# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 31st August, 2022

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**SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

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RSA No.10 of 2019

**Appellants** : Chabilal Sapkota and Another

***versus***

**Respondents** : Narad Mani Sapkota and Another

Second Appeal under Section 100 read with Section 151 of the Code of Civil Procedure, 1908.

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**Appearance**

Mr. J. B. Pradhan, Senior Advocate with Ms. Prarthana Ghataney and Ms. Ranjeeta Kumari, Advocates for the Appellants.

Ms. Gita Bista, Advocate for the Respondents.

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# J U D G M E N T

Meenakshi Madan Rai, J.

***1.*** This Second Appeal assails the Judgment dated 29-09-2018 of the Learned First Appellate Court in Title Appeal No.08 of 2017, which upheld the Judgment of the Learned Trial Court dismissing the suit of the Plaintiffs/Appellants, vide its Judgment dated 31-05-2017, in Title Suit No.25 of 2014.

***2.*** This Second Appeal was admitted on the following substantial questions of law formulated for determination;

(i) Whether the Learned Courts below were correct in their construction and interpretation and thereby the legal effect of the Deeds dated 12-01-1965 (Exhibit D1) and 06-01-1972 (Exhibit D2) of the matter in *lis?*

(ii) Whether the concurrent findings of the Learned Courts below that Schedule "C" property was transferred to the Respondent/Defendant No.2 by way of exchange is correct and in consonance with the provision of Section 118 of the Transfer of Property Act, 1882?

***3(i).*** The Title Suit was one for declaration, injunction, recovery of possession and consequential reliefs. A brief narration of the facts are necessary to comprehend the dispute between the parties. The Plaintiffs'/Appellants' claim to be absolute owners of the property covered by Schedule 'A' to the Plaint, which includes Plot Nos.237 and Plot Nos.1027 and 1028, situated at Samdong, East Sikkim, inherited from their father, late Hari Narayan Sapkota vide Exhibit "P3/D1", the Partition Deed dated 12-01-1965, which property prior in time belonged to their grandfather. The Plaintiffs' claim that on the death of their father in the year 1974, when they were still minors, their widowed mother took them and left for her paternal home after handing over Schedule 'A' lands in the care of both the Defendants/Respondents, their younger paternal uncles. The Defendants allegedly cultivated the Schedule 'A' land and gave their mother share crops therefrom and sometimes money in lieu of crops. On their return after ten years to Schedule 'A' land, they started cultivating the property except Schedule 'C' lands comprising of Plot Nos.1027 and 1028 from where the Defendants continued to give them crop or cash in lieu thereof, till the year 2007. From 2008 neither crops nor money was forthcoming, consequently in January, 2013, the Plaintiffs objected to the Defendants' possession of the Schedule 'C' property, who however refused to return their property. The Plaintiffs' case is that their mother had permitted the Defendants to cultivate the Schedule 'C' property on the Plaintiffs' behalf and the Defendants are licencees thereof. Hence, the prayers in the Plaint which included a prayer seeking a declaration that the Defendants have no right, title and

interest over the Schedule 'C' property and recovery of possession thereof.

***(ii)*** The Defendants while repelling the Plaintiffs' case referred to a document Exhibit 'D2' dated 06-01-1972, vide which certain clarifications had been made to the Partition Deed Exhibit "P3/D1" dated 12-01-1965. According to them, the contents of Exhibit 'D2' clarified that during the execution of the Partition Deed no portion of the properties was set aside as "Jiwni" (maintenance) for their mother's upkeep during her lifetime. Exhibit 'D2' accordingly detailed the shares of each of the brothers to be set aside for their mother's maintenance, from their respective partitioned shares. In the alternative, to deposit the specified amount of paddy for the same purpose. In the event of failure by any son to give his paddy field or deposit the crop, the land set aside would be handed over to Defendant No.2 by the Panchayat. That, the Plaintiffs' father and Defendant No.1 were to expend one share each for the funeral/death rite expenses of their mother, while Defendant No.2 would bear the twice expenses. The Defendants' claim that on their mother's death in 1975 as the Plaintiffs' mother refused to contribute her share of expenses for the funeral/death rite, her land was given to Defendant No.2. The land so given for "Jiwni" by the Plaintiffs' mother as revealed by Exhibit 'D4' was Plot No.237 and bounded as follows;

*East : Paddy field of the plaintiffs (Appellants)*
*West : Paddy field of Narad Muni Sapkota*
*North : Paddy field of plaintiffs*
*South : Kholsa*.

