

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

S.B.: HON’BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

RFA No. 02 of 2015

Ram Narayan Prasad,
S/o late Devi Prasad,
R/o Road No.1, Jorethang Bazar,
P.O. & P.S. Jorethang,
South Sikkim.

... Appellant/ Defendant.

versus

Benu Kumar Mukhia,
S/o Lt. R.B. Mukhia
R/o Karloo Building,
Deorali, Gangtok,
East Sikkim.

... Respondent/ Plaintiff.

Appearance:

Mr. A. Moulik, Sr. Advocate with Ms. Kesang Diki Bhutia and Mr. Ranjit Prasad, Advocates for the Appellant.

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Ms. Sarita Bhusal, Advocates for the Respondent.

J U D G M E N T
(22.05.2017)

Satish K. Agnihotri, CJ

The instant appeal is directed against the judgment and decree dated 30th May, 2015, passed in Eviction Suit No. 01 of 2012, wherein and whereunder the suit filed by the respondent herein/plaintiff (hereinafter referred to as "the plaintiff") was decreed holding that the plaintiff was entitled to a decree for recovery of possession of the suit premises from the appellant herein/defendant (hereinafter referred to as "the defendant"). Also a decree for arrears of rent of the suit premises to the tune of Rs.2,88,000/- was granted. The suit premises, as described in the plaint, was all that two rooms, front and back, with attached bathrooms at the ground floor measuring 15' x 30' and 10' x 30' respectively and the entire first floor measuring an area of 60' x 30' consisting of six rooms with attached toilet-cum- bathroom, one kitchen and one small open hall, with three unfinished rooms and with vacant area of the terrace of one three storied RCC building situated at Road No. 1, Jorethang Bazaar, South Sikkim.

2. The plaintiff filed a suit seeking eviction against the defendant from the aforementioned suit premises on two grounds. Firstly, *bona fide* requirement of the first floor and

secondly, default in payment of rent from December, 2006 and also thereafter from December, 2010, even after giving an undertaking dated 13th November, 2010 (Exhibit – 17). During pendency of the suit, the mother of the plaintiff, for whom the first floor of the suit premises was required *bona fide*, expired on 10th May, 2013. Thus, the ground of *bona fide* was neither pressed nor considered while examining the suit.

3. The case of the plaintiff was that a tenancy agreement dated 21st November, 1982 (Exhibit – 4) was executed between the father of the plaintiff and the defendant for a portion of the premises measuring 15' x 30', for a period of one year, on a monthly rent of Rs.600/- payable within the first week of every month. Thereafter, one more agreement dated 30th May, 1995 (Exhibit – 5) was executed between them for the entire first floor of the suit premises on rental of Rs.1700/- per month for a period of one year, stipulating that the rental would be payable within seventh day of the succeeding month. Thus, the entire suit premises in question came into the possession of the defendant as tenant. One more agreement, which has come on record, was executed on 1st February, 1999 (Exhibit – 6), wherein the rent was fixed at Rs.3,500/- per month for the shop house on the front portion of the ground floor measuring 15' x 30', Rs.1,000/- per month for back portion shop house measuring 10' x 30' of

the same building between the room and the passage for the first floor and Rs.2,000/- per month for the first floor of the same building measuring 60' x 30' and the total rent payable was fixed at Rs.6,500/- per month stipulating that the payment of rent would be made within first week of every subsequent month. The tenancy agreement further stipulates a condition that the defendant shall vacate the premises on or before 31st January, 2000. One more agreement appears to have been executed on 1st April, 2001 (Exhibit – 7) for the same premises on the same rent, wherein it was conditioned that the premises shall be vacated by the defendant on 31st March, 2002. It is brought to my notice that clause 9 of the agreement prescribes for giving three months notice in writing to the defendant, requiring the defendant to vacate the premises in question. It is also revealed that there was a condition in the agreement that if the defendant makes default in payment of monthly rent for two consecutive months or if he violates or infringes any of the terms and conditions contained therein, the landlord will be entitled to determine the agreement and re-enter the premises.

