



**HIGH COURT OF SIKKIM
GANGTOK.
DECREE IN APPEAL
(Under Order 41 Rule 35 of C.P.C.)**

Regular Second Appeal against the Judgment and Decree dated 25/09/2004 passed by the Ld.District Judge (East & North) Gangtok Sikkim in Title Appeal No.03 of 2004.

Regular Second Appeal 02 of 2004

Shri Ramashis Prasad,
S/o Late Ram Raksha Shah,
R/o Rangpo Bazar,
P.O.Rangpo, East Sikkim.

..... Appellant.

Versus.

1. Shri Suresh Prasad,
2. Shri Jitendra Prasad,
Both sons of Late Bhawan Shah,
R/o Upper Bazar, Rangpo,,
P.O.Rangpo,
East Sikkim

..... Respondents.

“DECREE IN SECOND APPEAL”.

This appeal coming up for final hearing on 29th day of September, 2005 before the Hon'ble Justice N.S. Singh, Judge of this Court in presence of Shri A.Moulik, learned senior counsel assisted by Shri N.G.Sherpa, learned counsel for the appellant, Shri A.K.Upadhyaya, learned senior counsel assisted by Miss S.Pradhan, learned counsel for respondents.

On hearing, the appeal is dismissed with cost, thus affirming the judgment and decree passed by the learned District Judge, East and North Sikkim at Gangtok in Appeal No.3 of 2004.

Cost of Appeal

Appellant	Amount	Respondents	Amount.
Court fees	Rs. 590.00	stamp for power	Rs.2.00
Stamp fee memo of Appeal	Rs. 10.00	stamp for petition	--
Stamp for power	Rs. 10.00	pleader fee	N.A.
Stamp for petition	Rs. 12.00		
Pleader for petition	Rs. N.A.		
Cost	Rs.5, 000.00		

Given under my hand and seal of the Court on this the 5th October, 2005 at Gangtok.

Prepared by

Ojala
5/10/05
**JOINT REGISTRAR-CUM-READER
HIGH COURT OF SIKKIM
GANGTOK.**

[Signature]
**REGISTRAR GENERAL
HIGH COURT OF SIKKIM
GANGTOK.** 5/10/2005

THE HIGH COURT OF SIKKIM : GANGTOK

REGULAR SECOND APPEAL NO.2 OF 2004

In the matter of an appeal under section 100 of
the Code of Civil Procedure, 2002

and

in the matter of

Shri Ramashis Prasad,
S/o Late Ram Raksha Shah,
R/o Rangpo Bazar,
P.O. Rangpo,
East Sikkim Plaintiff/Appellant.

Versus

1. Shri Suresh Prasad
2. Shri Jitendra Prasad,
Both sons of Late Bhawan Shah,
R/o Upper Bazar, Rangpo,
P.O. Rangpo,
East Sikkim. Defendants/Respondents.

For appellant-plaintiff : Mr. A. Moulik, senior
counsel assisted by Mr.
N.G. Sherpa, counsel.

For defendants-respondents : Mr. A. K. Upadhyaya,
senior counsel assisted by
Miss S. Pradhan, counsel.

PRESENT : THE HON'BLE MR. JUSTICE N. SURJAMANI SINGH, JUDGE.

Last date of hearing : 29th September, 2005.

DATE OF JUDGMENT : 5TH OCTOBER, 2005.

J U D G M E N T

N. S. Singh, J.

The judgment and decree dated 25th September,
2004 passed by the learned District Judge (E & N) Sikkim

N.S. Singh

at Gangtok in Title Appeal No.3 of 2004 (reference Civil Appeal No.5 of 2003) is the subject matter under challenge in this Second Appeal. The facts of the case in a short compass are as follows:-

The plaintiff, namely, Shri Ramashis Prasad, the appellant herein, instituted a suit before the trial Court under Civil Suit No.18 of 2001, later on re-numbered as Civil Suit No.3 of 2002 of the Court of Civil Judge, East at Gangtok against the present respondents (defendants) for the following reliefs:-


