



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

J U D G M E N T

RFA No.19 of 2013

Shri Norbu Tshering Bhutia
S/o Late Nagey Bhutia,
R/o Khamdong Busty,
P.O. Khamdong,
East Sikkim.

..... **Appellant**

versus

1. M/s Calcutta Hardware Stores
through its Proprietor,
Shri Gajanand Agarwal,
S/o Late Ramjidas Agarwal,
R/o M. G. Marg,
P.O. and P.S. Gangtok,
East Sikkim.
2. Shri Gajanand Agarwal,
S/o Late Ramjidas Agarwal,
Proprietor of M/s. Calcutta Hardware Stores,
P.O. & P.S. Gangtok,
East Sikkim.
3. Shri Anand Agarwal,
S/o Late Ramjidas Agarwal,
R/o M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim. **Respondents**
4. The Deputy Chief Town Planner,
Urban Development & Housing Department,
Government of Sikkim,
Gangtok,
East Sikkim.

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5. The Additional District Magistrate,
East District,
Gangtok,
East Sikkim.
6. The State of Sikkim
through Secretary
Urban Development and Housing Department,
Government of Sikkim,
Gangtok,
East Sikkim. **Proforma Respondents**

For Appellant : Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Ms. Nisha Rajliwal, Advocates.

For Respondents No.1 to 3 : Mr. A. Moulik, Senior Advocate with Mrs. K. D. Bhutia and Mr. Manish Kumar Jain, Advocates.

For Respondents No.4 to 6 : Mr. Karma Thinlay Namgyal, Senior Government Advocate with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates.

CORAM**HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE**

DATE OF JUDGMENT : 13-10-2014

Wangdi, J.

1. This Appeal is directed against the impugned judgment dated 30.09.2013 passed by the Learned

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District Judge, Special Division - I, Sikkim at Gangtok in Title Suit No.1 of 2010 by which the suit filed by the Respondent No.1 was decreed prohibiting the Plaintiffs and the Proforma Defendants from interfering with possession and enjoyment of the suit premises by the Respondents except in accordance with law. At the same time dismissing the counter-claim of the Appellant.

2. In the original suit, the Appellant is the Defendant No.1 and the Respondents No.1, 2 and 3 are the Plaintiffs No.1, 2 and 3 respectively. The Respondent No.1 is a firm in the name and style of M/s. Calcutta Hardware Stores of which Respondent No.2 is the proprietor who, with the assistance of his brother Respondent No. 3, runs a business of hardware and paint (these Respondents are hereinafter together referred to as the Respondents). Proforma Respondents No.4, 5 and 6 are the Defendants No.2, 3 and 4 respectively.

3. The case of the Respondents in the suit is that the Appellant is the owner of a house situated at M. G. Marg wherein they had taken one godown on rent that was located just below their shop in or about the year

1989 on a monthly basis. In the year 1997, the Appellant requested them to vacate the godown as the premises was required by him for a new construction. Although reluctant initially, the Respondents later agreed to vacate the godown which was shifted to another house of the Appellant at Children's Park, Gangtok which is hereinafter referred to as the suit premises.

4. It is alleged that after sometime the Appellant began to refuse accepting the usual mode of payment of rent in cash periodically which, as later revealed to the Respondents, was a ploy to pressurise them to quit and vacate the godown and, if not, to make them pay an enhanced rent at a rate almost double the amount being paid at the material time.

5. Their efforts to persuade the Appellant to be reasonable in the fixation of rent having failed, the Respondents began remitting the rent through Money Orders but, as the Money Orders were also being refused every time, they opened an account in the name of Anand Agarwal, the Respondent No.3, and deposited the accumulated rent duly intimating the Appellant of the fact.

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The Respondents, also sent a letter dated 03.02.2006 to the Appellant at both his Gangtok and Khamdong addresses informing him that, since payment of rent in cash was being refused by him, it was being sent regularly by Money Orders every month and that those also having been refused, the amounts were being deposited in a Bank Account opened in the name of Anand Agarwal, the Respondent No.3.

6. The Appellant, however, refused to accept the letter but eventually accepted the rent in cash. However, he again refused to do so from April, 2007 compelling the Respondents to commence sending it by money orders again. As per the Respondents, the Appellant was indulging in pressure tactics to compel them to agree in enhancing the monthly rent in respect of the godown to an unreasonably high amount. It has also been alleged that the Appellant and his sons, by resorting to various means, were attempting to evict the Respondents from the tenanted premises.

7. That the Urban Development & Housing Department (UD&HD), the Defendant No.4 in the original

suit and Proforma Respondent No.6 in the present Appeal, was aware of the fact that the Respondents had shifted their godown from M. G. Marg to the new location at Children's Park in the one storied wooden house belonging to the Appellant. This was evident by the fact that they were paying licence fee of ` 400/- per year to the Proforma Respondent No.6 and their trade licence renewed by them from year to year. Neither the Proforma Respondent No.5 nor the Proforma Respondent No.6 had issued any notice to the Respondents requiring them to vacate the godown.

