IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

R.F.A. No. 11 of 2017

Mrs. Devi Maya Chettri,
W/o Late Karna Bahadur Chettri,
R/o Middle Sichey,
Gangtok, East Sikkim.

… Appellant

Versus

1. Mr. Mahesh Chettri,
   Son of Late Lal Bahadur Chettri,
   R/o Sichey Busty,
   P.O. & P.S. Gangtok,
   East Sikkim.

2. Mr. Naresh Chettri,
   Son of Late Lal Bahadur Chettri,
   R/o Sichey Busty,
   P.O. & P.S. Gangtok,
   East Sikkim.

3. Shri Rajendra Chhetri,
   Son of Late K.B. Chettri,
   R/o Middle Sichey Busty,
   P.O. & P.S. Gangtok,
   East Sikkim.

… Respondents

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For the appellant : Mr. T.B. Thapa, Senior Advocate with
Mr. B.K. Gupta, Advocate.

For the respondent No. 1 & 2 : None

For the respondent No. 3. : Mr. A.K Upadhyaya, Senior Advocate with
Ms. Rachhitta Rai, Advocate

Date of hearing : 20.10.2020 and 21.10.2020

Date of judgment : 23.11.2020

JUDGMENT

(*Arup Kumar Goswami, CJ*)

This appeal is preferred against the judgment and decree dated 31.07.2017 passed by the learned District Judge, Special Division-II, East Sikkim in Title Suit No.05/2014 dismissing the suit of the plaintiff.

Defendant no.1 is the brother-in-law of the plaintiff, he being an elder brother of her late husband Karna Bahadur Chettri. The defendant no.2 is her son. On the death of defendant no. 1, his legal representatives were brought on record. They are respondent nos. 1 and 2 in the appeal. Defendant no.2 is the respondent no.3 in the appeal.

3. Defendant no. 1 had filed written statement but for non-appearance, the suit proceeded ex-parte against him from 02.07.2015. It appears that without having the ex-parte order against him vacated, evidence on affidavit was filed by him. In the paper book also there is a copy of the evidence-on-affidavit filed by him as defendant no.1. The same was not considered by the learned Trial Court. He was examined as a witness by defendant no. 2.

4. It is the case of the plaintiff that she is the owner of land described in Schedule-A and the two three-storied RCC Buildings, described in Schedules-B and C, standing over it. While Schedule-B building was constructed in the year 1998-1999 and occupied by defendant no.2, Schedule-C building was constructed in the year 1982-1983 and the same is in occupation of several tenants.

5. It is pleaded that the suit land was purchased by her father-in-law late Mandal Purna Bahadur in the name of defendant no.1 in the year 1969-70 as the husband of the plaintiff had gone for higher training outside the state. During the survey operation conducted in the year 1976-1978, the plot of land was recorded in the name of defendant no.1 vide Plot No.604/1056 under Khatiyan No.162, measuring an area of 0.1500 hectare. The defendant no.1 had submitted an application to the Director, Survey and Settlement, Government of Sikkim on 08.06.1978 requesting him to correct the records and register the plot of land in Sichey Basti, standing in his name, to K.B Chettri, husband of the plaintiff. The aforesaid land was transferred on the condition that two plots of land - one at Samdong known as “Buri Baju Ko khayal” and the other at Tumin Block, recorded in the name

her husband, were to be transferred and mutated in favour of defendant no.1. Though no attested Parcha was provided to the plaintiff, a non-attested Parcha was given.

6. Further case of the plaintiff is that as her husband was in dire need of money in 1979, a verbal arrangement was worked out in between her and her husband that on her providing a sum of Rs.2000/-, her husband would transfer the land mentioned in Schedule –A measuring 0.1500 hectare in her favour. It is stated that the aforesaid land is maintained by Land Revenue Department as Plot Nos.1622, 1623 and 1624 under Khatiyan no.544.