The Defendants averred that before leaving for her paternal home, the Plaintiffs' mother made a request to them to exchange four rows of paddy field in Plot No.237 given as "Jiwni" by her with

Plot Nos.1027 and 1028. Defendant No.2 complied with the request.

***(iii)*** On the basis of these averments, the following issues were drawn up and determined by the Learned Trial Court, *viz*;

> **"1)** Whether the plaintiffs are the absolute owner of landed property falling under plot No.237, 1027 and 1028 (as per survey operation of 1978-80) situated at Samdong, East Sikkim *(onus on the plaintiffs);*
>
> **2)** Whether the defendants have encroached and constructed upon Schedule 'B' property; *(onus on the plaintiffs)*;
>
> **3)** Whether the Defendants can claim rights over schedule 'C' property on the basis of the deed dated 06.01.1972. *(onus on the defendants)*;
>
> **4)** Whether the plaintiffs are bound by the deed dated 06.01.1972. *(onus on defendants).***"**

***(iv)*** In Issue No.1, the Court concluded that the Plaintiffs were unable to establish that they are the *bona fide* legal and absolute owners of Schedule 'C' property and decided the Issue against the Plaintiffs.

Issue No.2, was decided against the Plaintiffs, the Learned Trial Court having concluded that the spot verification revealed that the disputed construction was being carried on in the land of Defendant No.1 (Plot No.241) and not Schedule 'B' (Plot No.237).

While considering Issue No.3, the Court concluded that the Defendant No.2 had been in continuous uninterrupted peaceful possession of Schedule 'C' property but could not claim Schedule 'C' vide Exhibit 'D2' in particular and decided the Issue against the Defendants.

In Issue No.4, the Learned Trial Court concluded that the Plaintiffs are bound by the Deed dated 06-01-1972. The suit of the Plaintiffs came to be dismissed on their failure to prove their case.

***4(i).*** Being aggrieved thereof, the Plaintiffs were before the Court of Learned District Judge, Special Division - II, East Sikkim,

at Gangtok. The Learned First Appellate Court while remarking that so far as Issue No.3 was concerned the Defendants did not file any Cross Appeal assailing the findings of the Learned Trial Court, which had thereby attained finality, upheld the findings of the Learned Trial Court in all the other Issues in its entirety and dismissed the Appeal. Aggrieved thereof, the Plaintiffs/Appellants are before this Court.

***(ii)*** Pertinently, while pausing here momentarily, it is worth observing that both Courts below have left the ownership of Schedule 'C' lands in limbo and have failed to decisively hold as to who the Schedule 'C' lands belonged to for the reason that in Issue No.1, it was the concurrent finding that the Plaintiffs were unable to establish that they were the *bona fide* owners of Schedule 'C' property. In Issue No.3, both Courts concluded that although Defendant No.2 had been in continuous possession of Schedule 'C' property but could not claim the property vide Exhibit 'D2' in particular.

***5.*** The Plaintiffs/Appellants shall hereinafter be referred to as the "Appellants" and the Defendants/Respondents as "Respondents".

***6(i).*** Learned Senior Counsel for the Appellants before this Court, contended that only the property in Schedule 'C' is now in dispute, the parties being in agreement that Schedule 'B' land (Plot No.237), belongs to the Appellants and it was held so by the Learned Trial Court and the Learned First Appellate Court. It was canvassed that despite the concurrent findings of the Learned Courts below that Schedule 'B' property (Plot No.237) belonged to the Appellants, no declaration to this effect in terms of the Prayers

made in (a) and (b) and as a corollary Prayer (d) of the Plaint were made in favour of the Appellants.

