

THE HIGH COURT OF SIKKIM : GANGTOK

DATED : 17<sup>th</sup> AUGUST, 2017

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

CRP No.05 of 2016

**Petitioner** : Mr. Topden Pintso Bhutia,  
S/o Late Nim Tenzing Bhutia,  
R/o Yangyang,  
Rangang,  
South Sikkim.

**versus**

**Respondent** : Mr. Sonam Plazor Bhutia,  
S/o Late Nim Tenzing Bhutia,  
R/o Jorethang Road  
Yangyang,  
Rangang,  
South Sikkim.

**Appearance**

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chettri,  
Advocate for the Petitioner.

Mr. B. Sharma, Senior Advocate with Mr. B. N. Sharma, Advocate  
for the Respondent.

O R D E R (ORAL)

Meenakshi Madan Rai, J.

**1.** This Petition under Article 227 of the Constitution of India, filed by the Petitioner, impugns the Order dated 20-07-2016, passed by the Learned Civil Judge (South), South Sikkim, at Namchi, in Title Suit Case No.09 of 2014, whereby the Learned Trial Court rejected the prayer of the Petitioner herein, to validate the document dated 21-12-2001, Exhibit 'A', in terms of the Notification No.2947 G, dated 22-11-1946.

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**2.** Assailing the said Order, Learned Senior Counsel for the Petitioner expostulates that, the said Order suffers from irregularity and illegality as the Learned Trial Court has taken recourse to the provisions of the Transfer of Property Act, 1882 (for short "TPA"), to reject the Petition for validation, when the TPA had not been enforced in the State of Sikkim at the time of publication of the Notification of 1946. In this situation, the requirements and intricacies of various provisions of the TPA and particularly Sections 122 and 123 of the TPA, relating to gift are not a requirement for application of Notification No.385/G, dated 11-04-1928 (hereinafter 'Notification of 1928') of which Para 2 has been amended by Notification No.2947 G, dated 22-11-1946 (hereinafter 'Notification of 1946'), promulgated by the Maharaja of Sikkim. That, Notification of 1946 clearly provides that, an unregistered document (which ought in the opinion of the Court to have been registered) may, however, be validated and admitted in Court to prove title or other matters contained in the document, on payment of penalty up to fifty times the usual registration fee. That, on the face of the said provision, the validation of Exhibit 'A' ought to have been allowed. It is his further contention that after validation the document may be admitted in Court to prove the title or other matters contained in the document, as laid down in Notification of 1946. That, at this stage, the Court cannot look into the contents of the document or the merits of the case, but has only to allow the document to be validated. Taking this Court through the Judgment in

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***Kul Bahadur Gurung and Others* vs. *Gajendra Gurung and Others*<sup>1</sup>**, it was urged that the Judgment lays down that any unregistered document cannot be excluded from the purview of the Notification of 1946 on the ground that it does not answer the description of sale deed, and includes every unregistered document effecting immovable property, thereby covering the instant case.

**3.** It was vehemently canvassed that the Notification of 1946 does not refer to any particular document, such as, gift or sale, but merely addresses an unregistered document, to prove title or other matters contained in the document. The option thereafter lies with the party who seeks validation of the document to get the same legally admitted in evidence, however, such validation does not change the value, nature and character of the document. The Learned Trial Court is empowered to give findings on the validity and admissibility of the document while deciding the case finally on merits. Hence, the impugned Order be set aside and the document be allowed to be validated and admitted in evidence, in terms of the Notification of 1946.

**4.** The vociferous *contra* contention raised by Learned Senior Counsel for the Respondent is that, the document relied on by the Petitioner would reveal that the land in question infact belonged to his mother, one Lakik Bhutia, but Exhibit 'A' was signed by the father, who gifted away the property. He is not competent to sign the document or gift the property as he is not the owner of the

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<sup>1</sup> AIR 2007 Sikkim 23

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property in question. Secondly, Exhibit 'A' is only a declaration and not a deed, thus, the prayer seeking its validation is not tenable. In the third leg of his argument it was expostulated that the document does not comply with the provisions of Sections 122 and 123 of the TPA, the document having been executed on 21-12-2001, after the extension and enforcement of the TPA to the State of Sikkim on 01-09-1984. It was also further urged that the Respondent denies the signature appearing on the document as that of his father and should the document be allowed validation, it will tantamount to validation of the contested signature, thereby giving the Petitioner a handle to put forth the claim that contested signatures appearing on other documents, relied on by him are genuine, hence, the Petition being without merit deserves no consideration and ought to be dismissed.

