THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 08.06.2019

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

RFA No. 13 of 2017

Appellants : 1. Shri Rajendra Prasad Mangla,
Son of Late Narsing Das Mangla,
Proprietor Golden Tea Company,
Resident of Rangpo, East Sikkim.

2. M/s Golden Tea Company,
Proprietor Rajendra Prasad Mangla,
Lal Market Road, Gangtok,
East Sikkim.

versus

Respondent : Shri Govind Agarwal,
Son of Late Chetram Agarwal,
Lal Market Road, Gangtok,
East Sikkim.

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

Appearance

Mr. Sudesh Joshi and Mr. Sonam Palden Tamang, Advocates for the Appellants.

Dr. (Ms.) Doma T. Bhutia, Advocate for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellants herein were ordered to vacate the suit premises of the Respondent on *bona fide* requirement of the Respondent and default in payment of rent by the Appellants, vide the Judgment dated 31.08.2017 in Eviction

Suit No. 08 of 2014 *(Shri Govind Agarwal v. Shri Rajendra Prasad Mangla and Another)*. Aggrieved, the Appellants herein are assailing it in Appeal.

2. The Respondent's/Plaintiff's case before the learned trial Court was that the suit property described in Schedule 'A' to the plaint comprising of a shop measuring 9'x14½', on the fourth floor of a five storeyed RCC building, along with a *gully* measuring 30'x60' and in the third floor of the same building rooms measuring a total area of 22'x45' and 11'x20' were rented out by the mother of the Respondent/Plaintiff (hereinafter "Respondent") to the Appellants/Defendants No. 1 and 2 (hereinafter "Appellants No. 1 and 2"), vide an Agreement dated 17.05.1978. The Appellant No. 1 is in continuous occupation of the said suit premises since 1978 with rent fixed at Rs.625/- (Rupees six hundred and twenty five) only, per month, excluding water and electricity charges. The third shop on the fourth floor which is rented to the Appellants, fell in the share of the Respondent by a verbal partition effected by his mother, late Saraswati Agarwal, between him and his two brothers. The Respondent's wife carries on business in the adjacent shop, which fell in the share of his youngest brother, after duly obtaining his brother's permission but the income therefrom is paltry. The Respondent's specific case is that his family which includes his wife, brother-in-law and two sons who are pursuing higher education are entirely dependent on him,

apart from which he suffers from several health issues, hence the requirement for the tenanted premises in order to augment his income. That apart, the Respondent has been compelled to take up premises at a monthly rent of Rs.7,500/- (Rupees seven thousand and five hundred) only, in Gangtok. That, on the other hand, the Appellant No. 1 is settled in Rangpo where he conducts business in his four storeyed RCC building. That, the Respondent's mother who was receiving the house rent for the Schedule 'A' premises passed away on 21.01.2010 but despite knowledge of this fact, the Appellant No. 1 continued to remit the monthly rent by Money Order in her name. That, on 19.04.2013, the Respondent issued a Legal Notice to the Appellant No. 1 terminating the rent agreement dated 17.05.1978. The Appellant No. 1 sent a reply through their Lawyer dated 16.05.2013, Exhibit 12, implicitly revealing that the suit premises were in the occupation of his employees and was not in his own use. Later in response, to the Respondent's letter dated 04.01.2014, Exhibit 13, the Appellant No. 1 sent another reply on 24.01.2014, Exhibit 14, allegedly reiterating the requirement of the suit premises for his employees. That, although the Appellant No. 1 sought to meet the Respondent to settle the matter amicably, he failed to appear on the dates fixed, hence the prayers in the plaint *inter alia* seeking eviction of the Appellants on grounds of *bona fide* requirement and default in rent.