***(ii)*** It was further contended that in Exhibit 'D2' the Nepali word "Jimma" translated into English as "Hand over", tantamounts to transfer of the land for the upkeep of their mother during her lifetime and is not to be interpreted as an arrangement of retention of land by the Defendant No.2 for his benefit, even after her passing. Further, Exhibit 'D2' categorically provided that the Partition Deed Exhibit "P3/D1" would be considered "valid" for which the Nepali word "*Sadar*" has been employed. Hence, the contents of Exhibit 'D2' being subject to the contents of Exhibit "P3/D1" are to be read holistically, bearing in mind the objective of its execution, i.e., to provide for the maintenance of their mother. That, in order to consider the real nature of the document one has to look into the recitals thereof and not the title. On this aspect, strength was drawn from ***B. K. Muniraju*** vs. ***State of Karnataka and Others***[1]***.*** It was next contended that mere handing over of Schedule 'C' land for the maintenance of the Appellants' grandmother by their mother cannot be termed as an "exchange" for Schedule 'B' land as wrongly urged by the Respondents, since both Schedule 'B' and 'C' lands belong to the Appellants. That, it would be an incongruous proposition for the Appellants' mother to exchange one plot of the Appellants' land with another that belonged to them. Drawing strength from Section 54 and Section 118 of the Transfer of Property Act, 1882 (hereinafter, the "TP Act"), it was urged that both provisions are to be read in consonance with each other which demonstrates that no "Exchange" as envisaged by Law has taken place. It was next urged that Section 52 of the Indian

[1] (2008) 4 SCC 451

Easements Act, 1882 defines "Licence" and handing over four rows of paddy fields for the maintenance of the Appellants' grandmother does not create any rights of ownership for the Respondents on Schedule 'C' land by claims of exchange but was licence granted by the Appellants' mother. That, the Sikkim Registration of Document Rules, 1930, requires registration of document on transfer of immovable property, but Schedule 'C' land despite claims of possession has not been registered in the name of Respondent No.2. Contending that Exhibit "P3/D1" and Exhibit 'D2' required no registration reference was made to ***Nazir Mohamed*** vs. ***J. Kamala and Others***[2] where the Hon'ble Supreme Court propounded that a family agreement need not be registered. That, accordingly the Appellants are entitled to a declaration that the Respondents have no right, title and interest over the Schedule 'C' land and a declaration for Schedule 'B' property in terms of the Prayers made in the Plaint.

***7(i).*** Contesting and repelling the arguments of the Learned Senior Counsel for the Appellants, Learned Counsel for the Respondents contended that the averments in Paragraph 13 of the Plaint referred to only Schedule 'A' land being handed over to the Respondents and not Schedule 'C'. That, the question of exchange of Schedule 'C' property only came up later with Exhibit 'D2' being introduced by the Respondents, thus there is a variance in the pleadings and proof of the Appellants. That, the averments in the Plaint do not specify as to when Schedule 'C' property was handed over to the Respondents for cultivation nor was it proved, neither is the term "share crop" elucidated by the Appellants. That, Schedule 'C' property has been in the possession of Respondent No.2 since 1975, who is cultivating it and not Respondent No.1 as wrongly

[2] (2020) 19 SCC 57

alleged by the Appellants but the title to the property is not with Respondent No.2 as correctly held by the Learned Trial Court. That, although the issue of "Exchange" was averred in the Written Statement, the Appellants neither denied it nor made an effort to clarify their position by amending their Plaint. That, Section 118 of the TP Act relied on by the Appellants was not applicable at the relevant time as the Act was extended and enforced in Sikkim only on 01-09-1984 whereas the "exchange" took place in 1975. That, the Appellants have failed to approach the Court with clean hands as the Appellants' mother is unaware of the Plot numbers that her sons are laying claim to and their Appeal deserves a dismissal. To buttress her submission that the person seeking equity must do equity, reliance was placed on ***Kishore Samrite*** vs. ***State of Uttar Pradesh and Others***[3]. Relying upon ***Bachhaj Nahar*** vs. ***Nilima Mandal and Others***[4]***,*** it was argued that no amount of evidence can be looked into upon a plea which was never averred in the pleadings and that there is no averment in the Plaint about handing over of Schedule 'C' land to the Respondents. Learned Counsel however conceded that family agreement needs no registration for which reliance was placed on ***Ripudaman Singh*** vs. ***Tikka Maheshwar Chand***[5]**.**

***(ii)*** The rival contentions of Learned Counsel were heard at length and all records meticulously perused.

***8(i).*** Section 100 of the Code of Civil Procedure, 1908 (hereinafter, the "CPC"), deals with Second Appeal and Section 100(4) of the CPC provides that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. Section 103 of the CPC lays down the

[3] (2013) 2 SCC 398
[4] AIR 2009 SC 1103
[5] (2021) 7 SCC 446

power of the High Court to determine issues of facts in any Second Appeal, if the evidence on record is sufficient to determine any issue necessary for the disposal of the Appeal;

