

Divisional Forest Officer (T) And Ors vs Ashok Tshering Bhutia on 15 May, 2026

Author: Meenakshi Madan Rai

Bench: Meenakshi Madan Rai

THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

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

Appellants : RFA No.09 of 2020
The Divisional Forest Officer (T),
Department of Forest, Environment and
Wildlife Management and Others

versus

Respondent : Ashok Tshering Bhutia

Appeal under Order XLI Rules 1 and 2
of the Code of Civil Procedure, 1908

Appearance

Mr. Aarohi Bhalla, Additional Advocate General and Mr. Thinlay Dorjee Bhutia, Government Advocate for the Appellants with Ms. Rita Sharma, Government Advocate (Forest and Environment Department) and Ms. Norzila Tamang, Legal Officer (Forest and Environment Department).

Mr. T. B. Thapa, Senior Advocate with Mr. Ranjan Chettri and Mr. Khem Raj Sapkota, Advocates for the Respondent.

Date of hearing : 01-04-202
Judgment reserved : 01-04-202
Judgment pronounced & uploaded : 15-05-202

JUDGMENT

Meenakshi Madan Rai, J.

1. The questions that this Court is called upon to determine in this Appeal are;

(i) Whether the land claimed by the Respondent, bearing Plot Nos.311, 312 and 313 measuring a total area of 1.7560 hectares belongs to him;

(ii) Whether the Appellant No.1 and the Appellant No.2 have established that, the land claimed by the Respondent vide the aforementioned documents is in fact reserved forest and has been

encroached upon by the Respondent?

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2. Before the Court of the Learned District Judge, South Sikkim, Namchi, the Appellant No.1 was the Defendant No.1 [The Divisional Forest Officer (T), Department of Forest, Environment and Wildlife Management];

The Appellant No.2 was the Defendant No.2 [The PCE-cum- Secretary, Department of Forest, Environment & Wildlife Management];

The Appellant No.3 was the Defendant No.3 [The Secretary, Energy and Power Department, Government of Sikkim];

The Appellant No.4 was the Defendant No.4 [The Sub- Registrar/SDM, Office of the District Collectorate, Namchi]; and The Respondent was the Plaintiff. To prevent obfuscation the parties shall hereinafter be referred to as per their litigative status before this Court.

3. In order to arrive at a finding, on the two questions settled for determination hereinabove, it is necessary to delve, briefly into the facts of the Respondent's case.

(i) The Respondent filed a suit for declaration, injunction and other consequential reliefs before the Court of the Learned District Judge, South Sikkim, Namchi, claiming to have purchased three plots of land, being plot no.311 measuring 0.5960 hectares, plot no.312 measuring 0.0460 hectares and plot no.313 measuring 1.1140 hectares, viz., a total area of 1.7560 hectares/4.33 acres, at Samardung, District Namchi, Sikkim, from one Jhumki Doma Bhutia, on 09-10-2012. Consequent upon necessary verification, the lands were registered in his name on 17-01-2013, which he then demarcated and fenced. It is claimed that his ownership of the land's was fortified by a letter dated 01-12-2016, addressed to the The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia Appellant No.3, by the Appellant No.4, informing that, land measuring 1.7560 hectares, vide khatiyon No.116, was found recorded in the Respondent's name. Exbt 21, dated 08-12-2012 and Exbt 23, dated 27-05-2015 □No Objection Certificates , issued by the Department of the Appellant No.1 and Appellant No.2 further certified respectively that, the land claimed by the Respondent was not forest land nor was there encroachment into forest land by the Respondent.

(ii) In 2016, the Respondent's land was identified by Appellant No.3, for construction of a 66 KV Sub-Station, for M/s. Power Grid Corporation of India, Limited. To avoid cost overrun the Project was to be taken up on priority and completed by December, 2018. The rate for acquisition of the Respondent's property was fixed at 490/- sq.ft.

(iii) Following the above development, the Appellant No.3 sought for a □No objection Certificate (NOC), from the Appellant No.1, as per the land survey records of 1951-52 and 1979-80, vide his letter, dated 09-05-2017. It is the Respondent's case that, the Land Revenue Department on 17-01-1984 had already notified that, the land records of 1951 would cease to be in operation and

that the land records of 1979-80 would come into force with immediate effect.

(iv) Pursuant thereto, the Appellant No.1 issued letter dated 30-06-2017 (Exbt-12) informing the Respondent that, as per the joint inspection carried out on 21-10-2016, by the Forest Department, Land Revenue and Disaster Management Department (LR&DMD) and Energy and Power Department, in the presence of the land owners, it was found that out of a total area of 4.33 acres The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia registered in the Respondent's name, an area of 3.23 acres was forest land, which had been encroached upon by the Respondent and required immediate eviction, this, despite Exbt 21 and Exbt 23 (supra) having been issued earlier, clarifying that the suit land did not fall within forest land.

(v) The Respondent consequently, issued a Legal Notice dated 29-07-2017 (Exbt-13), to the Appellant No.1, requiring the Appellant No.1 to inter alia recall the Notice dated 30-06-2017, alleging that, the contents of the notice were false and no joint inspection had been carried out on 21-10-2016. It was averred that prior to the purchase of the suit land by the Respondent, the previous three owners had the relevant documentation pertaining to their ownership of the suit land and so did the Respondent who obtained it from Appellant No.4 as per the applicable rules and procedure. It was also averred that, the acts of the Appellants No.1 and 2 and their allegation of ownership of the land had caused financial loss to the Respondent.

(vi) The Respondent sought inter alia for a declaration that, he is the absolute owner of the entire suit land and a permanent injunction, restraining the Appellant No.3 from purchasing/acquiring another land for construction of the Project for which the Respondent's land was identified. The Schedule to the Plaint details the suit land as having an area of 4.3391 acres and delineates the boundaries thereto.

4. All the Appellants denied the claims of the Respondent.

(i) The Appellants No.1 and 2 filed a joint Written Statement and averred that the Department relies on the cadastral survey record of 1950-52 for the purposes of authentication of any The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia land record. Land recorded as □forest land in the survey of 1950- 52 is deemed to be forest land. That, an area of 3.23 acres was found to be recorded in excess, as the 1950-52 survey operations recorded 1.10 acres in the name of Hari Krishna Sharma, son of Bishnu Prasad Sharma the original owner, but in the cadastral survey of 1979-80 it had increased to 4.33 acres and was found recorded in the name of Bishnu Prasad Sharma. The topographical Map prepared by the Survey of India reflects the boundaries of Tsalumthang reserved forest, of which part and parcel falls within the suit land.