8. All of a sudden the Respondents received a letter dated 17.8.2007 (Exhibit 106) from the Appellant forwarding them copies of notices dated 4.8.2007 (Exhibit 107) and 13.08.2007 (Exhibit 108) which he had received from the Deputy Chief Town Planner, UD&HD, the Proforma Respondent No.4 and, the Additional District Collector, East Sikkim, Proforma Respondent No.5, respectively, directing him to relocate the godown considering the nature of the materials stored and the fact

that it was operating without a valid permission although no permission was required under the Rules.

9. As per Notice (Exhibit 108) issued by the Proforma Respondent No.5, the notice (Exhibit 107) was required to be complied with within 30 days from the date of receipt of the notice failing which action as per law would be taken against them. The Respondents alleged *mala fide* in issuance of those notices as having been issued in collusion with the Appellant's sons and that instead of the Proforma Respondents No.4, 5 and 6, it had been the Appellant who was pursuing with the implementation of the notices with extra zeal threatening to seal the suit premises by his letter (Exhibit 106) followed by letter dated 04.09.2007 (Exhibit 109).

10. It is stated that the Appellant has no right or authority to seal the suit premises in the garb of implementing the notices and that he ought to prefer a regular suit for eviction of the Respondents from the suit premises and that the notices issued by the Appellant were only pretext to get possession of the suit premises.

11. In these premises, the Respondents primarily sought a decree on the following: -

- “(i) Declaring that the defendant No.1 has no right to seal or lock the suit premises under occupation of the plaintiffs as tenant and hence to declare that the notice dated 17.8.2007 and 4.9.2007 were issued illegally and hence to set aside, quash and cancel the said notices;
- (ii) Declaring that the notice dated 4.8.2007 issued by the Dy. Chief Town Planner is bad for non-compliance of the principle of fair play and natural justice as against the plaintiff No.1 and hence to declare the said notice as illegal and not binding on the plaintiffs;
- (iii) Declaring that the notices dated 13.8.2006 and 4.8.2007 were issued illegally without giving a chance of hearing to the plaintiff No.1 and not being addressed to them are not binding on them and hence to cancel the same;
- (iv) Declaring that the plaintiffs shall not be evicted from the suit premises and or the suit premises, shall not be sealed or locked in the manner that has been attempted to by issuing notices by the three defendants and hence, to set aside, quash and cancel all the four notices;
- (v) A permanent injunction restraining the defendants and each of them from interfering with peaceful possession and enjoyment of the plaintiffs and/or sealing, locking the suit premises;”

12. The Appellant, who was arrayed as Defendant No.1, in the suit denied all material allegations in his

written statement and alleged suppression of material facts by the Respondents as an attempt to mislead the Court.

13. It is stated that the Respondents were tenants along with some others under M/s. Jethmull Bhojraj in a wooden house at M. G. Marg and, amongst the premises of which they were tenants, was a godown just below the one where they were running a shop.

14. The Appellant had purchased the wooden house including the godown in possession of the Respondents in the names of his four sons from M/s. Jethmull Bhojraj. Consequent to the purchase the Respondents became tenants under the Appellant and his two sons, viz., Karma Loday Bhutia and Karma Pintso Tshering Bhutia, in respect of a godown in possession of the Respondents as it fell in their share.

15. The house being an old wooden structure in a dilapidated condition, the Appellant and his sons decided to demolish it and construct a RCC building in its place. The tenants including the Respondents were, therefore, requested to vacate the premises to facilitate the

construction. Although the Respondents were initially reluctant, they later agreed to vacate the godown on being assured by the Appellant and his two sons in whose share the godown fell, that they would be provided with a godown space once the construction of the proposed building was completed. The Respondents were also offered the use of a portion of a one storied wooden house situated at Children's Park (i.e., the suit premises) which was lying vacant on payment of monthly rent till such time the building at the M. G. Marg was not completed and the godown space not handed over to them. Although the Respondents had vacated the godown and shifted to the temporary accommodation at the Children's Park, the construction of the building, however, got delayed due to litigations with other tenants and the time taken by all the sons in commencing with the construction as the entire construction had to come up together. But, the Respondents continued to occupy the premises at the Children's Park during this period. The use of this premises which is the suit premises, was for a temporary period. After the other tenants in the wooden house at the M. G. Marg vacated their respective portions

temporarily to enable the Appellants and his sons to start their construction, the Appellant with the consent of his two sons, entered into agreements with them including the Respondents. As per the agreement dated 01.09.2007 (Exhibit D2) entered into with the Respondents, the Appellant promised to provide a godown measuring 15' x 30' at the same location.

16. It is averred that suit premises is also an old wooden house in a very dilapidated condition requiring thorough overhauling after demolition for which the Appellant had also obtained an approved B. P. Plan and construction order dated 24.09.2002.