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

***(ii)*** In ***Narayan Sitaramji Badwaik (Dead) Through Lrs.*** vs. ***Bisaram and Others***[6], it was observed that;

> "**10.** It is a settled position of law that a second appeal, under Section 100 of the Code of Civil Procedure, lies only on a substantial question of law [refer Santosh Hazari v. Purushottam Tiwari (deceased) by LRs, (2001) 3 SCC 179]. However, this does not mean that the High Court cannot, in any circumstance, decide findings of fact or interfere with those arrived at by the Courts below in a second appeal. In fact, Section 103 of the Code of Civil Procedure explicitly provides for circumstances under which High Court may do so. ……..
>
> **11.** A bare perusal of this section clearly indicates that it provides for the High Court to decide an issue of fact, provided there is sufficient evidence on record before it, in two circumstances. First, when an issue necessary for the disposal of the appeal has not been determined by the lower Appellate Court or by both the Courts below. And second, when an issue of fact has been wrongly determined by the Court(s) below by virtue of the decision on the question of law under Section 100 of the Code of Civil Procedure. ……"

***(iii)*** In ***State of Punjab*** vs. ***Mohinder Singh***[7] where the First Appellate Court in deciding age acted on irrelevant material, e.g., Horoscope and ignored the School Certificate, the dismissal of the Appeal by the High Court observing that the Appeal involved no substantial question of law was held to be improper and set aside. It is now settled law and this Court is aware that the High Court cannot substitute its opinion for the opinion of the First Appellate Court unless it is found that the conclusions drawn by the lower Appellate Court were erroneous being contrary to the mandatory

[6] 2021 SCC OnLine SC 319
[7] AIR 2005 SC 1868

provisions of law applicable or a settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. [See ***Kondiba Dagadu Kadam*** vs. ***Savitribai Sopan Gujar and Others***[8]]

***9(i).*** While first addressing the arguments of Learned Counsel for the Respondent that the TP Act was not applicable in the State in the year 1975 we may relevantly refer to the decision of a Division Bench of this Court in ***Bishnu Kala Karki Dholi and Others*** vs. ***Bishnu Maya Darjeeni***[9] [Civil First Appeal No.8 of 1976, decided on 06-03-1978]. Speaking for the Court, A. M. Bhattacharjee, J., while considering and observing that the TP Act had not been extended and enforced in the State of Sikkim then, held as follows;

> "9. ……..
> ……..
>
> The observations quoted above should be read with the observations of the Supreme Court in the above noted decision in Namdeo versus Narmada Bai (AIR 1953 Supreme Court 228 at 230) quoted hereinbelow:-
>
> > "It is axiomatic that the Courts must apply the principles of justice, equity and good conscience to transactions which come up before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. It follows, therefore, that the provisions of the Act which are but a statutory recognition of the rules of justice, equity and good conscience also governs those transfers."
>
> And when so read will lead to the conclusion that **even though the Transfer of Property Act does not formally apply in Sikkim, the Courts in Sikkim, in discharging their paramount duty to act, in the absence of statutory provisions, according to the principles of justice, equity and good conscience, should reasonable and properly apply the principles contained in Section 60 of the Transfer of Property Act relating to redemption of mortgage and unenforceability of any clog on the right of redemption.** This is what was also done by the Rajasthan High Court in Devkaran versus Murari Lal (ILR 1958 Rajasthan 811) in a case arising from the

[8] (1999) 3 SCC 772
[9] 1978 (1) Sikkim Law Journal 23

> former State of Alwar before the extension of the Transfer of Property Act thereto and this decision has been affirmed by the Supreme Court in Murarilal versus Devkaran (AIR 1965 SC 225) and relying in the observations made therein (at page 231), **I would hold that it would be reasonable to assume that the Civil Courts established in Sikkim, like Civil Courts all over India, were and are required to administer justice according to the principles of equity and justice where there was or is no specific statutory provision to deal with the question before them and, therefore, it would be just and proper to apply the principles contained in Section 60 of the Transfer of Property Act relating to the right of redemption and clog on the equity of redemption.**" (emphasis supplied)

***(ii)*** In ***Jas Bahadur Rai v. Putra Dhan Rai[10],*** decided on 29-07-1978, the Division Bench of this High Court, while considering whether the provisions of the Indian Easements Act, 1882, should be applied in Sikkim sans extension or enforcement of the Law on the point in Sikkim, held as follows;