7. It is pleaded that the suit properties are under the possession of plaintiff and her husband since last forty-four years and the plaintiff is enjoying the same uninterruptedly. Further case of the plaintiff is that relationship of the plaintiff and her son was not cordial as a Will was executed by the husband of the plaintiff bequeathing some landed property to their daughters. On instigation of defendant no.1, defendant no.2 is giving harassment to the plaintiff. Defendant no.1 had also executed a Gift Deed dated 31.03.2011 in favour of the defendant no.2 in respect of Schedule-A land, as against which an objection was lodged by her before the Registrar of the District Collectorate, East Sikkim. Though the plaintiff used to collect rent from the tenants residing in Schedule-C building, by threatening the tenants in the month of December 2012, the defendant no.2 started collecting rents from them from the month of February, 2013, compelling her to lodge a complaint before the Superintendent of Police, East Sikkim and to issue legal notices to the tenants. It is averred that defendant no.2, with an ulterior motive, had received all such notices. Reference is made to an appeal preferred against dismissal of Title Suit No.1/2013, instituted by the husband of the plaintiff, where the defendants were parties.

8. Under the direction of the defendant no.1, defendant no.2 started making additions and alterations on and from 01.01.2014 to the Schedule-B

lding occupied by him and had also started to construct a fourth storey in the terrace of the building without any permission from the plaintiff. Though the plaintiff had repeatedly requested the defendant no.2 not to construct the fourth storey and not to collect rent, the same was to no avail.

9. With the above broad facts, the suit was filed essentially for (i) a declaration that the plaintiff has right, title and interest over the suit property and that defendants have no right and title over the same, (ii) permanent injunction against the defendants from raising the fourth storey, (iii) restraining defendant no.2 from collecting rent from the tenants over the RCC building and delivery of possession of the suit premises.

10. The learned Trial Court had recorded that the suit had proceeded ex-parte against the defendant no.1. The defendant no. 1, during his cross-examination, had stated that he had not contested the suit on merit. But since he was examined by the defendant no. 2 as his witness, it will be appropriate to broadly take note of the stand taken by him in the written statement.

11. In the written statement, defendant no.1, in substance, had stated that the property mentioned in the Schedule-A of the plaint is covered by Plot No.604/1059 under Khatiyan No.162, which is wrongly recorded by the plaintiff as Plot No. 604/1056 at Paragraph-5 of the plaint. The schedule-A, B, C properties had never been recorded in the name of the plaintiff and the Schedule-A stands recorded in his name. He had purchased Schedule-A land with his money in order to settle the family of his younger brother, i.e. husband of the plaintiff, at Gangtok as his brother had gone outside the state to pursue higher studies.

12. It is denied that by him that plaintiff and her husband were in possession of building for the last forty-four years. It is also denied that Schedule-B property was constructed in the year 1998-1999 and the

ıedule-C building in the year 1982-83. It is stated that husband of the plaintiff had requested him to transfer the suit land along with the two buildings in the name of defendant no.2. It is pleaded that his brother late Karna Bahadur Chettri had no authority to execute the Will in respect of the property belonging to him. He had admitted gifting plot of land bearing Plot No.604/1059 to defendant no.2 out of love and affection.

13. The defendant no.2, in his written statement, stated that none of the properties, i.e. Schedules-A, B and C, are transferred or mutated in the name of the plaintiff and that Schedule-A land was purchased by defendant no.1. His father had constructed Schedule-B and Schedule-C buildings during the years 2000-2002 and 1986-89, respectively. The Schedule-B building is in his exclusive possession from the year 2002. The allegation of there being some understanding between his father and defendant no.1 regarding transfer of land is denied. The version put forth by the plaintiff that on providing a sum of Rs.2,000/- in the year 1979 her husband had transferred Schedule-A land in her favour is denied as false. It is stated that his father was a man of means and in the year 1979, he was the Managing Director of State Bank of Sikkim and the Head of the Department. It is also denied that Schedule-A property was with his father for last forty-four years uninterruptedly. He had approached his mother after the demise of his father to tell her that he would be collecting rent from January, 2013 and the plaintiff had also agreed that she would collect rent till the year 2012 in respect of Schedule-C property. It is stated that the plaintiff still continues to collect rent from the building occupied by UCO Bank.