**5.** I have heard Learned Counsel for the parties at length and given due consideration to their submissions. I have also perused the records of the case, the contested document as also the impugned Order of the Learned Trial Court, the Notification of 1928 and of 1946 and the relevant provisions of Law.

**6.** A glimpse of the facts in dispute are necessary for appreciation of the matter at hand. The Petitioner herein is the Defendant, while the Respondent herein is the Plaintiff, before the Learned Trial Court (hereinafter 'Plaintiff' and 'Defendant'). The Plaintiff and the Defendant are blood brothers, the Defendant being the Plaintiff's elder brother. The Plaintiff laid claim to the suit land

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alleging that his mother, Lakik Bhutia, had verbally gifted him the property in the year 1980. Lakik Bhutia passed away in the year 2008. The Plaintiff claims possession of the suit land since 1980, to the exclusion of his other siblings. After his mother's demise, he approached the Office of the Sub-Divisional Magistrate, Ravangla, South Sikkim, for mutation of the suit property in his name. This was objected to by the Defendant, *inter alia*, on the ground that, *vide* a document dated 21-12-2001 (marked as Exhibit 'A'), executed by his father, Late Nim Tenzing Bhutia, allegedly in the presence of the Defendant and his brothers, the suit property was infact gifted to him. It is this document, Exhibit 'A', dated 21-12-2001, that the Defendant seeks to validate on the basis of the aforesaid Notification.

**7.** It needs no deep rumination to assess that the Notifications of 1928 and 1946 relied on by Learned Senior Counsel for the Petitioner and Sections 122 and 123 of the TPA pertain to completely different matters. In order to examine the matter in its correct perspective, it is apposite to consider the provisions of Section 122 of the TPA, which defines 'gift' and reads as follows;

**"122. "Gift" defined.**—"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

**Acceptance when to be made.**—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

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**8.** On the heels of Section 122 of the TPA is Section 123 of the TPA, which delineates how transfer of the gift is to be effected and provides the following;

**"123. Transfer how effected.**—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered."

**9.** On the other hand, Notifications of 1928 and 1946 deal with registration of documents and read as follows;

NOTIFICATION OF 1928

**"SIKKIM STATE**

**GENERAL DEPARTMENT**

Notification No. 385/G;

All Kazis, Thikadars and Managers of Estates.

In continuation of the previous rules on the subject, His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under :-

"Any document such as mortgage and sale deeds and other important documents and deeds, etc. will not be considered valid unless they are duly registered.

The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.

Exception :- Handnotes duly stamped shall be exempt from registration penalty".

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Gangtok  
The 11th April, 1928

Gyaltsen Kazi  
General Secretary to  
H.H. the Maharaja of Sikkim."

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**NOTIFICATION OF 1946**

**"SIKKIM STATE**

**GENERAL DEPARTMENT**

Notification No: 2947 G.

Amendment of para 2 of Notification No: 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty upto fifty times the usual registration fee.

Issued by order of H.H. the Maharaja of Sikkim.

Gangtok  
The 22nd Nov., 46

T. Tsering  
(Offs) General Secretary to  
H.H. The Maharaja of Sikkim.

....."

Thus, the Notification of 1946 is relevant for the present purpose.