> "3. The Indian Easements Act, 1882, was never formally adopted in Sikkim prior to its incorporation in the Union of India; nor the same has been extended to Sikkim by any notification under Article 371-F (n) of the Constitution of India or otherwise; and neither there was nor there is any corresponding statutory law relating to easement or licence in force in Sikkim. But when a point for decision was not covered by the provision of any law in force in Sikkim, the Courts in Sikkim, from long before its incorporation in the Union of India, have followed the principles of laws in force in India in deciding such a point, if such principles appeared to them to be based on or in consonance with the principles of justice, equity and good conscience. …….
>
> 4. ……..…..
>
> 5. ……. In my view, therefore, the provisions of Section 60, Indian Easements Act, 1882 can be invoked and should be applied in Sikkim in the absence of any corresponding law in Sikkim on the point. I would repeat that if this amounts to making of laws by Courts, the Courts in Sikkim will have to continue to do so until the field is occupied or is substantially occupied by specific laws. ……."

***(iii)*** In ***Sonam Topgyal Bhutia v. Gompu Bhutia[11],*** decided on 14-06-1979, by a Division Bench of this High Court, which concerned a matter pertaining to Wills and whether Buddhists in

[10] 1978 (3) Sikkim Law Journal 6
[11] AIR 1980 Sikkim 33

Sikkim can legally make testamentary disposition, this High Court *inter alia* observed;

> "**27. But though there is no legislation in Sikkim relating to Wills, the Courts in Sikkim have followed and applied the provisions of the Indian Succession Act, 1925 in all matters relating to Wills including granting of Probates and Letters of Administration. The question, therefore, is whether the provisions relating to Wills in the Indian Succession Act, 1925, which have never been formally adopted in or extended to Sikkim by any formal legislative authority are to be regarded as laws in force in Sikkim?. ……. Therefore, the provisions relating to Wills in the Indian Succession Act, 1925, having so long been "recognised" "applied" and "acted on" by the Courts of justice in Sikkim in the administration of justice in matters relating to Wills, are also to be regarded as Laws in force in Sikkim**." (emphasis supplied)

***(iv)*** In ***Asharam Agarwala v. Union of India***[12], it was held that though the Arbitration Act, 1940, had never been formally made applicable in Sikkim, yet the provisions of the Arbitration Act having so long been recognized, applied and acted upon by the Courts of Justice in Sikkim in the administration of justice in matters relating to Arbitration, are to be regarded as the law in force in Sikkim, though not as direct statutory laws.

***(v)*** In ***Nil Kumar Dahal and Another*** vs. ***Indira Dahal and Others***[13]***,*** this High Court observed that;

> "**36.** …… where there is no existing old Law on a particular subject in Sikkim or where the Law is scanty or inadequate, the Courts in Sikkim also being Courts of equity, justice and good conscience, have to turn to the Laws of the country. It is but apposite to notice that the Courts in Sikkim, even prior to being part of the Indian Union have followed principles of Law in force in India if the principles were based on justice, equity and good conscience, as already reflected in the plethora of ratio of this High Court referred to above. ……"

The discussions above soundly quells the arguments of the Learned Counsel for the Respondents about the non-extension of the TP Act to the State of Sikkim with ***Bishnu Kala Karki Dholi*** (*supra)* having dealt with it specifically.

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[12] 1978 (4) Sikkim Law Journal 18
[13] SLR (2020) SIKKIM 815

***10(i).*** The air having been cleared on that facet, it is now necessary to consider the first substantial question of law *supra.* Exhibit 'D2' is the document executed on 06-01-1972, pursuant to the Partition Deed, Exhibit "P3/D1" executed on 12-01-1965. Exhibit 'P3' was executed between the three sons of one late Tika Ram Sapkota, *viz.,* Hari Narayan Sapkota (father of the Appellants), Narad Muni Sakpota (Respondent No.1) and Abi Lall @ Abi Narayan Sapkota (Respondent No.2). There is no dispute whatsoever between the parties regarding the execution or the contents of this document. It is borne out by the evidence on record that on execution of Exhibit "P3/D1" the three brothers named above took possession of the respective shares of their ancestral property. Exhibit 'D2' was also executed between the above named three brothers, i.e., Hari Narayan Sapkota, Narad Muni Sapkota and Abi Narayan Sapkota, who sought to correct the discrepancy in Exhibit "P3/D1" in which, according to them, no property for the maintenance of their mother, known as "Jiwni" in the local parlance, had been set aside from the partitioned property. The document Exhibit 'D2' which is scribed in Nepali roughly translated into English would be that;

