

(2007) 07 OHC CK 0035
In the Orissa High Court
Case No : A.H.O. No. 96 of 1995

A. Rama Rao and Others

APPELLANT

Vs

Raghunath Patnaik and Others

RESPONDENT

Date of Decision : 23-07-2007

Acts Referred:

Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Specific Relief Act, 1963 — Section 19

Citation : (2007) 07 OHC CK 0035

Hon'ble Judges : A.S. Naidu, J;A.K. Parichha, J

Bench : Division Bench

Advocate : Ashok Mukherjee and G. Mukherjee, for the Appellant; B.H. Mohanty and S.K. Dey, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—This Letters Patent Appeal arising out of a suit filed for specific performance of contract was disposed of by a Division Bench of this Court on October 17, 2001. Being aggrieved the Defendants have approached the Hon''ble Supreme Court in Civil Appeal No. 5130 of 2005. The Hon''ble Supreme Court by judgment dated April, 24, 2007 has directed as follows:

...We direct the High Court to record its findings on the question of service of notice and also the effect of the absence of any definite and specific plea regarding dispatch of notice by post and/or its refusal. Even if it is accepted that the refusal was on 5.4.1984 i.e. the date of filing of the suit nothing prevented the Plaintiff to at least mention that the notice has been sent by post. The findings shall be recorded by the High Court after granting opportunity to the parties to place their respective stand. The High Court shall send its findings to this Court after recording the same within a period of three months.

2. The matter was therefore taken up for hearing once again. The facts of the case have been elaborately dealt with in the judgment passed by this Court on

October 17, 2001. To avoid repetition the same are not reiterated once again.

3. On the basis of the pleadings of the parties, the trial Court framed seven issues, of which issue No. 7 is required to be dealt with as per the direction of the Hon'ble Supreme Court. The said issue reads as follows:

Whether the Plaintiff's claim against Defendant Nos. 2 and 3 is barred u/s 19 of the Specific Relief Act?

4. The trial Court after discussing the evidence in extenso in para-13 of its judgment dealt with the notices Exts. 7, 8 and 9 purported to have been issued by the Plaintiff's advocate on March 29, 1984. It found that Ext. 7 issued to Defendant No. 1 had returned undelivered with an endorsement that the addressee was absent. Exts. 8 and 9 stated to have been issued to Defendant Nos. 2 and 3 had returned unserved with the endorsement "Addressee Refused. Hence return to sender". The trial Court further found that there was endorsement on the registered letter to show that effort was made by the postman concerned to deliver the same to the addressees but could not do so as Defendant No. 1 was absent and Defendant Nos. 2 and 3 refused to receive the same.

5. It is also held that knowledge of Defendant 2 and 3 regarding existence of a prior contract for sale of the suit site was manifest, inasmuch as the said Defendants having refused to receive the notice issued by the Plaintiff's advocate hastily proceeded to obtain the registered sale deed from Defendant No. 1. So it could not be held that Defendants 2 and 3 were transferees for value who had paid their money in good faith and without notice of the earlier contract. The trial Court which had the privilege of marking the demeanor of the witness, disbelieved D.W. 1 (Defendant No. 1) and concluded that Defendants 2 and 3 were not entitled to avail the benefits of the provision of Section 19(b) of the Specific Relief Act. That apart, it was held by the trial Court that the Plaintiff not only tried to restrain the Defendants to proceed with execution of registered sale deed, but also had filed written objection in the shape of a petition before the District Sub-Registrar paying requisite Court-fees, vide Ext. 2, and also a protest petition, vide Ext. 4, clearly stating therein that Defendant No. 1 had entered into the aforesaid agreement with him on November 7, 1983. Thus, according to the trial Court, the Plaintiff tried his best and took all possible means to prevent Defendant Nos. 2 and 3 from entering into the aforesaid illegal transaction in respect of the suit land with Defendant No. 1.