A decree for:-

- "i) declaring that the plaintiff is the real owner of the Pan Gumti disclosed in the schedule to the plaint;
- ii) declaring that the defendant Nos:1 and 2 are trespassers in respect of the schedule premises and therefore recovery of possession of the schedule premises by evicting the defendant No:2 therefrom and also by evicting his agents, subordinates etc. from the suit premises including the defendant No:1 in case he takes over possession of the suit premises again during pendency of the case;
- iii) Cost of the proceedings;
- iv) Any other relief or reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;"

by contending, *inter alia*, that the appellant is the exclusive owner of a pan gumti made of wooden wall and


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plane sheets on the top measuring 10' x 6½' situated at Rangpo Upper Bazar near Gully in between the shop house of M/s. Tapsiram Ramprit Ram in the upper row of the Rangpo Bazar, Sikkim which is morefully described in the schedule of the plaint, which is hereinafter referred to as 'suit- pan gumti' and, that the permission was granted by the Executive Officer, Bazar Department to the appellant-plaintiff for putting up a pan gumti of standard size at Rangpo Bazar vide, office letter No.3226/B dated 6th March, 1974 and thereafter, the Local Self Government Department also granted a trade licence on 16th April, 1975 in the name of the plaintiff to run pan shop, manihari etc. in the suit-pan gumti and the appellant renewed the trade licence from time to time thus running his business personally in the said suit-pan gumti. It is also the case of the appellant-plaintiff that on the request of the defendant No.1, the respondent No.1 herein, the plaintiff out of sympathy allowed the defendant No.1 to run business in the said suit-pan gumti in the year 1993 as the plaintiff had other business to run with a condition that the defendant No.1 is to continue his business temporarily in the suit-pan gumti but in the year 2000 the defendant No.1 shifted to his business on a rented shop owned by one Dwarka Prasad Sharma, Mandir Bazar Gate and that,


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○ instead of handing over vacant possession of the suit-pan gumti to the plaintiff, the defendant No.1 had most illegally handed over possession of it to his younger brother Jitendra Prasad, defendant No.2 in the month of August, 2000, for which the appellant-plaintiff raised protest against such activities of defendant Nos. 1 and 2 but, the defendant No.2 did not vacate the suit premises. According to the appellant-plaintiff, no permission was granted to the defendant No.2, i.e., the respondent No.2 herein, for running his business in the suit-pan gumti and as such, he has been possessing and running the said business in the suit-pan gumti without any authority of law. As the plaintiff required the suit premises for business of his son in the said suit-pan gumti, the appellant herein filed the suit for the reliefs sought for in the plaint as stated above.

The defendant Nos.1 and 2, i.e., the present respondent Nos.1 and 2, contested the suit by filing joint written statement wherein they claimed that suit is not maintainable in law or, in fact as the plaintiff has no cause of action nor *locus standi* to file the suit. It is also the case of the respondents-defendants that the suit-pan gumti was in a dilapidated condition lying unused and vacant in the year 1993 as the Department of U.D.&H.D.

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had cancelled the licence of the plaintiff and thereafter, the Department of U.D.&H.D. let out the place to the defendant No.1 in the year 1993 by granting a related licence in the name of the defendant No.1 vide, licence No.358(174)UD and HD/93 dated 22nd July, 1993 and defendant No.1 after getting licence from the said department, renovated and repaired the suit-pan gumti and accordingly, he has been running his business in the suit-pan gumti as on today.

2. On the basis of the related pleadings of the parties, the learned trial Court framed the following issues:-

- "1. Whether the plaintiff has locus standi to file the present Suit for evicting of the defendant?
2. Whether the plaintiff is entitled to recovery of possession of the schedule premises by evicting the defendant no.1 and 2 or there agents therefrom.
3. Whether the defendant is the licensee under UD and HD in respect of the premises."

Supporting the respective cases, the appellant-plaintiff examined three witnesses including himself and likewise, the defendants examined six witnesses including themselves and parties had produced their respective documentary evidence. Upon hearing the parties, the learned trial Court decreed the suit under the related

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decreed dated 20th November, 2003 passed in Civil Suit No.3 of 2002. Being dis-satisfied with the impugned judgment and decree passed by the learned trial Court, the respondents-defendants preferred appeal before the First Appellate Court under Title Appeal No.3 of 2004 (reference Civil Appeal No.5 of 2003) and the First Appellate Court upon hearing the parties, the appeal preferred by the present respondents, was allowed thus setting aside the related judgment and decree passed by the learned trial Court in Civil Suit No.3 of 2002 and dismissing the suit filed by the present appellant-plaintiff. Being aggrieved by the impugned judgment and decree passed by the First Appellate Court, the present appellant-plaintiff preferred this Second Appeal.