> **"***We the three sons are in agreement that on 12-01-1965, our father had partitioned property between us and the said Partition Deed is correct/accepted. On the said date, an error occurred in not setting aside "Jiwni". For this reason, on 06-01-1972 in the presence of Panchayat Members detailed herein, from the partition share of the two brothers (Hari Narayan Sapkota and Narad Muni Sapkota) who were living separately, four rows each from the tail end land of their respective partition shares and seven rows of land from the tail end land of the partition share of youngest brother (Abi Narayan Sapkota) as he had been given a little*

*extra land during the partition, are being set aside for the purpose ("Jiwni").*

*The boundary of such land set aside from the share of the (Kancha) youngest brother (*for clarity Respondent No.2*) is as follows;*

*East – Own paddy field.*

*West – Paddy field of Nim Tshering.*

*North – Kholsa.*

*South – Dry field of Nochi.*

*The harvest of which is approximately (illegible) muris.*

*The boundary of land set aside from share of (Kahila) fourth brother (*for clarity Respondent No.1*) is as follows;*

*East – Own paddy field.*

*West – Paddy field of Nim Tshering.*

*North – Own paddy field.*

*South – Kholsa.*

*Harvest approximately two muris.*

*The boundary of land set aside from the share of (Sahila) third brother (*for clarity Appellants father*) is as follows;*

*East – Own paddy field.*

*West – Paddy field of Narad.*

*North – Own dry paddy field.*

*South – Kholsa.*

*Harvest approximately two muris.*

*Within the boundary demarcated by the Panchayat, three pieces of land (paddy fields) are being set aside for mother's upkeep/maintenance for her lifetime, because these lands fall in our partition shares we will cultivate it and from the third son by birth one 'muri', from the fourth son by birth one 'muri' and the youngest one two 'muris' would be given to mother. In the event that anyone defaults in payment of shares of paddy for the maintenance the "Panch" can hand over the property demarcated for such maintenance to the brother who is the care giver for mother or else four 'muris' of paddy will be set aside and all will continue to cultivate their own partitioned fields. The two brothers who were living*

*separately from the mother would bear one share each for the death rites of the mother, while the brother with whom the mother was living would bear the expenses equivalent to two shares. While holding the previous Partition Deed as central and true/accepted no one will interfere in the possession of each other's partitioned lands. That, the document is prepared with the consent of all for providing maintenance to mother for her lifetime and all affix signatures in the presence of "Panch". If any brother has any issue/disagreement, the "Panch" would decide the matter on the basis of the said document.***"**

***(ii)*** It is necessary to highlight here that the real intention of a document can be ascertained from the meaning of the words employed therein. At the outset, Exhibit 'D2' mentions that the contents of Exhibit 'P3', Partition Deed is "Sadar". Learned Counsel for both the parties are in agreement that the word "Sadar" in Nepali translated into English is "correct/valid". According to the ***Nepali-Nepali-English Dictionary, Bhagyamin Publisher, Complete New Edition 1983*** (Reprinted on March 1989)***,*** at page No.562, defines the word "Sadar" as "central place/acceptance". Thus, the Nepali word "Sadar" employed in Exhibit 'D2' would be correct/central/ acceptance. In other words, it was agreed between the three brothers that Exhibit "P3/D1" would be the central document, the contents of which were correct/acceptable to all the parties executing Exhibit 'D2'.

***(iii)*** The parties dispute the interpretation and intention of the word "Jimma" appearing in Exhibit 'D2'. According to the Appellants although the word meant "Handing over" it was not to be in perpetuity. The Respondents in contra interpret it to mean a penalty for default in payment of "Jiwni" and funeral expenses of the mother. The Nepali word "Jimma" according to ***Nepali-Nepali-***

***English Dictionary, Bhagyamin Publisher, Complete New Edition 1983*** (Reprinted on March 1989), at Page No.222, means "responsibility; care; custody". In my considered opinion, the word has to be interpreted in its correct perspective while bearing in mind the intent and purport of the document which has to be read holistically.

