

**(1996) 10 DEL CK 0056**

**In the Delhi High Court**

**Case No :** Regular First Appeal No's. 357 and 359 of 1995

Chander Kanta Singhal etc.

APPELLANT

Vs

Kapadia Exports and Another

RESPONDENT

**Date of Decision :** 11-10-1996

**Acts Referred:**

Transfer of Property Act, 1882 — Section 106

**Citation :** (1996) 5 AD 108 : (1997) 1 CivCC 264 : (1997) 65 DLT 926 : (1997) 115 PLR 56 : (1997) 1 RCR(Civil) 643 : (1997) 1 RCR(Rent) 188

**Hon'ble Judges :** Mahinder Narain, J; M.S.A. Siddiqui, J

**Bench :** Division Bench

**Advocate :** Vijay Kishan, V.K. Jaitley, R.P. Bansal and S. Poddar, for the Appellant;

## Judgement

M.S.A. Siddiqui, J.

(1) The plaintiffs who filed two separate suits on 1.2.90 for possession and mesne profits for use and occupation in respect of ground floor, 1st and 2nd floors of the property bearing No. 94, Malcha Marg. Diplomatic Enclave, New Delhi (hereinafter referred to as "the suit accommodation") are the appellants. Ground floor of the said building, subject matter of Rfa No. 357/95, was let out to the defendant firm at a monthly rent of Rs. 4,000.00 and first and 2nd floor whereof, subject matter of Rfa No. 359/95, was let out to the defendant at a monthly rent of Rs. 4,000.00. By mean soft notices dated 2.11.89, the defendant's tenancies were terminated but despite service of the said notices, the defendant did not vacate the suit accommodation. The suits were resisted on the grounds that: (a) the plaintiffs are not the owners of the suit accommodation and as such they had no right to serve quit notice dated 2.11.89; (b) the suit is not maintainable as the plaintiffs had waived the quit notice dated 2.11.89 by accepting rent for the period from 1.1.90 to 30.4.90 amounting to Rs. 16,000.00, and (e) the suit is barred u/s 50 of the Delhi Rent Control Act.

(2) The Trial Court framed as many as five issues and after examining one

witness on the side of the plaintiffs, and two witnesses on the side of the defendant, it found that each portion of the suit accommodation was let out to the defendant by the plaintiffs at a monthly rent of Rs. 4,000.00 and as such the plaintiffs' suit is not barred u/s 50 of the Delhi Rent Control Act in view of the judgment in D.C. Bhatia and Others Vs. Union of India (UOI) and Another, .

(3) It has also been found that the alleged payment of Rs. 16,000.00 by the defendant to the plaintiffs does not amount to waiver of the quit notice dated 2.11.89.

(4) The Trial Court has found that the plaintiffs have failed to prove that the defendant's tenancies had been validly terminated by the quit notices dated 2.1.89.

(5) Consequently, the Trial Court dismissed both the suits.

(6) Aggrieved by the judgment of the Trial Court, the present appeals have been filed by the plaintiffs.

(7) This common judgment shall govern the disposal of R.F.A. No. 359 /95 also as both these appeals raise a common question of facts and law.

(8) Learned Counsel appearing for the appellants submitted that the learned Trial Court went wrong in placing the onus of proof regarding service of the quit notices dated 2.11.89, on the plaintiffs when the defendant had impliedly admitted service of quit notices in the written statements and no issue was framed by the learned Trial Court concerning that. He also submitted that the learned Trial Court took an erroneous view in holding that the plaintiffs have failed to prove that they had authorised Mr. S.K. Mahajan, Advocate to issue the quit notices on the defendant. According to the learned Counsel, the notices of ejectment could not be held to be invalid because the same were served by an Advocate acting under instructions from his client, and for the reason that such an Advocate had not been examined to prove the giving of instructions. He further contended that the learned Trial Court also went wrong in holding that in the absence of the plaintiffs themselves entering the witness box and Shri V.K. Mittal (Public Witness 1) having failed to prove his authority to represent the plaintiffs as their attorney, the termination of the defendant's tenancies does not stand established.