4. The plaintiff has produced one document (Exhibit – 8), seemingly signed on 16th April, 2002 under the caption "Bandobast Letter" extending the tenancy for one more year

from April, 2002 to March, 2003. The plaintiff has also relied on handwritten loose sheets purportedly to be pages of the register maintained by the landlord, initially by the father, after his death by the mother of the plaintiff, wherein the rentals paid by the defendant were recorded. On perusal, it is noticed that the last entry made therein was dated 20th December, 2006 indicating that the rental @ Rs.8,000/- per month for five months, i.e. July, August, September, October and November, 2006, aggregating Rs.40,000/-, was made by the defendant personally. Thereafter, neither any sheet nor any entry of this nature or any rent receipt was brought on record by either party indicating the payment of rental by the defendant.

5. Mr. A. Moulik, learned Senior Counsel appearing for the appellant herein/defendant, would contend that indisputably on the basis of the agreements as above, the defendant was put in possession of the suit premises. It is urged by Mr. Moulik that clause 4 of the first agreement dated 21st November, 1982 (Exhibit-4) prescribes for issuance of rent receipt of every payment, but subsequent agreements (Exhibit-5, Exhibit-6 and Exhibit-7) did not prescribe for issue of any rent receipt. In fact no rent receipt was ever issued by the landlord, father and thereafter mother of the plaintiff. Mr. Moulik would further submit that the loose rent register indicating the due payment of rent refers to "*lena dena*", which means the settlement for

certain payment made by the defendant, as is evident from Exhibit-16 i.e. "Bandobast" dated 19th July, 2007. The defendant was paying the monthly rent regularly though rent receipt was never issued and the plaintiff had deliberately not made any entry in the register, which was accepted by the plaintiff. The loose sheets of the register produced by the plaintiff do not provide for payment of rent for the period from May 2000 to May 2001 (pages 97 and 98), for the period from November 2001 to February 2002 (pages 100 and 101) and for the period from May 2002 to December 2002 and again from February 2003 to April 2003 (page 106). Thus, the same is unreliable and unauthenticated as not proved under the provisions of Section 34 of the Indian Evidence Act, 1872. To garner support, Mr. Moulik refers and relies on **Smt. Chandrakantaben, wife of Jayantilal Bapalal Modi vs. Vadilal Bapalal Modi and others¹** and **Central Bureau of Investigation vs. V.C. Shukla and others²**. Subsequently, the plaintiff declined to accept the rental, which was sent by money order. Learned Senior Counsel fairly submits that the rental was sent by money order only after filing of the suit on 10th December, 2012, which was never accepted. It was further contended that the plaintiff, landlord wanted to evict the defendant without there being any reason

1 (1989) 2 SCC 630

2 (1998) 3 SCC 410

but to get exorbitant rental from the market. The rent amount expected by the landlord was too excessive beyond reach of the defendant. The alleged undertaking (Exhibit-16) states only eviction of the upper floor which was required as *bona fide* need for the use of the mother and the said need of the floor came to an end on death of plaintiff's mother when she died during pendency of the suit, on 10.05.2013. Learned Senior Counsel would further contend that the practice for collection of rent followed by the landlord was that whenever the plaintiff used to come to Jorethang, he had been collecting rental, as the plaintiff was residing in Gangtok. This was the accepted practice between the parties. The plaintiff has not collected the rent thereafter with the sole purpose to seek eviction on the ground of default.

6. The Senior Counsel would next contend that the agreement clearly stipulates issuance of notice before seeking eviction, which was not done in the case and as such the suit deserves to be dismissed on this ground alone. To buttress support on this, the learned counsel would rely on ***Mahendra Raghunathdas Gupta vs. Vishvanath Bhikaji Mogul and others***³, ***Gujarat Steel Tube Co. Ltd. vs. Virchandbhai B. Shah and others***⁴ and ***Jokhiram and another vs. Mangturam Agarwal***⁵.

