, title and interest by way of adverse possession over the suit land, raised by the Court below on the basis of alternative plea raised by the plaintiff, is decided by the Court below against the plaintiff on the reason that the original owner of suit land hails from Bhutia Tribe community and law is very clear that the adverse possession shall not apply to tribal's land and also on the reason that the documents placed on record in this case will show that the plaintiff has not held the property adversely during the period requisites for presentation of title against the Government.




**21.** Issue No.14, as to whether taking over forcible possession of the suit land by the defendants no. 1 and 2 and allegedly transferring the possession to U.D. & H.D. pending disposal of the instant suit is valid in the eye of law, is also separately considered by the Court below. Now, the Court below noticed that this issue was raised by the plaintiff invoking the principle enshrined under Section 52 of the Transfer of Property Act, 1882. The Court below would conclude that if in order to attract the doctrine of '*lis pendens*', the suit or the proceeding must have been pending in a Court of competent jurisdiction when the transaction affecting the property is made. According to the Court below, the compulsory acquisition by the Government even if it is considered as a transaction within the scope of Section 52 of the Transfer of Property Act, was made at a time when the suit was pending before the learned Civil Judge who had no competent jurisdiction over the *lis*. The above issue was also decided by the Court below against the plaintiff.

**22.** Issue No. 13 pertaining to the eligibility for any relief or reliefs to which the plaintiff is entitled to, was also answered against the plaintiff and the suit was accordingly dismissed without granting any relief to the plaintiff.

**23.** Very extensive submissions were addressed before me by Mr. N. Rai, learned Senior Counsel for the appellant on the basis of the grounds raised in the memorandum of appeal and otherwise. Referring to the various documents which are available on the records of the case,




Mr. Rai would draw my attention to the chequered career which the present suit had. According to Mr. Rai, the defendants/ respondents disregarded the rules and due process of law. As a result of this, valuable constitutional and other legal rights of the appellant/ plaintiff have been denied to him. The plaintiff suffered grave injustice at the hands of the State machinery. According to him, it was on very unreasonable grounds that the 2<sup>nd</sup> defendant refused to register the gift deed executed by L.D. Kazi in favour of the appellant/ plaintiff. He pointed out that the issue as to whether the plaintiff is entitled to get the gift deed registered in his favour was finally decided by the Hon'ble Supreme Court in Civil Appeal No.6707 of 1995, yet respondents have not chosen to register the gift deed till date. Learned Senior Counsel submitted that ignoring the gift deed which was recognized as a valid one even by the Hon'ble Supreme Court, the respondents would acquire the property showing Shri L.D. Kazi as the owner and the compensation was wrongly paid to the donor who had ceased to have any interest over the gifted property which was under acquisition. Referring to the decision of the Hon'ble Supreme Court in the land acquisition matter, Mr. Rai submitted that the Hon'ble Supreme Court had doubted the locus standi of the plaintiff to challenge the land acquisition merely on the reason that the gift deed relied on by the appellant was an unregistered one. Non-registration of the gift deed was an illegal act done by the defendants and therefore, the defendants cannot be permitted to take advantage of the same. Learned Senior Counsel pointed out that even in



the Supreme Court's decision, the appellant has been given the liberty to adjudicate his right on the basis of the gift deed which is dated 10.12.1986. According to the learned Senior Counsel, initial notification under Section 4(1) of the Land Acquisition Act, 1894 was published on 03.03.1987 which is months after the date of the gift deed on which date the appellant had already become owner in possession.

**24.** Drawing my attention to Exhibit - 1, learned Senior Counsel submitted that Exhibit - 1 discloses an unconditional and irrevocable gift which was accepted by the appellant, the Donee who was put in possession on the date of the gift deed itself. According to him, the gift deed was duly presented for registration by the Donor and the Donee jointly and the Sub-Registrar complied with all the statutory formalities and confirmed that a valid gift of the property, in question, had been made by the Donor to the appellant, the Donee. What remained was only the ministerial/administrative work of registration and it was accordingly that the matter was deferred to 11.01.1987 issuing public notice inviting objection from the general public. According to the learned Senior Counsel, nobody raised any objection regarding the proposed registration. Nevertheless on 21.4.1987 the Registrar would decline registration relying on Revenue Order No.1, taking the view that express sanction of the Government was necessary for Bhutias and Lepchas to transact their properties and as the Donor was a Lepcha, the proposed gift deed was illegal. Mr. Rai submitted that Revenue Order No. 1, and Maharaja's proclamation dated 13.08.1956 which is relied on



by the Registrar to decline registration, is not applicable in this case. According to him, though the plaintiff's challenge of the order of the Registrar before the Appellate Authority was unsuccessful, the appellate authority has given a clear finding that the property is not an agricultural property, but urban property and the same was situated in Gangtok town. The learned Senior Counsel would highlight the judgment of the High Court of Sikkim in Writ petition No. 6 of 1988 and submit that it was to bypass the above judgment confirmed by the Supreme Court also that the 1<sup>st</sup> respondent issued a notification under Section 4(1) of the Land Acquisition Act, 1894 so as to acquire the suit property for a purpose which neither was public nor genuine. The action of the defendants in the context of the land acquisition proceedings, according to the learned Senior Counsel, was clearly malafide and the learned Senior Counsel submitted that even the application for injunction filed by the appellant, the petition seeking registration, could be successfully subverted by the respondents who denied the plaintiff of his entitlement to receive the land acquisition compensation, thereby compelling the appellant/plaintiff to withdraw from the suit and the injunction petition.

**25.** Drawing my attention to Exhibit - 11 - the letter sent by the 2<sup>nd</sup> respondent to L.D. Kazi, Exhibit 12 - the order of the Hon'ble Supreme Court of India in Civil Appeal No.6707 of 1995 and Exhibit 14 - the order of the Hon'ble Supreme Court of India in Special Leave to Appeal (Civil) No(s).21982-21986/2004, the learned Senior Counsel would submit that all the issues, which arose in the suit upon the pleadings raised by the



parties, have been left open by the Supreme Court. The learned Senior Counsel would proceed to assail the findings entered by the learned District Judge on issues No.1, 5, 7, 8, 9, 10, 11, 12, 13 and 14; those issues decided by the learned District Judge against the appellant/plaintiff one by one. According to the learned Senior Counsel, those findings are contrary not only to the facts but also to law statutory as well as settled. Learned Senior Counsel submitted that the implications of the doctrine of merger have not been properly understood by the Court below and he would argue on the authority of the judgment of the Supreme Court in ***Kunhayammed & Ors. v. State of Kerala & Anr. : AIR 2000 SC 2587*** that the judgment of the Sikkim High Court in Writ Petition No.6 of 1988 merged with the order of the Hon'ble Supreme Court of India in Civil Appeal No.6707 of 1995 and according to the learned Senior Counsel, the implications of the merger and the direction to the authority to register the same were finally decided by the Supreme Court in favour of the plaintiff. Referring to recitals of the gift deed and also the oral evidence adduced by the appellant/plaintiff in the context of that, the learned Senior Counsel would submit that it has been abundantly proved in this case that a valid and completed gift of the property covered by Exhibit-1 has been made in favour of the appellant who had accepted the same and had taken possession of the gifted property also. Therefore, according to the learned senior counsel issue no. 6 should have been decided by the Court below in favour of the appellant/plaintiff.

26. Making submissions with reference to the decision of the Court below in issue no. 7, 9 and 10, the learned senior counsel would submit that the findings of the Court below on the above three issues are erroneous. According to him a valid gift has been executed and the same having been accepted by the donee, who had taken over the possession of the property also, the donor had no authority at all to revoke the gift deed especially as it was explicit from the gift deed that the same was an irrevocable one. Apart from express recitals in the gift deed that the gift deed is accepted, in the present case possession was actually taken over by the donee and such taking over of possession amounts to acceptance by the donee. In this context the learned senior counsel would rely on the judgment of the Privy Council in ***Kalyanasundaram Pillai vs. Karuppa Mooppanar (AIR 1927 PC 42)***, that of a Full Bench judgment of the Bombay High Court in ***Atmaram Sakharam vs. Vaman Janardhan (AIR 1925 Bom 210 (FB)) Mst. Samrathi Devi, Appellant vs. Parsuram Pandey and others, Respondents (AIR 1975 Patna 140)*** and ***Vannathi Valappil Janaki & Ors, Appellants vs. Puthiya Purayil Paru & Ors., Respondents (AIR 1986 Ker 110)***. The learned counsel also referred to the judgment of the High Court of Travancore - Cochin in the case of ***Esakkimadan Pillai vs. Esakki Amma (AIR 1953 Trav-Co. 336)*** in support of the proposition that delivery of the original of the gift deed to the donee and assumption of possession by the donee over the



property covered by the gift deed amounted to acceptance of gift by the donee.

