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IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CIVIL APPELLATE JURISDICTION)

R F A No. 01 of 2008

Shri Jagdish Prasad,
S/o Late Kapur Chand,
Singtam Bazar,
East Sikkim.

...Appellant/Defendant

Versus

Tashi Tshering Bhutia,
S/o Tshering Wangdi Bhutia,
Resident of Simik Lingzey,
P.O. Khamdong,
P.S. Singtam,
East Sikkim.

...Respondent/Plaintiff

For the appellant:

Mr. T.B. Thapa and Mr. B.R. Pradhan, Sr. Advocates with Ms. Yangchen D. Gyatso, Ms. Pema Yeshay Bhutia, Mr. Yadav Sharma and Mr. Karma T. Bhutia, Advocates

For the respondent:

Mr. J.B. Pradhan, Sr. Advocate with Mr. Karma Thinlay and Mr. D.K. Siwakoti, Advocates.

Date of Hearing : 18.05.2010

Date of Judgment : 21.05.2010

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE BARIN GHOSH**



J U D G M E N T

Ghosh, CJ

By the judgment and decree under appeal, the suit for eviction of tenant has been decreed with directions upon the defendant, appellant herein, to deliver vacant possession of the suit premises within two months from the date of decree; to pay rent from the month of October, 2000 to March, 2008, without interest, and cost of Rs.2,500/-.

2. Before the appeal was admitted, this Court directed deposit of rent from the month of October, 2000 until the date the order was passed, amounting to Rs.2,25,000/-. The defendant-appellant deposited the said sum. Thereupon this Court admitted the appeal, stayed the operation of the judgment and decree and at the same time directed the appellant to deposit rent month by month @ Rs.2,500/-. There appears to be no dispute that the appellant is depositing the same.

3. The principal contention of the appellant in the appeal is that the plaintiff respondent has failed to prove any of the grounds of eviction as was available to him and pressed at the trial.

4. On 14th April, 1949 the then Government of Sikkim by a Notification made the following law:



"GOVERNMENT OF SIKKIM
Health and Works Department

Notification No. 6326-600-H&W-B

Under powers conferred in para 2 of Notification No.1366-G, dated the 28th July, 1947, the following Rules have been framed to regulate letting and sub-letting of premises controlling rents thereof and unreasonable eviction of tenants as the scarcity of housing accommodation still exists in Sikkim.

1. The landlords can charge rent for premises either for residential or business purposes on the basis of the rents prevailing in locality in year 1939, plus an increase upto 50 per cent so long as the scarcity of housing accommodation lasts.

2. The landlords cannot eject the tenants so long as the scarcity of housing accommodation lasts, but when the whole or part of the premises are required for their personal occupation or for thorough overhauling of the premises or on failure by the tenants to pay rent for four months the landlords may be permitted to evict the tenant on due application to the Chief Court.

3. Any tenant may apply to this Department for fixing his rent. On receipt of such application the Department will enquire about the rent prevailing in the locality in 1939, and fix rent as per Rule (1) above.

4. Any person acting in contravention of this Notification will be liable to prosecution under para 4 of notification No. 1366-066-G, dated the 28th July, 1947.

5. The tenant means those person in actual occupation. Landlord means owners of the premises.

These rules will come into force with immediate effect.

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By order of His Highness the Maharaja
of Sikkim.

R.B. Singh,
Secretary,
Health and Works Department,
Government of Sikkim.
Gangtok,
The 14th, April, 1949."

5. By reasons of clause (k) of Article 371F of the Constitution of India, the provisions contained in the said Notification continues to deal with matters pertaining to letting and sub-letting of premises, rent payable in relation thereto and eviction of tenants therefrom, inasmuch as the competent legislature has not yet amended or repealed the law as was thus made by the said Notification. The provisions contained in the said Notification by virtue of constitutional mandate referred to above overrides the provision of Transfer of Properties Act. The provisions contained in the said Notification are applicable to the State of Sikkim except to those buildings and constructions situated within the area of Gangtok Bazar, inasmuch as for buildings and constructions situated within Gangtok Bazar, the then Government of Sikkim made the Gangtok Rent Control and Eviction Act, 1956.

6. There appears to be no dispute, inasmuch as the suit premises is situated at Singtam, in the State of Sikkim, and not within the area of Gangtok Bazar, that the provisions contained in the said Notification applies to the suit premises.

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In terms of the provisions contained in clause 2 of the said Notification, landlords cannot eject tenants so long as the scarcity of housing accommodation lasts except for personal occupation or for thorough overhauling of the premises or on failure by the tenants to pay rent for four months. It is nobody's case that scarcity of housing accommodation, which was pronounced by the said Notification to be existing then, has now cease to exist. Therefore, the only ground available to the respondent to seek eviction of the appellant was either requirement for his personal occupation or for thorough overhauling of the premises or for failure of payment of rent for four months.