**10.** On perusal of the above Laws, it transpires that Section 122 of the TPA pertains to how a gift deed is to be executed, Section 123 of the TPA explains how the gift of Immovable property must be effected, while the Notification of 1946 lays down how an unregistered document can be validated. The purposes of the above Sections and the Notification are specific and the question of the Notification of 1946 being promulgated by the Maharaja of Sikkim and, therefore, inapplicable to the instant situation is a mis-placed argument of Learned Senior Counsel for the Petitioner. True, the Notification is one of 1946 and, therefore, protected under the provisions of Article 371F(k) of the Constitution of India, which commences with a *non obstante* clause; but this is not the contest

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at hand, which pivots around the contention as to whether Exhibit 'A' ought to be validated. The Notification of 1946 allows an unregistered document, which the Court is of the opinion ought to have been registered, to be validated on payment of penalty up to fifty times the usual registration fee and the contents thereof to be admitted in Court, to prove title or other matters, borne in the document. This being the situation, I am of the considered opinion that the document sought to be validated, being bereft only of registration, ought in substance, to be compliant of the provisions of Section 122 and Section 123 of the TPA, the said Act having been extended and enforced in the State of Sikkim on 01-09-1984, prior to Exhibit 'A', which was executed on 21-12-2001. This Court is conscious that a document need not adhere to a specific format, in other words, substance and not the form of a document is relevant, but a glance at Exhibit 'A' clearly indicates that it does not conform to the legal mandate. Consequently, the Court cannot perpetuate any irregularity or for that matter illegality, sans compliance of provisions of Law. It goes without saying that the provisions of Sections 122 and 123 of the TPA go hand in hand with Notification of 1946 and are not at cross purposes. Validation of a document after 1984 can be allowed in terms of the Notification of 1946, if the requirements of Sections 122 of the TPA are fulfilled, but that of Section 123 of the TPA remains incomplete, on account of non-registration of the document. Although it was contended that this Court in **Kul Bahadur Gurung**<sup>1</sup> had held as follows;

"23. .... This goes to show that the expression 'unregistered documents' is wide enough to

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include every unregistered document effecting immovable property. Therefore, the plain language employed in the Notification makes it amply clear that an unregistered document cannot be excluded from the purview of the Notification on the ground that it does not answer the description of sale deed, as contended by the learned Counsel for the Respondents. Therefore, this contention raised by the learned counsel for the respondent also deserves to be rejected.”

**11.** But, it is evident from the Judgment *supra* that the document in question therein had been validly executed. In other words, the document had in substance complied with the provisions of Law, although not in form and had remained unregistered due to the death of the seller soon after execution of the sale deed in the year 1968. The case at hand is undoubtedly distinguishable from the afore cited ratio, lacking, as already stated, in the necessary requisites of Section 122 and Section 123 of the TPA. Besides the authenticity of the signature alleged to be of the Defendant’s father is contested by the Plaintiff.

**12.** The consequence of validation of the unregistered document as per the Notification of 1946 is that, the document is to be admitted in Court to prove title or other matters contained in the document. This points to the inevitable conclusion that the document ought to have been correctly executed under relevant provisions of Law, which consequently allows its admission as evidence, subsequent to the validation. ‘Valid’ as per Bryan A. Garner Black’s Law Dictionary, Eighth Edition, 2nd Reprint – 2007, means “legally sufficient or binding”. By ordering validation of Exhibit ‘A’, this Court would be implying that the document is legally

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sufficient and binding which is not the correct position herein as the document falls short of the legal requirements. That apart, no Court has opined that the document ought to be registered, which is a prerequisite under the Notification of 1946. Thus, it is not every document that has not been registered which can be validated by the Order of the Court, but only those documents which bear compliance to the legal provisions.

**13.** In the said circumstances, I find that the impugned Order of the Learned Trial Court brooks no interference.

**14.** Consequently, the Petition stands dismissed.

**15.** The Learned Trial Court shall proceed in the matter as per Law, without being prejudiced by the findings herein, which are not to be construed as a decision on the merits of the Suit, confined as it is to one document.

**16.** Records of the Learned Trial Court be remitted forthwith along with a copy of this Order.

sd/-  
( **Meenakshi Madan Rai** )  
**Judge**  
17-08-2017

Approved for reporting : **Yes**

Internet : **Yes**