**27.** According to the learned senior counsel by contending in one breath that the deed of gift is invalid for registration and by resisting the appellant's request for registration in another breath, the respondents have virtually taken advantage of their own wrong. This cannot be permitted and in this context, learned senior counsel relied on the judgment of the Supreme Court in ***Savitri Pandey vs. Prem Chandra Pandey (AIR 2002 SC 591)***.

**28.** Learned senior counsel would expatiate his argument that Revenue Order No. 1 which is relied on by the Sub-Registrar to justify his order declining the registration does not apply to the present case at all. Learned senior counsel submitted that this Court by judgment in Writ Petition No. 6/1988 had clearly held that the above Revenue Order applies to agricultural land only and not to urban lands like the land covered by the gift deed situated in a commercially vantage area of Gangtok city. The learned senior counsel also submitted that it is clearly held by this Court in the above judgment that deeds of gift are excluded from the purview of Revenue Order No. 1. To drive home the proposition that transfer by way of gift has been intentionally and expressly excluded by the Government in Revenue Order No. 1, for the reasons that unlike sale deed, deed of gift made out of natural love and affection which a donor has for a donee, learned senior counsel would



rely on the judgment of the Supreme Court in ***UCO Bank & Anr. vs. Rajinder Lal Capoor (AIR 2008 SC 1831)***, which rules that a Court of law is not expected to presume a '*cassus omissus*' but if there is any, it shall not supply. As regards this limitation on the power of the Court, the learned senior counsel also relied on a judgment of the Full Bench of the Punjab & Haryana High Court in ***A.K. Ahlawat & Ors. vs. State of Haryana & Ors (2011 Cri. L.J. 4708)***.

29. Learned senior counsel submitted that the registering authority was bound to facilitate the registration of the gift deed which was sought for jointly by the donor and the donee. In this context, the learned senior counsel relied on a judgment of the Jharkhand High Court in ***Narendra Butala vs. State of Jharkhand & Ors. (AIR 2005 Jhar 99)***. According to him as the original donor Shri L.D. Kazi had ceased to have any interest in the gifted property by virtue of gift deed which was accepted by the done, the respondents were wrong in initiating L.A. proceedings in the name of Shri L.D. Kazi as if he continued to be the owner of the property. The position that Shri L.D. Kazi had ceased to be the owner was actually conceded by the respondent according to the learned counsel, who drew my attention to paragraph 21 of the counter affidavit filed by respondent No. 2 in Writ Petition No. 18 of 1988. According to the learned senior counsel the initiation of the L.A. proceedings cannot affect the appellant's entitlement for registration as registration once effected would relate back to the date of execution.



30. The learned senior counsel would assail the findings of the Court below on issue no. 11 which pertains to the legality of the payment of compensation to the erstwhile owner of the land Shri L.D. Kazi. The senior counsel submitted that in Sikkim the District Collector himself exercises the powers of the Sub-Registrar and the Land Acquisition Officer. Therefore, the factum of the execution of gift deed for registration, the delivery of the gifted property by the donor to the donee were all known to the District Collector. The payment of compensation to L.D. Kazi who had ceased to have any ownership or interest in the property covered by the gift deed, was a wrong committed by the respondents and the appellant cannot be made to suffer for such wrong act. In this context learned senior counsel relied on the observations of the Allahabad High Court in ***Vishnu Kumar and another vs. State of U.P. and others (1989 All. L.J. 1365)***.

31. The learned senior counsel would assail the findings of the Court below on issue no. 1 regarding the plaintiff's locus standi to file the suit. According to the learned senior counsel, the Court below having decided issue no. 2 regarding the application of the principles of res-judicata and also regarding maintainability of the suit in favour of the appellant erred egregiously in deciding the issue no. 1 of locus against the appellant. The learned counsel submitted that apart from placing a bald contention that the plaintiff has no locus standi to maintain the suit, the defendants have not put forward anything cogent to show on what




account plaintiff lacks in locus. The learned counsel pointed out that it cannot be argued by anybody even for a moment that the plaintiff does not have a grievance. The plaintiff does have a genuine grievance in that the 2<sup>nd</sup> defendant who was duty bound to facilitate the registration of the gift deed did not facilitate such registration without any valid reason. The initiation of the LA proceedings is at a time when the registration process was kept pending by the authorities for no fault of the appellant. At least as regards the initiation of the LA proceedings showing L.D. Kazi donor as the owner (instead of plaintiff, the donee who had already acquired ownership) it has to be conceded by the respondents that the appellant had a genuine grievance. All persons with genuine grievance should have a remedy. The finding that the appellant has no locus standi to file a suit was thus clearly erroneous. The learned counsel in this context referred to the observation of the Hon'ble Supreme Court in its order in SLP (C) Nos. 21982-21986/2004 that the plaintiff was free to pursue his remedies in respect of the gift deed in accordance with the law.

**32.** Probably in the light of an observation by me during the course of hearing of the case that the remedy of the appellant if he has a grievance regarding the payment of LA compensation to Shri L.D. Kazi, the donor instead of himself, lies against the other assets left behind by Shri L.D. Kazi and the legal representatives of Shri L.D. Kazi, Mr. Rai, the senior counsel referred to the judgment of the Madras High Court in ***Deputy Collector, Cocanada vs. Maharaja of Pittapur (AIR 1926***

**Madras 492)** and the judgment of the Orissa High Court in ***Shantibala alias Shantilata Devi vs. Krushna Chandra Samantaray & Ors.*** (**AIR 2004 Orissa 9**) and argued that the wrong of paying compensation to L.D. Kazi who had ceased to have any interest in the property was done by the State and its functionaries i.e. the defendants. According to him, having perpetrated an illegality and that too malafide, it is not open to the State to contend that the appellant should pursue his remedies against the person receiving the compensation wrongly. The appellant was the only person interested in the property at the time when the LA proceedings were initiated and the result of the illegal acquisition is that the valuable right of the appellant to receive adequate compensation as guaranteed under Article 300 A of the Constitution has been violated.

**33.** Learned counsel referred to the judgment of the Supreme Court in ***State of U.P. & Ors. vs. Manohar (AIR 2005 SC 488)*** which clearly lays down that even though the fundamental right originally guaranteed under Article 19(1)(f) to property has been taken away Article 300 A confers on the citizen an equally valuable right to receive adequate compensation when his property is compulsorily acquired. There has been infraction of Article 300 A by the respondents in that they initiated the LA proceedings in the name of L.D. Kazi while they knew that the appellant had already acquired valuable interest in the property by virtue of the gift deed. Therefore, according to the learned counsel issue no. 1, regarding the locus and issue no. 5 regarding the



maintainability had to be decided in favour of the appellant. Counsel further submitted in this context that the maintainability of the suit was challenged by the respondents mainly in the context of Section 80 CPC. The Court below actually turned down that challenge. Nevertheless issue no. 5 regarding the maintainability is decided against the appellant in the light of the Court's finding under issue no. 9. This was wrong, it was submitted.

**34.** Learned counsel would then argue that the findings of the Court below in issue no. 8 as to whether the defendants recognized the appellant/plaintiff as the rightful owner of the suit property is clearly erroneous. Exhibit -11 was referred to by the learned senior counsel who placed strong reliance on the judgment of this Court in writ petition No. 6/1988 whereby the registering authority was directed to register the gift deed. This judgment according to the learned counsel clearly shows that this Court recognized the appellant as the rightful owner and Exhibit – 11 would show that this Court's judgment is accepted by the defendants. Learned counsel also submitted that Exhibit-11 was issued to L.D. Kazi based on the basis of a letter sent by the then Advocate General on 25.05.1989 to the District Collector, East. These two items of correspondence show that the Government did recognize appellant as owner of the property covered by the gift deed. Respondents are therefore estopped from contending now that the appellant never became the owner and was not entitled to receive the compensation under the LA Act.

35. The learned counsel would assail the findings of the Court below in issue no. 12 regarding the appellant's prescribing for title by adverse possession and limitation. According to the learned counsel even that issue should have been decided in favour of the appellant.

36. Lengthy arguments were submitted by the learned senior counsel regarding the correctness and findings of the Court below in issue no. 14 which pertains to the legality of dispossession of the suit property and transferring of possession of the suit property over to the U.D. & H.D. pending disposal of the suit. According to the learned counsel ugly haste was displayed by the respondents in the matter of dispossessing the appellant from the property in question after the temporary injunction which was originally granted by the trial Court was vacated by this Court. Counsel submitted that the Hon'ble Supreme Court passed an order directing the parties to maintain status quo in respect of the property. Even though that status quo order of the Hon'ble Supreme Court was intimated to the respondents, they did not refrain from dispossessing the appellant. Counsel referred to Section 52 of the Transfer of Property Act which prohibits transfer of property during the pendency of suit. In order to enunciate the doctrine of *lis pendens*, learned counsel referred to the judgment of the Supreme Court in ***Amit Kumar Shaw and another vs. Farida Khatoon & another*** : (AIR 2005 SC 2209) and the judgment of the Andhra Pradesh High

Court in ***Pannala Renuka w/o P. Parvathal Reddy & anr. vs Kavali (Rajumouni) Venkataiah & Ors. : (AIR 2007 AP 46)***.