6. The trial Court, vide para-21 of the judgment, also entertained some doubt with regard to execution of any agreement between Defendant No. 1 and Defendant Nos. 2 and 3 as there was some discrepancies with regard to payment consideration therefore in the pleadings and evidence vis-a-vis the deed of agreement and decreed the suit.

7. Being aggrieved, all three Defendants together filed First Appeal No. 27 of 1988 before this Court. The learned Single Judge who heard the appeal dealt with

the issue in question in para-8 of the judgment. After referring to the pleadings, and after elaborate discussion of the evidence, both oral and documentary, confirmed the findings of the trial Court and dismissed the Appeal.

The said judgment and decree passed in the First Appeal were assailed in AHO No. 96 of 1995 before this Court which was disposed of by a detailed judgment and the matter is now pending before the Hon''ble Supreme Court in Civil Appeal No. 5130 of 2005.

8. In consonance with the direction of the Hon''ble Supreme Court (supra) this Court once again heard the learned Counsel for both sides. This Court also perused the materials on record meticulously, noted all the submissions patiently, considered the same diligently with regard to the question of service of notice, and the effect of absence of specific plea and/or its refusal as also with regard to the date of refusal in particular.

9. In para-3 of the plaint it was averred as follows:

That subsequently the Defendants 2 and 3 having come to know that Defendant No. 1 has already entered into an agreement of sale of suit site to the Plaintiff with a view to avoid that sale and purchase the same in their names they influenced the Defendant No. 1 and it appears that they again took an agreement from the Defendant No. 1 regarding the suit site. When Plaintiff came to know such as agreement he issued notice to all the Defendants including the Sub-Registrar, Chatrapur informing him that there is an earlier agreement in existence between himself and the Defendant No. 1 in respect of the suit site. It is seen that all the Defendants evaded to receive the notice sent by the Plaintiff and now the Plaintiff reliably learns that by avoiding the notice the Defendants are in a hot haste mood to create the sale deed purporting that Defendant No. 1 would execute the same in favour of Defendant Nos. 2 and 3 in respect of the suit site.

The said averment has been answered by Defendant No. 1 in para-4 of his written statement as follows:

That the allegations made in para-3 of the plaint are absolutely false. xx xx that this Defendant is not aware (sic) the Plaintiff (sic) and much less in respect of the suit property of the issue of any such notice from the Plaintiff. Had this Defendant received any such notice as alleged, he could have sent a suitable reply thereto.

Defendants 2 and 3 in para-4 of their written statement have stated as follows:

That the allegations made in para-3 of the plaint are untrue, imaginary and baseless.

In para-6 they stated as follows:

That further allegation made in para-3 of the plaint that the Plaintiff issued notice to these Defendants informing them about the existence of any agreement

alleged to have been entered by him with Defendant No. 1 is not to the knowledge of these Defendants. No such notice has ever been addressed to them and they have never evaded to receive any such notice.

10. The Plaintiff was examined as P.W. 1. In para-4 of his evidence he stated as follows:

The notice on Defendant No. 1 returned un-served for absence. Ext.7 is the said notice. The notice on Defendants 2 and 3 marked as Exts.8 and 9 are returned on refusal by them to receive.

In para-24 he stated:

...that I restrained them orally not to purchase the suit land for I have agreement for sale, I cannot give the date when I restrained Defendant Nos. 1 and 2.... It is not true to say that Defendant Nos. 2 and 3 did not know about my agreement, that I did not inform them about my agreement nor I gave them notice.

11. In the aforesaid scenario, two points arise for consideration;

viz,-

(1) If there is proper pleading regarding tender and denial of notice; and

(2) What is the outcome of the endorsement of the postman regarding refusal of notice by Defendant Nos. 2 and 3.