7. In the plaint, the respondent pleaded requirement for his personal occupation, requirement for thorough overhauling of the premises and also failure on the part of the appellant to pay rent for more than four months. In his amended written statement, appellant denied that the premises is required for personal occupation of the respondent or that the premises requires thorough overhauling or that there has been failure on the part of the appellant to pay rent for four months. At the trial, the respondent gave up the plea that the premises is required for thorough overhauling. The trial Court was thus required to ascertain whether the respondent requires the premises for his personal occupation and whether there has been failure

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on the part of the appellant to pay rent for four months. The trial Court held both in favour of the respondent.

8. As the evidence of the plaintiff stands, he had deposed, to which there appears to be no dispute, that the respondent has grown up male children, who he wants to settle and for that matter desires and intends to convert the suit premise into a hotel and a manihari shop. Assuming "his personal occupation" encompasses requirement of dependants of the landlord and accordingly requirement of grown up children of the respondent may be treated to be personal requirement of the respondent, but that the premises is required for grown up children of the respondent was not brought on evidence. What was brought on evidence was that the respondent desires and intends to settle his children in a hotel business and manihari shop to be established in the tenanted premise. Desire and intention cannot be equated with requirement. Even though the respondent had deposed that the suit property is the only available property belonging to him which can be utilized for any commercial purpose as the same is situated in Singtam Bazar, the same would not establish requirement, inasmuch as there is no evidence to convert desire and intention into requirement, except unemployment of some of his grown up children, who, as admitted by him in cross examination, are useless fellows. It, therefore, does not appear to me that

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there was enough evidence to suggest that the respondent had made out a case of requirement of the suit premises for his personal occupation. Further more occupation alone cannot encompass use and occupation. The desire and intention, as was expressed, addressed requirement for use only and not requirement for occupation.

9. It was contended by the respondent in the plaint that the appellant has not paid rent from the month of September, 2000 till the time of filing of the suit. In his evidence he repeated that the appellant failed to pay rent from the month of September, 2000, but at the same time tendered in evidence records kept and maintained by him pertaining to receipt of rent, which in turn suggested rent for the month of September, 2000 was tendered in the month of October, 2000 and the same was accepted. The records so tendered in evidence suggested that rent for a month was paid in the following month. It is true that in view of Section 34 of the Indian Evidence Act, 1872 only on the basis of such records maintained by the respondent, the appellant could not be charged, but at the same time the fact remains that negative cannot be proved. It is true that it was the contention of the respondent that rent from the month of September, 2000 remained outstanding; whereas records thus tendered in evidence suggested rent for the month of September, 2000 was duly paid. The burden of proof, having regarded to the



law governing the field as contained in the said Notification, required the respondent to establish that rent for four months had not been paid. The said burden remained with the respondent all throughout. The suit was instituted in September, 2004. The evidence tendered by assertion that rent from September, 2000 till the time of filing of the suit has not been paid shifted the onus to the appellant to prove that such rent was paid. The fact that rent for September, 2000 was paid should be treated to have been admitted by the respondent by exhibiting the records as referred above. That was only for one month. The onus pertaining to non-payment of rent for September, 2000 thus shifted back to the respondent, but not the onus pertaining to non-payment of rent for the months of October, 2000 onwards and until September, 2004. The appellant deposed that he had paid rent for the months of October, November and December, 2000 as well as January, February and March, 2001 in person and for the month of April, 2001 rent was tendered by money order, which was refused. He also established that for the subsequent months until filing of the suit and even thereafter rents were tendered by money order, but refused. Therefore, onus to prove non-payment of rents for the months of April, 2001 and until the date of filing of the suit shifted to the respondent, but onus to prove tendering of rents by the appellant and acceptance thereof by the respondent for the months of October, November and December, 2000 and



January, February and March, 2001, as was asserted by the respondent, did not shift merely on the assertion of the appellant from the witness box, although the respondent admitted in his evidence that he never issued any rent receipt on acceptance of rent after he became owner of the premises in question, inasmuch as in order to shift back the onus to prove, which, as aforesaid, stood shifted to the appellant, his assertion was required to be corroborated, since he was seeking to prove positive, and the fact remains that the appellant did not make any effort to do so. In the circumstance, conclusion would be that the respondent had been able to prove non-payment of rent for four months by the appellant which was one of the grounds of eviction available to him in terms of the said Notification and which ground had been pleaded by him.

10. A look at the said Notification, and in particular clause 2 thereof, would make it abundantly clear that on no other ground, but only on those three grounds as mentioned therein, the respondent could seek eviction of the appellant. However, the said clause itself gives discretion to the Court to permit eviction. In other words, if any of the three grounds mentioned in the said clause of the said Notification is put home, the same would not necessarily result in eviction. The Court would be required to use its discretion in permitting eviction. In order to use such discretion, the Court was



required to take into account the conduct of the respondent, the hardship he is likely to face and other surrounding circumstances.