(9) Learned Counsel appearing for the defendant/respondent strongly supported the impugned judgments. We have considered the rival submissions.

(10) In the instant case, the main issue for decision was whether there was a valid notice terminating the defendant's tenancy. On this point, the learned trial Judge had framed Issue No. 3 which reads as follows: Whether the tenancy of the defendant has been validly terminated before the filing of the present suit?

(11) This issue was answered against the plaintiffs on the following reasons:

(a) that the plaintiffs have not been examined to prove that they had authorised

their Advocate to issue the quit notice dated 2.11.89; (b) that the Advocate, who had signed the quit notice dated 2.11.89, had not been examined to prove that he was duly instructed by the plaintiffs to issue the said notice; (e) that the plaintiffs witness V.K. Mittal (Public Witness 1) was not duly authorised by the plaintiffs to give evidence on behalf of the plaintiffs in as much as the power of attorneys (Ex. Public Witness Public Witness I /1 & Ex. Public Witness Public Witness I /2) alleged to have been executed by the plaintiffs did not satisfy the requirements of Section 85 of the Evidence Act; and eliminating the evidence of V.K. Mittal (Public Witness 1) there remains nothing on record to prove that the quit notice dated 2.11.89 was duly served on the defendant.

(12) It is beyond the pale of controversy that the quit notice dated 2.11.89 (Ex. PW 1/4) is signed by Mr. S.K. Mahajan, Advocate. In the body he wrote that he was giving the notice in accordance with the instructions of his clients. Learned Counsel for the defendant has strenuously urged that in the absence of oral evidence that the plaintiffs had authorised Mr. Mahajan Advocate to sign the notice it could not be said to have been signed by him on their behalf. It is significant that the plaintiffs have filed a copy of the quit notice mentioned in the plaint. The defendant's Counsel was aware of the contents of the notice before he filed the written statement. The defendant in the written statement did not specifically raise the question as to the want of a power of this character in Mr. Mahajan, Advocate. If it was the defendant's desire to challenge the validity of the quit notice on the said ground, it was his duty to put forward his specific plea in the written statement in order that the plaintiffs could have produced evidence showing that Mr. Mahajan, Advocate was duly instructed by them to issue the said notice because the law does not require that such authority must necessarily be given in writing. In *D.N. Mushi v. Gayatri Devi* 1961 A.L.J. 353, it was held that the Courts can legitimately draw an inference that a notice purported to have been given by an Advocate on behalf of his client was so given unless the contrary was proved.

(13) According to the requirements of Section 106 of the Transfer of Property Act, a notice of eviction on behalf of the landlord should be in writing and should be signed on behalf of the person giving it. In this case, the quit notice (Ex. Public Witness Public Witness 1 / 4) issued by Mr. Mahajan, Advocate clearly mentions that the same was given on behalf of the plaintiffs. It is also significant that Mr. Mahajan, Advocate was subsequently engaged by the plaintiffs to conduct trial of both the suits before the Trial Court. The plaints were drafted by Mr. Mahajan, Advocate. They were signed and verified by the plaintiffs. It is also pertinent to observe that the plaintiffs have made specific averments in the plaint regarding ingredients contained in Section 106 of the Transfer of Property Act. The reply to this is in paragraphs No. 2 and 6 of the written statement to the following effect: Para 2:-"That the suit is bad because no valid notice terminating the tenancy of the defendants has been served on the defendants and is liable to be dismissed on the ground only."

Para 6:-"The plaintiffs have no right to serve legal notice terminating their tenancy in respect of the suit premises. It is denied that a valid and binding notice dated 2nd November, 1989 is served on the defendants by the plaintiffs, and the alleged notice dated 2nd November, 1989 is illegal, without any legal force and is not binding on the defendants."