3. The Appellants, in their written statement, denied and disputed the claims of the Respondent and pleaded ignorance of the partition amongst the Respondent and his two brothers. That, no proof of ownership of the suit premises by the Respondent has been furnished nor disclosure made with regard to who the rent was to be tendered to, hence the Appellant No. 1 has continuously been tendering rent in the name of the Respondent's mother by Money Order. The question of default in rent does not arise as it is the Respondent who has failed to accept the rents tendered by him by Money Orders. The Appellants deny having any other business besides the tea business located in the tenanted premises. Admitting that the Appellant No. 1 lives in Rangpo, he specified that it was on account of his ill health and asserted that he periodically visits the tenanted premises to oversee the business which he denies is in the occupation of his employees. That, there is no *bona fide* requirement of the Respondent whose income from the shop suffices for his family, hence the suit be dismissed.

4. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:

> "(1) Whether the Plaintiff is the absolute owner/landlord of the suit premises?
>
> (2) Whether the Plaintiff requires the suit premises for his and his dependents' *bona fide* use and occupation?

(3) Whether the Defendant has defaulted in payment of the monthly rents?

(4) Relief(s), if any."

5. On Issue No. 1, the learned trial Court concluded that the Respondent is the owner of the tenanted premises. On Issue No. 2, it was found that the Respondent required the tenanted premises *bona fide* for occupation and for his business. Issue No. 3 was decided in favour of the Respondent on account of default of payment of rent by the Appellants from the month of January, 2010. On Issue No. 4, it was concluded that the Appellants are to be evicted from the scheduled premises and to hand over vacant and peaceful possession to the Respondent and to pay arrears of rent from January 2010 to August 2017. The suit was decreed accordingly.

6. The grounds urged in Appeal herein are that in the Notices sent to the Appellants on behalf of the Respondent, he claims to be the owner of the entire five storeyed building and not just of the suit premises, which tantamounts to commission of fraud. That, it is a well settled principle of law that if any Judgment or Order is obtained by fraud it cannot be said to be a Judgment or Order in law. On this count, reliance was placed on ***A.V. Papayya Sastry and Others v. Govt. of A.P. and Others***[1]. The Respondent, due to his

[1](2007) 4 SCC 221

vacillating pleadings has failed to establish that he is the owner of the suit premises and his claim of partition of properties remained unproved even by the evidence of his wife, PW 2 or his brother-in-law, PW 5. That, the burden of proof on this aspect rests on the Respondent. On this count, succour was drawn from the ratio in ***Corporation of City of Bangalore v. Zulekha Bi and Others***[2] and ***Rangammal v. Kuppuswami and Another***[3]***.*** That, the provisions of the "Gangtok Rent Control and Eviction Act I of 1956" requires only the owner to file an Eviction Suit but no proof of ownership has been advanced by the Respondent. That, on account of the refusal by the Respondent's mother to accept rent in cash after 1998, the Appellants started remitting it by Money Order which they have continued to do even after her death due to ignorance as to the owner of the premises, hence no arrears of rent accrues to the Respondent. That, the evidence of the Postmen examined in the Court clearly reveal that even during the lifetime of Saraswati Agarwal, the Respondent would not allow them to meet her when they went to deliver the Money Order to her. That, the Respondent was bent on evicting the Appellants from the suit premises as can be gauged from his attitude. It was further urged that the Respondent has also failed to establish *bona fide* requirement. Learned Counsel would also deny any attornment by the

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[2] (2008) 11 SCC 306

[3] (2011) 12 SCC 220

Appellants No. 1 and 2 to the Respondent. That, in fact the shop being run by PW 2, the Respondent's wife is their own shop as established by Exhibit 5, the Trade Licence issued in her name for business to be carried on in her own property. No evidence has been furnished to establish that the shop fell in the share of the Respondent's youngest brother Anand Agarwal. That, during the course of evidence, an effort was made to establish that the Respondent is the *karta* of his family but this is a concept introduced only in the evidence and is in contradiction to the pleadings of partition. Assuming that the property is of a Hindu Undivided Family, the suit cannot be filed by the Respondent in his personal capacity. The Appellants No. 1 and 2 also sought to question the *locus standi* of Saraswati Agarwal to partition the suit properties, verbal or otherwise as she did not qualify as a *karta* of a Hindu Undivided Family and could only act as its manager. On this count, reliance was placed on ***Shreya Vidyarthi v. Ashok Vidyarthi and Others***[4]. That, the evidence of Manila Sherpa, PW 4 to establish that the Respondent has taken premises on rent from her for business purposes remained unproved. PW 7, Suresh Kumar Agarwal claimed that the partition was affected in the year 1979 but no details thereof were furnished. Ironically, the living brothers of the Respondent and his nephews were not brought to establish this fact. That, PW 7 is an unreliable witness as in a bid to improve the