(ii) In their Counter Claim, the Appellants No.1 and 2, claimed to be exclusive owners of the suit land as further established by the joint inspection and sought a declaration that they are the absolute owners of the excess area of 3.23 acres of land. That, the Respondent is liable to be evicted from the suit land.

5. The Appellant No.3 in his Written Statement averred that on 09-05-2017, the Appellant No.1 was communicated of the proposal of the Appellant No.3 to acquire the Respondent's land for the said Power Project. The Appellant No.1 was requested to issue NOC, instead of which the Appellant No.3 was informed of the Notice dated 30-06-2017, issued by the Appellant No.1 to the Respondent demanding eviction of the Respondent from the suit land. As the Project was time bound, another plot of land was identified by Appellant No.3 instead of the Respondent's land and the costs of acquisition settled. No cause of action thus arises against the Appellant No.3 in the present Suit.

6. In the Written Statement of Appellant No.4, it was averred that, the Sale Deed dated 09-10-2012 was executed The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia between Jhumki Doma Bhutia and the Respondent and the sale deed registered based on the records maintained in the office of the Appellant No.4, which found support from the NOC bearing Ref. No.52/F(T)S, dated 08-12-2012, Exbt 21 issued by the Appellant No.1 certifying that the lands in question being Plot nos.311, 312 and 313 pertaining to Smt. Jhumki Doma Bhutia were verified and did not fall within the forest land. Appellant No.4 also obtained NOC from the contiguous boundary holders before registration and mutation in the Respondent's name with emphasis placed on the NOC (supra) issued by the Appellant No.1 as the Forest Department holds boundaries contiguous to the suit land.

7. On the basis of the pleadings of the parties, the Learned District Judge, Namchi, South Sikkim, in Title Suit No.02 of 2017 (Ashok Tshering Bhutia vs. The Divisional Forest Officer (T) and Others), framed eight Issues, for determination as detailed hereinafter.

8. To prove his case, the Respondent initially examined himself as PW-1 and two witnesses, namely, Rishi Raj Pradhan as PW-2 and Munna Kumar Pradhan as PW-3. The Appellants No.1 and 2 examined Peggyla Tshering Venchungpa as DW-1 and Ashish Gurung as DW-2. The Appellant No.3 examined Krishna Kumar Pradhan as DW-3. The Appellant No.4 did not examine any witness.

9. The Issues that were settled and determined by the Learned Trial Court, after extensive examination of the evidence furnished and analysis thereof, as follows;

(i) Issue No.1 Whether the present suit is maintainable in its present form or not? (Onus on Plaintiff) The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia The suit of the Plaintiff was found maintainable by the Learned Trial Court.

(ii) Issue No.2 Whether the Defendants No.1, 2 and 3 are liable to pay the compensation to the Plaintiff? (Onus on Plaintiff) It was found that the Plaintiff had failed to produce any document to indicate that he had suffered financial loss due to non-registration of the portion of the suit land in favour of the Defendant No.3 for construction of 66 KV Sub-Station. The Issue was decided against the Plaintiff.

(iii) Issue No.3 Whether the suit is barred by law of limitation? (Onus on Defendants) The Learned Trial Court was of the view that the suit was not barred by the limitation.

(iv) Issue No.4 Whether the excess land/area of 3.23 acres is a reserved forest land as per the cadastral survey record of 1950-52 and whether the Plaintiff is in possession of the said excess land? (Onus on Defendants) After considering the evidence and documents on record, the Trial Court was of the view that although Defendants No.1 and 2 claimed that the portion of the suit land 3.23 acres was reserved forest but they failed to prove its ownership or that the portion of the suit land falls under the reserved forest. The Defendants No.1 had issued Exbt 21 the NOC during the process of registration of suit land in favour of the Respondent stating that the suit land did not fall within the forest land and Exbt 21 was corroborated by Exbt 20, spot verification report The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia dated 23-04-2010 and Exbt 23. That, the Government Gazette Notification dated 29-11-1983 also notified that the old land records of 1951 shall cease to be in operation and the new land records would come into force. It was thus proved that, the Plaintiff was the absolute owner of the suit land and the Defendants No.1 and 2 had failed to prove their ownership over the lands or that the portion of the suit land fell under the reserved forest.

(v) Issue No.5 Whether the suit of the Plaintiff grossly suffers from mis-joinder and non-joinder of necessary party? (Onus on Defendants) The Learned Trial Court was of the view that even without impleading the Land Revenue and Disaster Management Department, Government of Sikkim or the seller Jhumki Doma Bhutia, the relevant documents pertaining to the sale transactions were available in the case records for proper adjudication of the matter, to enable the Court to arrive at a proper finding, hence Issue no.5 was decided against the Defendants.

(vi) Issue No.6 Whether forest land can be transferred, alienated or de- reserved in terms of the Forest Conservation Act, 1980, without prior approval of the Central Government? (Onus on Defendant No.1 and 2) The Learned Trial Court was of the view that any activity which was prima facie in violation of the provisions of the Forest Conservation Act, 1980, is impermissible without the The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia prior approval of the Central Government and every State Government is to promptly ensure total cessation of all such activities forthwith. The issue was decided in favour of Defendants No.1 and 2.

(vii) Issue No.7 Whether the Defendant No.1 had the right/authority to issue letter bearing reference No.369/DFO(T)/S, dated 30-06- 2017 and if so, whether it was issued bona fide or with ulterior motive? (Onus on Plaintiff) The Trial Court was of the considered view that the Defendant No.1 had no right to issue letter bearing Ref. no.369/DFO(T)/S, dated 30-06-2017, to the Plaintiff.

(viii) Issue No.8 Whether the Plaintiff is entitled for any other relief or reliefs?

In this issue the Learned Trial Court concluded as follows;

"..... Plaintiff is declared as absolute owner of the suit land i.e. plot Nos. 311, 312 and 313 measuring an area of 0.5960 hectares, 0.0460 hectares and 01.1140 hectares (total area 1.7560 hectares) at Samardung falling under Burul Block, South Sikkim and Defendant No.1 had no right to issue letter bearing reference No.369/DFO(T)/S dated 30.06.2017 (Exhibit-

12) to Plaintiff and accordingly said letter (Exhibit-12) is hereby declared null and void and the Counter-Claim filed by the Defendant No.1 & 2 against Plaintiff is also dismissed."

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10. Aggrieved thereof, the Appellants were before this Court assailing the Judgment dated 24-12-2019, in Title Suit No.02 of 2017 (Ashok Tshering Bhutia vs. Divisional Forest Officer (T) and Others). Upon hearing the parties, a Single Bench of this High Court (comprising of Bhaskar Raj Pradhan, J.) after considering the evidence on record and the findings of the Learned Trial Court, vide detailed Order, dated 12-04-2022, observed in Paragraph 20, as follows;

"20. Resultantly, this court deems it fit and proper to invoke the provisions of Order XLI Rule 25 of the CPC and frame the following issues for trial:-

(i) Whether the suit land was originally numbered as plot no. 170/171 as per the cadastral survey of 1950-52 and measured only 1.10 acres?