14. It is pleaded that he started construction of the fourth-floor above the existing terrace of third floor in the month of January, 2014 and the plaintiff who resides nearby did not raise any objection to such construction until he had already completed essential part of the construction work and only sanitary fittings and floor works had remained to be done. It is stated

t the plaintiff had turned hostile towards him ever since he had married, as his wife belongs to another community.

15. On the basis of pleadings, the learned trial Court had framed the following issues:-

"(1) Whether the plaintiff is the owner of the suit property and if so the Defendant No.2 is liable to be evicted from there and the plaintiff is entitled to recovery of the same?

(2) Whether the Defendant No.2 illegally started to collect the rent from the tenants of the Schedule C property?

(3) Whether the Defendant No.2 has illegally made addition and alternation as well as constructed fourth storey on the terrace of the building, Schedule B property and if so whether the same is liable to be removed?

(4) Whether the suit of the plaintiff is maintainable?

(5) Whether the suit is bad for non-joinder and mis-joinder of necessary party?

(6) Whether the plaintiff has right, title and interest over the suit properties?

(7) Whether Defendant No.1 has gifted the landed property covered under Khatian No.162, plot No.604/1059 measuring 0.32 acres, situated at Middle Sichey, Gangtok to Defendant No.2?

(8) Any other relief/reliefs?"

16. During trial, plaintiff had examined 8 witnesses and defendant no.2 had examined 4 witnesses including defendant no.1 as DW-2.

17. At this juncture, it is relevant to note that in the evidence on affidavit submitted by Rajendra Prasad Upreti, he is shown as Witness No.6

the plaintiff but in cross-examination he is shown as PW-2. Abhi Chandra Sharma is examined as PW-3. Gitanjali Chettri, a daughter of the plaintiff, is examined as PW-4. In the evidence on affidavit of Vikash Chettri, Witness No. is not indicated. However, the learned Trial Court has treated him as PW-5. Same is the case with. Kavita Jayaru and Manu Kumar Giri. However, the learned Trial Court treated them as PW-6 and 7, respectively. Though, evidence on affidavit of Madhu Poudyal shows that she is Witness No.5 for the plaintiff, the learned Trial Court had recorded her as PW-8. In order not to create any further confusion I will proceed to describe the witnesses in the manner as numbered by the learned District Judge.

18. I have heard Mr. T.B. Thapa, learned Senior Counsel for the appellant and Mr. A.K Upadhyaya, learned Senior Counsel for the respondent no.3. None appears for respondent nos.1 and 2.

19. Mr. Thapa has submitted that the learned Court below committed manifest error of law as well as of facts in dismissing the suit of the plaintiff. He submits that letter dated 08.06.1978 (Exhibit-2) demonstrates that the defendant no.1 had requested the authorities to record the name of the husband of the plaintiff in respect of the suit land and that fact itself demonstrates that the defendant no.1 had thereafter, no right, title and interest in respect of the suit land. He also contends that learned Court below was not justified in not placing any reliance on Exhibit-1 and Exhibit-3, which are Parcha Khatiyans. He places reliance on a judgment of this Court in the case of ***Pipon Langchen alias Tholung Pipon vs. Thondup Bhutia alias Thondup Lepcha and Anr.***, reported in ***1977 (2) Sikkim Law Journal 40*** .

20. Mr. A.K Upadhyaya, learned Senior Counsel for respondent no.3, while supporting the impugned judgment, contends that the plaintiff had failed to produce any document of title and there is no evidence that the defendant no.1 had transferred the suit land in favour of his brother in

:ordance with law. He has also contended that record-of-rights do not confer title.

21. I have considered the submission of the learned Counsel for the parties and have examined the materials on record.

22. The appellant had filed her evidence on affidavit as PW-1. The evidence, so filed, is in tune with the averments made in the plaint. She had exhibited as Exhibit-1, a Parcha Khatiyan, in respect of Schedule-A land. The application dated 08.06.1978 written by the defendant no.1 to the Director, Survey and Settlement, Government of Sikkim was exhibited as Exhibit-2. She had exhibited a non-attested Parcha Khatiyan as Exhibit-3. Apart from some other documents such as notices issued from Gangtok Municipal Corporation, electricity bill, etc., the plaintiff had also exhibited the Will and the Gift Deed as Exhibits-11 and 12, respectively.