[4] (2015) 16 SCC 46

Respondent's case he has added facts which have not been averred in the Plaint. The witness, under cross-examination, testified that Saraswati Devi Agarwal was not the landlady of the tenanted premises during her lifetime thereby belying the admission of the Respondent. Besides, he was unaware of the mode of payment of rent to her. Although reliance was placed on Exhibit 9 and Exhibit 10 allegedly sent by the Respondent to the Appellant No. 1 requiring him to vacate the suit premises and settle outstanding rents, but no proof of either the letters having been sent or the Appellants being in receipt thereof were furnished. That, although the Legal Notice, Exhibit 10 speaks of an Agreement, dated 17.05.1978, purportedly executed between the Appellants and the Respondent, the document was not exhibited thereby prompting an adverse inference under Section 114(g) of the Indian Evidence Act, 1872. That, Exhibit 12 is the document by which the Respondent claims that the Appellants attorned to him and allegedly requested the Respondent to execute a formal agreement pertaining to revised rent repeatedly but these allegations too went unsubstantiated. That, the Respondent's case having remained unestablished, the impugned Judgment requires to be set aside.

7. Resisting the arguments of learned Counsel for the Appellants No. 1 and 2, learned Counsel for the Respondent in the first instance, admitted that no documents of ownership to establish that the Respondent was indeed the

owner of the tenanted premises existed. That, the partition was an oral one effected by the late mother of the Respondent and it is now settled law that in a suit for eviction the title of the landlord cannot be adjudicated upon. Reliance in this context was placed on ***Dr. Yogesh Verma v. Shri Shiv Kumar Agarwal and Another***[5] and ***Smt. Kaushilya Minda and Another v. Rajesh Verma***[6]. That, the evidence of the Appellants' witness, Sushmita Mangla, DW 6, the daughter of the Respondent's late brother, Raj Kumar Agarwal establishes that Bijay Agarwal, her brother, is running the corner shop thus lending support to the fact of oral partition. That, Exhibit 12, the reply by the Appellants' Counsel to the Legal Notice sent by the Respondent's Counsel is a clear indication of attornment by the Appellants to the Respondent. That, Exhibit D-1 the Trade Licence issued in the name of the Appellant No. 1 bears the signature of Sispal Chaudhary, his employee lending credence to the fact that the Appellants are not in possession of the tenanted premises but have sublet the premises to Sispal Chaudhary, DW 3. This fact is buttressed by the cross-examination of the Appellant No. 1 who has admitted that he has not filed any document to show that he was running the business of M/S Golden Tea Company. That the *bona fide* requirement of the Respondent is established by the evidence of the witnesses furnished by the Respondent.

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[5] AIR 2018 (NOC 278) 97

[6] AIR 2017 Sikk 1

Contending that there was default in payment of rent for seven years from January 2010 to 2017, it was postulated that the Appellants despite attornment to the Respondent in 2013 continued to send rent in the name of the Respondent's deceased mother which he could not accept. On this count reliance was placed on ***Shyam Sundar Beriwala & Ors. v. M/s. Bhajanlal Sajjan Kumar***[7]. That, the requirement of the Respondent is *bona fide* and the tenant cannot dictate terms to the landlord regarding use of his property as held in ***R.C. Tamrakar and Another v. Nidi Lekha***[8]. Hence, no error emanates in the observations and conclusion of the learned trial Court and consequently the Appeal be dismissed.