**37.** As regards issue no. 13, the learned counsel submitted that all the reliefs sought for by the appellant/plaintiff should have been granted in this case as there was cogent evidence to substantiate all the claims of the plaintiff. Referring to the various documents produced on the side of the Government-defendants, the learned counsel submitted that all these documents are marked by DW-1 Nezing Lepcha. This Nezing Lepcha was neither the maker of the documents nor a signatory of these documents. The evidence of Nezing Lepcha, DW-1 was quite inadequate to prove the documents. Therefore, according to the learned counsel there is no responsible counter evidence adduced on the side of the defendants against the available evidence adduced by the appellant/plaintiff. For this proposition Mr. Rai relied on the judgment of the Supreme Court in ***Sait Tarajee Khimchand and others vs. Yelamarti Satyam and others : (AIR 1971 SC 1865)*** and ***Hazara Singh vs. Attar Kaur : (AIR 1976 P & H 24)***. The learned senior counsel before concluding his submissions would rely on some more decisions.

**38.** He relied on judgments of the Supreme Court in ***State of Orissa vs. Md. Illiyas : (AIR 2006 SC 258)***; ***Central Board of Dawood Bohra Community & Anr. vs. State of Maharashtra and Anr. : ((2005) 2 SCC 673)*** and that of the Karnataka High Court in



***Govindanaik G Kalaghatigi vs. West Patent Press Co. Ltd. and other : (AIR 1980 Karnataka 92).*** To argue regarding the binding nature of judicial precedents, giving stress on the judgment of ***State of Orissa (supra.)*** the counsel would submit that precedent is an authority for what it actually decides or what is of the essence in a decision or what is the ratio of the decision only. According to him the issues regarding the valid execution of a gift deed and the liability of the authority to register the same, have attained finality by the order of the Hon'ble Supreme Court in Civil Appeal No. 6707 of 1995 and that issue is now sought to be resurrected by respondents. This cannot be permitted. The learned counsel would argue so on the strength of judgment of the Supreme Court in ***Sugandhi Suresh Kumar vs. Jagdeeshan : ((2002) 2 SCC 420).***

**39.** Learned counsel referred to Section 47 of the Registration Act, 1908 and submitted that the section clearly provides that the registration of a document shall operate from the time from which it would have commenced to operate if there is no necessity for registration and not from the time of registration. According to him acquisition proceedings initiated subsequent to the gift deed cannot nullify or defeat the accrued/vested rights of the appellant/plaintiff and for this proposition he would rely on ***Atmaram Sakharam vs. Vaman Janardhan : (AIR 1925 Bom 210 (FB)); Venkat Subba Srinavas Hegde vs. Subba Rama : (AIR 1928 PC 86); Hamda Ammal vs. Avadiappa Pathar : ((1991) 1 SCC 715)*** and two other decisions.




According to the learned counsel as issue nos. 7, 8, 9 and 12 are decided in favour of the appellant/plaintiff, the Court below became obliged to decide the other issues also in favour of the appellant.

**40.** Mr. J.B. Pradhan, learned Additional Advocate General assisted by Mr. Karma Thinlay Namgyal, learned senior Government Advocate would make very emphatic submissions resisting the submissions of Mr. N. Rai.

**41.** The learned Additional Advocate General submitted that the State Government issued Notification under Section 4(1) of the L.A. Act as well as declaration under Section 6(1) of the same Act for acquisition of Plot No. 713 measuring 0.35 acres (property covered by the gift deed) while the Writ Petition No. 6/1988 filed by the donor L.D. Kazi and the donee, the present plaintiff was pending before this Court. The above notification and declaration were issued for a very genuine public purpose of construction of multi-storied structure for car parking in the city of Gangtok.

**42.** Learned Additional Advocate General pointed out that though the above writ petition was filed by the donor and donee jointly later on 17.11.1988 the donor L.D. Kazi filed an application to withdraw from the writ petition saying that he did not want to proceed with the matter. This Court by order dated 06.09.1990 allowed that application thus leaving the present plaintiff, the second petitioner in the writ



petition, alone to continue with the legal battle. Learned Additional Advocate General submitted that on 17.11.1988 itself L.D. Kazi accepted the entire compensation of Rs.6,52,463/- which had been awarded for the property covered by gift deed in terms of Section 11 of L.A. Act under cheque No. H 191268 dated 17.11.1988.

**43.** Learned Additional Advocate General submitted that in the meanwhile this Court by judgment dated 24.05.1989 in W.P. No. 06/1988 set aside the appellate order regarding the registration and directed the concerned authority to register the gift deed. The Government of Sikkim challenged that judgment before the Hon'ble Supreme Court by filing a Special Leave to Appeal (Civil) No. 9706 of 1989, which was later converted as Civil Appeal No. 6707 of 1995. The Hon'ble Supreme Court admitted the appeal and granted interim stay of the proceedings related to the registration of the gift deed pending notice in the appeal. In the meanwhile, the donor L.D. Kazi through a letter dated 09.08.1994 addressed to the Registrar/ District Collector revoked the gift deed. In the meanwhile the High Court vide judgment dated 11.08.2004 dismissed the W.P. No. 16 of 1988 by a reported judgment in **AIR 2004 Sikkim 41**. Another writ petition (W.P. No. 18/1988) was also dismissed by an order dated 11.08.2004. According to the learned Additional Advocate General, the W.P. No. 16/1988 was dismissed by the High Court mainly taking the view that when the need shown by the Government is for a public purpose a Court cannot





substitute its opinion in place of the Government's opinion with regard to the public purpose. Against that judgment the present appellant preferred S.L.P. No. 21982-21986 of 2004 before the Hon'ble Supreme Court. In the meanwhile, Civil Appeal No. 6707 of 1995 which was filed by the State against the judgment of the High Court in W.P. 06/1988 was disposed of by the Supreme Court without examining the merits of the dispute but leaving open the question involved (question pertaining to gift deed) to be decided in an appropriate case. Learned Additional Advocate General submitted that on 12.09.2005 SLP No. 21982-21986 of 2004 filed by the present appellant was dismissed by the Hon'ble Supreme Court indicating that in the absence of a registered gift deed from L.D. Kazi the appellant cannot have a legitimate claim on the property and that in view of the subsequent payment of compensation to L.D. Kazi, the appellant ceased to any locus standi to maintain the SLP and accordingly the SLP stood dismissed.

**44.** The first submission of the Additional Advocate General was that the challenge against the LA proceedings is preposterous. The above challenge had been finally turned down by this Court and the Hon'ble Supreme Court by its judgment in 1995. The learned Additional Advocate General would next submit that the Hon'ble Supreme Court by its order in SLP No. 21982-21986 of 2004 had noticed that there was no registered gift deed in favour of the appellant. The finding of the Supreme Court in that order that the appellant had no locus standi to




maintain the SLP was entered mainly in view of the absence of a registered gift deed. The observation that the appellant can seek remedy was subject to the rider, that the remedy should be available to him in law. No remedy is unfortunately available to the appellant in law. According to the learned Additional Advocate General the question of illegality of the LA proceedings has not been under challenge at all. Even the question of the appellant acquiring ownership by virtue of gift deed has not been suggested to challenge. If this Court ultimately finds that under the gift deed the appellant has acquired ownership then the only remedy to which the appellant may be available is to recover the compensation amount from the legal heirs of late L.D. Kazi. That remedy cannot be granted in the present suit as neither L.D. Kazi nor his legal heirs are parties. Therefore, result of the suit can only be dismissal.

**45.** The finding entered by the Court below under issue no. 5 regarding maintainability can be sustained on better reason including the reasons that the Supreme Court vide its order in SLP No. 21982-21986 of 2004 has clearly found that the appellant does not have any locus standi. After making the above submissions which were factual and based on records Mr. Pradhan went on to make certain legal submissions which I am referring to below.