So far as the first point is concerned, it is well settled that pleadings should be liberally construed and should not be rejected in pedantic manner. It has been held by the Hon''ble Supreme Court in the case of Madan Gopal Kanodia Vs. Mamraj Maniram and Others, , as follows:

It is well settled that pleadings are loosely drafted in Courts and Court should not scrutinize the pleadings with such meticulous care so as to resulting genuine claims being defeated on trivial grounds.

In the case of S.B. Noronah Vs. Prem Kumari Khanna, , the Hon''ble Supreme Court observed:

Pleadings are not statutes and legalism is not verbalism. Common sense should not be kept in cold storage when pleadings are construed.

12. The object and purpose of pleadings is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that the adversary may not be taken by surprise. The pleadings however should receive a liberal construction. No pedantic or hair-splitting technicalities should be adopted to defeat justice. Sometimes pleadings are expressed in words which cannot expressly make out a case in accordance with the strict interpretation of law. In such a case it is the duty of Court to ascertain the substance of the pleadings to determine the

question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleadings is raised, the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that inspite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by adducing evidence, it would not be open to a party to raise the question of absence of pleadings in appeal, as has been observed by the Supreme Court in the case of Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, .

13. In the case at hand, an overall reading of the plaint clearly reveals that the Plaintiff has averred that he had issued notices to Defendant Nos. 1, 2 and 3. It was also pleaded that the Defendants evaded to receive the said notice. The word "evade" in Webster's Encyclopedic Unabridged Dictionary, New Revised Edition, is defined inter alia as....

to elude or escape.

The Law Lexicon by P. Ramnath Iyer defines the said word inter alia as....

avoid by some dexterity; by some device or strategem; to elude

The Chambers Dictionary defines the said word inter alia as....

to escape; slip away; to escape or avoid artfully; to shirk; to baffle; elude.

14. According to Mr. Ashok Mukherjee, learned Senior Advocate for the Appellants, the suit having been filed on April 5, 1984, for the sake argument if it is accepted that the Defendants refused to accept the notice on April, 1984, nothing prevented the Plaintiff from mentioning the said fact in the plaint and the word "evaded" is a camouflage expression.

15. Mr. B.H. Mohanty, learned Senior Advocate for the Respondent, strongly repudiating the said submission stated that on the date of filing of the suit, i.e. April 5, 1984, the Plaintiff could not have the knowledge about the fate of the registered notice sent by him to Defendant Nos. 2 and 3 as neither the A.D. nor the letter had returned to him by that date, though it ought to have returned and that is why it was pleaded in the plaint that the Defendants were evading to receive notice. He further submitted that the postman made the endorsement "Addressee Refused. Hence return to sender" on 5.4.1984 and on the same day the plaint was presented in Court. Therefore it cannot be presumed that on 5.4.1984 the notices had returned back to the Plaintiff. According to Mr. Mohanty, common knowledge is that after an endorsement is made by a postman, it takes minimum 2/3 days for the letter to be delivered back to the sender. Thus the Plaintiff had no knowledge about refusal of Defendant No. 2 and 3 on the date of filing of the suit and therefore the said fact could not have been pleaded specifically in the plaint.

We find some force in the submission made by Mr. Mohanty.

16. The other controversy is with regard to the date put by the postman while making the endorsement "Addressee Refusal. Hence return to sender" on the registered notice Ext. 8. According to Mr. Mukherjee, Ext. 8 reveals that the refusal was made on 8.4.1984 and that being a Sunday, the document was created for the purpose of the suit. To appreciate such argument this Court perused the original documents, i.e. Exts. 8 and 9, the two registered covers returned unserved. In Ext. 8, below his endorsement the postman has put the date while the endorsement on Ext. 9 bears no date. On a cursory glance though the date put on Ext. 8 appears to be "8/4/1984", a careful examination reveals that the same is "5/4/1984", inasmuch as the lower loop is too thin. Be that as it may, this aspect was not argued before the trial Court, nor in the First Appeal or in the AHO. Mr. Mukherjee fairly submitted that this fact could only be noticed at the Supreme Court level.