8. I have considered the rival contentions of both learned Counsel at length and given due consideration to their submissions. I have also carefully considered the evidence and documents on record and perused the impugned judgment as also the citations made at the Bar.

9. The questions that fall for consideration before this Court are as follows:

1. *Whether a jural relationship exists between the Respondent and the Appellants No. 1 and 2?*

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[7] 2011 SCC OnLine Cal 2880

[8] (2001) 8 SCC 431

2. *Whether the Appellants No. 1 and 2 were liable to be evicted on grounds of bona fide requirement of the Respondent and for default in payment of rent?*

10. While examining the first question hereinabove framed, it is imperative to advert to Issue No. 1 settled for adjudication by the learned trial Court *viz. "Whether the Plaintiff is the absolute owner/landlord of the suit premises?"* The learned trial Court, as already stated, observed that the Respondent was the owner of the tenanted premises. It is now no more *res integra* that in eviction proceedings the question of title to the properties may be incidentally discussed but cannot be decided finally. In this view of the matter, it is relevant to refer to ***Bhogadi Kannababu and Others v. Vuggina Pydamma and Others***[9]*,* wherein the Hon'ble Supreme Court observed *inter alia* as follows;

> "**19.** In this connection, we may also point out that in an eviction petition filed on the ground of sub-letting and default, **the court needs to decide whether relationship of landlord and tenant exists and not the question of title to the properties in question, which may be incidentally gone into, but cannot be decided finally in the eviction proceeding**."
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> **(emphasis supplied)**

Later in ***Keshar Bai v. Chhunulal***[10]*,* the Hon'ble Supreme Court held as follows;

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[9] (2006) 5 SCC 532

[10] (2014) 11 SCC 438

> **"14.** …The High Court has accepted that in his cross-examination the respondent has stated that he was not accepting the appellant as his landlady. …… The High Court has further held that the respondent was within the permissible limit in asking the appellant to produce documentary evidence about his title as a landlord. The High Court, in our opinion, fell into a grave error in drawing such a conclusion. **Even denial of a landlord's title in the written statement can provide a ground for eviction of a tenant. It is also settled position in law that it is not necessary that the denial of title by the landlord should be anterior to the institution of eviction proceedings**. .....
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> **15.** The High Court has expressed that the respondent was justified in asking the appellant to produce the documents. **Implicit in this observation is the High Court's view that the respondent could have in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. In eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally**. …"
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> **(emphasis supplied)**

Hence, it is evident that the question of title is not required to be settled in an Eviction Suit.

11. The Appellants have placed reliance on ***Corporation of City of Bangalore v. Zulekha Bi and Others*** *(supra)* to establish that the burden of proof of ownership lies on the Respondent. This is irrelevant for the present purposes as the instant matter pertains to a landlord-tenant dispute and not title. Reliance was further placed on ***Rangammal v. Kuppuswami and Another*** *(supra)*, which is also misplaced as it is in the context of partition of a joint family property. In these circumstances, the argument of learned Counsel for the Appellants that the owner and none else is to file the suit in

terms of the provisions of the "Gangtok Rent Control and Eviction Act I of 1956" is untenable.

12. Be that as it may, to establish that the Respondent was the landlord of the Appellants, the attention of this Court was drawn to Exhibit 10, a Legal Notice sent to the Appellant No. 1 on 19.04.2013 by the Respondent's Advocate. Exhibit 10 *inter alia* informs that the Respondent runs a shop beside the rental shop given to the Appellants on rent and due to his financial constraints he requires the tenanted premises to overcome his financial difficulties, thus he terminates the rent agreement dated 17.05.1978 between him and the Appellant No. 1 and required them to vacate the premises. In response thereof, the Appellant No. 1 sent a reply dated 16.05.2013, Exhibit 12 which *inter alia* reflects as follows;