17. Initially the Appellant had permitted the Respondents temporary use of a portion of the ground floor of the suit premises on rent which was enhanced from time to time. Later at the stage when the rent had become ` 9,200/- (Rupees nine thousand two hundred) only, the entire suit premises was permitted to be used but on payment of an enhanced rent of ` 14,000/- (Rupees fourteen thousand) only, until the godown at M. G. Marg was not handed over. The Respondents,

however, started using the courtyard of the suit premises also. The Appellant pleaded the need of the suit premises for personal use and occupation, there being no alternative accommodation for him in Gangtok. It was also alleged there was default on the part of the Respondents in payment of monthly rent from the month of April, 2000 onwards.

18. On these grounds the Appellant made counter-claims in the written statement and prayed for a decree on the following: -

- “(i) Declaring that the plaintiff have been allowed to shift their godown to the suit premises temporarily till they get a space at the original location just below the shop of the plaintiffs called “Calcutta Hardware” at M. G. Marg, Gangtok,
- (ii) Declaring that the plaintiffs have no tenancy right over the suit property and they are liable to hand over the khas and peaceful possession of the suit premises and courtyard.
- (iii) For recovery of possession of the suit premises including courtyard from the plaintiffs.
- (iv) For recovery of mesne profit at the rate of Rs.15,000/- (Rupees fifteen thousand) only w.e.f. April, 2007.
- (v) Cost of the proceedings and any other relief or reliefs as deemed fit in the facts and circumstances of the case.”

19. In their written statement to the counter-claim the Respondent No.1 has stated that the Respondents are the tenants under the Appellant and that they were not informed by him that his sons Karma Loday Bhutia and Karma Pintso Tshering Bhutia were the landlords.

20. The Respondents have specifically pleaded that there was one godown located just below their existing shop and the other below the premises occupied by Sonam Topgay Bhutia, owner of Cooks Inn Bar and Restaurant and M/s. ABC Transport as tenants and, that they had vacated the godown located below their shop at M. G. Marg, in the year 1998 and shifted to the suit premises in respect of which they became independent tenants under the Appellant since that year. It is stated that the Respondents had vacated the said godown without any claim to re-occupy it which the Appellant demolished and raised a RCC structure thereupon in or about the year 2002 which was much before the suit was filed.

21. It is averred that the godown vacated by the Respondents was not located directly below their shop at

M. G. Marg but a little away below the premises occupied by another tenant Sonam Topgay Bhutia. The agreement dated 01.09.2007 (Exhibit D2) as per the Respondents pertains to that godown and has no connection with or relevance to the suit premises. This, as per the Respondents, would be evident from the fact that they had occupied the godown at Children's Park in the year 1998 whereas the agreement Exhibit D2 is dated 01.09.2007. The godown mentioned in the agreement dated 01.09.2007 was under construction when the earlier godown was vacated by the Respondent and after completion of the RCC structure the Respondents have not been provided with any space for godown.

22. These, as per the Respondents, would clearly show that the godown below the shop premises in occupation of Sonam Topgay Bhutia and M/s. ABC Transport had no relation with the suit premises, i.e., the one at the Children's Park, admitting at the same time that as per agreement dated 01.09.2007 (Exhibit D2), the Appellant was obliged to provide a godown space measuring 15' x 30' on completion of the RCC structure.

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The plea of the suit premises being in a dilapidated condition raised by the Appellant has also been denied.

23. The Proforma Respondents No.4 and 6 (Defendants No. 2 and 4 in the original suit), in their joint written statement, have re-emphasized and confirmed having issued notices (Exhibits 107 and 108) requiring the Appellant to relocate the godown from the suit premises in order to facilitate the developmental works being carried out in the adjoining areas and that those had been issued in pursuance of the decision taken by the Government. It has been stated that similar notices had also been issued to some other business establishments located at the M. G. Marg denying that those were issued at the instance of the owner for illegal eviction of the Respondents from the tenanted premises but was for the purpose of shifting the godown to some other location for a public purpose.

24. Upon consideration of the pleadings, the Learned Trial Court framed as many as seven issues which are reproduced below:

- “(i) Whether the Plaintiffs are bound by the terms of the notices issued by the Defendants. If not, whether the notices are liable to be quashed?

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- (ii) Whether the Counter-claim is maintainable in the present suit?
- (iii) Whether the Counter-claim is undervalued?
- (iv) Whether the Plaintiffs were allowed to use the suit premises temporarily till the Defendant no.1 and his two sons complete the construction and hand over one godown at M.G. Marg, Gangtok to the Plaintiffs?
- (v) Whether the Plaintiffs are liable to vacate and hand over the suit premises if the Defendant no.1 is ready to provide space measuring 15' x 30' at M.G. Marg, Gangtok?
- (vi) Whether the Plaintiff is liable to shift his godown from the suit premises in order to facilitate developmental activities of the State Government like beautification and expansion of M.G. Marg and other adjoining areas?
- (vii) Relief."