***(iv)*** The document was undisputedly executed for the purpose of setting aside "Jiwni" land for the mother of the brothers mentioned therein. The term "Jiwni" employed in the document according to the ***Nepali-Nepali-English Dictionary***, ***Bhagyamin Publisher***, ***Complete New Edition 1983*** (Reprinted on March 1989), at Page No.224, means "maintenance; property set apart for old age; means of support". The translation of the Nepali word "Jiwni" as reflected above, requires no further elucidation. The document explicitly lays down the area of land along with boundaries that have been set aside by each brother for their mother's maintenance during her lifetime. If any brother were to default in the payment of shares of paddy for "Jiwni" then the Panchayat were empowered by the document to give "Jimma"/"custody" of the property demarcated for such maintenance, to the youngest brother with whom their mother was living. It is specified therein that after such property was handed over to the "custody" of the younger brother, the brothers would continue to cultivate their own partitioned properties. The document further lays down details of expenditure to be borne by the brothers in the event of their mother's demise.

***(v)*** The document nowhere indicates or intends that if the brothers failed to pay their share for their mother's death rites, their land would stand forfeited to the youngest brother. Exhibit

'D2' does not envisage confiscation of any brother's property by the youngest brother and penalising the defaulter by retention of the property by him, beyond their mother's lifetime. The purport of the document was to provide for their mother's maintenance during her lifetime and not for the unjust enrichment of Respondent No.2. The condition of the "Panch" giving custody of the property in default of payment of "Jiwni" in Exhibit 'D2', precedes the condition of payment of expenses for funeral/death rites of their mother. Admittedly, the Appellants' mother did not bear the funeral expenses, the document nevertheless mentions no penalty for such default by way of confiscation of partitioned property, for the benefit of Respondent No.2. In this context, the provisions of Sections 91 and 92 of the Indian Evidence Act, 1872, are relevant, apposite and self-explanatory for the interpretation of Exhibit "P3/D1" and Exhibit 'D2' which are extracted hereinbelow;

> **"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—**When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> **92. Exclusion of evidence of oral agreement.—**When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its term:
>
> **Proviso** (1).—.....
> **Proviso** (2).—.....
> **Proviso** (3).—.....
> **Proviso** (4).—.....

**Proviso** (5).–……
**Proviso** (6).–……..**"**

***11(i).*** At this juncture, the second substantial question of law requires a discussion being connected to the first question. It is apparent that the Respondents' claim that four rows of paddy fields in Plot No.237 was the "Jiwni" property set aside by the Appellants' father. That, the mother of the Appellants sought to 'exchange' the four rows in Plot No.237 by requesting the Respondents to hand over the said land to her in lieu of which she would hand over Plot Nos.1027 and 1028 to them.

***(ii)*** Firstly, there is no evidence of such exchange furnished by the parties but indubitably Schedule 'C' stands recorded in the name of the Appellants. The handing over of Schedule 'C' as "Jiwni" and purportedly taking back four rows of fields from Schedule 'B', from Respondent No.2, does not qualify as exchange nor does it fulfil the legal parameters set out by the provisions of Section 118 along with Section 54 of the TP Act, which reads as follows;

> **"118. "Exchange" defined.–**When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".
>
> A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.**"**
>
> **"54. "Sale" defined.–**"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> ……**"**

It is indeed settled law that a document of Title is not proof of ownership and that possession of the property has to be taken into consideration, but in the instant matter, there are no materials to indicate possessory Title of the Respondent No.2. The Respondent No.2 claims possession of Schedule 'C' lands from

1975 with no effort made to correct the Record of Rights in compliance with the provisions of the Sikkim Registration of Document Rules, 1930. More importantly, no document of transfer of Schedule 'C' lands by way of gift or sale have been furnished by the Respondent No.2, while it is an admitted position that the Records of Rights were prepared on the basis of Exhibit "P3/D1" and accepted by all parties. No one can deny that possession may *prima facie* raise a presumption of Title but such presumption can hardly arise when the facts are known. It is settled law that when the facts disclose no title in either party, possession is the decisive factor, undisputedly the Title herein is with the Appellants.