> "**2.** ... **That your client has been regularly refusing to accept the tendered rents for the last several years**.
> .....
> **5.** That as regards your client requesting my client to vacate the said premises, the same does not bear an element of truth in it. **As a matter of fact, rather my client has been requesting your client to execute a formal agreement, with revised rent time and again, over almost two decades, to which your client is yet to respond. Your client has been regularly refusing to accept the rents personally, besides he is continuously ignoring to executing a formal rental agreement over two decades, as a result of which my client is forced to tender rent by way of money orders every month without fail since then, each time hoping that the rent would be accepted by your client. In fact your client is neither revising the rent, nor accepting the same directly from my client, or has he executed a revised rental agreement** *(sic)***, as was agreed Orally amongst them over decades ago**. ...

6. That my client informs me that by sending a notice, your client appears to create undue pressure upon my client, to succumb to his so called requirements, **in circumstances when your client has neither revised the rent nor executed a fresh agreement so far, and has been regularly refusing acceptance of rents. In such circumstances, my client is untouched by element of default at any point of time. Your Notice is un-warranted, and it appears that your Client did not tell you truth that - the Oral agreement between my client and your client was that – my Client would live/stay as long as he wish to run the shop** *(sic)*. Your Client had enhanced/revised the rate of rent to Rs.675/- per month in May, 1978, and your Client appear to be adamant in enhancing rent still further. **My client reserves his right to file an application before the appropriate authority under the Law for fixation of rent, if your client does not do so**.

7. That my client has been occupying the rental premises, and has been regularly tendering the rent from the time of his late father, and the rent tendered by money orders is being regularly refused by your client. ... The reason for issuance of the Notice under reference is the refusal by my client to accept the proposal for exorbitant enhancement of rent, as it was unjustified and illegal demand of your client, and against the statutory provisions of the law of the land. ...

8. ... **and also your client has not executed any revised agreement or revised the rent despite several requests made by my client, and my client has not defaulted at any point of time in tendering rents to your Client. My Client has been tendering rents regularly to your Client by M.O.; Hence, your Notice to quit and vacate the tenanted shop within 30 days of receipt is not valid**.

9. ... It is your Client who has forced my Client by his refusal to tender the rent every month by Money Orders, that too at his cost, which is under the law and the means to make payment directly upon refusal to accept the rent directly from the tenant. My client is not going to vacate the shop under his occupation and use as asked by you. Your client is at liberty to file an eviction suit against my client at his sole risk, ...

10. .....

Kindly tell your Client not to file any suit against my Client who is still willing to sit across table to finalise a workable/acceptable rental and execute an amicable agreement thereafter, in order to harass and make un-due pressure over him, as presently he is not well

> since too long ago, and your client started harassing him, ...”
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> **(emphasis supplied)**

This response was met by a counter response of the Respondent dated 04.01.2014, Exhibit 13, reiterating that the Respondent was in requirement of the tenanted premises for his *bona fide* personal use and that of his dependents and requested that the Appellants vacate the tenanted premises. Another response ensued from the Appellant No. 1 being Exhibit 14, dated 24.01.2014, reiterating therein that the rent had not been revised by the Respondent nor a fresh agreement executed but the rents being tendered by the Appellant No. 1 were being refused. That, the parties could sit together and work out an acceptable rental and execute an amicable agreement between themselves. On this note, we may now examine what attornment entails.

13. In ***Uppalapati Veera Venkata Satyanarayanaraju and Another v. Josyula Hanumayamma and Another***[11], a four Judge bench of the Hon’ble Supreme Court has explained “attornment” as follows;

> “**14.** “Attornment, in its strict sense, is an agreement of the tenant to a grant of the reversion made by the landlord to another, or, as it has been defined, **‘the act of the tenants putting one person in the place of another as his landlord’”** — see para 732, *Foa's General Law of Landlord and Tenant*. This means that in the first instance attornment is made in favour of the person who has derived his title or supposed title from the original landlord. It

[11] AIR 1967 SC 174

implies a continuity of the tenancy created by the original landlord in favour of the tenant. It is in these circumstances that the existing tenant, for the rest of the period of his tenancy, agrees to acknowledge the new landlord as his landlord. Such an agreement of the tenant amounts to attornment and by such an attornment the tenant by his act substitutes the new landlord in place of the previous one. Such attornment is complete the moment the tenant agrees to acknowledge the new landlord to be his landlord. Any future payment or non-payment of rent does not affect the relationship created by the attornment. The new landlord will have his remedies with respect to the rents falling in arrears.