3. Supporting the case of the appellant, Mr. A. Moulik, learned senior counsel contended that the findings of the First Appellate Court to the effect that the defendant-respondent No.1 was the owner of the suit-pan gumti is not a legally sound finding and is not based on any evidence and the First Appellate Court did not properly consider and examine the trade licence exhibit D1 issued by the authority concerned to and in favour of the respondent No.1 *inasmuch* as it reflects the appellant, Ramashis Prasad as owner of the suit-pan gumti. The

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validity and genuineness of the allotment order dated 6th March, 1974 (exhibit P1) which established the ownership of the said pan gumti in favour of the appellant was not properly considered by the First Appellate Court, Mr. Moulik argued. It was also argued that the First Appellate Court failed to consider the *locus standi* of the permission dated 6th March, 1974 vide, exhibit P1 vis-à-vis the trade licence issued to the appellant and to the respondent No.1 vide, exhibits P2 and D1 respectively while passing the impugned judgment and decree. Mr. Moulik, learned senior counsel further argued that the First Appellate Court misappreciated the evidence on record thus dislodging the correct findings and the observations and appreciation of evidence made by the learned trial Court while passing the impugned judgment and decree. Supporting his contention, Mr. Moulik, learned senior counsel relied upon the following decisions of the Apex Court rendered in ***Ishwar Dass Jain (dead) through LRs. Vs. Sohan Lal (dead) by L.Rs.*** reported in ***AIR 2000 SC 426***; ***Hafazat Hussain vs. Abdul Majeed and others*** reported in ***AIR 2001 SC 3201***; ***Sundra Naicka Vadiyar (dead) by LRs. and another vs. Ramaswami Ayyar (dead) by his LRs.*** reported in ***AIR 1994 SC 532***; ***State of Himachal Pradesh vs. Maharani Kam Sundri*** reported

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in **AIR 1993 SC 1162; Rajappa Hanamantha Ranoji vs. Mahadev Channabasapa and others** reported in **AIR 2000 SC 2108** and, **Jagdish Singh vs. Natthu Singh** reported in **AIR 1992 SC 1604**.

4. In terms of the provisions of law laid down under Order XLII of the Code of Civil Procedure, 1908, this Court while admitting the appeal formulated the following substantial questions of law for just determination of the real points in controversies between the parties:-

“Whether the findings of the first Appellate Court with regard to the ownership of Gumti and the construction of schedule premises are based on no evidence or not?”

5. Now this Court is to see and examine as to whether the appellate-plaintiff could make out a case in his favour and, whether the impugned judgment and decree of the First Appellate Court is tenable in the eye of law or not, and the related findings of the First Appellate Court are based on evidence or not?

6. I have perused the judgment and decree of the learned trial Court as well as the impugned judgment and decree of the First Appellate Court. For better appreciation in the present matter, the relevant observations and findings of the First Appellate Court made in the related judgment dated 25th September, 2004 is very much

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relevant and such relevant findings and observations find its place in paragraph Nos. 29 to 37 of the judgment of the First Appellate Court and accordingly, it is quoted below:-

"29. The case of the plaintiff is that he is the absolute owner of the Pan Gumti. He had given the same temporarily to the defendant No.1 who was passing through difficult days to help him out of his difficulty. The claim of the plaintiff is that he became the absolute owner of the Pan Gumti by virtue of the permission given to him by the UD & HD followed by the construction of the same by him after he obtained the Trade Licence. It was under his authority as the owner of the Pan Gumti that he had temporarily handed over the Gumti to the defendant No.1.

30. In view of the above the plaintiff would be required to prove that he is the owner of the Pan Gumti and that he had granted permission to the defendant No.1 to run his business for temporary period and that he refused to vacate the same on demand and thereby made himself liable to evicting from the suit premises.