(onus on the defendant nos. 1 and

2)

(ii) Whether the same plot no. 170/171 as per the Cadastral Survey of 1950-52 was renumbered as plot no. 311/312/313 as per the Cadastral Survey of the year 1979- 80 and recorded in the name of Bishnu Prasad Sharma, father of Hari Krishna Sharma, reflecting a total area of 4.33 acres with excess area of 3.23 acres of forest land included therein? (Onus on the defendant nos. 1 and 2)

(iii) Whether the subsequent transfers of the suit land initially from Bishnu Prasad Sharma to the extent of the excess 3.23 acres, as claimed, could all be rendered void? (onus on the defendant nos. 1 and 2);"

(i) The Learned Trial Court was ordered to take additional evidence, if required, and return the evidence to this Court together with its findings and reasons, within a period of six months from the date of the first appearance of the parties. It was clarified that as the Appeal was not finally decided, the observations made in the Order were solely for the purpose of the said Order.

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11. The Learned Trial Court in compliance thereto, recorded the evidence of four additional witnesses (jointly) of the Appellants No.1 to 4 and four additional witnesses of the Respondent. Consequent thereto, vide the impugned Order, dated 30-09-2023, in the same Title Suit No.02 of 2017, the Issues (supra) were taken up and having duly considered the evidence of the witnesses, the

Trial Court concluded in Paragraphs 10 and 11 as under;

"10. From the evidence of the witnesses, especially of Shri Hari Kumar Sharma, son of Bishnu Prasad Sharma, it is presumed that the suit land was originally numbered as 170/171 as per cadastral survey of 1950- 52, but was wrongly recorded in his name (Hari Krishna Sharma) as he was a minor then. It is also presumed that the same plot was renumbered as 311, 312 and 314 and the subsequent transfer of the suit land was done following due process, and also in view of the NOC, thus the same cannot be rendered void.

11. The Defendants could not prove any issues i.e. issue no (i), (ii) and (iii) with cogent evidence. Thus, the finding of this court in the aforesaid issues is that the Defendants could not prove that there was an excess area of 3.23 acres of forest land and that the Defendants also could not prove any of the aforesaid issues, for the reasons, as discussed above i.e. in view of the evidence, so produced and discussed."

[emphasis supplied]

12. The Order , dated 30-09-2023, of the Learned Court of the District Judge, Namchi, Sikkim, was taken on record by this Court, vide Order, dated 18-10-2023.

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(i) The matter appears to have been thereafter forwarded for Mediation on 11-08-2025, but was returned unresolved and was heard finally by this Bench.

13. Learned Additional Advocate General appearing for all the Appellants contended that;

(i) The suit land has been described in the Written Statement, filed by the Appellants No.1 and 2 wherein it has been clarified that, plot numbers 170/171 measured 1.10 acres, as per the 1950-52 cadastral survey records in the name of Hari Krishna Sharma. The plot was re-numbered as 311, 312 and 313 in the 1979-80 survey operations but the area was recorded as 4.33 acres, indicating an excess of 3.23 acres. That, the Joint Inspection Report, Exbt D-1, (in three pages collectively) lends credence to this fact. That, the excess land is reserved forest land which has been encroached upon by the Respondent. Relying on a Map in Exbt D-1 it was contended that plot number 170/171 was contiguous to the forest reserved land, which resulted in the encroachment. It was urged that, when the original owners had only 1.10 acres of land, it was the bounden duty of the Respondent to have checked the 1950- 52 records to verify whether the landed property being sold to him in fact had belonged to the original owner.

(ii) That, in their Written Statements the Appellants have clearly averred that the topographical Map bearing No.78 A/8/4 indicates the forest boundaries and was prepared by the Survey of India. That, the total area of the Tsalumthang reserve forest as per the topographical Map is shown to be 300 hectares and the total boundary as per the 1950-52 records between the said reserved The Divisional

Forest Officer (T) and Others vs. Ashok Tshering Bhutia forest area and 1.10 acres of adjacent private land, was duly demarcated with boundary pillars in the year 2005.

(iii) Pausing here momentarily, it may be remarked here that during the verbal submissions, the Learned Additional Advocate General sought to file an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter, the **CPC**) to exhibit the original topographical Sheet, but subsequently no such steps were initiated.

(iv) It was urged that, no issue was framed for determination with regard to the transaction between Bishnu Prasad Sharma and his son Hari Krishna Sharma which was also an observation made by this Court vide Order, dated 12-04-2022. A specific plea had been raised by the Appellants both in the Written Statement as well as in the Counter Claim in this context, but the Respondent failed to file any Written Statement to the Counter Claim and there was no finding on this aspect.

(v) It was contended that despite a direction from this Court, vide Order dated 12-04-2022, the Learned Trial Court returned no findings on the additional Issues framed by this Court.

(vi) Stressing on the point that forest land cannot be alienated or put to any other use, reference was made to the Judgment of the Supreme Court in T.N. Godavarman Thirumulkpad vs. Union of India and Others wherein the Supreme Court propounded that the word **forest** must be understood according to its Dictionary meaning and also the term **forest land** occurring in Section 2 of the Forest Conservation Act, 1980, includes forest not only as understood in the dictionary sense, but also any area (1997) 2 SCC 267 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia recorded as **forest** in the Government records irrespective of ownership or classification thereof. Hence, the impugned Judgment dated 24-12-2019 and the impugned Order dated 30-09-2023 both deserve to be set aside.

14. Resisting the arguments advanced by Learned Additional Advocate General for the Appellants No.1 to 4, Learned Senior Counsel for the Respondent contended that;

(i) Contrary to the submissions of the Learned Additional Advocate General, the Learned Trial Court has returned a finding on each of the three additional Issues, as apparent from its Order dated 30-09-2023. At Paragraph 9(g) therein, it has been observed that, the Appellants could not prove that the suit land as per the cadastral survey of 1950-52 measured only 1.10 acres. That, the Appellants failed to put forth any reliable evidence that, there was excess area of 3.23 acres, said to be forest land, apart from Exbt D-1 (in three pages collectively) which cannot be relied upon. It was further observed by the Learned Trial Court that Hari Krishna Sharma witness of the Respondent and original owner of the land, has categorically admitted that the plot numbers bearing 170/171 as per survey record of 1950-52 were renumbered as 311, 312 and 313 in the 1979-80 survey operation and volunteered to state that the area was more than 1.10 acres. He denied the entries made in Ext-D- 8(collectively) as he was aware that the said plot was bigger than that reflected in Ext-D-8(collectively). The Respondent's witness G. B. Subba admitted that, there was no written documentation to establish that Land Revenue Department does not have jurisdiction over the Forest Department. That, the jurisdiction concerning the The Divisional Forest Officer (T) and

Others vs. Ashok Tshering Bhutia forest lands are in accordance with the toposheet issued by the Central Government.