The Supreme Court in ***Chief Conservator of Forests, Govt. of A.P.*** vs. ***Collector and Others***[14] while discussing the provision of Section 110 of the Evidence Act held as follows;

> **"19.** Section 110 of the Evidence Act reads thus:
>
> "110. *Burden of proof as to ownership*.— When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."
>
> **20.** It embodies the principle that possession of a property furnishes prima facie proof of ownership of the possessor and casts burden of proof on the party who denies his ownership. The presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.**"**

In the matter at hand, it is not denied that the Title is with the Appellants. We may also profitably refer to the decision in ***Nair Service Society Ltd.*** vs. ***K. C. Alexander and Others***[15] which referred to the ratio *supra* and observed:

> **"**(15) ..... That possession may prima facie raise a presumption of title no one can deny but

[14] (2003) 3 SCC 472
[15] AIR 1968 SC 1165

> this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides. ……**"**

***(iii)*** The Hon'ble Supreme Court in ***Suraj Lamp and Industries Private Limited (2) through Director*** vs. ***State of Haryana and Another***[16], was considering whether the transfer of immovable property can be executed by General Power of Attorney (GPA) sales or Sale Agreements (SA). While holding in the negative it was elucidated that immovable property can be legally and lawfully transferred/ conveyed only by a Registered Deed of Conveyance.

At this juncture, profitable reference is made to Section 5 of the TP Act which defines the "transfer of property" as under;

> **"5. "Transfer of property" defined**.—In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.
> ……..**"**

In the instant matter, on pain of reiteration, the property was partitioned vide Exhibit "P3/D1" upon which the brothers took their shares in 1965 in terms of the Deed. After the death of the Appellants' father around 1974/1975, the Respondents took possession of Schedule 'A' which included Schedule 'C' lands. There is no Registered Deed of Conveyance between the parties to indicate that the Appellants or their mother had at any time transferred the above mentioned immovable property to the Respondents in terms of the provisions of law.

***(iv)*** It is an admitted fact that consequent upon the partition in 1965 in terms of Exhibit "P3/D1" the brothers took possession of their respective shares. The father of the Appellants passed away in 1974 and thereafter from 1975 the Respondent

[16] (2012) 1 SCC 656

No.2 took possession, but the Title, admittedly prepared on the basis of Exhibit "P3/D1" continued to remain in the joint names of the Appellants. As no exchange has taken place in terms of Section 118 of the T.P. Act and the Respondent No.2 is evidently in possession of the property by way of licence as defined in Section 52 of the Indian Easements Act, 1882, it thus concludes that Schedule 'C' belongs to the Appellants.

***(v)*** The Learned Courts below failed to consider that all parties were in acceptance of the contents of Exhibit "P3/D1" as correct and that possession followed thereof, with Schedule 'A' property being recorded in the joint names of the Appellants. Schedule 'A' property includes Schedule 'C' property. Both the Learned Courts below held that the document Exhibit 'D2' dated 06-01-1972 is binding upon the Appellants but failed to discuss its contents, intent or purpose. The Learned Trial Court also erroneously observed that as per Exhibit "P3/D1" it is not clear which plots of land are going to be partitioned amongst the Plaintiffs' father and his uncles and that the Plaintiffs failed to show any documents to prove that Schedule 'C' land was actually mutated as per Exhibit "P3/D1", when the reality is that the Defendant/Respondent Nos.1 and 2 have no argument with Exhibit "P3/D1" and admitted that the Records of Rights were issued in terms of the said Deed. The Respondents' contention is in fact confined to the claim that the Respondent No.2 has remained in possession of the Schedule 'C' lands since 1975.

***12.*** In light of the foregoing discussions hereinabove, I am constrained to differ with the concurrent findings of the Learned Courts below pertaining to Exhibit "P3/D1" and Exhibit "D2".

***13.*** The concurrent findings of the Learned Trial Court with regard to Schedule 'B' property being the absolute property of the Appellants is upheld.

(a) It is accordingly declared that the Appellants are the absolute owners of Schedule 'B' property.

(b) Consequently, both Respondents have no right, title or authority to enter into the Schedule 'B' property.

***14.*** The concurrent findings of the Learned Courts below that Schedule 'C' property was exchanged by the Appellants' mother with a portion of land in Schedule 'B', set aside for "Jiwni", is incorrect, neither is it in consonance with the provisions of Section 118 read with Section 54 of the T. P. Act.

(a) It is declared that the Respondents Nos.1 and 2 have no right, title and interest over Schedule 'C' property.

(b) It is further declared that the Appellants are entitled to recovery of possession of Schedule 'C' property from the Respondents.

***15.*** This Second Appeal stands disposed of accordingly.

***16.*** Pending applications, if any, also stand disposed of.

***17.*** No order as to costs.

***18.*** Records of the Courts below be remitted forthwith along with a copy each of the Judgment for information.

**( Meenakshi Madan Rai )**
**Judge**
31-08-2022

ds/sdl

Approved for reporting : **Yes**