25. The Learned Trial Court upon hearing the parties decided all the issues in favour of the Respondents except on issues no.(i), (ii) and (vii). While deciding issue no.(vii) in favour of the Appellant and arriving at a finding that the suit premises was indeed in a dilapidated condition requiring overhauling, it held that the Respondents could only be evicted by an appropriate proceeding under the law.

26. It is pertinent to note that the Respondents have not preferred an Appeal or Cross Objection against

the findings of the Learned Trial Court on issue no.(vii) that the suit premises is in a dilapidated condition which required thorough overhauling. The finding, thus assumes finality.

27. Pressing the Appeal Mr. K. T. Bhutia, Senior Advocate, appearing for the Appellant, would urge that the wooden structure at the M. G. Marg was purchased by the Appellant from M/s. Jethmull Bhojraj in the year 1989 in two portions, one in his own name and the other in the name of his two sons, Karma Loday Bhutia and Karma Pintso Tshering Bhutia. At the ground floor of these, there was one godown each, both under occupation of the Respondents as tenants. The Respondents continued to occupy as Lessees the one in the portion purchased in the name of the Appellant for a period of two years under a registered deed of lease (Exhibit D1) entered on 05.03.1990 which they vacated in the year 1992 on expiry of the term.

28. As regards the one in the premises purchased in the names of his two sons, it was submitted that it was vacated by the Respondents on an agreement that an

alternative space shall be provided to the Respondents in a wooden house belonging to the Appellant at the Children's Park temporarily as an interim measure in order to enable them to raise a RCC structure and, after its completion, the Respondents shall vacate the temporary godown and shift to a godown measuring 15' x 30' that would be provided for them at the old place to reoccupy.

29. A document to that effect was also executed on 01.09.2007 being Exhibit D2. Mr. Bhutia reiterated that the reason for drawing the agreement in the year 2007 when the Respondents had shifted to the suit premises at the Children's Park in the year 1998, was on account of the fact that the Appellant and his two sons were engaged in various litigations with the other tenants, more particularly Sonam Topgay Bhutia. In order to give clarity to his submission he placed before this Court a rough sketch map illustrating the location of the various godowns. As per him, there was further delay due to the time taken by the Appellant and his sons in commencing with the construction work as it had to come up together and which involved arrangement for the expenditure involved in the construction. It was submitted that

although the construction had been completed and the godown measuring 15' x 30' ready for occupation, the Respondents have refused to vacate the suit premises and occupy the space in terms of the agreement Exhibit D2.

30. Learned Senior Counsel urged that the finding in the impugned judgment that although the Appellant was successful in establishing that the suit premises was in a dilapidated condition and required overhauling, it was necessary for him to initiate an appropriate proceeding for eviction of the Respondents, was a proposition unacceptable in law and liable to be set aside.

31. Learned Senior Counsel would further urge that the Learned Trial Court had mis-directed itself in holding that the counter claim made by the Appellant was not maintainable. He also would argue that when the evidence was clear to indicate that the godown mentioned in the agreement Exhibit D2 referred to the suit premises, it was erroneous and perverse to hold that the Appellant had failed to substantiate his claim that the Respondents were allowed to use the suit premises temporarily till the construction over the earlier location was completed and

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that it had not been sufficiently established that the agreement pertained to the suit premises.

32. On the maintainability of the counter-claim, Mr. Bhutia sought to rely on various decisions amongst which are (i) ***Ashok Kumar Gupta vs. Vijay Kumar Agarwal*** : ***AIR 2002 SC 1310***; (ii) ***Jag Mohan Chawla and Another vs. Dera Radha Swami Satsang and Ors.*** : ***AIR 1996 Supreme Court 2222*** (iii) ***Bhagwati Prasad vs. Chandramaul*** : ***AIR 1966 SC 735***; (iv) ***Gaya Prasad vs. Smt. Jamwanti Devi and Others*** : ***AIR 1998 Patna 53*** and (v) ***M/s Ramsewak Kashinath vs. Sarafuddin and Others*** : ***AIR 1991 Orissa 51***.

33. Mr. A. Moulik, Senior Advocate, representing the Respondents No.1, 2 and 3 contended that issues no.(iv) and (v) that were taken up together were the principle issues that were crucial for determination of the questions involved in the case required consideration. From the facts and circumstances and the evidence on record, there was no reason to interfere with the finding of the Learned Trial Court on those. Mr. Moulik would submit that the document Exhibit D2 has no nexus with the suit premises.

As per him, the tenancy in respect of the suit premises located at Children's Park was an independent one entered into between the Appellant and Respondents.

