

**(2004) 08 SIK CK 0002**

**Sikkim High Court**

**Case No:** Regular Second Appeal No. 4 of 2003

Karma Denka Bhutia and  
Another

APPELLANT

Vs

Sarki Lamu and Another

RESPONDENT

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**Date of Decision:** Aug. 11, 2004

**Citation:** AIR 2004 Sikk 33

**Hon'ble Judges:** Radha Krishna Patra, C.J

**Bench:** Single Bench

**Advocate:** S.P. Wangdi and Karma Thinlay, for the Appellant; S.R. Sarkar, S. Majumdar, Umesh Ranpal and Sanjay Gurung, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

R.K. Patra, C.J.

Plaintiffs are the appellants in this second appeal which is directed against the decree dated 27-6-2003 of the learned District Judge, Special Division-I, Sikkim in Civil First Appeal No. 1 of 2002 who has dismissed the suit by reversing the decree dated 28-2-2001 of the Civil Judge (East) at Gangtok in Civil Suit No. 31 of 1997.

2. The appellants instituted the suit against the original defendant Lakpa Sherpa (the respondents are his legal representative) for declaration that they are the absolute owners of a two storeyed wooden house measuring 15" x 40" situated at Rongli Bazar (hereinafter mentioned as the suit premises), that the entry in the records of rights in respect of the suit premises in the name of the original defendant is incorrect and for permanent injunction restraining them from interfering with their peaceful possession of the suit premises.

The case is of the appellants that one Goley Gyalpu Bhutia was the owner of the suit premises. His son was Laku Ongden Bhutia, the appellants being its daughters through his first wife. In the year 1969, after the demise of their mother, their father Laku Ongden Bhutia remarried another woman on account of which they were

brought up under the care and custody of their (maternal) grandfather Cholek Dorjee Bhutia who was appointed as their guardian ad litem by the Chief Magistrate, Gangtok in his order dated 10-8-1972 in Civil Miscellaneous Case No. 41 of 1972. During the guardianship the appellants' father and their guardian entered into an agreement dated 9-8-1973 to the effect that the properties standing in the name of the grandfather (Goley Gyalpu Bhutia) would be divided into equal halves between the appellants and the issues through their second mother. Contrary to this agreement and without anybody's knowledge their father sold out a portion of the wooden house to the original defendant by executing sale deed on 25-1-1979. When this fact came to the knowledge of their guardian, he filed objection to the sale before the District Registrar who after hearing the parties cancelled the registration of the sale deed. Subsequently, the appellants' father executed a registered sale deed dated 13-10-1980 in their favour in respect of the entire half portion of the suit premises in the spirit of the earlier agreement dated 9-8-1973. Following the execution of the sale deed, their guardian took possession of the suit premises and inducted one Lakpa Sherpa Sardar as tenant therein. The guardian had been collecting rent from him. After death of their guardian in the year 1994, the appellants have been collecting rent from him. The appellants allege that the sale made by their father in favour of the original defendant is null and void because of the prohibition of sale of immovable property by Bhutias and Lepchas in favour of the other communities. Although they have been in continuous and peaceful possession of the suit premises since 1980 first through their guardian and after his death by themselves, the original defendant attempted to exercise his authority over the suit premises and started instigating the tenant not to pay rent. On the other hand, the original defendant had been in possession of the other half of the wooden structure on the basis of the sale made by their father in his favour. Having noticed the hostile activities of the original defendant as well as his legal representatives they applied for mutation of the suit premises in their favour but to their utter surprise they could come to know that the suit premises and the other half of the wooden structure stand recorded in the name of the original defendant. The Sub-Divisional Magistrate advised them to approach the Civil Court for necessary relief and hence the suit.

In the written statement the defendants denied all the allegations. Their case is that the suit is barred by time. According to them, the deed dated 9-8-1973 executed by the father of the appellants was not an agreement but a compromise deed. The guardian was aware of the sale deed executed by the father of the appellants in favour of the original defendant. The objection raised by the guardian in respect of the sale was heard by the Registrar who allowed registration of the suit premises on 20-3-1979: They had taken possession of the same in December, 1978 when negotiation for sale was in progress and since then they have been in possession of the same. On 13-5-1996 the original defendant applied to the Urban Development and Housing Department of the Government of Sikkim for approval of a blue print

for reconstruction of the wooden house to a r.c.c. structure. The department after consideration approved the plan and the original defendant started construction thereafter. The guardian of the appellants was aware of the sale of the wooden house including the suit premises but did not take steps for enforcement of agreement dated 9-8-1973.

On the basis of the above pleadings, parties led their respective evidence. The trial Judge decreed the suit of the appellants by recording the following findings:--

(i) Cause of action arose on 14-5-1996 when the khatian parcha was issued in the favour of the defendants and the suit for declaration having been filed on 30-6-1997, it is within time.

(ii) In view of the revenue order No. 1 of 1917 prohibiting sale of immovable property by Bhutias and Lepchas in favour of the other communities, the sale deed dated 25-1-1979 executed by the appellants' father in favour of the original defendant (who was admittedly a non-Bhutia) is void.

(iii) The above sale deed dated 25-1-1979 was never cancelled by the Registrar.

(iv) The appellants have been in possession of the suit premises and the defendants have failed to prove their adverse possession over it.

3. In the appeal filed by the defendants, the learned District Judge reversed the decision of the trial Judge and dismissed the appellants' suit by holding as follows :--

(i) The suit is barred by limitation.