**46.** According to Mr. Pradhan, Section 122 of the Transfer of Property Act deals with the manner in which gift of immovable property



is to be made. According to him, a gift of immovable property can be made only by a registered instrument signed by or on behalf of the Donor and attested by at least 2 (two) witnesses. Learned Addl. Advocate General submitted that in the present case, inasmuch as it is not through a registered gift deed that the appellant is claiming ownership, the appellant cannot claim that there is a valid gift in his favour. The learned Additional Advocate General would draw in the context my attention once again to the observation of the Supreme Court in its order dated 12.09.2005 in SLP No. 21982-21986 of 2004 that the petitioner who claims under an unregistered gift deed has no locus standi to maintain the present writ petition. Learned Additional Advocate General further submitted that inasmuch as validity of the gift relied on by the appellant has become a matter seriously in dispute in the appeal and the suit, any finding one way or other regarding the legality of the gift will cause prejudice to the legal heirs of L.D. Kazi. According to him the legal heirs of L.D. Kazi should be allowed a say in the matter before this Court takes a decision on the question of legality of the gift. The legal heirs of L.D. Kazi are necessary parties without whose presence Court cannot pass an effective order. Referring to the emphasis given by the learned counsel for the petitioner during the course of the arguments on the affidavits submitted by the District Collector, R-3, in the writ petition No. 18/1988 and the submission that the State had admitted most of the averments contained in that writ petition, learned Additional Advocate General submitted that it is on record that W.P. No. 16/1988



and subsequent W.P. No. 18/1988 filed by the appellant were clubbed together by the High Court and the appellant during the pendency of the writ petition amended the writ petition and the State filed an additional and amended counter affidavit. Through the additional counter affidavit the State has shown the actual picture with regard to the acquisition of the property and therefore, the Court may peruse the additional counter affidavit filed before this Court in W.P. No. 16/1988.

**47.** The learned Additional Advocate General placed reliance on a number of judicial precedents in support of various propositions canvassed by him. He placed strong reliance on the judgment of the Supreme Court in ***Smt. Gomtibai (dead) through LRs and others vs. Mattulal (dead) through LRs : ((1996) 11 SCC 681)*** to argue that in the absence of any registered instrument of gift and acceptance thereof by the donee, the property covered by the gift deed cannot be said to be a legal transfer. For the same proposition learned Additional Advocate General placed reliance on a judgment of the Privy Council in ***Lim Charlie and another vs. Official Receiver : (AIR 1934 PC 67)*** and it was submitted that in the absence of a registered gift deed the donee cannot acquire title. Reliance was placed on the judgment of the Calcutta High Court in ***Hari Pada Mukherjee vs. Elo Keshi Devi & anr. : (AIR 1940 Cal 254)*** wherein the Calcutta High Court has expressed surprise as to how without any registered document of gift there can be a valid gift of immovable property. Relying on a judgment

of the Allahabad High Court in ***Lallu Singh vs. Gur Narain : (AIR 1922 All 467 (FB))*** the learned Additional Advocate General submitted that even if delivery of possession was necessary under the pristine Hindu Law to make a Hindu gift valid, Section 123 of the Transfer of Property Act has done away the necessity of delivery of possession. Reliance was placed by the Additional Advocate General on ***Imbichimoideenkutty vs. Pathumunni Umma and Ors. : (AIR 1982 Kerala 148)*** to argue for the proposition under Section 123 T.P. Act and Section 17 of the Registration Act, gift of immovable property of value more than Rs.100/- can be made only through a registered document. For the same proposition, Mr. Pradhan, learned Additional Advocate General relied on the judgment of the High Court of Bombay in ***Naranji Bhinji Family Trust through Managing Trustee, Shri Mahendra Bhavanji Thaker vs. Sub Divisional Officer, etc. : (2009 (3) Bombay CR 746)***. Learned Addl. Advocate General relied upon the decision of the Delhi High Court in ***Wg. Cdr. (Retd) R.N. Dawar vs. Shri Ganga Saran Dhama : (AIR 1993 Delhi 19)***, a judgment of the Bombay High Court in ***Hiralal Chimanlal vs. Gavrishankar Ambashankar : (AIR 1928 Bombay 250)*** and the judgment of the Mysore High Court in ***Revappa vs. Madhava Rao & Anr. : (AIR 1960 Mysore 97)*** for the same proposition.

48. Learned Additional Advocate General would argue that when the judgment of a High Court comes to Supreme Court by way of SLP



and the Supreme Court grants leave and the civil appeal is disposed of with or without reason, then doctrine of merger applies and the judgment of the High Court merges with that of the Supreme Court and it is the judgment of the Supreme Court which holds the field. According to the learned Additional Advocate General the judgment of the High Court in writ petition No. 6 of 1988, under which directions are issued for registration of the document merged with the judgment of the Supreme Court in Civil Appeal. Therefore, it is not open to the appellant to place any reliance on the judgment of the High Court hence in W.P. No. 6/1988. The learned Additional Advocate General also said that in the same way the order which prevails in the land acquisition matter is the order of the Hon'ble Supreme Court in the SLPs.

**49.** I have given my very anxious consideration to the rival submissions addressed before me by the learned senior counsel for the appellant and the learned Additional Advocate General. I have given thoughtful consideration to the various judicial precedents which were cited before me on either side. I have made a survey of the entire evidence placed on record by either sides.

**50.** According to me it was not necessary that the learned trial Judge formulated as many as 14 issues for trial. Some of the issues could have been consolidated in which case I feel the relevant issues could have been more conveniently appreciated and decided by the



learned trial Judge. I make this observation at the very outset as it appears to me that on account of the multitude of issues which were formulated for trial, some confusion got into the mind of the learned Judge which has at least to a certain extent influenced the decision that he has taken. I therefore, re-formulate or recast the relevant issues which actually survive in this appeal for decision as follows:

1. Is not the suit filed by the present plaintiff maintainable in law? (Under this issue, considerations such as the locus standi of the plaintiff, whether the suit is barred by principles of res-judicata, or due to any other technical bar can be considered).
2. Whether the present suit is bad for non-joinder of necessary parties?
3. Whether Exhibit -1 gift deed executed by L.D. Kazi in favour of the plaintiff is a valid one and whether pursuant to that the present plaintiff the donee took possession of the property covered by the same?
4. Whether the defendants are duty bound to register the gift deed executed by L.D. Kazi in favour of the plaintiff in respect of the suit property?
5. Whether there is any illegality or infirmity about the acquisition of the suit property by the defendants during the



pendency of the suit and whether such acquisition in any manner affects the right if any derived by the plaintiff over the property by virtue of the gift deed in question?

6. Whether the defendants acted malafide in paying the compensation determined under Section 11 of the Land Acquisition Act to L.D. Kazi notwithstanding the gift deed?
7. To what relief if any is the plaintiff entitled?

### **Issue No. 2**

**51.** The trial Court formulated an issue as to whether the suit is bad for non-joinder of necessary parties on the basis of the contention raised in paragraph 6 of the separate written statements filed by D - 1 and D - 2, which I extract as below:

“That even assuming without admitting that the plaintiff has any cause of action in the suit in respect of the suit properties, the same is bad for misjoinder and non-joinder of necessary parties.”

It appears to me that this contention that the suit is bad for non-joinder of necessary parties is not pursued by the defendants seriously in the evidence adduced. Order 1 Rule 9 of CPC provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it provided that nothing in this rule shall apply to non-joinder of a necessary party.





In the oral evidence adduced by DW-1, it is not attempted to be shown as to why and on account of whose absence on record as a party is the present suit not maintainable in law. The submission of the learned senior counsel for the appellant before me and before the Court below also was that in the nature of the reliefs which are all directed against the two defendants alone the presence of those two defendants alone is necessary for deciding the issues which arose on pleadings and for granting the reliefs sought for. The submission of the learned Additional Advocate General before me was that the only relief which the appellant can aspire for, may be the relief in respect of the compensation amount paid by the Government to L.D. Kazi and now that L.D. Kazi is no more, any relief in respect of the compensation amount can be given to the appellant only in the presence of legal heirs or legal representatives of late L.D. Kazi alone. The contention that a suit is bad for non-joinder of necessary parties is always treated as a preliminary contention which is to be addressed by the Court at a pre-trial stage so that if the Court comes to a conclusion that the suit is bad for non-joinder of necessary parties, opportunity shall be given to the plaintiff to implead the party who the Court finds to be necessary.

**52.** It is clear from the records of this case that the defendants were not very serious about the contention that the suit is bad for non-joinder of necessary parties and that was why the issue regarding the non-joinder of necessary parties was deferred for trial along with other



issues in the case. In my view, in the nature of reliefs that the plaintiff has claimed in the suit, with no relief in respect of the compensation specifically claimed, it cannot be said that the suit as framed is as bad for non-joinder of necessary party. I, therefore, hold that the issue regarding non-joinder of necessary parties was rightly answered by the Court below in favour of the plaintiff.

**53.** I shall now deal with the issue pertaining to the maintainability of the suit. The reliefs claimed by the appellant are only the following: -

1. a decree of declaration regarding the right, title, interest and possession of the plaintiff in respect of the suit property, covered by the gift deed executed in favour of the plaintiff by the Donor, L.D. Kazi,
2. a decree of right, title, interest and possession of the suit property to the plaintiff,
3. a decree of mandatory injunction commanding the defendants to register the deed of gift,
4. a decree of prohibitory injunction registration restraining the defendants from interfering with the possession of the plaintiff over the suit property,



5. an alternative decree for declaration of the plaintiff's right, title and interest over the suit property by virtue of adverse possession from 10.12.1986.