23. Rajendra Prasad Upreti (PW-2) is the son-in-law of the plaintiff being married to the eldest daughter of the appellant. He had deposed that the suit properties are the properties of the plaintiff and that RCC buildings were constructed by his father-in-law. Though the Schedule-A still remains recorded in the name of defendant no.1, defendant no.1 had relinquished his right, title and interest over the same forty-five years ago and he had never claimed the same during the life time of his father-in-law and it is only after the death of his father-in-law, the defendant no.2 has tried to grab the Schedules-B and C buildings by seeking to record the same in his name. It is stated that there was some understanding in between defendant nos.1 and 2 regarding properties at Samdong and Sichey and it is in that view, defendant no.1 sought to gift the Schedule-A land to defendant no.2 and in lieu of that, defendant no.2 is helping him to claim the properties at Samdong. After the death of his father, the defendant not.2 did not allow the plaintiff to cultivate the suit land and also to keep cows there and by threatening the tenants, he started collecting rent. Evidence of PW-2 from paragraph nos.5 to 16 and 18

24 are almost verbatim reproduction of the contents of the plaint, with change of the word 'the plaintiff' appearing in the said paragraphs, to 'mother-in-law'.

24. PW-3, who is the Revenue Officer-cum-Assistant Director, came along with records. He stated that Exhibit-3 (under objection) is the original unattested Parcha Khatiyan pertaining to Plot Nos.1622, 1623 and 1624 under Khatiyan No.544. He deposed that he had issued extracted photocopy of Exhibit-3 under his signature.

25. Gitanjali Chettri, PW-4, is the daughter of the plaintiff. Her evidence is more or less similar to the evidence on affidavit of PW-2.

26. PW-5, PW-6, PW-7 and PW-8 were examined by the plaintiff in connection with payment and collection of rent.

27. DW-1, in his evidence, stated that no land as described in Schedule-A exists in the record of Land Revenue Department or Revenue Division of District Administrative Centre. He had stated that the plaintiff at paragraph 5 had wrongly given the Plot No. as Plot No.604/1056. The land described in Schedule-A, actually covered by Plot No.604/1059 under Khatiyan No.162, is recorded in the name of the defendant no.1 and he had exhibited the Parcha Khatiyan as Exhibit-D2-A. Schedule-B and Schedule-C buildings were constructed by his father with due consent of defendant no.1 on condition that the same would ultimately be transferred in his name. The Schedule-B building was partially constructed in the year 2000-01 and Schedule-C building was constructed in the year 1986-89 and he had shifted to Schedule-B property in the year 2002 on the request of his father. He also stated that defendant no.1 had executed a Gift Deed in his favour on 31.03.2011 in respect of the land covered by Plot No.604/1059 under Khatiyan No.162 and exhibited an attested copy of the same as Exhibit-D2-C. He stated that registration of the same could not be done because of an

ection lodged by the plaintiff. His father had told him during the year 2006-07 to collect rent from the tenants of Schedule-C building so as to provide better education to his grand-sons for whom he had immense love and affection and he started collecting rent from Schedule-C property from February, 2013. The plaintiff is collecting rent from the building occupied by the UCO Bank and she is also receiving family pension of Rs.30,000/- per month. By filing additional evidence on affidavit, DW-1 had exhibited the Parcha Khatiyan stating the same to be the original copy as Exhibit-D2-Y.

28. DW-2 stated that he had purchased the Schedule-A land by his own means. He admitted that he had written a letter to the concerned department for recording Schedule-A land in favour of his younger brother but the same was not processed and consequently, Schedule-A property remained in his name. There was no talk with his brother for exchange of some other properties with the suit land. He stated that his brother had requested him to transfer Schedule-A land along with two buildings to the defendant no.2. He also stated that out of love and affection, he gifted plot of land bearing Plot No.604/1059 under Khatiyan No.162, covering an area of 0.1500 hectare on 31.03.2011 to the defendant no.2.

29. DW-3 is an Additional Secretary, Land Revenue and Disaster Management Department. He stated that Exhibit-3 is a record of Gangtok Station Survey Record of 1976-80 and the same being not attested, has no legal basis and as such, nobody can claim title or ownership on the basis of the extract taken out of such unattested record.