(14) As stated earlier, the defendant did not specifically raise the question in the written statement that Mr. Mahajan had not given notice on behalf of the landlords. It is necessary that a person objecting to the validity of the quit notice u/s 106 of the Transfer of Property Act must plead which of the requirements of Section 106 had not been complied with. The mere fact that the defendant contended in the written statement that the suit is bad for want of a valid and binding notice terminating the tenancy does not tantamount to making the requisite pleas. Consequently, averments made in paragraphs No. 2 and 6 of the written statement cannot be construed as an allegation that all requirements of Section 106 of the Transfer of Property Act were not complied with.

(15) In the present case, the plaint contains plea regarding termination of tenancy by notice. The plaint having been signed and verified by the plaintiffs, it has to be inferred that Mr. Mahajan, Advocate had been instructed by the plaintiffs to issue the quit notice on their behalf. In addition to this, there is evidence of V.K. Mittal (Public Witness 1) that the quit notices (Ex. Public Witness Public Witness 1/4) were issued by Mr. Mahajan, Advocate under instructions of the plaintiffs. V.K. Mittal (Public Witness 1), as stated hereinafter, has been examined as a witness and being a witness, he needs no written authority from the plaintiffs to give evidence on their behalf. We are Therefore, unable to agree with the view expressed by the learned trial Judge that Mr. Mahajan, Advocate was not duly authorised by the plaintiffs to issue the quit notice (Ex Public Witness Public Witness 1 /4) on their behalf.

(16) As regards the question whether the quit notice dated 2.11.89 was served on the defendant, it is contended by learned Counsel for the plaintiffs, that the averments contained in paragraph 6 of the plaint regarding service of notice were not traversed by the defendant and these averments had, Therefore, to be deemed to have been admitted. In support of his submission, he had placed reliance on the decision of the Supreme Court in Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar, , which is an authority for the proposition that an allegation of fact in the plaint should be taken to be admitted when the said allegation is not specifically denied in the written statement. In paragraph 6 of the plaint it is stated that:

"That the plaintiff did not want the defendants to be tenants in the aforesaid premises and, Therefore, by a notice dated 2nd November, 1989, the tenancy of the defendants was terminated at the end of 31st day of December, 1989. It was further stated in the said notice that in case the defendants felt that their tenancy month expired on any other date other than the last day of the English calendar month, the tenancy of the defendants was terminated at the end of the

tenancy month which would have expired after 31st December, 1989 and the defendants were called up on the hand over vacant and peaceful possession of the premises in their occupation to the plaintiffs on the expiry of their tenancy month. The notice dated 2nd November, 1989 terminating the tenancy of the defendants was duly served upon them by registered A.D. post as well as by certificate of posting."

The reply to this is in paragraph 6 of the written statement to the following effect:

"Para 6 of the plaint is wrong, malafide, self-serving and is specifically denied. The plaintiffs have no right to serve legal notice terminating their tenancy in respect of the suit premises. It is denied that a valid and binding notice dated 2nd November, 1989 is served on the defendants by the plaintiffs, and the alleged notice dated 2nd November, 1989 is illegal, without any legal force and is not binding on the defendants. The demand allegedly made through" the aforesaid notice dated 2nd November, 1989 to hand over the possession of the suit premises is illegal and without any lawful force and same deserves to be ignored."

(17) Thus, para No. 6 of the written statement clearly shows that the defendant had denied service of the notice dated 2.11.89. In the case of Lohia Properties (P) Ltd. (supra), the point of substance in paragraph 7 of the plaint was that the quit notice dated 8.1.65 was served upon the defendant and that point of substance was nowhere met in the written statement as it was pleaded by the defendant that "the notice of ejectment as referred to in para 7 of the plaint is not according to law." Therefore, it was held that non-traverse would constitute as implied admission on the part of the defendant. In our opinion, the ratio decidendi of Lohia Properties (P) Ltd. (supra) does not govern a case like in hand.