(ii) Besides, the Appellants, if aggrieved by the impugned Order of the Learned Trial Court, failed to file any objection to the findings as required by Order XLI Rule 26 of the CPC.

(iii) Apart from this circumstance, the Appellants failed to file any ownership documents of the Forest Department to buttress their claim of ownership of the suit land or that it was recorded as reserved forest and the witness of the Appellants No.1 and 2, Peggyla Tshering Venchungpa as DW-1, has admitted as much.

(iv) That, although the Forest Department is basing their claim on the topographical Sheet marked as □Document-T , it is not an original document, DW-1 has deposed as much. It is not an Exhibit nor is it of 1950-52 vintage, but is that of 1979-80.

(v) The Trial Court observed that as the topographical Map was not an original document, nor was it certified by any competent authority, it held no probative value. This Order of the Learned Trial Court has attained finality as it was never assailed.

(vi) It was also further canvassed that, although the original records from the Land Revenue Department, were duly received during the course of the trial from the Office of the District Collectorate but the certified copies were not compared with the original documents nor were the original documents exhibited, leading to an adverse inference against the Appellants No.1 and 2.

(vii) The evidence on affidavit of the witness for the Appellants No.1 to 4, K. B. Ghalay, a retired Divisional Forest Officer of the Forest Department established that he had certified Exbt D-1 (in three pages collectively) including the Joint inspection report The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia dated 21-10-2016, but he was absent when the alleged inspection took place. It was admitted by the witness that Exbt-D1 (collectively) was submitted to him after the inspection. The witness also deposed that there are no conclusive records of the lands of the Forest Department which in fact depended on the compilation of the Land Revenue Department.

(viii) That, the NOC Exbt 21, dated 08-12-2012 was issued by the Forest authorities certifying that the land bearing plot nos. 311, 312 and 313 pertaining to Jhumki Doma Bhutia, did not fall within the forest land. Exbt 23, NOC dated 27-05-2015 was also issued by the Forest authorities certifying that the land bearing plot nos. 311, 312 and 313 pertaining to Ashok Tshering Bhutia did not fall within the forest land. Exbt-22 is the mutation Order issued in the name of Ashok Tshering Bhutia from the name of Jhumki Doma Bhutia showing plot nos.311 measuring 0.5960 hectares, 312 measuring 0.0460 hectares and 313 measuring 1.1140 hectares. This document itself established the authenticity of the fact that it belonged to Jhumki Doma Bhutia before it was purchased by the Respondent.

(ix) It was next argued that, the Schedule to the Counter Claim is defective, the boundaries having been shown to be the same as described in the Schedule to the Plaint. That, although a Counter

Claim was filed by the Appellants No.1 and 2 they did not implead the Land Revenue Department as a party. The impugned Judgment of the Learned Trial Court dated 24-12-2019, dismissed the Counter Claim of the Appellants but no appeal was filed against such dismissal. In such circumstances, the Judgment of dismissal of The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia the Counter Claim has attained finality. The argument was buttressed by Ramesh Chand vs. Om Raj and Others².

(x) It was further canvassed that, the proviso to Section 34 of the Specific Relief Act, 1963 (hereinafter, the "Specific Relief Act"), was invoked in the Counter Claim sans prayer for "recovery" of possession. In the absence of such prayer, the Court cannot make a declaration as sought by the Appellants.

(xi) That, when the cadastral survey of 1979-80 were conducted and attested in 1984, the Appellants No.1 and 2 made no claims to the property and the records relied on by them shed no light as to from when and how the claim of the Appellants find support.

(xii) That, although the suit land changed hands four times from 1990 itself, having been sold to one Ong Tshering Bhutia by the original owner and thereafter by him to Donkala Bhutia in 2005, from Donkala Bhutia to Jhumki Doma Bhutia in 2011 and from Jhumki Doma Bhutia to Ashok Tshering Bhutia in 2013, no objection to registration of the suit land was raised at any point of time earlier and is now being raised belatedly with an ulterior motive.

(xiii) Apart from the foregoing arguments, it was contended that the cause of action is time barred. Hence, the Appeal deserves a dismissal.

15. The opposing contentions of the parties have been heard in extenso, the pleadings, evidence, all documents on record and the impugned Judgment dated 24-12-2019 and impugned Order dated 30-09-2023 have been carefully perused. 2022 SCC OnLine HP 2094 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia

16. In the impugned Judgment, dated 24-12-2019, the Learned Trial Court in Issue No.4 (supra) considered in depth the evidence of the Respondent and the Appellants No.1 and 2. The documents relied on by the Respondent as well as the Appellants were discussed at length. The Court concluded that, it is proved by the Plaintiff by virtue of Exbt 1 and Exbt 2 that he is the absolute owner of the suit land and is in possession of the same.

17. The Counter Claim of the Appellants was dismissed.

18. On remand by a Learned Single Judge of this Court as detailed (supra), the Learned Trial Court opined in the impugned Order dated 30-09-2023 that the Appellants failed to prove Issues No.(i), (ii) and (iii) with any cogent evidence, thus they could not prove that the Respondent had claimed an excess area of 3.23 acres of forest land. These being the findings of the Learned Trial Court, it is now to be examined whether the findings were correct.

(i) The Respondent to prove his claims, before the Learned Trial Court relied upon and identified Exbt-1 as the registered sale deed executed by Jhumki Doma Bhutiani in his favour. He furnished Exbt-2 the Parcha khatiyon (Title deeds) of the suit land, dated 21-02-2013, indicating that the disputed property is registered in his name reflecting the area as claimed by him. He also furnished and identified Exbt-3 as the map of the land owned by him, issued by the Survey and Demarcation Division, Forest, Environment and Wildlife Management Department. Exbt-4 was identified by him as another map of the land belonging to him issued by the Village Level Officer of the concerned area.

(ii) The original owner as appears from the records was one Bishnu Prasad Sharma from whom it came to Ong Tshering Bhutia.