Again, it is stated in para 745 at p. 475:

"**With regard to the title of a person from whom the possession was not obtained, but who has been recognised as landlord by the tenant, such recognition may be by express agreement, by attornment, or other formal acknowledgment (as by paying a nominal sum of money), by payment of rent, or of a nominal sum as rent, or by submission to a distress."**

The attornment is here described as one mode of recognising a person as one's landlord, just as payment of rent is another mode for the purpose. Expression to similar effect is to be found in paras 746, and also 747 where it is further noted:

"**But the tenant is not allowed to impeach the title of a person to whom he has paid rent, or whose title he has otherwise recognised, without showing a better title in some other person.** …"

……

16. These observations make it clear that simply by attornment the tenant is estopped from questioning the derivative title of the claimant's successor just as the acceptance of rent will create an estoppel against the landlord from denying the person, who paid the rent, to be his tenant. **These observations do not indicate that any actual payment of rent by the tenant who has attorned is necessary to make the attornment effective. If it was otherwise, the new landlord in whose favour the tenant has attorned, will not be able to take successfully any action against that person till that person had made the first payment of rent.**

……"

(emphasis supplied)

14. The above-stated decision was referred to by the Hon'ble Supreme Court in ***Apollo Zipper India Limited v. W. Newman and Company Limited***[12] wherein it was also held *inter alia* as follows;

> **"58.** As mentioned above, the title of the landlord over the tenanted premises in a suit for eviction cannot be examined like a title suit. **Similarly, the attornment can be proved by several circumstances including taking into consideration the conduct of the tenant qua landlord**."
>
> **(emphasis supplied)**

The ratiocination extracted *supra* exposits with clarity the position of law on attornment and its implications.

15. A careful examination of the documents relied on by the parties as discussed hereinabove clearly establish that the Appellants had by their conduct attorned to the Respondent. The Appellant No. 1 in the communications has insisted on a settlement between him and the Respondent to reach an amicable amount to be paid as revised rent to the Respondent. If the Appellant No. 1 did not consider the Respondent as his landlord then there was no reason for him to seek such a settlement. The Appellants, by the correspondences reflected hereinabove have accepted the Respondent as their landlord. Although the rent was remitted in the name of Saraswati Agarwal, the Appellant No. 1 has insisted in his correspondence that the Respondent refused to accept rent and thus could not hold the Appellants responsible

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[12] (2018) 6 SCC 744

for default, this aspect also points to a clear acceptance of the Respondent as his landlord. Ignorance of oral partition was asserted by the Appellant No. 1 and a feeble attempt was made to establish acrimony amongst the Respondent and his living brother and nephew pertaining to the suit premises, thereby making an insidious attempt to insert a plea of non-joinder of parties. It would be relevant to point out that in a suit by a landlord against a tenant for arrears of rent and eviction, it is not necessary to implead the brothers or other relatives of the landlord and title cannot be an issue. It may also pertinently be mentioned that it is settled law that a plea of non-joinder cannot be raised at the appellate stage as held in ***Church of Christ Charitable Trust and Educational Charitable Society, Represented by its Chairman v. Ponniamman Educational Trust, Represented by its Chairperson/ Managing Trustee***[13]. It may be claimed that the Respondent by not accepting the rent has denied his position as a landlord, however the Legal Notices, Exhibit 10 and Exhibit 19 and the Counter Reply, Exhibit 13 stand testimony to his assertion that he is the landlord of the tenanted premises.