**54.** Section 9 of the CPC provides that the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. In other words, when going by the averments of a plaint, it is seen that the suit presented is of civil nature, a presumption is aroused that the Court in which the suit is presented has the jurisdiction to try the same. It is for the person who contends that the suit is not maintainable to substantiate the contention by showing how the suit is not maintainable whether it be on account of express or implied bar or due to any other reason. Going by the allegations in the plaint and by the reliefs claimed, one does not find any express or implied bar to the entertainment of the present suit by a competent Civil Court, as significantly, no relief pertaining to the alleged illegality of the proceedings initiated by the Government for acquisition of the property has been sought for. The contention that the suit is not maintainable in law was raised by the respondents mainly in the context of Section 80 CPC. The respondents also raised a plea that the suit is barred by principles of res-judicata. All these contentions were repelled by the Court below giving reasons, which according to me, are valid. Not only that no memorandum of cross-objection assailing the correctness of the finding entered by the Court below in the context of the plea of res-judicata and the issue of maintainability has been lodged, but during



submissions also (to the extent of arguments addressed in the context of the plea of non-joinder of necessary parties, which I have already considered) no serious arguments were raised regarding the maintainability of the suit. The averments in the plaint will disclose that the appellant/plaintiff has a grievance that the respondents without valid reasons refused to register a gift deed duly executed in his favour by late L.D. Kazi and at least to that extent the suit pertains to the relief sought for in respect of the appellant's eligibility to have the document registered. There cannot be a legitimate contention that the present suit is not a suit of civil nature entertainable by a civil court of competent jurisdiction. I, therefore, vacate the findings entered by the Court below that the suit is not maintainable in law and hold that the suit is clearly maintainable in law.

### **Issue No. 3**

**55.** I shall now proceed to consider Issue No. 3 recast by me. The issue is whether Exhibit - 1, gift deed executed by L.D. Kazi is a valid one and whether pursuant to Exhibit - 1, the present plaintiff, the Donee came into possession of the property covered by that deed. The validity or otherwise of any gift deed is primarily a matter between the Donor and the Donee. That the Donor, L.D. Kazi was the owner of the property covered by the gift deed and that he had power of disposal over the property at the time of his executing the gift deed, is almost admitted. There are express recitals in Exhibit - 1 from the part of the Donor

regarding the absolute nature of his power of disposal over the property and the conveyance of entirety of the Donor's interest over the gifted property in favour of the Donee. It is expressly recited that the Donee has been put in possession and that the Donee in acceptance of the gift deed has taken over possession of the property gifted to him.

**56.** The learned Addl. Advocate General in his submissions before me assailed the legality of the gift deed mainly on the reason that the same was not registered. The statutory authority before whom Exhibit1 was duly presented for registration by the Donor and the Donee jointly, declined registration. Relying on Revenue Order No. 1 and a Proclamation of Maharaja of Sikkim made on 30.08.1956. The Revenue Order No. 1 reads as follows:-

“ With reference to the order dated the 2<sup>nd</sup> January, 1987, it is hereby again notified to all Kazis, Thikadars and Mandals in Sikkim, that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their lands to any person other than a Bhutia or Lepcha without the express sanction of the Darbar, or Officer empowered by the Darbar in this behalf, whose orders will be obtained by the landlord concerned. If anyone disobeys this order he will be severely punished.

In this order the term “mortgage” means the mortgaging the whole or part of a holding on the biyaz or masikata system and the term “sublet” means the sub-letting the whole or part of a holding on the pakuria system.

Definition: -

- (1) Biyaz means, mortgaging land to another person who enjoys the produce of the field as interest, so long as the principal loan remains unpaid.
- (2) Masikata means, mortgaging of field to a creditor who enjoys the produce of the field as an annual instalment towards the loan.



(3) Ppakuria means, sub-letting, where a ryot to settle upon a portion of his own holding, generally, receiving from him some rent in cash and some assistance in cultivating his own fields.

Gangtok,  
The 17<sup>th</sup> May, 1917.

C.A.  
Superintendent, Sikkim State."

The Proclamation issued by the Maharaja of Sikkim on 30.08.1956 relied on by the statutory authority, reads as follows: -

" PART I SIKKIM DARBAR GAZETTE, AUGUST, 1956.

The following Proclamation issued by His Highness the Maharaja of Sikkim is published for general information:-

PROCLAMATION OF HIS HIGHNESS SIR TASHI NAMGYAL  
K.C.S.I., K.C.I.E.  
MAHARA OF SIKKIM  
Dated 30<sup>th</sup> August, 1956.

1. WHEREAS it is His Highness's desire that, notwithstanding the continuance of measures for the protection of the interest of the indigenous people, all duly recognized subjects of Sikkim should be accorded equal treatment.

AND WHEREAS, hitherto, there has been difference in the rate of land revenue payable by Nepali subjects of Sikkim and subjects of Bhutia and Lepcha origin on account of annual services, etc. rendered by the latter.

HIS HIGHNESS is pleased to proclaim his decision that progressive steps should be taken to eliminate this difference in such a manner that undue hardship should not be caused to any section of the community.

AND IN PURSUANCE OF the above decision, His Highness is pleased to order that, within 10 years from the date of issue of this proclamation, the rates of revenue should be equalised by five periodical adjustments, the first such adjustment to take effect two years after the issue of this Notification.

2. AND WHEREAS, secondly, it is necessary to give a clear decision regarding the question of limitation of suits in respect of cases of unauthorized transfer of land by Bhutias and Lepchas to Nepalis (i.e. transfer without the written permission of the Sikkim Darbar).

HIS HIGHNESS is pleased to order that such unauthorised transfers as may have taken place within the 1<sup>st</sup> 25 years from the date of issue of this Proclamation shall be deemed as invalid by the Courts and such land shall revert, on application by the party concerned, to the original holder on payment of such compensation for improvement as may be decided by the Court,

AND, FURTHER, His Highness is pleased to order that, no unauthorised transfer of land (transfer without the written permission of the Sikkim Darbar) by Bhutia and Lepcha Sikkimese to Nepali Sikkimese subsequent to the issue of this Proclamation shall henceforward be held valid by the Courts irrespective of such laws, rules, regulations and usages regarding limitation of suits as may be applicable in other cases.

3. AND WHEREAS, thirdly, His Highness deems fit that the interests of the indigenous and backward people in the North Sikkim are require, as hitherto, to be duly safeguard,

HIS HIGHNESS is pleased to order that the rules relating to the settlement and or the carrying on of any occupation in such areas (i.e. North of the line formed by the Dick Chu from the Chola, down the Tista to Rangphap Chu, up the Rangphap Chu till it meets the 27 25 minutes latitude and thence along it to the Western border of Sikkim) by outsiders (Non-indigenous) only on a permit issued by the Sikkim Darbar shall continue to hold force.

MAHARAJA OF SIKKIM

N. K. RUSTOMJI,  
Dewan of Sikkim."

**57.** The Donor and the Donee approached this Court challenging the order of the statutory authority and the appellate authority declining registration of the gift deed by filing Writ Petition No.6 of 1988 which was decided by this Court by Exhibit 9 judgment. Under Exhibit 9 judgment this Court held that the Revenue Order No. 1 prohibits only transactions by way of sale, mortgage or sub-letting transacted between Bhutias and Lepchas and persons who did not belong to those two tribes.

This Court also held that the Revenue Order No. 1 did not cover all types of landed properties, it covered only agricultural lands. This Court in its judgment in Writ Petition No. 6 of 1988 would analyse the Maharaja's Proclamation of 1956 and hold that the Revenue Order No. 1 and the Proclamation operated in two different fields. According to this Court, Revenue Order No. 1 laid down the law prohibiting certain types of transfer therein without permission while Maharaja's Proclamation of 1956 made provision as to how the Court should enforce that law. According to this Court in order to find out what has prohibited, it is Revenue Order No. 1 which is to be looked into. This Court did not accept the argument that the purpose behind the promulgation of Proclamation of 1956 was to supplant Revenue Order No. 1. The intention, according to this Court, was at the most to the supplement Revenue Order No. 1. This Court also noticed that notwithstanding the promulgation of Proclamation of 1956, Revenue Order No. 1 continued to exist and has been recognized by the Sikkim Legislature under Section 35 of the Sikkim Agricultural Land Ceiling & Reforms Act, 1977 providing that on and from the commencement of the provisions of the Chapter containing that Section, the provisions contained in Revenue Order No. 1 and all other laws relating to matters governed by that Chapter would cease to have any force and effect. This Court, in fact, relied on a statement produced by the writ petitioners as Annexure – G giving details of 38 transactions entered into between Bhutia/Lepcha in favour of non-Bhutia/Lepcha and found that the Government had acquiesced at





those transactions despite conflict with Revenue Order No.1 and the Proclamation. It was on the above reasoning that Writ Petition No. 6 of 1988 was allowed by this Court quashing the order passed by the registering authority declining registration and also the order of appellate authority confirming that order and issuing a direction to the registering authority to register the gift deed. The two respondents had preferred Civil Appeal No. 6707 of 1995 against the above judgment and the Hon'ble Supreme Court disposed of that Civil Appeal by Exhibit P12 order. The argument of the learned Addl. Advocate General that doctrine of merger applies even when the Civil Appeal is disposed of with or without reason is correct, as the same is supplemented by the judgment of Hon'ble Supreme Court in ***Kunhayammed & Ors. vs. State of Kerala & Arn. : (2000 (6) SCC 359)***. I take it that Exhibit - 9 judgment did merge with Exhibit - 12 of the Supreme Court and that it is Exhibit - 12 which holds the field now. Therefore, Exhibit - 9 cannot be considered as binding on either of the parties. But significantly under Exhibit - 12, the Hon'ble Supreme Court did not examine the merits of the rival contentions or the correctness of Exhibit - 9 judgment and much less the soundness of the reasoning on the basis of which Exhibit - 9 judgment was given by this Court.