11. In the instant case, although there is no requirement of giving ejection notice, an ejection notice was served upon the appellant, where it was mentioned that rent since September, 2000 remains outstanding. The appellant did not remove the default by tendering rents for the months of October, November and December, 2000 and January, February and March, 2001, instead he tendered rent for the month of April, 2001 only in the month of May, 2001 by money order. Although rents payable for the subsequent months were tendered by him in similar fashion, but the fact remains that after the suit was filed he did not deposit rents in Court by taking recourse to Order XXIV of the Code of Civil Procedure, 1908.

12. The learned senior counsel for the appellant cited a judgment rendered by a Division Bench of this Court in the case **Tekchand Agarwal vs. Prem Prakash Agarwal & Anr**, Civil Ref. No. 1 of 1987, on 11th May, 1987, where the question that was referred is as under:

“Whether under the Gangtok Rent Control and Eviction Act, 1956, the tenant can deposit the rent in the Court of Chief Magistrate (equivalent to Court of District Judge) and whether that will amount to legal deposit or not?”



The said question was answered by the Division Bench, without, however, noticing the provisions contained in Order XXIV of the Code of Civil Procedure, 1908, by saying that though there is no provision for depositing rent in Court, but the Courts are adopting the practice of accepting rent and thereafter issuing notices to the landlords to appear in the Court to receive the amount and in some cases, the landlords do not appear and the money remains deposited in the Court for several years and accordingly the Court is unnecessarily being burdened with additional work. By the said judgment and order, the Courts of the District Judges were directed not to accept any deposit of rent in their Courts. First of all the judgment did not take note of Order XXIV of the Code and secondly the judgment was pertaining to Gangtok Rent Control and Eviction Act, 1956. Be that as it may, by reason of the said judgment, the appellant may have been misled and accordingly he did not deposit rent in Court, but the fact remains that he deposited such rent subsequently and is continuing to deposit the same in Court in terms of the orders of this Court, as referred above. The question is, can such conduct be treated as special equity in favour of the appellant for not exercising discretion to permit his eviction?

13. In the plaint, the respondent had specifically asked for recovery of rent which was in arrear and also rent that would accrue during the pendency of the suit together



with interest @ 18 % per annum, in addition to eviction. In such a suit, in view of Order XX Rule (12) of Code of Civil Procedure, it is obligatory on the part of the Court to decree the suit for payment of rent until such time the possession is recovered. Therefore, tendering of rent by money order, even though refused, and payment of rent in Court would not absolve the liability to pay the same and as a result such conduct cannot be treated as special equity.

14. In the Rent Control Acts prevalent in various States including the State of West Bengal, non payment of rent is one of the grounds available for eviction, but in the event an application is made and the default in payment of rent is removed by paying rent in Court and the tenant continues to pay rent for the subsequent months, by the law thus made, he is absolved from the liability of eviction for the first default, but not for the later defaults, which in turn suggests that meeting up of the default by subsequent payment is not such a conduct which attracts special equity and, therefore, statutes had to intervene to show lenience to first defaulters.

15. However, in the event, the appellant had tendered rent for the months of October, November and December, 2000 and January, February and March, 2001 along with rent tendered for the month of April, 2001 or had he deposited the same in Court by taking recourse to Order XXIV



of the Code of Civil Procedure, 1908 and such deposit had been accepted by the respondent, such conduct could be looked at from a different angle.

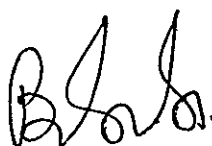
16. The question, therefore, is whether hardship and other circumstance demand consideration of special equity to refuse permission to evict. Whereas in Singtam Bazar, a flourishing town in the State of Sikkim, the appellant owns a premises and accordingly eviction of the appellant from the suit premises would not expose him to a shelter on the street, the respondent has no other premises at Singtam, although he does not ordinarily reside at Singtam. Can such a situation deprive the respondent to obtain a permission to evict the appellant, though on facts it is established that he has no personal requirement of the premises. I do not think failure to establish personal requirement is fatal, inasmuch as default in payment of rent is an independent ground for eviction. In the event such a ground is made out, unless it is shown and established that the eviction would result in irreparable hardship or other surrounding circumstances suggest to the contrary, the plaintiff must succeed. No case of such hardship or other surrounding circumstances has been made out by the appellant. The discretion, therefore, cannot be used in his favour.

17. In the circumstance, for the reasons as above, there is no scope of interference with the judgment and



decree under appeal, except that the appellant is given time till 31.10.2010 to vacate the suit premises on condition that he will continue to deposit rent in terms of earlier orders of this Court until for the month of October, 2010. The plaintiff shall be entitled to receive the amount so deposited in part satisfaction of the decree. Inasmuch as the respondent has not filed a cross appeal pertaining to his claim for interest, interest accrued on the deposit shall be paid to the appellant, after deducting cost of Rs.2,500/-, which shall be paid to the respondent. There shall be no order as to costs of the appeal.

jks/


Chief Justice