16. The Appellants relied on ***Shreya Vidyarthi v. Ashok Vidyarthi and Others*** *(supra)* wherein it was held that a Hindu widow is not a coparcener in the undivided family of her husband therefore she cannot act as a *karta* of that undivided

[13] (2012) 8 SCC 706

family, however she can act as its manager. This is an indubitable position of law but in the instant matter no objections from the brother of the Respondent ensued and the Appellant No. 1 has no *locus standi* to raise this question. Consequently in view of the foregoing discussions, it can safely be concluded that a jural relationship exists between the Appellants and the Respondent.

17. It is now to be examined meticulously as to whether the Respondent herein has been able to establish his *bona fide* requirement and rent in arrears amounting to four months or more.

18. The Gangtok Rent Control and Eviction Act I of 1956 lays down at Paragraph 4 as follows;

> "**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 dependents 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."

19. The Respondent in his evidence has deposed that his wife, brother-in-law and both his sons who are pursuing higher education, one in USA and one in Nepal are dependent upon him added to which he himself has health issues. According to him, the college fees and living costs of his sons

are exorbitant. The evidence of the Respondent on this count is supported by the evidence of his sons PW 3, Ashish Agarwal and PW 6, Akash Agarwal who have both stated that their father bears their educational and other miscellaneous expenses. To further validate this assertion, Exhibit 6 (collectively) has been relied upon by the Respondent, which pertains to the enrolment of PW 6 Akash Agarwal, in the University of Toledo, USA and Lease Agreement for living apartments and student fees of the University. Exhibit 7 (collectively) pertains to the witness PW 3, Ashish Agarwal and his selection in the academic session of 2008, Tribhuvan University, Institute of Medicine, Nepal and fee receipts. Exhibt 17 was also relied upon by the Respondent to indicate the state of his health and the condition *"Generalized myasthenis (myasthenia gravis)"* from which he suffers. The Respondent's wife, PW 2 supported the fact that the Respondent is a patient of the said ailment and requires medical treatment and that she along with their sons who are studying as also her brother are dependent on her husband. The evidence of Manila Sherpa, PW 4, however is of no assistance to the Respondent as neither the year of having rented out the premises to the Respondent nor any receipts pertaining to rent have been furnished.

20. The Appellant No. 1 admitted that he is the sole proprietor of Golden Tea Company being run in the tenanted premises and he is in sole occupation of the tenanted

premises. As per the Respondent, which is admitted by the Appellant No. 1, he is now settled in Rangpo with his family. The Respondent went on to state that the Appellant No. 1 is not residing in Rangpo on account of ill health but is conducting his business in Rangpo. The Trade Licences, Exhibit D-5, Exhibit D-6 and Exhibit D-7 issued in the name of one Din Dayal Mangla and Lalita Devi Mangla belongs to the joint family of the Appellant No. 1. The evidence of DW 6, Sushmita Mangla supports the evidence of the Respondent that the Appellant No. 1 is living in Rangpo. She added that Din Dayal Mangla lives in Siliguri and has two shops in Rangpo of which his wife was the proprietor of one. She would further testify that Sita Mangla who is the wife of the Appellant No. 1, lives in Siliguri in the house of Usha Mangla and Din Dayal Mangla. Her evidence raises a strong probability that the Appellant No. 1 was indeed conducting his business at Rangpo as Din Dayal Mangla and his wife in whose names the business Licences were issued are living in Siliguri, as also the wife of the Appellant No. 1. No evidence was furnished to prove that the Appellant No. 1 frequented Gangtok to supervise his business while PW 7, Suresh Kumar Agarwal testified that he had never seen the Appellant No. 1 coming to Gangtok to take stock of his business here. In fact from all accounts, it appears that the employee of the Appellant No. 1 has been sublet the premises but since this is not an issue herein the Pandora’s box can remain closed. The

evidence on record also reveals that the Respondent has no other business except the business of one small tea shop and his family is entirely dependent on the income generated from this business. His medical condition would undoubtedly entail higher expenditure. In view of the afore discussed facts and circumstances, I am of the considered opinion that the Respondent requires the premises *bona fide* for his own use.