The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia It was sold by Ong Tshering Bhutia to Donkala Bhutia, vide Exbt-17. The sale deed document between the vendor and vendee then, indicated that, the plot numbers, so transacted were 311, 312 and 313 measuring an area of 0.5960, 0.0460 and 1.1140 hectares respectively at Burul Block, Bermiok Elaka, South Sikkim. Exbt-18 (parcha khatiyon) was thereafter issued to Donkala Bhutia bearing the same plot numbers and the same area. Exbt-19 indicates that, it was subsequently registered in the name of Jhumki Doma Bhutia with the same plot numbers and the same area and title deeds issued accordingly.

(iii) Mutation order Exbt-22 in the name of Jhumki Doma Bhutia, fortifies the position that the suit land did not fall within the forest land. The title deeds are fortified by the deed of conveyance executed between the vendor and vendee in each of the cases and are marked and identified as Exbt 1 (vendor Jhumki Doma Bhutia and vendee Ashok Tshering Bhutia), Exbt 15 (Bishnu Prasad Sharma vendor and Ong Tshering Bhutia vendee). This Court is aware that mutation in revenue records neither creates nor extinguishes title. It does not have any presumptive value. In Sawarani vs. Inder Kaur and Others it was held that;

"7. Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question....."

(iv) In Bhimabai Mahadeo Kambekar (dead) through Legal Representative vs. Arthur Import and Export Company and Others the Supreme Court in this context reiterated that;

"5. The law on the question of mutation in the revenue records pertaining to any land and what is its (1996) 6 SCC 223 (2019) 3 SCC 191 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia legal value while deciding the rights of the parties is fairly well settled by a series of decisions of this Court.

6. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the

land revenue in question. (See *Sawarni v. Inder Kaur* [*Sawarni v. Inder Kaur*, (1996) 6 SCC 223], *Balwant Singh v. Daulat Singh* [*Balwant Singh v. Daulat Singh*, (1997) 7 SCC 137] and *Narasamma v. State of Karnataka* [*Narasamma v. State of Karnataka*, (2009) 5 SCC 591 : (2009) 2 SCC (Civ) 582].)"

(v) Exbt-20, relied on by the Respondent is the spot verification report dated 23-04-2010 issued by B. S. Rai, Survey Inspector, Namchi, addressed to Deputy Director, Land Revenue Department, Namchi, which details the spot verification, the contents of which were inter alia that; on 05-04-2010 a Joint inspection was conducted at Burul Block, South Sikkim and the land was surveyed in the presence of the land owner, representatives of Forest Department, LANCO Private Limited and Land Revenue Department. On such verification it emerged that Plot nos. 311, 312 and 313, measuring a total area of 1.7560 hectares was recorded in the name of Donkala Bhutia, Gangtok. It was also reported that no forest land was encroached by Donkala Bhutia.

(vi) This being the settled legal position, the contra position would be for the Appellants to furnish documentary evidence to establish their claim of ownership or to indicate that it was reserved forest area. The argument that the area of 1.10 acres in the name of Hari Krishna Sharma in 1950-52 survey, became 4.33 acres in the name of Bishnu Prasad Sharma, has not been proved by the Appellants No.1 and 2 by any documentary evidence. The toposheet □Document-T was not furnished in original or exhibited, the alleged encroachment by the series of private owners has not been established by the Appellants No.1 and 2 despite vehement verbal claims. The Appellants witness K. B. Ghalay, testified that, there The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia are no conclusive records of the lands of the Appellants and the Forest Department is dependent on the compilation made by the Land Revenue Department. The evidence of Respondent's witness G. B. Subba reveals that there is no documentation to establish that land revenue records do not contain the area of forest lands.

(vii) In fact with regard to □Document-T , a perusal of the records of the Learned Trial Court is revelatory of the fact that, on 07-11-2019 a detailed order on this facet was passed by the Learned Trial Court. It appears that Appellants No.1 and 2 had filed an application under Section 151 of the CPC on 22-10-2019 submitting that the said Appellants had filed the toposheet bearing No.78 A/8/4 along with the Written Statement as Annexure-3, however during the time of examination of Defendant No.1/Appellant No.1 on 10-09-2019, the said document was inadvertently marked as □Document-T instead of marking it as an □Exhibit . It was argued by the Appellants No.1 and 2 that the document was a vital and relevant document necessary for proper adjudication in the matter, especially for resolution of disputes regarding reserved forest and the non-marking of the document as an □Exhibit was a bona fide mistake on the part of Defendants No.1 and 2 (Appellants No.1 and 2). This was objected to by the Counsel for the Plaintiff/Respondent submitting that during their examination Defendant No.1 had specifically stated that the said toposheet is a copy and marked as □Document-T and was even cross-examined on this aspect. The Learned Trial Court after hearing the parties inter alia observed as follows;

"..... On going through the evidence of Defendant No.1, it is seen that during her examination she had clearly stated that

"Document-T is the copy of the The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia Toposheet Map bearing No.78 A/8/4 prepared by the Survey of India." She has not stated anything about the said Toposheet Map being an original one. Even she has been cross-examined by the Learned Counsel for the Plaintiff on the basis of the said as Document-T. There is nothing on record to show that the said Toposheet Map is an original document and neither it is certified by any competent authority. The marking of the said Toposheet Map as □Document-T seems to be proper and correct. It is noted that this suit is in its advance state (i.e. at the stage of final arguments).

In view of the above and considering the facts and circumstances of this case, the application filed by the Defendant No.1 & 2 under Section 151 of the Code of Civil Procedure, 1908, is hereby rejected and accordingly disposed of.

....."

(viii) Relevantly it may be pointed out that, Transfer of immovable property by way of sale can only be by a deed of conveyance viz., a sale deed. It is only in the absence of a deed of conveyance that no right, title or interest in the immovable property can be transferred. The word □conveys is explained in Section 5 of the Transfer of Property Act, 1882 (hereinafter, the □TP Act) which reads as follows;

"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 this section □living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

It is also settled law that any contract by sale, which is not a registered deed of conveyance would fall short of the requirements of Section 54 and Section 55 of the TP Act. Such a circumstance would not confer any title nor transfer any interest in immovable property. In the instant matter there can be no denial of the existence of an execution of conveyance Exbt-1, between Jhumki The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia Doma Bhutia to the Respondent duly stamped and registered as per the requisite law as already discussed at length (supra).

(ix) Exbt 21, NOC, dated 08-12-2012 indicated that the land bearing plot nos.311, 312 and 313 pertaining to Jhumki Doma Bhutia, did not fall within the forest land. On 27-05-2015, vide Exbt-23, another NOC issued by the Divisional Territorial Officer (T) of the Forest Department, certified that the Forest, Environment and Wildlife Management Department, South Division, Namchi had no objection to the issuance of NOC for the land bearing No.311, 312 and 313, at Burul Block, South

Sikkim, as the land holding was recorded in the name of Shri Ashok Tshering Bhutia (Respondent) resident of Gangtok, East Sikkim, as per the cadastral survey of 1979-80. It was further certified that, as per the report of the Revenue Surveyor, (Namchi, South Sikkim), there is no encroachment of any kind of forest land.