17. After scrutinizing the date, we feel that the same could not be "8/4/1984" but "5/4/1984". More so, it appears that the postman has noted "Addressee absent" on 30/3, 31/3, 2/4/84, 3/4/84, 4/4/84 and then noted "Addressee Refused". Thus it can be more believable that the said endorsement was made on 5/4/84. An overall reading of the plaint gives a clear-cut impression that the pleadings with regard to an earlier agreement, issue of notice to Defendants and the conduct of the Plaintiff as has been averred in the plaint, satisfy the essential criteria and the basic requirements, more so the parties had entered into the issues after clearly understanding each other's case and had adduced evidence.

18. So far as service of notice is concerned, it is clear from the pleadings and evidence that notices had been issued by the Plaintiff by registered post with A.D. to Defendants 1 to 3. The notice issued to Defendant No. 1 A. Gopal Rao had returned undelivered with an endorsement "Addressee not Available", vide Ext. 7. The registered letter issued to Rankanath panda Defendant No. 2 had returned undelivered with the endorsement "Addressee Refused", vide Ext. 8 Ext. 9 is the undelivered letter issued to Padma Charan Patra Defendant No. 3 with the endorsement "Addressee Refused". A perusal of the aforesaid three exhibits reveals that the postman tried to deliver the letters on more than one date and made endorsements to that effect on the letters.

19. Section 114 of the Evidence Act emphasizes that a Court may presume existence of any fact which it thinks likely to have happened regard being had to the common course of events, human conduct and public and private business in their relation to the facts of a particular case. When a letter is shown to have been posted with correct address and the same is returned with an endorsement that the addressee refused to accept, it should be presumed to have been delivered, but then the said presumption is rebuttable one and can be rebutted by the addressee in accordance with law.

20. Relying upon the decision of the Supreme Court in the case of Puwada

Venkateswara Rao Vs. Chidamana Venkata Ramana, , Mr. Mukherjee submitted that when there is pleading and evidence that the notice was refused, examination of the postman was necessary to prove such refusal. In the present case, as there is no pleading or evidence as to refusal and on the other hand there is denial by the Defendants, examination of the postman was very much necessary and as such, the Courts acted illegally in presuming that the letter had been duly served though such presumption has been rebutted.

21. In the case of Puwada Venkateswara (supra), the question raised before the Hon''ble Supreme Court was whether the notice sent could be held not to have been served at all simply because the postman who had made the endorsement of refusal had not been produced. Reconciling the decisions of the Bombay High Court, Calcutta High Court and Andhra Pradesh High Court, the Hon''ble Supreme Court held that it is not always necessary to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admission or conduct.

22. In the case of Harcharan Singh Vs. Smt. Shivrani and Others, , the Hon''ble Supreme Court held as follows:

Section 27 of the General Clauses Act raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing pre-paying and posting by registered post to the addressee. Such presumption is raised irrespective of whether any acknowledgement due is received from the addressee or not. Thus when the Section raises the presumption that service shall be deemed to have been effected, it means the addressee to whom the communication is sent must be taken to have known the contents of the document to be served upon him without anything more. Similar presumption raised under illustration (f) to Section 114 of the Indian Evidence Act is one of proper or effective service which must mean service of everything that is contained in the notice. The presumptions under this statute are rebuttable, but in the absence of proof to the contrary, the presumption of proper service or effective service on the addressee would arise.

In the case of K. Bhaskaran v. Shankaran 2000 (I) OLR (SC) 1, the Hon''ble Supreme Court held as follows:

It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him, vide Harcharan Singh Vs. Smt. Shivrani and Others, , and Jagdish Singh Vs. Natthu Singh, .

In the case of M/s. Madan and Co. Vs. Wazir Jaivir Chand, , it has been observed by the Hon''ble Supreme Court as follows:

Under the rules of the Post Office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by the addressee.

In the case of Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, , the Hon"ble Supreme Court held:

There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tender the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party challenging the factum of service.