**58.** Having carefully gone through the Exhibit - 9 judgment and having appreciated the arguments addressed before me by the learned Senior Counsel for the appellant and the learned Addl. Advocate General

in the context of Revenue Order No. 1 and Maharaja's Proclamation of 1956 and keeping in mind the nature of the contentions raised in the suit, I am of the view that the reasons stated in the Exhibit 9 judgment to hold that Revenue Order No. 1 and Maharaja's proclamation of 1956 did not invalidate Exhibit - 1 gift deed, are sound. The consequence of the above view presently taken by me will be that the only reason on which Exhibit - 1 gift deed was assailed before me on the reason of non-registration by the learned Addl. Advocate General is not a valid reason. The ratio which emerges from the various judicial precedents cited before me in the context of registration of a gift deed – and also the two statutory provisions - Sections 122 and 123 of the Transfer of Property Act which are relevant in the above context - ***Smt. Gontibai (dead) through LRs and others vs. Mattulal (dead) through LRs : ((1996) 11 SCC 681), Lim Charlie and another vs. Official Receiver : (AIR 1934 PC 67), Hari Pada Mukherjee vs. Elo Keshi Devi & anr. : (AIR 1940 Cal 254), Lallu Singh vs. Gur Narain : (AIR 1922 All 467 (FB)), Imbichimoideenkutty vs. Pathumunni Umma and Ors. : (AIR 1982 Kerala 148), Naranji Bhinji Family Trust through Managing Trustee, Shri Mahendra Bhavanji Thaker vs. Sub Divisional Officer, etc. : (2009 (3) Bombay CR 746), Wg. Cdr. (Retd) R.N. Dawar vs. Shri Ganga Saran Dhama : (AIR 1993 Delhi 19) and Revappa vs. Madhava Rao & Anr. : (AIR 1960 Mysore 97)*** cited by the learned Addl. Advocate General and judgment of the Full Bench of the Bombay High Court in ***Atmaram***

***Sakharam vs. Vaman Janardhan : (AIR 1925 Bom 210 (FB));*** judgment of Privy Council in ***Venkat Subba Srinavas Hegde vs. Subba Rama : (AIR 1928 PC 86);*** judgments of Hon'ble Supreme Court in ***Hamda Ammal vs. Avadiappa Pathar : ((1991) 1 SCC 715); A. Jithendranath vs. Jubilee Hills Coop : ((2006) 10 SCC 96)*** and ***Har Narain vs. Mam Chand : ((2010) 13 SCC 128)*** cited by the learned counsel for the appellant can be summed up as follows: -

1. a transfer of existing immovable property made voluntarily and without consideration by a person called Donor to another person called Donee accepted by or on behalf of the Donee will be a gift for the purpose of Section 122 of the Transfer of Property Act,
2. a transfer by way of a gift in respect of the immovable property has to be effected by a registered instrument signed by or on behalf of the Donor and attested by a minimum of two witnesses.
3. Registration once effected dates back to the date of execution.

**59.** Exhibit - 1 gift deed is signed not only by the Donor but also by the Donee. It is attested by two witnesses, namely, Mr. B. C. Sharma and Dr. G.S. Prasad. The scribe-draftsman of the document Mr. U. P. Sharma has also scribed as a signatory to Exhibit 1, though not as an

attesting witness. As already stated hereinbefore, there is abundance of evidence in this case to accept the case of the appellant, that pursuant to Exhibit - 1, the appellant was put in possession or took possession and in that way demonstrated his acceptance of the gift. The materials brought on record on the side of the respondents/defendants will show that the acceptance of the gift by the plaintiff was never seriously disputed by them. The one and perhaps the only blemish, which is to be noticed in respect of the Exhibit - 1 or can be pointed out in respect of Exhibit - 1, is that the same was not registered. But the ratio emerging from the decisions cited on behalf of the plaintiff is that registration of any deed of transfer is only a necessary formality and that it is not through registration that the conveyance or transfer of the interest of the Donor or the transferor over the property is effected in favour of the transferee or Donee. It is trite that once registration takes place, the same relates back to the execution date. That Exhibit - 1 was duly presented by the Donor and the Donee together in the statutory format prescribed for such presentation is not disputed. The registering authority refused to registration citing reason which I have found to be invalid. In other words, the denial of registration by the registering authority was an illegality perpetrated by the defendants on the plaintiff who as Donee was more aggrieved than the donor on account of non-registration. The question that immediately arises for consideration is whether the defendants can capitalize on their own legality and contend successfully that the deed of gift is invalid and the appellant/plaintiff has not derived



any interest in the suit property, which is admittedly the property covered by the gift deed.

**60.** Indian Registration Act is yet to be extended to Sikkim through notification. The rules pertaining to registration of documents in Sikkim are rules issued by the Maharaja of Sikkim and they relate only to the procedure for registration. The Transfer of Property Act has been extended to Sikkim and it is, therefore, needless to state that in Sikkim, gift deeds in respect of immovable property do require registration. The registration once effected will date back to the date of execution of the document, however, late the registration is effected. This principle is incorporated in Section 47 of the Indian Registration Act, which reads as follows: -

**47. Time from which registered document operates.**— A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

**61.** I have already found that the refusal by the statutory authorities to register Exhibit 1 gift deed duly presented for registration was an illegality and I have no doubt in my mind that respondents cannot capitalize on that legality and resist eligible relief being granted to the appellant/plaintiff. Unlike in England, in this country we do not have separate courts of equity. Indian Courts are governed by principle of equity also. The Supreme Court in **Ashok Kapil v. Sana Ullah : ((1996) 6 SCC 342)** has held that the maxim "*Nullus commodum*



*capere protest de injuria sua propria*", thereby meaning "no man can take advantage of his own wrong" is a salient tenet of equity which Indian Court have been following from time to time.

**62.** The upshot of the above discussion is that under Issue No. 3 recast by me, I hold that Exhibit - 1 gift deed executed by L.D. Kazi in favour of the plaintiff is a valid one and also that pursuant to that the plaintiff, the Donee came into possession of the property covered by the gift deed. Issue No. 4 formulated by me is as to whether the defendants are duty bound to register Exhibit - 1 gift deed executed by L.D. Kazi in favour of the plaintiff in respect of the suit property. In view of the discussion I have made under Issue No. 3, the above issue has consequentially be answered in favour of the appellant/plaintiff and I hold that the defendants were bound to register Exhibit 1 on time as the reasons assigned by the statutory authority and the appellate authority for declining registration were not valid reasons.