30. DW-4 is a Deputy Director in the Revenue Section of the District Collectorate. He had produced original khatiyan of land record of 1950-54 before the Court and based on the same, he had exhibited as Exhibit-C1-A, the attested copy of the original khatiyan. He stated that plot of land falling under Plot No. 604/1059 measuring an area of 0.32 acres of Khatiyan

.162, stands in the name of defendant no.1 and that the aforesaid land was not mutated or transferred in the name of any other individual. He also stated that Exhibit-3 is not available in his office and as such, the name of defendant no. 1 is not found recorded under Plot Nos. 1622, 1623 and 1624 of Khatiyan No. 544.

31. Learned Trial Court had decided issue no. 5 in favour of the plaintiff. Having decided issue nos. 1, 2, 3, 6 and 7 against the plaintiff, issue no. 4 i.e. "Whether the suit of the plaintiff is maintainable" was decided against the plaintiff holding that the suit is not maintainable.

32. It is one thing to say that the plaintiff is not entitled to reliefs as prayed for if the plaintiff cannot establish his or her case. But that does not mean that the suit of the plaintiff is not maintainable. Maintainability of a suit is a question of law. In view of Section 9 of the Civil Procedure Code, 1908, all suits of civil nature are maintainable unless barred either by an express provision or by implication of law. For instance, suppose jurisdiction of civil court is barred under a statute in respect of matters falling within it and a suit is filed in respect of a subject matter under that statute, then the suit can be said to be not maintainable. If there is any issue regarding maintainability of the suit, it is appropriate that such issue is decided at the threshold.

33. As issue nos. 1 and 6 were decided by the learned Trial Court together, I consider it appropriate to take up both the issues together.

34. In the plaint itself at paragraph 5, it is stated that the land of Plot No.604/1056 under Khatiyan No.162 situated at Sichey Busty is still recorded in the name of L.B. Chettri (defendant no. 1). It appears that the same very plot of land is claimed by the plaintiff to be under Plot Nos.1622, 1623 and 1624 under Khatiyan No.544 on the strength of Exhibit-1. It is noticed that Exhibit-D2-A and Exhibit-D2-Y(Parcha) is the same copy though

/-1 had stated that Exhibit-D2-Y is the original copy. However, this will not be very material since it is an admitted position that Schedule-A land was recorded in the name of the defendant no.1 after purchase. Though, it was pleaded by the plaintiff that her father-in-law had purchased the property in the name of defendant no. 1, such assertion has not been proved by the plaintiff in evidence. The plaintiff claims that her husband had become the owner of the Schedule-A land on the basis of letter dated 08.06.1978 issued by defendant no. 1 and that later on, she became the owner of Schedule-A land in view of the arrangement with her husband as she had provided Rs.2000/- to her husband.

35. Relevant portion of the letter dated 08.06.1978, Exhibit-2, reads as follows:

> *"To:-*
>
> *The Director,*
>
> *Survey and Settlement, Government of Sikkim,*
>
> *Gangtok (Sikkim).* *Dated, Gangtok 8th June, 1978.*
>
> *Dear Sir,*
>
> *You may please find from your record that a small plot of land in Sichey Busty stands recorded in my name. The said plot at present is being occupied by my immediate younger brother Mr. K.B. Chettri.*
>
> *I request your esteemed department to change your records and register the said plot of land in the name of Mr. K.B. Chettri."*

36. Defendant no. 1, who deposed as DW-2 for defendant no. 2, stated that though he had submitted the application dated 08.06.1978, the application was not processed and his brother Karna Bahadur Chettri had requested him to transfer the Schedule-A property along with the two buildings in the name of defendant no. 2, who is in actual possession of the

ne. The aforesaid letter does not indicate what property was being referred to and as such, the identity of the plot of land, in any view of the matter, could not have been ascertained there from.