3 (1997) 5 SCC 329

4 (1999) 8 SCC 11

5 1977 Sikkim L.J. 30

7. Contradicting the aforestated submissions of learned Senior Counsel appearing for the appellant herein/defendant, Mr. K.T. Bhutia, learned Senior Counsel appearing for the plaintiff would submit that the defendant failed to pay the rent as agreed between the parties. Mr. Bhutia would further contend that the defendant was a habitual defaulter and the father of the plaintiff used to chase him to collect the rent and as such rent was always paid after few months and not on regular basis as required in the terms of the agreement. The rental amount, as evident from the register, was Rs.8,000/- per month. Accordingly, the plaintiff served a notice dated 11th June, 2007 (Exhibit – 14) after the defendant retraced back from his undertaking dated 20th December, 2006 (Exhibit – 13), wherein he had clearly undertaken to vacate the suit premises by April, 2007. In the notice (supra), it was clearly stated by the plaintiff landlord that the defendant had defaulted in payment of house rent of the suit premises since December, 2006, which was never responded. The defendant had given one more undertaking under the caption “Bandobast Patra” (Exhibit – 16) dated 19th July, 2007 to vacate the suit premises within three months and also clear all the dues of rental outstanding since December 2003. Exhibit-16 i.e. the undertaking dated 19th July, 2007 has duly been accepted by the defendant in his cross-examination. The issue of settlement of labour charges raised by the defendant

is an afterthought, and has nothing to do with the rental. The learned Judge has rightly held that the defendant was in default of payment of rental. One more undertaking, dated 13th November, 2010 (Exhibit – 17) was produced, wherein the defendant had assured to vacate the upper floor of the building in the month of December, 2010.

8. Referring to the observations made by the Supreme Court in ***V. Dhanapal Chettiar vs. Yesodai Ammal***⁶, Mr. Bhutia would next contend that the provisions of Section 106 of the Transfer of Property Act, 1882, is not applicable to the facts of the case as the tenancy herein is governed by Rules of 1949. It is further pleaded that the plaintiff has sought for arrears of rent till the recovery of the possession of the suit premises by way of Cross Objection, which deserves to be allowed.

9. In the light of the aforestated documents, it was contended by Mr. Bhutia that the defendant had failed to honour the commitment and declined to make outstanding arrears of rent since December, 2006. However, the plaintiff had claimed rental from December, 2009. According to the plaintiff, the claim for the period from December, 2006 to November, 2009 was

6 AIR 1979 SC 1745

time barred. The Court-fee of the plaint was, accordingly, valued and paid. However, according to the plaintiff, the total arrear of the rent from December 2006 till filing of the suit was Rs.4,68,000/-. It was decreed that the plaintiff was entitled to recovery of rent arrear to the tune of Rs.2,88,000/- with *pendent lite* interest and further interest @ 6% per annum on the said amount till the payment of total amount.

10. Heard learned Senior Counsel appearing for the parties, perused the pleadings and documents appended thereto.

11. The first issue that emerges for consideration is as to whether the notice is mandatory, if 'yes', whether the notice was served on the defendant before filing of the instant suit for eviction against the defendant. Letting and sub-letting of premises controlling rents in the State of Sikkim is regulated by Notification No. 6326-600.H&W-B dated 14th April, 1949, (hereinafter referred to as "the Rules of 1949) which is saved under Article 371F of the Constitution of India. The said notification still governs the tenancy in the entire State of Sikkim except premises situated in Gangtok, which is regulated under the Gangtok Rent Control and Eviction Act 1 of 1956. The Rules of 1949, as applicable to the facts of the case for the reasons the

premises, is situated in Jorethang, regulates eviction of tenants as under: -

- "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 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."