(ii) The defendants have been in continuous and uninterrupted possession of the suit premises since 12-12-1978.

4. At the time of admission of this appeal six substantial questions of law were framed and at the commencement of the hearing, the learned counsel for the appellants suggested two more questions with the permission of the Court. In view of the order which I propose to make, all those questions framed as well as suggested by the learned counsel for the appellants need not be stated. For the disposal of this appeal it is sufficient to mention two of them. They are extracted hereunder :--

" 1. In view of the judgment of this Court dated 3-12-1986 in Civil First Appeal No. 6 of 1986 (Mahabir Prasad Agarwala v. Man Bahadur Basnet) holding that the period of limitation provided under the Sikkim State Judicial Department Notification No. 1067/J dated 10-5-1952 (1932) is elastic and not rigid, the substantial question of law that arises for consideration is whether the finding recorded by the lower appellate Court that the suit is barred by limitation is sustainable.

2. The substantial question of law is whether the provisions of Article 65 of the Limitation Act would be applicable in view of the fact that the appellants' suit is

essentially and primarily for declaration of title and confirmation of possession when the plea of the respondents being that they have perfected title in respect of the suit property by way of adverse possession."

5. It is an admitted fact that the Limitation Act, 1963 was extended to the State of Sikkim for the first time with effect from 1-9-1984. The suit was instituted on 30-6-1997 by which time the Limitation Act, 1963 has already come into force in the State which governs the field. Therefore the issue whether the suit is barred by limitation has to be decided on the basis of the period of limitation prescribed for the purpose under the Limitation Act, 1963. The learned District Judge has clearly fallen into legal error in holding that the period of limitation would be governed as prescribed in the notification No. 1067/J dated 10-5-1932 of the Sikkim State Judicial Department. The said notification was not in force on the date of filing of the suit. Therefore question of applying it to the suit does not arise. The reasoning adopted by the learned District Judge that the present case relates to a transaction which took place on 25-1-1979 and possession of the suit premises was given to the father of the defendants on 12-12-1978 and the law of limitation prescribed in the notification No. 1067/J dated 10-5-1932 would be applicable is therefore wholly perverse and is liable to be set aside."

6. Furthermore the learned District Judge seems to be under the impression that period of 12 years in "land suit" prescribed in the above notification No. 1067/J dated 10-5-1932 is not relaxable. The relevant notification No. 1067/J dated 10-5-1932 of the Sikkim State Judicial Department is quoted hereunder:--

"SIKKIM STATE JUDICIAL DEPARTMENT

Notification No. 1067/J

To

All whom it may concern.

It is hereby notified that His Highness the Maharaja Sahib has approved of the principle that the Law Courts in Sikkim shall be guided by the undermentioned Limitation Law in the trial of Civil cases viz., a period of six years in money and miscellaneous suits and of 12 years in land suits. The above mentioned period may be made elastic where the circumstances of the case justify but no enquiry into the merits of the case would be held if the suit is based on a cause of action which is considered to be too old by the Courts (Keeping the above principle in view) and the defendant denies the claim.

Gangtok,

The 10th May, 1932

Gyaltsen Kazi,

Judicial Secretary

to His Highness

the Maharaja of Sikkim."

A Bench of this Court in Mahabir Prasad Agarwala v. Man Bahadur Basnet Civil First Appeal No. 6 of 1986 decided on 3-12-1986 had the occasion to consider and interpret the aforesaid notification. In paragraph 9 of the judgment this Court held as follows:--

"9. It would appear from the above Notification that the law of limitation was not strict. Only the principle was specified and even that principle could be made elastic where the circumstances of the case justified that course. Enquiry into the merits of the case was barred only if the suit was based on a cause of action which was considered to be too old by the Courts. Furthermore, the above Notification did not recognise any rule of acquisition of title by adverse possession. It should not be forgotten that prior to the merger of Sikkim in India, the State was governed by the Maharaja called the Chogyal. It is inconceivable that the Maharaja would have had the intention of prescribing a period of 12 years in respect of the land belonging to him, even though in private capacity, which could have been taken possession of by any individual."

From the above, it is clear that this Court has opined that the period of limitation prescribed in the notification is not rigid and in a given case it can be relaxed. The view of the learned District Judge in the circumstances is contrary to the decision of this Court. He should have considered as to whether the appellants have been able to make out a case for earning the benefit of "flexibility" of the period of limitation. Non-consideration of this aspect has vitiated his finding. An issue of law (like a point on limitation) goes to the root of the case.

7. It may further be seen that the specific case of the appellant is that they have been in continuous and peaceful possession of the suit premises since 1980 on the basis of the sale deed executed in their favour by their father. They could come to know in the year 1996 that the suit premises stands recorded in the name of the defendants and the suit having been filed within one year from the date of issuance of the khatian, it is within time. The respondents seem to have taken the plea of adverse possession. Adverse possession means a hostile assertion which is expressly and impliedly in denial of the title of the true owner. The possession of land however long it might be, cannot confer on the person claiming adverse possession any right unless it is adverse to the owner. The burden of proving adverse possession is on the person who claims it. The learned District Judge should have examined to find out as whether Articles 64 or 65 of the Limitation Act, 1963 would be applicable to the facts and circumstances of the case.

8. All the aspects mentioned above require fresh look by the lower appellate Court.

9. In view of the foregoing reasons, the judgment and the decree of the learned District Judge are hereby set aside. The matter is remitted to him for fresh disposal according to law and the observations made in this judgment.

10. In the result, the appeal is allowed. Parties shall bear their own costs of this appeal.