37. Karna Bahadur Chettri died on 22.11.2010. After his death, a letter dated 31.03.2011, Exhibit-D2-H, was issued by defendant no.1 to the Registrar, East District, Gangtok, Sikkim. The relevant portion of the said letter reads as follows:

> "Sir,
>
> I, L.B. Chettri, Son of late Shri P.B. Chettri, resident of Ipsing, Samdong, had given my land bearing plot no. 604/1059 situated in Sichey, measuring 0.32 acres to my brother Shri K.B. Chettri. My brother is now dead as such the property be registered in the name of only son of K.B. Chettri i.e. Shri Rajendra Chettri."

38. From a combined reading of Exhibit-2 and Exhibit-D2-H, it will appear that defendant no.1 did not want to retain the suit land and had verbally given the aforesaid land to the husband of the plaintiff. In his cross-examination, he had said that by Exhibit-2, he had relinquished his right, title and interest over Schedule-A land, but before completion of mutation, his brother died. PW-2, in his evidence, had also stated that though the Schedule-A land still remains recorded in the name of defendant no. 1, he had relinquished his share, title and interest over the said land forty-five years ago. PW-1 admitted in cross-examination that Schedule-A land, where Schedule-B and Schedule-C buildings are standing, was not mutated in the name of her husband during his life time as also in her name. PW-4 also stated that the land in Plot No.604/1059 under Khatiyan No.162, stands recorded in the name of defendant no. 1 and the same is not mutated and transferred in the name of any other individual.

Admittedly, there is no conveyance deed transferring the suit land by defendant no. 1 to the husband of the plaintiff or by the husband of the plaintiff to the plaintiff. Question arises as to whether by way of letter dated 08.06.1978 defendant no.1 could have transferred his property to the husband of the plaintiff and also whether the husband of the plaintiff could have verbally transferred the land to the plaintiff**.**

40. Learned counsel for the parties have submitted that the Transfer of Property Act, 1882 (for short, T.P Act) was brought into force in the State of Sikkim with effect from 01.09.1984.

41. There is no evidence on record that prior to coming into force of the T.P Act, transfer of property could be made orally or by simply writing a letter to the authorities in the State of Sikkim. Rather, the concept of mortgage and sale deed was not unknown and way back on 11.04.1928, the General Secretary of His Highness the Maharaja of Sikkim had issued a Notification No. 385/G wherein it is stated that documents such as mortgage and sale deeds and other important documents and deeds will not be considered valid unless they are duly registered. It is further provided that the contents of the unregistered documents, which ought to be in the opinion of the Court to have been registered, may be provided in Court but a penalty of 50 times of registration fee shall be charged. Para 2 of the said notification was subsequently amended by Notification No. 2947G dated 22.11.1946, providing that an unregistered document, which in the opinion of the Court ought to have been registered, may, however, be validated and admitted in Court to prove title or other matters contained in the documents on payment of penalty up to 50 time the usual registration fees. It seems to suggest that for transfer of property in any form, either by sale or gift or by relinquishment, a deed was required. As noticed earlier, the identity of the land was not ascertainable from the letter dated 08.06.1978. That apart, it is also not indicated that DW-2 was requesting recording of his brother’s name

:cause he had relinquished his rights or had transferred the same, as is sought to be contented by the plaintiff. Plaintiff has failed to produce any document of title. If document of title was not so required, it was plaintiff's burden to establish the same. The plaintiff claims title solely on the basis of Exhibit-1 and Exhibit-3. Exhibit-1, unattested Parcha Khatiyan, is in the name of the plaintiff. In Exhibit-3, unattested Parcha Khatiyan , after striking off the name of Karna Bahadur , name of plaintiff is written.

42. In ***Pipon Langcheng*** (supra), this Court had stated that even if record-of-rights are not prepared under statutory law, but are prepared by public servants in discharge of their official duty under executive orders of the Government, the entries in such records cannot but still be regarded to have been made by public servants in discharge of their official duty within the meaning of Section 35 of Evidence Act and, therefore, are to be treated as evidence of the facts recorded in them. PW-1 and PW-2, in their cross-examination, admitted that Exhibit-1 and Exhibit-3 do not bear the seal and signatures of Amin, Surveyor and the District Collector as also the date, month and year. When the same were prepared or who, under what authority had prepared the same is anybody's guess. In cross-examination, PW-3 admitted that original record of Exhibit-3 is not signed or counter-signed by the competent authority or by any other authority. As such, Exhibit-1 and Exhibit-3 have no evidentiary value. In ***Suraj Bhan vs. Financial Commissioner & Ors.***, reported ***in (2007) 6 SCC 186,*** the Hon'ble Supreme Court had held that it is well-settled that an entry in revenue records does not confer title on a person whose name appears in the record-of-rights. It is also well-settled that revenue records are not documents of title. In ***Pipon Langcheng*** (supra) also, this Court recorded that the entry in record-of-rights, in that case Exhibit-1, is not a document or instrument of title. Therefore, Exhibit-1 and Exhibit-3 cannot form the basis for declaration of title.