(x) The Search Certificate Exbt-24 issued by the Revenue Officer/Assistant Director, LR&DMD, District Administrative Centre, South Sikkim, dated 27-03-2017, reflected that, land bearing plot nos. 311, 312 and 313 measuring a total area of 0.5960, 0.0460 and 1.1140 hectares respectively situated at Burul Block, South Sikkim were found recorded in the name of Bishnu Prasad Brahman son of late Lall Das Brahman as per the survey record of 1979-80. The certificate also delineates the exchange of the disputed property from one owner to the next, in the series of persons who came to own the property. The cross-examination of the Respondent conducted by the Appellants with regard to the aforementioned documentary evidence stood undecimated.

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(xi) It also appears from Exbt-6, the letter addressed by the Sub-Divisional Magistrate, Namchi, to the Additional Chief Engineer, Energy and Power Department, Government of Sikkim, that on 01-12-2016, land measuring 1.7560 hectares vide khatiyan no.116, which was found recorded in the name of Ashok Tshering Bhutia, had been identified for establishment of sub-station by the Energy and Power Department. Exbt-7 reveals that the Additional Chief Engineer (Tr.), issued a letter to the Ward Panchayat, Burul (Samardung), South Sikkim, for negotiation of the rate of lands pertaining to the Respondent with a request that the said Ward Panchayat to be present on 19-12-2016 to witness the negotiations.

(xii) Exbt-8 indicates that the rate of acquisition was fixed at Rs.490/- per square feet. These documents support the claim of the Respondent that a project for 66 KV was to be built on his land and the rate of acquisition was also arrived at.

(xiii) The evidence of the Respondent's witnesses, Rishi Raj Pradhan and Munna Kumar Pradhan supported the Respondent's case of ownership of the disputed property, vide the documents relied on by the Respondent. Merely because the witnesses are related to the Respondent, the weight of their evidence cannot be brushed aside, more especially when the cross-examination has failed to extract otherwise.

(xiv) Further, on the question of ownership, when the evidence of Peggyla Tshering Venchungpa witness for the Appellants No.1 and 2 is perused, it is evident that apart from the joint inspection report (the veracity of which is denied by the Respondent, as he was not present there nor does the inspection report bear his signature), reliance is placed on the map of the suit The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia land said to be Exbt-D1 (in three pages collectively) comprising of joint inspection report, Map showing land of Hari Krishna Sharma and Map showing land of Bishnu Prasad Sharma. Admittedly, this document is a certified copy. No reason has been put forth as to why a certified copy was furnished. Ext-D-8(collectively) relied on by the witness is also a certified copy of the map of 1950-52 of Burul Block.

(xv) The law as emanates on the aspect of documentary evidence, is that, the contents of documents may be proved either by primary or secondary evidence. Section 61 of the Indian Evidence Act, 1872 (hereinafter, the 'Evidence Act'), provides that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act deals with primary evidence and means the document itself produced for the inspection of the Court. Section 63 of the Evidence Act details what documents can be produced in secondary evidence and includes as follows;

"63. Secondary evidence. Secondary evidence means and includes (1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by the mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

- (a)
- (b)
- (c)
- (d)"

(xvi) Section 64 of the Evidence Act lays down that documents must be proved by primary evidence except in the cases The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia mentioned in Section 65 of the Evidence Act. The law mandates that a document which is produced as primary evidence, to be produced in the manner laid down in Section 67 to Section 73 of the Evidence Act. Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence. The Supreme Court in Neeraj Dutta vs. State (Government of NCT of Delhi)5 held as follows;

"60. On the other hand, when a document is produced and admitted by the opposite party and is marked as an exhibit by the court, the contents of the document must be proved either by the production of the original document i.e. primary evidence or by copies of the same as per Section 65 as secondary evidence. So long as an original document is in existence and is available, its contents must be proved by primary evidence. It is only when the primary evidence is lost, in the interest of justice, the secondary evidence must be allowed. Primary evidence is the best evidence and it affords the greatest certainty of the fact in question. Thus,

when a particular fact is to be established by production of documentary evidence, there is no scope for leading oral evidence. What is to be produced is the primary evidence i.e. document itself. It is only when the absence of the primary source has been satisfactorily explained that secondary evidence is permissible to prove the contents of documents. Secondary evidence, therefore, should not be accepted without a sufficient reason being given for non- production of the original." [emphasis supplied] (xvii) The position with regard to secondary evidence has been further clarified in *Vijay vs. Union of India and Others*⁶ wherein it was held as under;

"34. 34.1. Law requires the best evidence to be given first, that is, primary evidence. [*Neeraj Dutta v. State (NCT of Delhi)* (five-Judge Bench), (2023) 4 SCC 731 : (2023) 2 SCC (Cri) 352; *J. Yashoda v. K. Shobha Rani* (two-Judge Bench), (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9] 34.2. Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence. [*J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9] 34.3. If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is (2023) 4 SCC 731 (2023) 17 SCC 455 *The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia* within the possession or can be produced or can be reached, no inferior proof could be given. [*J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9] 34.4. A party must endeavour to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party. [*M. Chandra v. M. Thangamuthu* (two-Judge Bench), (2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907] 34.5. When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed. [*Neeraj Dutta v. State (NCT of Delhi)*, (2023) 4 SCC 731 : (2023) 2 SCC (Cri) 352] 34.6. Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect. [*Surendra Krishna Roy v. Mohd. Syed Ali Matwali Mirza*, 1935 SCC OnLine PC 56 : (1935-36) 63 IA 85] 34.7. When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 :

(2011) 2 SCC (Civ) 209] 34.8. Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209] 34.9. Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. [*Neeraj Dutta v. State (NCT of Delhi)*, (2023) 4 SCC 731 : (2023) 2 SCC (Cri) 352] It has to be proved in accordance with the law. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 : (2011) 2

SCC (Civ) 209]

35. A reading of Section 65(a) of the Evidence Act displays the following:

(a) Secondary evidence can be presented as a substitute when the original document/primary evidence is in the possession of the opposing party or held by a third party;

(b) Such a person refuses to produce the document even after due notice; and

(c) It must be ensured that the alleged copy is a true copy of the original."