21. In ***Sidhharth Viyas and Another v. Ravi Nath Misra and Others***[14] it was propounded as follows;

> **"10.** The object of rent law is to balance the competing claims of the landlord on the one hand to recover possession of building let out to the tenant and of the tenant to be protected against arbitrary increase of rent or arbitrary eviction, when there is acute shortage of accommodation. Though, it is for the legislature to resolve such competing claims in terms of statutory provisions, while interpreting the provisions the object of the Act has to be kept in view by the Court. Unless otherwise provided, a tenant who has already acquired alternative accommodation is not intended to be protected by the Rent Act."

22. That having been said, it would now be necessary to consider whether there was default in payment of rent. It is an admitted fact that the Appellant No. 1 was in the know of the passing away of the Respondent's mother as the Appellant No. 1 incessantly insisted on a meeting with the Respondent to settle the rent matter with him. This reveals that he was aware that the Respondent No. 1 was the rightful

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[14] (2015) 2 SCC 701

owner of the suit premises. This is fortified by the fact that the Respondent had a living brother and a nephew but no such arrangements were sought to be made with them by the Appellant No. 1. The Appellant No. 1 admittedly continued to send Money Order in the name of Saraswati Agarwal despite knowledge of her death when in the circumstances *supra* it was imperative that the rent be despatched in the name of the Respondent. The Respondent, in his cross-examination, has denied that the Appellant No. 1, after the death of his mother came and enquired from him as to whom the rent should be tendered to and he had refused to answer. Why the Appellant No. 1 failed to enquire from the other brother and nephew of the Respondent when no response on this count was forthcoming from the Respondent is shrouded in mystery. He also denied that from May 1998, his mother refused to accept the monthly rent tendered in cash by the Appellant No. 1 pursuant to which the Appellant No. 1 had to send it through Money Order. DW 8, the Postman who allegedly went to deliver the Money Order deposed that as per the Post Office Rules, the remitter has to give the proper address of the payee including the house number in order to have the Money Order delivered. DW 5, another Postman deposed that Money Order can be received only by the person in whose name it is sent and not by any other person. DW 4, also a Postman working in the Head Post Office, Gangtok has stated that *"... as per the Rule of the Post Office, in the case*

of delivery of MO to the concerned payee there has to be two witnesses along with the Postman and the same practice is followed in case of return of the MO. …" No evidence in this context is in the records of the case to support the Appellants' case neither have any records been put forth to establish the Respondent's refusal to accept the rent. Accordingly it is found that the Appellants were in default of payment of rent from January 2010 to 2017.

23. So far as the question of obtaining the judgment by fraud is concerned, the Appellants relied on ***A.V. Papayya Sastry and Others*** *(supra)* wherein it was held that fraud vitiates all judicial acts whether in *rem* or in *personam* and that a judgment, decree or order obtained by fraud has to be treated as *non est* and nullity and can be challenged in any Court at any time. It may be remarked here that the pleadings and the evidence are to be read in its entirety and there cannot be cherry picking of the sentences for the purposes of convenience. It is clear from the Schedule to the plaint that the Respondent was referring only to the suit property, hence this argument of the Appellants is not tenable.

24. In view of the discussions hereinabove, the decision of the learned trial Court save to the extent discussed with regard to Issue No. 1, warrants no interference.

25. Appeal dismissed.

26. Consequently the Appellants shall vacate the suit premises within three months from today i.e. by 10.09.2019 and hand over vacant possession to the Respondent. The Appellants shall pay the arrears in rent from January 2010 till the time they vacate the suit premises. No interest is ordered on the defaulted rent amount.

27. Copy of the Judgment be sent to the learned trial Court for information.

28. No order as to costs.

29. Records of the learned trial Court be remitted forthwith.

(Meenakshi Madan Rai)
Judge
08.06.2019

Approved for reporting : **Yes**
Internet : **Yes**

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