**63.** Now, I come to Issue No. 5 regarding the legality or otherwise of the respondents acquiring the property during the pendency of the suit and whether such acquisition will in any manner affect the right which the appellant had derived over the property by virtue of the gift deed. As already noted by me even though the plaint contains many averments regarding the alleged illegality, impropriety and even malafides in the matter of the acquisition of the property covered by the



gift deed during the pendency of the present suit, the appellant did not claim any relief in the nature of a declaration or like relief in respect of the asserted illegality of the acquisition. During the course of submissions before me, Mr. N. Rai did argue that the authorities having been in the know of things regarding the execution of the gift deed and the appellant's assumption of possession of the property covered by the gift deed (in view of the peculiar situation of the Land Acquisition Collector and Registering Authority being one and the same person) the authority erred in initiating the LA proceedings in the name of L.D. Kazi who had parted with all his interest in the property by executing the gift deed in favour of the plaintiff. The submission was that the proceedings should have been initiated in the name of the present plaintiff recognizing him as the lawful owner and the person interested in the property proposed to be acquired. This submission does not appeal to me at all as it is seen from the records that the present plaintiff was very much in the know of things and he and the Donor, L.D. Kazi were waging a joint battle against the land acquisition proceeding till a particular stage of those proceedings (till about the final stage of those proceeding). It is seen that objections/claims were filed jointly and even an application for reference under Section 18 of the Land Acquisition Act was filed jointly. The feeble challenge against the legality of the land acquisition proceedings raised through pleadings only and not made subject matter of the reliefs sought for in the plaint will not succeed on the reason that the plaintiff, the person interested in the property was



not given notice. In his submission, Mr. N. Rai, learned Senior Counsel did argue before me that the purpose for which the acquisition was made was not a genuine public purpose. According to him the respondents acted malafide in insisting on acquiring the suit property even as one or two other items of the properties in town which had been notified to be acquired for the same purpose were excluded through subsequent notification from acquisition. I am not impressed at all by the submissions. It is seen from the records that the donor and the donee filed writ petition No. 5 of 1987 before this Court challenging the initial notification under Section 4(1) of LA Act. While admitting the writ petition this Court permitted the LA proceedings to continue and what was stayed was actual dispossession. The proceedings therefore continued and declaration under Section 6 was promulgated. Noticing that declaration W.P. No. 5/1987 was got dismissed as withdrawn and thereafter the donor and the donee themselves filed another writ petition No. 48 of 1987 challenging the declaration under Section 6 of the LA Act. In that writ petition also the interim order only stayed dispossession but permitted other proceedings to continue. It was during the pendency of that writ petition that W.P. No. 16/1988 was filed by the very same petitioners though the first petitioner L.D. Kazi withdrew from the writ petition leaving it to the present plaintiff to fight it out with the authorities, seeking quashment of notification under Section 4(1) the declaration under Section 6 and also challenging the vires of the statute itself.



64. Once writ petition No. 16 of 1988 was filed, writ petition No. 48 of 1987 was got dismissed as withdrawn. As the stay order was only in respect of dispossession, the acquisition proceedings continued and award under Section 11 was passed. Challenging that award yet another writ petition No. 18 of 1988 was filed by the donor and the donee together and it appears that writ petition No. 16 of 1988 and 18 of 1988 were being considered together by this Court. It is during the pendency of this writ petition that the donor took the decision to withdraw from the legal battles and to receive the compensation of Rs.6,52,463/- by himself. The donor not only did receive the entire compensation but he even addressed a letter to the Registrar-cum-District Collector informing him that he is withdrawing the original gift deed presented for registration. In that letter which I could peruse from the files relating to Writ Petition No. 16/1988 he goes to the extent of stating that the gift deed document "has not been completed registration as yet". In fact in the affidavit, which L.D. Kazi filed in support of the application with leave to withdraw from Writ Petition No. 16/1988 and 18/1988 he has professed his decision to revoke the gift deed and acknowledges having received the full compensation as though the gift deed never existed. Writ Petition No. 16/1988 and 18/1988 continued on the files of this Court notwithstanding the withdrawal of L.D. Kazi from them and finally this Court vide judgment dated 11.08.2004 would dismiss the writ Petition No. 16/1988 virtually turning down all the challenges that the present appellant made against the various notifications, the declarations



issued under the L.A. Act in respect of the property covered by the gift deed. Judgment clearly found that the purpose for which the property was acquired for was eminently a public purpose and that the malafides attributed to the Government in the matter of acquisition are all without basis. On the same day by a separate judgment Writ Petition No. 18 of 188 was also dismissed by the same Bench thus repelling the challenge which had been made by the present plaintiff against the award. However, dismissal of Writ Petition No. 18/1988 was subject to the following observations:

“If the petitioner feels aggrieved by the said award on the ground of inadequacy of compensation or if he claims for himself the entire amount, he is at liberty to take recourse of other remedies available in the Act, if law permits”.

**65.** Against the judgments in Writ Petition No. 16/1988 and 18/1988 the present plaintiff filed separate SLPs before the Hon'ble Supreme Court and the Hon'ble Supreme Court by Exhibit-14 order dismissed those SLPs at the threshold. The Hon'ble Supreme Court refused to entertain the SLPs mainly on the reason that the land acquisition proceedings have been completed and compensation for land acquired was received by the donor L.D. Kazi. As the Exhibit-14 is an instance of dismissal of SLPs themselves, the doctrine of merger will not apply and the judgment which holds the field is the judgment in Writ Petition No. 16/1988 and 18/1988. In other words, the challenge against the LA proceedings stand finally repelled.

66. The LA proceedings were sought to be assailed before me on a ground that was not urged before this Court in any other writ petitions filed by the plaintiff and L.D. Kazi. The ground was that the acquisition was hit by the doctrine of *lis pendens*. Section 52 of the Transfer of Property Act provides as follows:

**"52. Transfer of property pending suit relating thereto.**- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

*Explanation.*- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. "

The effect of Section 52 of the Transfer of the Property Act is only that a voluntary transfer of suit property made by a party to the suit during the pendency of the suit shall not affect the right of the other party under any decree or order which may be passed in the suit. In other words the effect of the doctrine of *lis pendens* is not to annul any voluntary transfer effected by parties to a suit. The same is only to render the transfer subservient to the rights of the party under a decree or order which may be given in the suit. In other words the transfer will remain subject to the result of the suit. It is extremely doubtful whether acquisition of the



suit property by the Government in exercise of its power of eminent domain during the pendency of a suit in which the Government is also a party will come within the purview of the Section 52 of the Transfer of Property Act. (see the judgment in ***Rajaram & Others vs. U.P. State & Others : (1983 (9) All. L.R. 594 (DB)***). At any rate it is very clear to my mind that even if the doctrine applied to acquisition under the provisions of the Land Acquisition Act, then also the doctrine does not apply, in the present case whether acquisition proceedings were already underway when the suit was instituted. In other words, the acquisition and consequent dispossession was only the culmination of the proceedings which started much prior to the commencement of the suit. It is true that the doctrine does not operate so as to any right exist before the date of the suit (1972 SCD 593). The right of the Government to acquire property of the citizens for genuine public purpose is a pre-existing right and in the present case long prior to commencement of the *lis*, the decision to acquire had been taken and even the declaration under Section 6 had been promulgated.

**67.** The above discussion leads me to the conclusion that there was no infirmity or illegality about the acquisition of the said property by the defendants. However, the corollary question as to whether the acquisition as above affects the right if any of the plaintiff over the property by virtue of the gift deed arises now. The answer to the above question can only be that whatever rights the appellant derived out of



the gift deed have also become extinguished and vested in the Government by virtue of gift deed for acquisition. The only benefit which the appellant plaintiff derived from the acquisition is that he and not L.D. Kazi the donor becomes entitled for the compensation.

**68.** I shall now deal with the next issue as to whether defendants acted malafide in paying the compensation under Section 11 of the LA Act to L. D. Kazi notwithstanding the gift deed.

**69.** Memo No. B(98)1422/DCE dated 31.05.1989 from District Collector / Land Revenue Officer to late L.D. Kazi, wherein the District Collector orders that L.D. Kazi shall deposit the entire amount of compensation (Rs.6,52,463/-) to the State Bank of Sikkim to the credit of the District Collector, in view of the judgment of the High Court of Sikkim in Writ Petition No. 6/1988. In this letter the District Collector also informs Kazi that his application dated 25.05.1989 regarding enhancement of compensation of valuation rate cannot be entertained as the High Court has held that the gift has become final.

**70.** The evidence reveals that after the judgment was passed by this Court in Writ Petition No. 6/1988 directing the registration of the gift deed, the compensation awarded under Section 11 was paid to late L.D. Kazi. The question is whether the Government acted malafide in paying the compensation to late L.D. Kazi after suffering a direction at the hands



of this Court to register the gift deed which means a direction to recognize the donee Mr. N.B. Khatiwada as the owner.

**71.** Though the available materials reveals that the Government immediately after the passage of judgment in writ petition No. 6/1988 was in a mood to obey the judgment, later it was decided to challenge the judgment before the Supreme Court. Along with the SLP that was filed against that Judgment, an application for stay was also filed and the Supreme Court did stay the operation of the judgment pending the SLP and the prospective Civil Appeal. It appears that it was at that juncture that the mind of Shri L.D. Kazi changed and he felt like receiving the compensation for himself and withdrawing from all the legal actions, which he had jointly initiated along with the present plaintiff against the Government.