(18) V.K. Mittal (Public Witness 1) deposed that the quit notice (Ex. Public Witness Public Witness 1 /4) was served upon the defendants by registered A.D. as well as by certificate of posting. Postal receipt (Ex. Public Witness Public Witness 1/6) and acknowledgement due cards (Ex. Public Witness Public Witness I/7 and Ex. Public Witness Public Witness I/ 8) have been tendered in evidence. In cross examination, Naresh Kapadia (DW 1) and D.M. Kapadia (DW 2) have unequivocally admitted that addresses written on Ex. Public Witness Public Witness 1/7 and Ex. Public Witness Public Witness 1/8 are correct. Learned Trial Court has rejected the evidence of V.K. Mittal (Public Witness 1) on the ground that he has failed to prove his authority to represent the plaintiffs as their attorney inasmuch as the power of attorneys (Ex. Pw I/I and Ex. Public Witness Public Witness 1/2) alleged to have been executed by the plaintiffs do not satisfy the requirements of Section 85 of the Evidence Act. On a careful perusal of the impugned judgment, it appears that the aforesaid reasoning is based entirely on the assumption that a party calling a witness in support of its case is required to execute a power of attorney in favor of such a witness to depose about certain facts " which are within his special knowledge. In our opinion, the aforesaid assumption made by the learned Trial Court is wholly erroneous.

(19) It needs to be highlighted that the plaintiffs have not filed the present suit through their attorney V.K. Mittal (Public Witness 1). On the contrary, the suit has been filed by the plaintiffs and V.K. Mittal (Public Witness 1) has been examined as their witness. Needless to add that a witness does not need a power of attorney or any authority in writing from a party calling him as its witness to depose about certain facts before a Court which are within his special knowledge. In our opinion, it is needless to decide in this case whether the power of attorneys (Ex. Public Witness Public Witness 1/1 and Ex. Public Witness Public Witness I /2) alleged to have been executed by the plaintiffs satisfy the requirements of Section 85 of the Evidence Act. It appears that the learned trial Judge has lost sight of the fact that V.K. Mittal (Public Witness 1) is the father of the plaintiff No. 2, nephew of the plaintiff No. 1 and husband of the plaintiff No. 3. Since V.K. Mittal (Public Witness 1) is a close relative of the plaintiffs, he needs no written authority from the plaintiffs to depose before the Court as their witness.

(20) That apart, it is significant that certain averments made in the written statement clearly go to show that V.K. Mittal (Public Witness 1) had been managing the affairs of the family. It is stated in para No. 2 of the written statement that "on 1.1 .80 Smt. Chandra Kanta Singhal informed the defendants that Shri Chet Ram Mittal died and payment of rent be made to Shri V.K. Mittal and Smt. Chandra Kanta Singhal. Ultimately on 4th of October, 1982 another lease deed was executed between the plaintiffs Nos. 1 and 2 and Shri Gaurav Mittal (Minor) through his father and natural guardian Shri V.K. Mittal, the plaintiff No. 2 and Shri Gaurav Mittal being minors at that time." Again it is stated in para No. 4 of the written statement that "However, on I.I .80 Smt. Chandra Kanta Singhal informed the defendants that Shri Chet Ram Mittal had died and payment of rent was requested to be made to Shri V.K. Mittal and Smt. Chandra Kanta Singhal which was complied by the defendants." in addition to this, Naresh Kapadia (DW 1), who is a partner of the defendant firm, has also stated in his evidence-in-chief that "on the same date, we handed over another pay order for Rs. 16,000.00 to plaintiff No. 1 on behalf of our other firm known as Overseas Import and Exports. At the time of taking their pay orders plaintiff No. 1 had assured us that she would talk to Mr. V.K. Mittal and then start accepting rent for the future also." He has also admitted in his cross examination that he had sent a cheque of Rs. 4,000.00 to the plaintiff No. 1 with a covering letter, copy of which was also sent to V.K. Mittal (Public Witness 1). Similarly, D.M. Kapadia (DW 2), who is another partner of the defendant firm has stated in his evidence-in-chief that "Mr. V.K. Mittal who is present in the Court, had met me and requested me to purchase the suit property, to which I replied for a reasonable price I would be ready to purchase." The aforesaid statements of Naresh Kapadia (DW 1) and D.M. Kapadia (DW 2) read Along with the defendant's pleading clearly go to show that V.K. Mittal (Public Witness 1) had been managing the affairs of the family and as such no written authority was required for this witness from the plaintiff side pose about certain facts which