31. In support of his plea the Plaintiff/Respondent examined three witnesses including himself.

32. The Plaintiff/Respondent as PW.1 stated that the Pan Gumti was allotted to him by the LSG, Department in the month of March 1974. The LSG allotted the particular plot to him to construct a Pan Gumti, which he constructed it at the cost of Rs.28,000/-. The L.S.G. department also granted him trade licence for running business of Pan, Manihari, readymade clothes and shoes etc. and accordingly he started his business in the year 1975 and continued the same till 1993. In the year 1993 the defendant No.1 who was passing his days in extreme poverty approached him for allowing him to run business in


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the said Pan Gumti. Since he had got another shop in the house of one Pramila Pradhan he acceded to the request of the defendant No.1 and allowed him to run business in the said Pan Gumti for temporary period so that he could earn his livelihood. In the year 1999 the Plaintiff/Respondent required the said Pan Gumti for his unemployed son and approached the defendant NO.1 to hand over vacant possession to him. However, the defendant No.1 not only refused to vacate the Pan Gumti, but also handed over the same to his brother the defendant No.2 instead of handing it over to him by shifting his business to another rented premises belonging to Dwarka Prasad. He repeated his requests to the Plaintiff/Respondent but in vain.

33. Sri M. L. Sharma PW.2 stated that the site of the said suit property was allotted to the Plaintiff/Respondent by the then Bazar Department and he was permitted to put up a Pan Gumti on the same location where it exists. After constructing the Pan Gumti the plaintiff/Respondent carried on business upto the year 1993. In the year 1993 the plaintiff/Respondent permitted the defendant No.1 the son of his uncle to carry on business in the suit premises temporarily until his financial condition improved and shifted his own business to another premises taken on rent from one Pramila Pradhan. At that time he was Panchayat President of Central Pandam Panchayat Unit and Rangpo Bazar and in that capacity he had submitted verification report on the basis of verbal No objection of the plaintiff who had informed him that he had given the suit property to the defendant/Appellant No.1 to run the business temporarily on condition that he will vacate the premises later on. On the basis of the such statement from the plaintiff/ respondent and the defendants/ appellants the Panchayat had issued a

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report to the effect that the Panchayat as well as the plaintiff/Respondent had no objection if the trade licence was issued to the defendant No.1. The defendant/appellant No.1 thereafter continued his business in the suit premises upto the year 2000 and then shifted his business to another premises owned by one Dwarka Prasad. However instead of handing over the suit property to the plaintiff/respondent he put the defendant/appellant No.2 his younger brother in possession of the suit premises as told to him by the defendant/appellant No.1 who had come to visit him.

34. Sri P.P. Khati PW.3 stated that the Gumti in question was constructed by the plaintiff/respondent in or about the year 1974, after the L.S.G. had allotted the place. The plaintiff/respondent carried on business in the said Pan Gumti till the year 1993 after which he permitted the defendant/appellant No.1 to run his business in the same Gumti. It was told to him by the plaintiff as well as the defendant No.1 that the defendant/appellant No.1 was allowed to run the shop in the Gumti for a temporary period, as his financial condition was not good.

35. The statements of the witnesses of the plaintiff in the cross-examination would go to show that they have been discredited on material points leaving the version of the plaintiff unsupported and uncorroborated. The deposition of Sri M. L. Sharma PW.2 to the effect that the plaintiff in the year 1993 allowed the defendant No.1 to run the Pan Gumti to help him out does not seem to have come from any independent source in so far as in his cross-examination he has admitted that he had no personal knowledge in this regard. His statement may be reproduced as follows;

"It is true that from plaintiff only I came to know that defendant No.1

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requested him to allow him to run the Pan Ghumti and seeing his poverty plaintiff allowed him to do the business temporarily thereon."

36. The statement of Sri P.P. Khati (P.3) the next witness of the plaintiff does not stand in any better footing in this regard. Even though in his examination in chief he stated that the Gumti in question was constructed by the plaintiff in the year 1974 and after running Pan Shop till 1993 the plaintiff permitted the defendant No.1 to run the said business for a temporary period as his financial condition was not good. In his cross/examination he has very fairly admitted that his knowledge was based on what the plaintiff had told him. He conceded that; **"It is true that the plaintiff told me that he had permitted defendant to run the said Pan Gumti for temporary period as his financial condition was not good."** It is also pertinent to reproduce the next following statement as follows:-

"It is not a fact that plaintiff did nto tell me that he had given pan Gumti for temporary period to the defendant as his financial condition was not good...."

37. Of equal relevance is the following statement of the witness:-

"It is true that except the plaintiff nobody informed me at any point of time that Ramasis Prasad had permitted defendant to run the said Pan Gumti for temporary period as defendants' condition was not good."