34. It was contended that a bare reading of Exhibit D2 would reveal that it was executed only in the year 2007 when the understanding between the Appellant and his sons and the Respondents had been purportedly arrived at way back in the year 1998. It was submitted that the rent receipts Exhibits 2 to 39 would show that the last rent paid by the Respondents was ` 1,890/- (Rupees one thousand eight hundred ninety) only, for the months of December, 1995 to January, 1996, when the amount was much more than that as would appear from the postal receipts Exhibits 95 to 102 being ` 4,000/- (Rupees four thousand) only, including the month of February, 2007. These, as per him, clearly indicate that the two godown premises at M. G. Marg are different with no relation with the suit premises at the Children's Park. By placing a rough sketch prepared by him, it was further submitted that the Appellant had failed to prove his claim that the agreement Exhibit D2 pertained to the godown purchased

in the names of his two sons at M. G. Marg and the suit premises at the Children's Park.

35. Mr. Moulik went on to urge that the counter-claim of the Appellant was not maintainable and that it was rightly held in the impugned judgment that the Appellant ought to institute separate proceedings before a competent Court of Law for eviction of the Respondents from the suit premises. He submits that the provision of Order VIII Rule 6A of the Code of Civil Procedure, 1908 (in short "CPC") has to be read with Section 9. He contended that although Order VIII Rule 6A CPC permits a defendant to make a counter claim, Section 9 bars the jurisdiction of the Courts from trying suits of cognizance of which are barred either expressly or impliedly. As per him, all matters pertaining to landlord and tenant in Sikkim contemplate a separate proceeding under the rules and the relevant statute prevalent in the State. The present premises being located at Gangtok, it is governed by the Gangtok Rent Control and Eviction Act, 1956. This being a special law providing for a distinct forum, cognizance of the counter-claim by the Learned District Judge (Special Division - I), is impliedly barred under Section 9 CPC. In

support of his contention, the Learned Senior Counsel referred to the decisions of (i) ***Anwar* vs. *1st Additional District Judge, Bulandshahr and Others* : *AIR 1986 SC 1785***; (ii) ***Sushil Kumar Mehta* vs. *Gobind Ram Bohra* : *(1990) 1 SCC 193***; (iii) ***Laxmi Chand and Others* vs. *Gram Panchayat, Kararia and Others* : *AIR 1996 Supreme Court 523*** and (iv) ***Sahebrao Vithoba Pawar* vs. *Bapurao Ravji Pawar* : *AIR 1985 Bombay 426***.

36. Upon hearing the Learned Counsel for the parties and having carefully examined the evidence, the principle contentions raised by the parties appears to be limited to only two aspects. The first aspect is the controversy as regards the identification of the godowns at the M. G. Marg under occupation of the Respondents at the time of purchase of the wooden structure by the Appellant and, as to whether the suit premises let out to them by the Appellant was an alternative accommodation to be occupied temporarily in lieu of the one at M. G. Marg. Related to this is as to which of the two godowns has reference to the agreement dated 01.09.2007 (Exhibit D2). The next is as regards the maintainability of the counter-claim and the soundness of the Learned Trial

Court in arriving at its finding that although the dilapidated condition of the suit premises was established, it was necessary for the Appellant to initiate a separate proceeding for eviction of the Respondents therefrom.

37. Taking the first aspect, I am inclined to agree with the Learned Trial Court that the Appellant could not establish satisfactorily that the document Exhibit D2 pertained to the godown in the portion of the wooden structure purchased in the name of his two sons of the Appellant and the suit premises. On a close and careful scrutiny of the document Exhibit D2, it is not clear as to which of the godowns it relates to. If it is with regard to the one in the name of the sons of the Appellant, it ought to have been signed by them but, it is the Appellant who has signed it as the owner. If the godown had been vacated by the Respondents and shifted to the Children's Park in 1998, the question of payment of rent for the vacated godown would not have arisen. However, we find rent receipts Exhibits 102 to 103 of ` 4,000/- per month (Rupees four thousand) only, for the months of April, 2006 to December, 2006, January, 2007, February, 2007 and

March, 2007 received from the Respondent No.1 for the godown at M. G. Marg, Gangtok. It is not the case of the Appellant that these were against the first godown which as per him was vacated by the Respondents after the expiry of the period of two years under the Exhibit D1. There is no doubt an admission on the part of the Respondents that Exhibit D2 relates to the godown below M/s. ABC Transport Company but, as per them, it was a separate agreement in respect of that godown which was executed when they actually vacated it in the year 2007. On the other hand, the case of the Appellant is that the godown was vacated in the year 1998 but the Agreement Exhibit D2 was drawn only in 2007. There are conflicting evidence led on both the sides on this question. For these reasons, I find that Appellant has failed to discharge the burden of proof of his case that Exhibit D2 was executed in respect of the suit premises by which it was provided as a temporary accommodation in lieu of the godown purchased in the names of the Appellant's two sons in order to enable them to complete their new construction at that place.

38. We may now proceed to deal with the other aspect regarding the maintainability of the counter claim and the finding of the Learned Trial Court that although the Appellant has been successful in establishing that the suit premises is in a dilapidated condition and required thorough overhauling, the liability of the Respondents to vacate the suit premises can be fixed only by instituting an appropriate proceeding. In my view, the finding does not appear to be sound in law.