12. Section 106 of the Transfer of Property Act, 1882 contemplates therein of a notice terminating lease of immovable property for any other purpose by fifteen days notice in the manner prescribed under sub-Section 4 of Section 106. Whether the mode prescribed under Section 106 of Transfer of Property Act is applicable to the facts of the case came up for consideration in ***V. Dhanapal Chettiar*** (supra), wherein the Supreme Court examined the applicability of the provisions of Section 106 of the Transfer of Property Act, in a case where the tenancy was governed under the rent act. The Constitution Bench of the Supreme Court held as under: -

" In such a situation it was plain and clear that if the lease of the immoveable property did not stand determined under any of the Clauses (a) to (g) of Section 111, a notice to determine it under S. 106 was necessary. But when under the various State Rent Acts, either in one language or the other, it has been provided that a tenant can be evicted on the grounds mentioned in certain sections of the said Acts, then how does the question of determination of a

tenancy by notice arise? If the State Rent Act requires the giving of a particular type of notice in order to get a particular kind of relief, such a notice will have to be given. Or, it may be, that a landlord will be well advised by way of abundant precaution and in order to lend additional support to his case, to give a notice to his tenant intimating that he intended to file a suit against him for his eviction on the ground mentioned in the notice. But that is not to say that such a notice is compulsory or obligatory or that it must fulfill all the technical requirements of Section 106 of the Transfer of Property Act. Once the liability to be evicted is incurred by the tenant, he cannot turn round and say that the contractual lease has not been determined. The action of the landlord in instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee and the jural relationship of lessor and lessee will come to an end on the passing of an order or a decree for eviction.”

13. In ***Mahendra Raghunathdas Gupta*** (supra) cited by Mr. Moulik, the issue involved was that under Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereinafter referred to as “Bombay Rents Act”), notice was mandatory in terms of Section 106 of the Transfer of Property Act to afford an opportunity to the tenant to express his readiness and willingness to pay rent within thirty days of receipt of notice.

14. In ***Gujarat Steel Tube Co. Ltd.*** (supra), the issue under consideration was the requirement of notice under Bombay Rents Act. Section 12 (2) of the Bombay Rents Act contemplates a notice in the manner provided under Section 106 of the Transfer of Property Act before a suit for recovery of possession on ground of non-payment of rent can be filed. The cases dealing with Bombay Rents Act are distinguishable on facts as in

the case on hand, premises situate in Sikkim are regulated by the Rules of 1949, which does not provide for issuance of notice in the manner prescribed under the Transfer of Property Act. In such view of the matter, notice *simpliciter* satisfy the requirement of notice as prescribed under the Rules of 1949 read with agreement dated 21st November 1982 (Exhibit-4) executed between the parties.

15. Applying the well-settled principles to the facts of the case, it has come on record as averred in the plaint that notice dated 11th June, 2007 (Exhibit-14) was served on the defendant by speed post duly received on 14.06.2007, as is evident from Exhibit-15. There is no specific denial of the receipt of the notice. Thus, the requirement of issue of notice is satisfied.

16. The next question that arises for consideration is as to whether the defendant defaulted in making payment of rent. It is true that the words "*lena dena*", mentioned in some places, means making payment after adjustment of dues, if any, from the landlord. Even after some dues were payable by the landlord, the defendant cannot run away from the responsibility of making payment regularly. The agreement provides for payment of rent by the defendant (tenant). Thus, it is not the obligation of the landlord to collect the rent but it is for the