43. No person can divest himself of a title in respect of immovable property which has come to be vested on him by taking recourse to a disclaimer of the kind as noticed in the letter dated 08.06.1978. A title once vested in a person can be divested only by a recognized mode of conveyance or in a manner which is permitted by law.

44. Use of the expression "relinquished" by DW-2 in his evidence cannot have any legal effect unless relinquishment was done in accordance with law. Such expression at best conveys his wish and desire to vest the property on his brother, but a wish will not transfer land to his brother or vest the same on his brother.

45. In view of the above discussion, it is held that the Schedule-A land was not transferred to the husband of the plaintiff and therefore, husband of the plaintiff could not have transferred the land to his wife, that too, without a deed of conveyance. Accordingly, it is held that the plaintiff has no right, title or interest over the Schedule-A land.

46. So far as Schedule-B and Schedule-C buildings are concerned, it is to be stated the plaintiff claims her right over the Schedule-B and Schedule-C buildings on the basis that the buildings stand over Schedule-A land, which belongs to her. It is admitted by the defendants that the buildings were constructed by the husband of the plaintiff. It is already noticed that Schedule-A land is recorded in the name of defendant no. 1 on the basis of purchase. As the foundation of the claim in respect of Schedule-B and Schedule-C buildings have not been established, as a logical corollary, it must be held that the plaintiff cannot claim right, title and interest over the Schedule-B and Schedule-C buildings on the basis of ownership and therefore, question of recovery of possession from defendant no.2 does not arise.

In view of the above discussion, issue nos. 1 and 6 are decided against the plaintiff.

48. As Schedule-A land had not been alienated and was not transferred by the defendant no.1, he continued to have right, title and interest over the same. It is an admitted position that a Gift Deed dated 31.03.2011 was executed by defendant no.1 in favour of defendant no. 2 relating to the suit land and the same was submitted for registration. An objection was lodged by the plaintiff against its registration. During the course of submission Mr. Upadhyaya has submitted that after the suit of the plaintiff was dismissed, the Gift Deed was registered on 01.09.2017. In the Gift Deed, Exhibit-12, there is no reference to the two buildings standing over Schedule-A. Issue no.7 is, accordingly, decided against the plaintiff with the above observations.

49. Now I come to the question as to whether defendant no. 2 illegally started to collect rent of Schedule-C property, which is covered under issue no. 2. To substantiate the same, the plaintiff had examined PW-5, PW-6, PW-7 and PW-8.

50. PW-5, PW-6 and PW-7 initially had refused to depose, but finally came to give evidence on receipt of non-bailable warrants of arrest. PW-5 had taken a garage on rent from the husband of the plaintiff and he stated that he used to pay rent to the maid servant of the appellant and later on he started to pay rent to defendant no. 2. He did not mention since when he started to pay rent to defendant no. 2, but in cross-examination he stated that defendant no. 2 had not threatened him not to give monthly rent to plaintiff and to pay rent to him. PW-6 was a tenant 20 years ago and she had tendered rent to the maid-servant of the plaintiff. PW-7 was also a tenant and he had also tendered rent to the maid-servant of the plaintiff. Evidence of PW-6 and PW-7 go to show they had given rent to the plaintiff.