39. The basis of the above finding in the impugned judgment is that Appellant has not been able to sufficiently establish that the agreement Exhibit D2 was entered into with respect to the suit premises while deciding issues no.(iv) and (v). It has also been noted in the impugned judgment that while on the one hand the Appellant claims that the Respondents are not his tenants in respect of the suit premises, on the other he alleges non-payment of rent by them and that if the relation between the Appellant and the Respondents is regarded as that of a mere licensor and licensees, he can only evict the Respondents by following due procedure of law and after giving sufficient opportunity to them to do the needful.

40. In my view, the Learned Trial Court has mis-directed itself and fallen in error in arriving at such conclusion. Obviously the Appellant by his counter-claim seeks eviction of the Respondents from the suit premises on two account, the first being the specific performance of agreement Exhibit D2 and, the second, his requirement of the premises for thorough overhauling. The first having been rejected as not proved, the second does not get obliterated just for that reason or for the reason stated in the impugned judgment. Even assuming that Exhibit D2 was executed in respect of the godown of the sons of the Appellant below M/s. ABC Transport Company and the suit premises, the Respondents would not cease to be tenants but, would continue to remain so albeit under the Appellant who is owner of the suit premises.

41. The case of the Respondents is also that their tenancy in respect of the suit premises is independent of the Agreement Exhibit D2 and that the Appellant is their Landlord, as would appear from the very pleadings of both parties. It is their categorical case that a portion of the suit premises was initially being occupied on payment of ` 9,200/- (Rupees nine thousand two hundred) only, per

month as rent and thereafter the entire area thereof on payment of enhanced rate of ` 15,000/- (Rupees fifteen thousand) only. The Appellant in his written statement has also acknowledged the fact that he had received ` 1,35,000/- (Rupees one lakh thirty five thousand) only, as rent from the months of April, 2006 to December, 2006 at the rate of ` 15,000/- (Rupees fifteen thousand) only, per month and also from January, 2007 to March 2007. These indubitably establish that relationship of landlord and tenant subsists in respect of the suit premises under both the circumstances set out above.

42. Once the relationship of landlord and tenant stands established, they would certainly fall within the purview of the relevant law governing landlord and tenant. In Sikkim, this field is covered by Gangtok Rent Control and Eviction Act, 1956, Sections 4, 5 and 12 of which sets out the circumstances under which a landlord may eject a tenant. For convenience, Sections 4, 5 and 12 are reproduced below: -

"4. A Landlord may not ordinarily eject any tenant. When, however, the whole or part of the premises are required for the bonafide occupation of the landlord or his dependent or for thorough overhauling (excluding additions and

alterations) or when the rent in arrears amount to four months rent or more, the landlord may evict the tenant on filing a suit of ejectment in the Court of the Chief Magistrate. The tenant so evicted shall, however, have the first right to re-occupy the premises, after over-hauling, on such enhanced rent as may be fixed by the Sikkim Darbar before it is let out to any other tenant.

5. No tenant shall sub-let the premises, either in whole or in part, to a third party without the consent of the Landlord.

12. No tenant shall make any additions or alterations to the building, or damage the structure in any way, save in the course of ordinary wear and tear, without the approval in writing of the landlord, failing which the landlord shall have the right to evict such tenant."

[underlining mine]

43. As would appear from the above, thorough overhauling is one of the grounds on which a tenant may be ejected.

44. While deciding issue no. (vii), i.e., whether the suit property is in a dilapidated condition requiring overhauling and, therefore, liable to be vacated by the Plaintiffs, the Learned Trial Court has held that *"it is amply clear that the godown/structure standing on the suit premises is in a dilapidated condition and requires overhauling"*. This finding as already noted has not been challenged by the Respondents either by filing an appeal or a cross-objection in the present proceedings.

45. As would appear from Section 4 of the Gangtok Rent Control and Eviction Act, 1956, suit for ejectment is required to be filed in the Court of the Chief Magistrate. Considering the trite position that Chief Magistrate is equivalent to District Judge it would necessarily follow that the Learned Trial Court being a Court of District Judge with the attendant powers and jurisdiction, it would have the necessary jurisdiction to entertain the counter-claim. Reference in this regard may be made to the decision of this Court dated 11.05.1987 in ***Civil Reference No.1 of 1987 : Tekchand Agarwal vs. Prem Prakash Agarwal and Another*** wherein while deciding a reference made under Section 113 CPC on the question as to whether "the tenant can deposit the rent in the Court of Chief Magistrate (equivalent to Court of District Judge)" it was held as follows: -

"6. In view of the above position, we are of the view that the Chief Magistrate (equivalent to the Court of the District Judge) shall not henceforth accept any deposit of rent in his Court and this practice should be discontinued forthwith."