38. It is therefore clear from the above that the plaintiff's evidence is vague, uncertain and unconvincing in the absence of corroborative evidence of reliable source. The version that the plaintiff after obtaining the permission constructed the Pan Gumti at the cost of Rs.28,000/- lacks corroboration. No evidence in support of this claim had been brought on record. The next claim of the plaintiff that in the

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year 1993 he allowed the defendant No.1 to run the Pan Gumti on his request so as to help him out for a temporary period on condition that he will vacate the same afterwards also remains uncorroborated by any independent and reliable evidence.

39. Therefore on the basis of the evidence on record it cannot be said that the plaintiff has discharged the burden, which falls squarely on him because of the stand taken by the defendants in the case."

7. So far as the case of the defendants-respondents is concerned, the First Appellate Court was of the view that it is on a better footing. It may be noted that even though the permission to run a pan gumti was obtained by the appellant-plaintiff in his name in the year 1974; it was on the initiation of Janaki Prasad with whom appellant-plaintiff was living at the relevant time, and after the permission was obtained, it was again, the said Janaki Prasad who constructed the pan gumti at his initiative and expense and it was after the pan gumti was constructed by him that the appellant-plaintiff started the pan shop business in the said pan gumti till the year 1986 after which he shifted the business to another place thereby abandoning the said pan gumti and it was only in the year 1993 that respondent-defendant No.1 obtained a licence of his own and in his name and started business in the suit-pan gumti after carrying out necessary repairs and


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renovations. According to me, evidence of DWs 1 to 6 are quite consistent and corroborative each other.

8. In paragraph 54 of the impugned judgment the First Appellate Court had exhaustively dealt with the related point and appreciated the evidentiary value of trade licence exhibit P2 which was only renewed up-to the year 1985-86, and was of the view that in terms of the Rule 9 of the Sikkim Trade Licence and the Miscellaneous Provisions Rules, 1985, the trade licence exhibit P2 should be treated as having been in force only up-to 1985-86 and the appellant-plaintiff had failed to show by any evidence adduced by him that he had renewed his trade licence after 1985-86 up-to 1993 the period during which he claims to have run the business in the suit-pan gumti and the plaintiff has neither produced any copy of trade licence the validity of which was extended during these period nor did he adduce any reliable evidence to show that he was carrying on business in the suit premises during the relevant period. The First Appellate Court was of the view that the evidence on record shows that respondent-defendant No.1 is a licensee under the U.D.&H.D. Department in his own right on and after he obtained the trade licence and started business in the suit-pan gumti after renovating and compensating the plaintiff for the

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usable materials in the gumti. According to me, from the available materials on record, it is seen that these related findings of the First Appellate Court are based on sufficient evidence and materials of records and as such, these findings are reasoned findings and apart from that the First Appellate Court rightly passed the impugned judgment and decree in accordance with law. I am also of the view that the case laws cited by Shri Moulik, learned senior counsel do not help the case of the appellant-plaintiff, but it helps the case of the respondents.

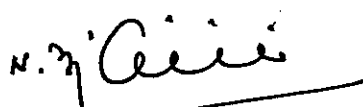
9. For the reasons, observations and discussions made above, I am of the view that the appellant-plaintiff could not make out a case to justify interference with the impugned judgment and decree dated 25th September, 2005 passed by the learned District Judge, East & North Sikkim at Gangtok in Title Appeal No.3 of 2004 (reference Civil Appeal No.5 of 2003).

10. In the result, the present appeal is devoid of merit and accordingly, it is dismissed with costs of Rs.5,000/- (Rupees five thousands) thus affirming the impugned judgment and decree passed by the learned District Judge, East and North Sikkim at Gangtok in Title Appeal No.3 of 2004. However, it is made clear that such cost of Rs.5,000/- (Rupees five thousands) shall be

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treated as part of the funds of the Sikkim Bar Association, for which, the appellant-plaintiff shall deposit such costs of Rs.5,000/- (Rupees five thousands) with the Registry of this Court within a period of one week from today and after such deposit, the General Secretary of the Sikkim Bar Association is at liberty to withdraw the same from the Registry of the Court.



(**N. Surjamani Singh**)

Judge

05-10-2005