defendant-tenant to pay the rent regularly. It is pleaded by Mr. Moulik that the loose sheets of the alleged Register cannot be taken on record as certain period for which payment was made, were not recorded. Referring to **Central Bureau of Investigation vs. V.C. Shukla and others** (supra), it is contended that the Supreme Court held that "Book" ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole." The same may not be of much assistance to the defendant as the contents written in the purported loose sheets as part of the register are not denied by the defendant. Loose sheets, wherein payment made by the defendant is stated, particularly, last entry dated 20th December, 2006 wherein it is recorded that the payment of Rs.40,000/- claiming rental for the five months at the rate of Rs.8,000/- per month for the months of July, August, September, October and November, 2006, was paid personally by the defendant is admitted by the defendant. Absence of entry of early payment may not be invoked to nullify the other entries when entries made therein are accepted by the parties. In fact, no other document or evidence has been adduced by the defendant to establish that any attempt was made on his part to make the payment of rental regularly, as required under various agreements executed between them. The defendant has also not examined any person to substantiate his

statement that rent was paid after December, 2006 in presence of anyone, even if the practice was to collect the rent from the defendant as and when the plaintiff's father used to go to Jorethang. In terms of the agreement, it was the obligation of the defendant to pay the rental regularly. Examining further, the defendant has given certain undertakings assuring to vacate the premises on April 2007 (Exhibit-13), undertaking dated 19th July, 2007 (Exhibit-16) promising to vacate the premises within three months and also the assurance clearing all outstanding dues since December 2003. These undertakings, which have not been doubted by the defendant and the signatures made by the defendant was verified and had not been denied, talk of outstanding dues since December 2003. These evidences clearly establish the fact that the defendant was in default of payment of rent since December, 2006. Again on 13th November, 2010 (Exhibit-17) an undertaking was given to vacate the upper floor of the premises, which it appears was not again complied with. Indisputably, an attempt was made by the defendant to make the payment after filing of the suit on 10th December, 2012, which was never accepted by the plaintiff landlord.

17. The issue as to whether the plaintiff was entitled to recovery of rent from December 2006 was not agitated before me though the plaintiff has claimed rent only from December

2009, as according to the plaintiff, his claim for arrear prior to December 2009 was barred by limitation. The trial court has held accordingly, however, the eviction can be claimed on the ground of default in payment of rent since December 2006, as held by the Supreme Court in ***Bhimsen Gupta vs. Bishwanath Prasad Gupta***⁷, while examining the provisions of Section 11 (1) (d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982. Learned trial Judge has rightly held that the remedy of eviction on the ground of default in payment of arrears is not barred by limitation while not granting arrears of rent prior to December, 2009. The Supreme Court in ***Bhimsen Gupta*** (supra) observed as under:-

“ 6. In this case we are concerned with the ground of default which falls under Section 11(1)(d) and which states that where the amount of two months rent, lawfully payable by the tenant and due from him is in arrears by reason of non-payment within the time fixed by the contract or in the absence of such contract by the last day of the month next following that for which rent is payable then such default would constitute ground for eviction. It is interesting to note that the expression used in Section 11(1)(d) is “lawfully payable” and not “lawfully recoverable” and, therefore, Section 11(1)(d) has nothing to do with recovery of arrears of rent. On the contrary Section 11(1)(d) provides a ground for eviction of the tenant in the eviction suit. It is well settled that law of limitation bars the remedy of the claimant to recover the rent for the period beyond three years prior to the institution of the suit, but that cannot be a ground for defeating the claim of the landlord for decree of eviction on satisfaction of the ingredients of Section 11(1)(d) of the said Act, 1982. In the case of *Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay and other*, reported in (AIR 1958 SC 328) it has been held that when the debt becomes time barred the amount is not recoverable lawfully through the process of the Court, but it will not mean that the amount has become not lawfully payable. Law does not bar a debtor to pay nor a creditor to accept a barred debt.”

18. The other cases, namely, **Smt. Chandrakantaben** (supra) and **Jokhiram & another** (supra) referred by the parties, are not discussed as not relevant for adjudication of the dispute involved in the case.

19. Having examined the case in its entirety, there is no infirmity or illegality in the judgment and decree sought to be impugned in this appeal, accordingly, it is dismissed.

20. No order as to costs.

Chief Justice
22.05.2017

pm/jk	Approved for Reporting	: Yes/ No .
	Internet	: Yes/ No .