(xviii) The above having been propounded by the Supreme Court, the Appellants have failed to enlighten the Court with reasons for non-production of the original documents discussed [Exbt D1 (collectively) and Ext-D-8(collectively)]. They have failed to explain whether the original documents were lost or destroyed. There is no satisfactory explanation for non-production of the original documents hence these documents are discarded as failing to fulfill The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia the mandate of law. On this facet it is pertinent to mention that the toposheet was also not produced in original. Similar is the fate of the toposheet which has already been considered and discussed earlier. The non-production of the original documents in the circumstances leads to an adverse inference against the Appellants as provided in Illustration (g) of Section 114 of the Evidence Act.

(xix) Consequently, all documents in photocopy, relied on by the Appellants do not establish ownership of the disputed plots of land by the Appellants No.1 and 2 nor does it establish that the land fell within forest land or was reserved forest.

(xx) While considering the argument of the Appellants No.1 and 2 that the total forest area of the Tsalumthang forest was shown by the toposheet map and reliance placed on the case of T.N. Godavarman Thirumulkpad (supra), it may be stated here that the case of T. N. Godawarman Thirumulkpad (supra) is of no assistance to the Appellants case unless it is shown that the said area was forest land in the first instance. No such proof was furnished as it was not proved that the records of 1950-52 also indicated ownership of the suit lands by the Appellants No.1 and 2.

(xxi) The Indian Forest Act, 1927, at Section 4 provides inter alia as follows;

"4. Notification by State Government. (1) Whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette

(a) declaring that it has been decided to constitute such land a reserved forest;

- (b) specifying, as nearly as possible, the situation and limits of such land; and
- (c) appointing an officer (hereinafter called

the Forest Settlement Officer) to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia any forest-produce, and to deal with the same as provided in this Chapter.

Explanation. For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries."

No Notification in terms of the above statutory provision was furnished by the Appellants No.1 and 2 before the Learned Trial to indicate the areas that fell under forest reserve, or that, the land of the Respondent was constituted as a reserved forest. (xxii) Reverting at this juncture to the evidence of Peggyla Tshering Venchungpa, she admitted that Ext-D-8(collectively), the khasra records, do not indicate that the same pertains to 1950-52 records or that it is of Burul Block . She was unable to identify the person who had scribed Burul Block Khasra copy of 1950-52 records in fresh ink on Ext-D-8(collectively). According to the witness, It is true the Forest Department is basing their claim that the suit property is in fact a Reserve Forest only based on the Survey of India Toposheet marked Document-T. It is true Document-T also shows Tsalumthang Reserve Forest. It is true Document-T states that Tsalumthang Reserve Forest is a dense mixed jungle mainly of Sal and Kattus. (xxiii) Witness Ashish Gurung for the Appellants No.1 and 2 was the Range Officer (Territorial Circle), he failed to shed light on the ownership of the disputed property by the Forest Department. Despite asserting that the joint inspection [Exbt D1 (in three pages collectively)] revealed an excess land and further asserting that an excess area of 3.23 acres fell under the Tsalumthang reserved forest, the Court was not enlightened by any of the witnesses as to what was the entire area of the Tsalumthang reserved forest area as per the 1950-52 cadastral survey and the 1979-80 survey.

The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia (xxiv) To buttress their claim that the NOCs issued vide Exbt- 21 and Exbt-23 respectively certifying that the suit land did not fall within the forest land were erroneous, it was highlighted that the officer concerned i.e., DFO(T) was issued show-cause by his higher authority. No documentary evidence was furnished to substantiate the claims of the Appellants, that the property ever belonged to them and was cut out from the reserved forest by way of encroachment. The Appellants witnesses also failed to specify when the wrong entries were made in the records of rights and who was responsible for the wrong entries. The original records called from the Land Revenue Department were not exhibited by the Appellants to establish the allegations of wrong entries made in the cadastral survey of 1979-80 from that of the cadastral survey of 1950-52. (xxv) Pausing here for a minute, it would be pertinent at this juncture to navigate through the provisions of Section 101 of the Evidence Act which provides as follows;

"101. Burden of proof. □Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Illustrations (b) of the said Section reads as follows;

"Illustrations

(a)

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts."

(xxvi) The Supreme Court in Rangammal vs. Kuppuswami and Another has observed as follows;

"14. When a person is bound to prove the existence of any fact it is said that AIR 2011 SC 2344 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts it. Unless such burden is discharged, the other party is not required to be called upon to prove his case....."

Thus, the burden of proof lies on the Appellants to establish their claim of ownership having filed a Counter Claim claiming that the property belongs to the Forest Department.

(xxvii) Besides it may be relevantly pointed out that there is always a presumption that a registered document is validly executed/registered and is prima facie valid in law. Section 114 Illustration (e) of the Evidence Act provides that the Court may presume that judicial and official acts have been regularly performed and Section 114 Illustration (f) of the Evidence Act provides that the Court may presume that the common course of business has been followed in a particular case. In the absence of evidence to the contrary, it is presumed that all official works pertaining to entries in the book of title deeds and mutation was done in a correct manner. (xxviii) That having been said, the Appellant No.3 by and large had no role to play in the claim of the Appellants No.1 and 2 and the Respondent, the Appellant No.3 was only responsible for identifying the land for construction of the project.

19. After the matter was remanded back to the Trial Court and additional witnesses were jointly examined by all the Appellants but no evidence different from the evidence at the time of the first trial emerged to support the Appellants case. A startling fact that emerged from the evidence of the witness Rajendra Prasad Sharma of the Appellant is that "..... The said joint inspection report

aforesaid was not prepared on the spot. After the spot inquiry, the said joint inspection report was prepared, typed and printed in our The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia office in the presence of our entire team. The maps accompanying the joint inspection report (Exhibit-D1) were also prepared in our office after the field survey.....". No document or written evidence on the record of the case was furnished to show that Munna Kumar Pradhan was authorized by Ashok Tshering Bhutia to represent him in the joint inspection. The joint inspection report lacks credibility and is therefore discarded.

(i) On remand, the evidence of the original owner Hari Krishna Sharma, by the Respondent, further revealed that, the disputed plot of land was more than 1.10 acres and his cross- examination extracted the fact that it was about 4.33 acres. The evidence of cultivator of the land Binod Rai under the original owner delineated the boundaries of the suit land, which are found to be in coordination with the boundaries set out in the Plaint. In this context, it is no more res integra that boundaries have precedence over area. In Subhaga and Others vs. Shobha and Others⁸ the Supreme Court while discussing the title claimed by the Plaintiff over a plot of land observed as follows;

"6. The High Court has also upheld the title claimed by the plaintiff over Plot No. 1301/1 Ba. Once we accept the identification made by the Commissioner as was done by the first appellate court, it is clear that the plaintiff has the right to have the disputed construction removed and the well filled up. That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail."