**72.** The learned Addl. Advocate General would justify the action of the Government in paying the compensation to late L.D. Kazsi on the basis of the situation that the property under acquisition stood registered in the name of late Kazi only and that the L.A. proceedings were also initiated in the name of L.D. Kazi for that reason. This explanation appears to be plausible as I find that the present plaintiff joined various claims, objections, petitions, etc filed by late L.D. Kazi pursuant obviously to a decision voluntarily taken by the two of them and not on the basis of any notice sent to him by any authority under the LA Act. Late L.D. Kazi disowned the present plaintiff and sought withdrawal from the litigation



only after receiving the compensation. At the time when the compensation was paid to Shri Kazi to the official knowledge of the Government and the authorities under the L.A. Act, there is no conflict inter-se between L.D. Kazi and the present plaintiff. In other words there are no materials produced in the case to show that there was malicious and oblique motives on the part of the Government in paying the compensation to Late Kazi who going by all the records pertaining to the LA proceedings was the person interested and prospective awardee. The junction between the plaintiff and Late Kazi in the L.A. proceedings was a matter of their own voluntary making. So far as the Government is concerned it was the direction of this Court in Writ Petition No. 6/1988 which alone stood in the way if at all of making payment to Late L.D. Kazi. But when payment was made, that judgment was under stay by the Supreme Court. Even though I am sure, that receiving compensation all by himself by Late Kazi was *per se* illegal in the teeth of the gift deed which he had executed in favour of the plaintiff, I find it difficult to say that there was any illegality and much less malifide in the Government's action of paying compensation to late L.D. Kazi without the consent of the present plaintiff. At the best it could be said that the payment of compensation when the issue covered under writ petition No. 6/1988 was in the seizin of the Supreme Court was irregular. But it cannot be said that the Government acted malafide in paying the compensation to late Kazi. In this context it should also to be remembered that Kazi principally and the present plaintiff jointly were litigating against the



Government challenging the LA proceedings themselves. When under such situation the principal litigant becomes willing to receive the compensation (an action which will be a strong defence to the Government in the litigation challenging the LA proceedings) if the Government secures for itself the above defence one cannot blame the Government. At any rate, one cannot attribute malafides to the Government.

**73.** The Conclusion of the above discussion is that the above issue as to whether the Government acted malafide in paying compensation to late L.D. Kazi has to be answered against the plaintiff and I do so.

**74.** The last issue which arises for the decision is the issue of reliefs and costs if any to be granted/awarded in this suit.

**75.** The following are the reliefs sought for in the plaint: -

“(a) a decree declaring the right, title, interest and possession of the plaintiff in respect of the suit property by virtue of the deed of gift dated 10.12.1986, executed by the Donor, Shri L.D. Kazi in favour of the plaintiff.

(a i) a decree for delivery of khas and vacant possession of the suit property to the plaintiff by the defendants.

(b) a decree by way of mandatory injunction directing the defendants to register the deed of gift dated 10.12.1986 executed by Shri L.D. Kazi, in favour of the plaintiff in respect of the suit property.





(c) a decree for permanent injunction restraining the Defendants from interfering with the possession of the plaintiff in the suit property described in the schedule below and for appropriate order of temporary/ad-interim injunctions in terms of the prayer made by a separate petition under order 39, Rule 1 and 2 read with Section 151 of the CPC, 1908.

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

(e) alternatively, a decree declaring the right, title and interest in favour of the plaintiff in respect of the suit property by virtue of adverse possession from 10.12.1986 against the defendants."

The inevitable result of the discussions I have made under the issues as recast by me herein before, will be as follows:

- (i) Relief (e) is declined as the appellant/plaintiff failed miserably in establishing the prescribed title over the suit property.
- (ii) Relief (a i) is declined in view of the findings already entered herein before that the property in question has been lawfully acquired by the Government and has now become vested in the Government under the provisions of Land Acquisition Act.
- (iii) Relief (b) is declined as infructuous in view of the decision taken under relief (a i).
- (iv) Relief (c) is declined in view of the decision taken under reliefs (a i) and (b).

- (v) Relief (a) - It is declared that at the time when the Land Acquisition proceedings became complete by the passage of the award under Section 11 of the LA Act and taking over of possession, the appellant/plaintiff was in possession of the suit property having been put in possession of the same pursuant to Exhibit-1 Gift Deed dated 10.12.1986 executed by late L.D. Kazi the registered owner of the property in his favour. It is also declared that the respondents who were bound to register the above gift deed erred in not doing so and therefore the defect if any in the title of the plaintiff on account of non-registration of the gift deed was a defect wrongfully cast on the title by the defendants and therefore liable to be ignored by them in the matter of payment of compensation under Section 11 of Land Acquisition Act.
- (vi) Relief (d) - In view of the decision taken under issue no. 6 as recast in this appeal and in view of the situation, I am not inclined to pass any decree in respect of compensation amount against the Government particularly as no such decree is specifically sought for. I find unable to pass any decree in respect of compensation amount against the legal heirs and representatives of late L.D. Kazi, as they are not on the array of parties. But I find that the appellant/plaintiff does have a legitimate grievance in that the compensation amount awarded under Section 11 which was due to him

only was not paid to him instead was paid to a wrong person. I am, therefore, inclined to make the following observations and directions, which in my view may lead to the appellant/plaintiff securing relief for his grievance.

**76.** In the final order dated 11.08.2004 passed by the D.B. of this Court in W.P. No. 18/1988 after referring to the judgment in W.P. No. 16/1988 and turning down the challenge of the present petitioner to the LA proceedings the DB consisting of Chief Justice R.K. Patra and Justice N.S. Singh made the following observations:

“If the petitioner feels aggrieved by the said award on the ground of inadequacy of compensation or if he claims for himself the entire amount he is at liberty to take recourse to other remedies available under the Act, if the law permits.”

In the very same writ petition No. 18/1988 the plaintiff had filed an application seeking leave of the Court to file a reference under Section 18. This application is considered by the Division bench of this Court consisting Chief Justice J.K. Mohanty and Justice R. Dayal on 23.09.1988 and their Lordships closed the said application by passing the following order:

“This is an application by the petitioner No. 2 seeking leave to file a reference under Section 18 of the LA Act, 1894. Our order dated 02.09.1988 passed in the writ petition No. 16/1988 is quite clear and no order need be passed on this petition.”

When the order sheet of the writ petition No. 16/1988 is perused, it seen that the only order passed on 02.09.1988 in writ petition No. 16/1988 is the following order:


“This writ petition has been filed as a consolidated writ petition embracing the grounds stated in the writ petition No. 48 of 1987. Mr. Narendra Rai, Advocate for the petitioners wants to withdraw the writ petition No. 48. In view of the same the writ petition is allowed to be withdrawn without prejudice to the rights of the petitioners.

2. Admit. Counter be filed on or before 30.09.1988.

3. In writ petition No. 48 of 1987 we had granted the stay to the effect that all other proceedings will continue but the possession shall not be taken without the leave of this Court. Same order will continue.”

**77.** In Exhibit – 8, the specific prayer was that the petitioners (late L.D. Kazi & the present appellant/plaintiff) claim for compensation of Rs.2,08,00,000.00 (Rupees two crores and eight lakhs) as market value and their claim for interest be referred to the Court under Section 18.

**78.** As I carried an impression that an order was passed by the District Collector-cum-Land Acquisition Officer on Exhibit – 8 declining the prayer for reference which was a prayer made by the appellant-plaintiff also on the reason that late L.D. Kazi the registered owner and recipient of compensation had no protest regarding the adequacy of the compensation, the appellant’s prayer for reference cannot be



entertained, I directed both sides to place for perusal a copy of that order. Even though more than two opportunities were given, no order was placed before me. It was asserted by Mr. N. Rai, learned senior counsel for the appellant that to his client's knowledge no order has been passed on Exhibit -8 so far. Mr. Karma Thinlay Namgyal, learned senior counsel for the Government also informed me on the basis of sufficient interaction with the officers concerned that the files do not contain copy of any order passed on Exhibit – 8. Under the above circumstances I am impelled to accept the stand taken by the appellant plaintiff that no order is so far passed on Exhibit-8.

**79.** Even though an order or decree in the nature of a mandamus directing reference under Section 18 is not sought for in the plaint. Considerations of justice demand that I issue a direction to the 2<sup>nd</sup> respondent, District Collector-cum-Land Acquisition Officer to pass order on Exhibit-8 (treating any available copy as the original if the original is not available) at the earliest. It is ordered accordingly. Notice will be issued to the appellant regarding the hearing on Exhibit-8 and hearing will be conducted and orders will be passed on Exhibit-8 early, at any date within 3 (three) weeks from today. As this judgment is being delivered orally in the open Court, hearing notice will be issued by the District Collector within 3 (three) days from today. Once the order is passed, the same should be communicated to the appellant immediately.



**80.** There will be one last observation that it will be open to the appellant to institute a suit for recovery of the original compensation wrongly paid to Shri L.D. Kazi against the legal representatives of Shri Kazi to the extent of assets left behind by late Kazi and now in their hands. If such a suit is filed within 2 (two) months from today, the time till such filing will be excluded from the reckoning for limitation invoking Section 14 of the Limitation Act.

**81.** The appeal is disposed of as above granting declarations and directions as above. The parties will suffer their respective costs.

Sd/-

**(Pius C. Kuriakose)**  
**Chief Justice**  
15.07.2013