(Emphasis supplied)

23. A cumulative reading of the ratio decided by the Hon"ble Supreme Court in all the aforesaid cases leads to an irresistible conclusion that a mere denial on oath is not sufficient to rebut the presumption unless the rebuttal is accepted by the Court. A presumption flowing from Section 114 of the Evidence Act can be rebutted only by the person who repudiates the service and not by the person in whose favour the presumption arises. In the case at hand, it is specifically pleaded by the Plaintiff that he had issued registered notice to all the three Defendants. The registered notice issued to Defendant No. 1 is marked as Ext. 7. The said exhibit reveals that the postman tried to serve the letter, but failed as the addressee was absent. He returned the letter with the said endorsement. The letter issued to Defendant No. 2 Ranka Panda which is marked as Ext. 8 reveals that the postman tried to serve the letter on 30.3.84, 31/3/84, 2/4/84, 3/4/84 and 4/4/84 but then could not do so as the addressee was absent. The endorsement made on 5/4/84 reveals that the addressee refused and hence returned to sender. The said Defendant has been examined as D.W. 1 and stated as follows:

I was all along present in Chatrapur after my agreement. I did not refuse to receive any postal notice sent by the Plaintiff. P.W. 1 or P.W. 2 did not personally told us not to purchase the suit land for P.W. 1 has got agreement with Defendant No. 1.

24. So far as Plaintiff is concerned, in his evidence he stated:

Having known the fact of my agreement of sale, Defendant Nos. 2 and 3 attempted to purchase the suit land. I orally restrained them. Notice also was sent to them which they refused to receive.

In Para-21 of his deposition the Plaintiff further stated:

In the month of February or March I sent registered notice to Defendants. When postman offered notice to Defendants 2 and 3 they refused to accept.

It is pertinent to mention that in cross-examination no question was put nor the said witness was confronted with the fact that the address mentioned in the

registered notice Exts. 8 and 9 was not correct.

25. Ext.9 is the letter issued to Defendant No. 3 Padma Charan Patra. The postal endorsement reveals that on "30/3", "31/3", "2/4/84" and "3/4/84" the postman found the addressee absent. The next endorsement is "Addressee Refused. Return to sender". Thus the ambiguity as to whether the said letter was refused on 5/4/84 or 8/4/84 does not arise so far as Ext. 9 was concerned. Defendant No. 3 has not got himself examined and has not rebutted the fact on oath that the letter was never offered to him. Apart from the said fact it appears that the houses of the Plaintiff and the Defendants are on one street. The disputed property is also situated in the neighbourhood. To add to that, the Plaintiff in his evidence has clearly stated that he had intimated Defendants 2 and 3 orally about his agreement to purchase the disputed property. It appears that the Plaintiff did not sit tight after sending the notice. He approached the Sub-Registrar by filing protest petitions. Exts. 2 and are such petitions, one of which was filed on the same day when the sale deed was registered. The orders passed by the Sub-Registrar are marked as Exts. 5 and 6.

26. In the case at hand, the Defendants failed to discharge the burden that the endorsement made by the postal authorities was wrong and incorrect as they failed to place any material before the Court in that regard. As has been observed by the Hon"ble Supreme Court mere denial made by the Defendants in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered covers. We are therefore of the opinion that the letters Exts. 8 and 9 were offered to Defendants 2 and 3 by the postman in usual course of business and they refused to accept the same. Consequently the service was complete and the view taken by the trial Court as well as the learned Single Judge of this Court was correct and that the conduct of the Defendants, reveal that the Defendants 2 and 3 had prior notice of the agreement dated November 7, 1983 Ext. 1 between the Plaintiff and Defendant No. 1 and therefore they cannot be called as bona fide purchasers. Consequently the findings arrived at by the trial Court as well as by the learned Single Judge of this Court with regard to issue No. 7 are confirmed.

A.K. Parichha, J.

27. I agree.