(ii) It may therefore be reiterated that, in case of discrepancy between dimensions and boundaries, the rule of interpretation is that boundaries must prevail as against the (2006) 5 SCC 466 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia measurement. This legal point was expounded as far back in 1924 by the Madras High Court in Subbayya Chakkiliyan vs. Manjam Muthiah Goundan and Another , where it was held that;

"..... Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements....."

....."

(iii) On the same lines in T. Rajlu Naidu vs. M.E.R. Malak¹⁰, it has been held as follows;

"..... In case of discrepancy between dimensions and boundaries the area specified within the boundaries will

pass, whether it be less or more than the quantity specified.

....."

20. The argument of Learned Additional Advocate General that it was the bounden duty of the Respondent to check the area of the land with the original owners in my considered view not only lacks a legal mandate but is too farfetched, the land having exchanged hand three times prior to the Respondent having purchased it from Jhumki Doma Bhutia. In fact, what needs to be mulled over is the role of Appellants No.1 and 2 when the survey of 1979-80 was being prepared and why they failed to raise objections then if aggrieved.

(i) The contention of the Learned Additional Advocate General that the no issue was framed for determination with regard to the transaction between Bishnu Prasad Sharma and his son Hari Krishna Sharma in my considered view is a situation of \square oo little, too late . In this context, we may refer to Order XIV of the CPC AIR 1924 MADRAS 493 AIR 1939 NAGPUR 197 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia which deals with settlement of issues. Order XIV Rule 5 of the CPC clothes the Court with powers to amend the issues or frame additional issues on such terms as it thinks fit and all such amendments and additional issues as may be necessary for determining the matter in controversy between the parties shall be so made or framed. The additional issues had already been framed by the Single Bench of this High as detailed (supra). It was for the Appellants to have made their submissions for framing of any requisite additional issue before this Court, when the additional issues were being considered or to have been raised the issue before the Learned Trial Court seeking inclusion of any such issue. It cannot be raised belatedly at the time of Appeal, after the parties were afforded sufficient opportunity to put forth their case including furnishing of additional evidence additional arguments and the case concluded by the Learned Trial Court.

(ii) It was also canvassed that the Respondent failed to file a reply to the Counter Claim. The impugned Judgment dated 24-12- 2019 has dismissed the Counter Claim. The Supreme Court in the point of Counter Claim has enunciated in Rajni Rani and Another vs. Khairati Lal and Others that;

"9.6. On a plain reading of the aforesaid provisions it is quite limpid that a counterclaim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counterclaim shall remain alive for adjudication. For making a counterclaim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counterclaim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the judgment against the plaintiff in relation to the counterclaim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counterclaim is to avoid multiplicity of the proceedings. When a counterclaim is dismissed on (2015) 2 SCC 682 The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6-A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counterclaim. The seminal

purpose is to avoid piecemeal adjudication.

The plaintiff can file an application for exclusion of a counterclaim and can do so at any time before issues are settled in relation to the counterclaim. We are not concerned with such a situation." [emphasis supplied]

(iii) The Supreme Court was discussing the provisions of Order VIII Rule 6A of the CPC which deals with Counter Claim filed by the Defendants. Rule 6A(2) of Order VIII of the CPC provides that, the Counter Claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final Judgment in the same suit both on the original claim and on the Counter Claim. The Counter Claim is therefore to be treated as a cross-suit, in other words, just as the Plaintiff is required to prove his case by a preponderance of probability, the same burden rests on the party filing the Counter Claim. In this context, as pointed out by Learned Senior Counsel for the Respondent, once the Counter Claim was dismissed by the Learned Trial Court under Order VIII Rule 6A of the CPC, the Appellants were to have assailed the Order of dismissal of the Counter Claim by the Learned Trial Court. No such challenge was made to the Order of dismissal as a consequence the Judgment in the context of the Counter Claim has obtained finality.

(iv) I am also not inclined to agree with the argument of the Learned Additional Advocate General that the Learned Trial Court on remand returned no finding on the three additional issues. A perusal of the impugned Order dated 30-09-2023, from Paragraphs 9 to 11 would indicate that the findings although not happily worded, have been returned by the Learned Trial Court.

(v) Delving further into the question of ownership of the disputed land by Appellants No.1 and 2, as pointed out by Learned The Divisional Forest Officer (T) and Others vs. Ashok Tshering Bhutia Senior Counsel for the Respondent, Section 34 of the Specific Relief Act provides that;

"34. Discretion of court as to declaration of status or right.--Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.--A trustee of property is a person interested to deny a title adverse to the title of someone who is not in existence, and whom, if in existence, he would be a trustee."

In the prayer of the Counter Claim, no prayer for recovery of the suit land has been made, there cannot be a prayer only for declaration of title, where the Plaintiff is able to seek further relief, in as much as a prayer for recovery of possession was imperative as they claim to have been dispossessed of the suit land due to the faulty survey operations of 1979-80.

(vi) While addressing the argument of Learned Senior Counsel for the Respondent that post the enforcement of the survey operation of 1979-80 the survey operations of 1950-52 had no relevance in my considered view this is an erroneous proposition. It is necessary to notice that prior to the survey operation of 1979-80 the area of land in Sikkim was measured in acres. After the survey operation of 1979-80 the lands were measured in terms of hectares and the plot numbers existing earlier were renumbered. In the obtaining circumstances, the survey operations of 1950-52 can be resorted to for the purposes of verification of area of land of a particular owner as the external boundaries of land owned by a person would continue to be the same.

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(vii) This Court in K. B. Bhandari vs. Laxuman Limboo and Another held as follows;

"23. With regard to the records of 1951 not being valid, we may peruse Notification No. 991/D.D.L.R. dated 17th January, 1984, which reads as follows;

□.....It is hereby notified for the information of general public that the old Land Records of 1951 which was in existence in the state of Sikkim shall cease to be in operation and new Land Record shall come into force with immediate effect.

..... The Land Records prior to 1984, was in acres and subsequently on converting the measurements to hectares, this Notification fell in place. However, it does not mean that the Land Records of 1951 have been shut out for the purposes of corroborating the possession of property held by different individuals, the subsequent records can be verified from the 1951 Land Records."

21. In the end result, the foregoing discussions lend a quietus to the two issues settled for determination (supra). The impugned Judgment dated 24-12-2019, in Title Suit No.02 of 2017 and the impugned □Order dated 30-09-2023, in Title Suit No.02 of 2017, thereby warrant no interference.

22. The Appeal deserves to be and is accordingly dismissed.

23. Parties shall bear their own costs.

24. Copy of this Judgment be transmitted to the Learned Trial Court forthwith along with its records.

25. Pending applications, if any, also stand disposed of.

(Meenakshi Madan Rai) Judge 15-05-2026 Approved for reporting : Yes ds/sdl 2017 SSC OnLine Sikk 122