-8 resides in the residence of the plaintiff as her brother-in-law i.e. the husband of her sister, is employed as a driver by the plaintiff. In her evidence she has stated that the plaintiff had asked her to collect rent from her tenants but later on they refused to give rent because defendant no. 2 had started asking for rent from them and had instructed them not to pay rent to the plaintiff. In cross-examination she stated that she had never issued rent receipts to the tenants and that there is no document to show that she had collected rent from the tenants. Evidence of DW-1 goes to show that he had started collecting rent from Schedule-C property from February, 2013 with the consent of plaintiff. However, it does not appear that consent was taken because first cause of action for filing the suit, according to plaintiff, arose when defendant no.1 started collecting rent from the month of February, 2013. Fact remains that before February, 2013, the plaintiff was collecting rent from the Schedule-C building.

51. In ***Narayan Das Khettri vs. Jatindra Nath Roy,*** reported in ***AIR 1927 PC 135***, the Privy Council recognized that there is no law or custom which lays down that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same right of property, as the soil itself. It was also held that buildings and other improvements do not by the mere accident of their attachments to the soil become the property of the owner of soil.

52. After the gift by defendant no.1, defendant no.2 would have right, title and interest over Schedule-A land. Defendant no.1, in the Gift Deed, did not make any reference to the two buildings standing over it. He had not claimed ownership of the buildings. Defendant no.2 automatically does not become the owner of the buildings in the attending facts and circumstances as the same were constructed by his father. So far as the Schedule-B and Schedule-C buildings are concerned, law of succession as prevailing in the State of Sikkim will operate. In order to claim exclusive ownership of the

ldings, Defendant no.2 will have to pay compensation to all the lawful successors–in-interest of Karna Bahadur Chettri, who may have a share in the buildings. What would be the compensation amount could be amicably settled or it could be a subject matter in a different suit or proceeding. There is no material on record to indicate numbers of tenants in Schedule-C building. What amount of rent was paid by them or what is the total amount of rent collected are also not known. There is no prayer in the suit for a decree to pay to the plaintiff the rent collected by defendant no.2. Evidence on record seems to suggest that the tenants had not paid rent voluntarily to defendant no.2 and it is established on record that notices issued by the plaintiff to the tenants were unauthorizedly received by defendant no.2. PW-5, Vikash Chettri had categorically stated that he did not know about any notice issued by the plaintiff. But DW-1 had stated that a reply was given by Vikash Chettri. He had admitted in cross-examination that replies to the notices sent by the tenants including Vikash Chettri did not contain their signatures which seems to support the stand of the plaintiff that defendant no.2 had engineered responses to the notices. However, the plaintiff's assertion that she was the owner of the buildings having not been established, it will be difficult to record a finding that the rent was illegally collected by defendant no.2 though evidently, there was a change of person to whom rent was tendered. In the present fact situation, I am of the opinion that till the issue of ownership in respect of Schedule-B and Schedule-C buildings is settled as per the law of succession as prevailing in the State of Sikkim, the plaintiff should be granted some amount by way of her maintenance. I think 50% of rent towards the maintenance of the plaintiff will be a just, reasonable and equitable amount. Accordingly, it is provided that from the month of January, 2021, defendant no. 2 will give 50% of the rent collected to the plaintiff by way of her maintenance. Issue no.2 stands disposed of in the above terms.

The allegation of illegal construction was based on the premise that the Schedule-B building is the property of the plaintiff. There is no dispute that defendant no. 2 was in occupation of the building. Reliance was also placed on the Will (Exhibit-11). Perusal of the order dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015, which was registered on the basis of an application filed by the appellant under Section 278 of the Indian Succession Act, 1925 in respect of the Will dated 09.06.2010 goes to show that Letters of Administration was not granted in respect of the three-storied building and the vacant land (suit property) on the ground that the said properties were not recorded in the name of the testator. While coming to the aforesaid conclusion, reference was made to certified copies of evidence on record of the present suit. It is pointed out by the learned counsel for the parties that no appeal was preferred against the aforesaid order 20.04.2017 and the order has attained finality. It is noticed from the cross-examination of PW-1 that by the time the suit was filed, on her own admission, fifty percent of construction had taken place. There is no allegation that additions and alterations were being made in violation of any law in force. In that view of the matter, issue no. 3 is decided against the plaintiff.

54. The appeal stands disposed of in terms of the above. No costs.

55. LCRs be sent back.

Chief Justice

Jk/avi