46. In ***Civil 1st Appeal No. 1 of 1980 : P. S. Nirash and Others vs. Mintok Dolma Kazini : 1981 RCJ 706*** the

position as regards the term "Chief Magistrate" has been clarified by a Division Bench of this Court. The relevant portion of which reads as under: -

"12. Mr. N.B. Kharga, the learned Advocate for the appellant has finally urged that the appeal must be allowed and the suit must fail as the Court of the District Judge had no jurisdiction to try a suit for ejectment of tenants of premises governed by the Gangtok Rent Control and Eviction Act, 1956. Section 4 of the Act, which provides the grounds on which a tenant of premises can be ejected, provides further that on one or more of such grounds, "the landlord may evict the tenant by filing a suit for ejectment in the Court of the Chief Magistrate". Mr. Kharga has accordingly argued that the present suit, giving rise to this appeal, could be instituted in and tried by the Court of the Chief Magistrate only and, therefore, the trial thereof by the Court of the District Judge was without jurisdiction.

13. The argument, in our view, could have carried if a particular or a Special Court was created for the trial of this type of suits. The Court of the Chief Magistrate, as specified in the Gangtok Rent Control and Eviction Act, 1956, was not a Special Court or Tribunal but was the principal Civil (as well as Criminal) Court of original jurisdiction. And, therefore, all that was meant by the provisions of Section 4 quoted hereinabove was that a suit for eviction of a tenant of premises was to be tried by the principal Civil Court of original jurisdiction. It appears from the notification being No. 61/SC dated 17th November, 1973 that this Court of Chief Magistrate was redesignated as the Court of the Judge, Central Court in 1973. After Sikkim was incorporated in the Union of India as a component State with effect from 26th April, 1975, by and under the Constitution (thirty-sixth Amendment) Act, 1975, the principal Civil Court of original jurisdiction has been designated as the Court of the District Judge. That being so, all proceedings triable by the principal Civil Court of original jurisdiction, which was designated as the Court of the Chief Magistrate and then as the Court of the

Judge, Central Court, shall, unless otherwise expressly provided by any law, continue to be triable by the principal Civil Court of original jurisdiction, which has now been designated as the Court of the District Judge.
 When a Special Tribunal is created outside and beyond the ordinary hierarchy of Courts for the disposal of particular proceedings, the jurisdiction of such Tribunal in respect of such proceedings may be exclusive and the jurisdiction of all other ordinary Courts, which would have otherwise been competent to try such proceedings, may be ousted. But when an ordinary Court of the land is specified as the forum for the trial of any particular proceedings, such Court shall continue to exercise such jurisdiction, even though it may be renamed or res-designated differently, unless its constitution or jurisdiction has also been altered. That being so, the proceedings which were triable by the former Court of the Chief Magistrate or of the Judge, Central Court, which was then the principal Civil Court of original jurisdiction, shall continue to be triable by the Court of the District Judge, which is now the principal Civil Court of original jurisdiction.

14. The question may be considered from another angle of vision and for that purpose, let us assume that the Court of the Chief Magistrate as mentioned in the Gangtok Rent Control and Eviction Act, 1956, was a special or exclusive Tribunal, and not an ordinary Court of the land. It has not been disputed by Mr. Kharga, as it obviously cannot be, that the said Court of Chief Magistrate has now ceased to exist. It is well-settled that if a Special Tribunal is specified as the forum for the determination of particular types of disputes, but such a Tribunal does not exist or has ceased to exist, the jurisdiction of the ordinary Courts of the land, which would have otherwise had jurisdiction to try such disputes, would not stand excluded unless and until such a Special Tribunal is brought into existence. Therefore, even if the Court of the Chief Magistrate is to be regarded to be a Special Tribunal of exclusive jurisdiction in respect of suits for eviction of tenants, such a Tribunal no longer being in existence, the jurisdiction of the ordinary Civil Courts to try this type of suits of civil nature must have revived."

[underlining mine]

Obviously, the case of ***Tekchand Agarwal*** vs. ***Prem Prakash Agarwal and Another*** was rendered following this decision.

47. Therefore, unlike other Rent Control Acts that provide for appointment of Rent Controllers with the defined jurisdiction, under the laws prevalent in Sikkim, it is the District Judges who adjudicate matters pertaining to landlord and tenant under their regular jurisdiction as a Civil Court. The Gangtok Rent Control and Eviction Act, 1956, which would govern the area where the suit premises is situated, prescribes, *inter alia*, the grounds of ejectment of tenants but the procedure applicable would be the Code of Civil Procedure, 1908. For the rest of the areas in the State, it is Notification No.6326-600/H dated 14.04.1949 having similar provisions as the Gangtok Rent Control and Eviction Act, 1956, that holds sway with the Chief Court also as the adjudicating authority. In other words, matters relating to landlord and tenant are treated like any other suit with Appeal lying before the High Court.

It may also be noted that it is not the case of Mr. A. Moulik, Learned Senior Advocate for the Respondents, nor

has he contended that the Learned Trial Court is not one of the principal Civil Courts of original jurisdiction in the District. His only contention is that in the present suit which is for declaration and injunction, counter-claim for eviction cannot lie.

48. While deciding a counter-claim it is essentially to be seen that the Court dealing with the original action also has the jurisdiction in the matter of the counter-claims. There is also nothing in Order VIII Rule 6A CPC that restricts the nature of the counter-claims as set up in the present case. For convenience, 6A of Order VIII is reproduced below: -

"6A. Counterclaim by defendant.—(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to

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pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

49. Apparently, the language used in the Rule are widely worded. I find support in this view in ***Gaya Prasad (supra)*** wherein after analyzing decision of various High Courts and the Apex Court, it has been held that *"from the wordings and plain reading of Rule 6A of Order VIII it is clear that it contemplates counter-claim with respect to any suit without having any restriction. The scheme of new rule to permit the defendant to set up counter-claim which arises between the parties and which are not non-cognizable to the Court where the suit is pending, the object is to reduce the pendency of the cases so that claims and cross-claims similar in nature can be disposed of by the common judgment."*

It may be relevant to note that the decision was rendered by the Patna High Court while dealing with an eviction suit in which the defendant had set up a counterclaim of title, a position similar to the present case, except that the parties stand in a juxtaposition.

50. In *M/s Ramsewak Kashinath (supra)*, it has been held that Rule 6A of Order VIII CPC cannot be construed in a limited sense and the Court can entertain by way of a counter-claim whether the claim is in respect of money or not and, therefore, where the plaintiff had filed a suit for declaration that he was licensee of the premises in question and had a right to remain in possession, the counter-claim by the defendant for eviction of plaintiff was maintainable. Although this decision of a single Bench of the Orissa High Court and, therefore, may not be binding, nevertheless I am persuaded to agree with with the principle as the facts and circumstances of the case is almost *pari materia* the present case.

51. In *Jag Mohan Chawla (supra)* the Apex Court, while considering the scope of Order VIII Rule 6A CPC, has observed as:-

“5. The question, therefore is: whether in a suit for injunction, counterclaim for injunction in respect of the same or a different property is maintainable? Whether counter-claim can be made on different cause of action? In sub-rule (1) of Rule 6 A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject

matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right of claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counterclaim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counterclaim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counterclaim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit."

52. The decisions cited by the Learned Counsel for the Respondents being distinguishable from the facts of the present case, are not applicable and of no assistance to the Respondents.

53. Having considered the entire facts and circumstances on the two questions set out earlier while upholding the finding on the first question arrived at by the Learned Trial Court, I find that the one on the second

appears to be clearly erroneous and, therefore, is set aside.

54. One of the reliefs sought for in the written statement is for a declaration that the Plaintiffs have no tenancy right over the suit premises, which raises the question as to whether a decree for eviction on the ground of the established requirement of thorough overhauling of the suit premises can be passed.

55. Since it has been held that a relationship of landlord and tenant subsists between Appellant and Respondents in respect of the suit premises which is also the case of the Respondents. I find no impediment in law in passing a decree for eviction of the Respondents from the suit premises on that ground as in prayer (iii) of the written statement, "a decree for recovery of possession of the suit premises including courtyard from the Plaintiffs" has also been prayed for apart from prayer (v) for "any other relief or reliefs as deemed fit in the facts and circumstances of the case".

56. In *Bhagwati Prasad (supra)* it has been held as under: -

“If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?”

57. In the present case also as would appear from the pleadings and the evidence, the parties were aware that the question as regards the relationship of landlord and tenant between them was involved in the trial and had also led evidence on it. It stands established that the Respondents are tenants under the Appellant in respect of the suit premises. This would be true even assuming it to be for a temporary period under the agreement Exhibit D2 as claimed by the Appellant.

58. Therefore, having regard to the finding that the suit premises is in a dilapidated condition requiring thorough overhauling, the Appellant has been successful in

making out a case for ejection as prescribed under the law, rendering the Respondents liable for eviction from the suit premises and the Appellant (Defendant No.1) entitled to the recovery of possession thereof from the Respondents No.1 to 3 (Plaintiff Nos.1 to 3).

59. It is the admitted case of the Respondents that the Appellant having refused to accept the rent for the suit premises from the month of April, 2007, they had deposited it in an account opened in the name of Anand Agarwal, Respondent No.3. The Appellant, therefore, shall be entitled to the rent accumulated in that account for the entire unpaid period until the vacant possession of the suit premises is not handed over to the Appellant.

60. The counter-claim, therefore, stands partially decreed.

61. In the result, the Appeal is allowed in part.

62. No order as to costs.

63. A copy of this judgment and the original case records be transmitted forthwith to the Court of the



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District Judge, Special Division - I, Sikkim at Gangtok, for compliance.

Sd/-
(S. P. Wangdi)
Judge
13-10-2014

Approved for reporting : Yes

Internet : Yes

to/ds