were within his special knowledge. In our opinion the learned trial Judge was not justified in ignoring the statement of V.K. Mittal (Public Witness 1) on the wrong assumption that he was not duly authorised by the plaintiffs to depose on their behalf.

(21) Learned Counsel for the defendant contended that the plaintiff shoving not come in the witness box in support of their case, an adverse inference against them should be drawn. In our opinion the question of drawing an adverse inference against plaintiffs on account of their absence from the Court would arise only when there is no other evidence on the record on the point in issue. In the instant case, V.K. Mittal (Public Witness 1) testified that the quit notice (Ex. Public Witness Public Witness 1/4) was sent to the defendant by registered post A.D. vide postal receipt (Ex. Public Witness Public Witness 1 /6) and the same was received by the defendant vide A.D. cards (Ex. Public Witness Public Witness 1 /7 and Ex. Public Witness Public Witness 1 /8). There is no dispute about the correctness of address of the defendants. Learned Counsel for the defendant. contended that acknowledgement due cards (Ex. Public Witness Public Witness 1/7 & Ex. Pw I /8), which were returned do not bear signatures of Naresh Kapadia (DW 1) and D.M. Kapadia (DW 2). The fact, however, remains that the notice (Ex. Public Witness Public Witness I/ 4) v/as sent by registered post at a correct address and this gives rise to the presumption with regard to service of notice u/s 114 of the Evidence Act as well as u/s 27 of the General Clauses Act. If somebody received the registered A.D. notice on behalf of the defendant firm, it cannot be held that the defendant has not been properly served. It is also significant that although the defendant's witnesses Naresh Kapadia (DW 1) and D.M. Kapadia (DW 2) have denied service of the notice (Ex. Public Witness Public Witness I /4) but a suggestion has been made in crossexamination of V.K. Mittal (Public Witness 1 ) to the effect that when the notice was given, the matter was being negotiated between the parties. V.K. Mittal (Public Witness 1) has denied the said suggestion. In view of the said suggestion no reliance can be placed on the bald denial of Naresh Kapadia (DW 1) and D.M. Kapadia (DW 2) that they did not receive the quit notice (Ex. Public Witness Public Witness 1 /4).

(22) In the instant case, no dispute has been raised by the defendant with regard to the date of commencement of the tenancy. Section 106 of the Transfer of Property Act requires that the notice period has to be as required by the nature of tenancy, should also be such that it expires at the end of the month or the year of tenancy as the case may be. The quit notice (Ex. Public Witness Public Witness 1 /4) shows that the defendant's tenancy was terminated at the end of 31st day of December, 1989. Alternatively, it is stated in the quit notice (Ex. Public Witness Public Witness 1 /4) that if, according to the defendant, his tenancy month expires on any other day other than the last day of the English calendar month, his tenancy would stand terminated at the end of that tenancy month. Thus, apart from their stand as to when the tenancy commenced and Therefore should stand terminated, the plaintiffs gave a choice to the defendant and allowed him an option to choose his own date of the termination of the

tenancy. We, Therefore, have on hesitation in coming to the conclusion that the defendant's tenancies were validly terminated by the quit notices dated 2.11.89 (Ex. Public Witness Public Witness 1/4) and the learned Trial Court was not right in dismissing the plaintiff's suits. For the foregoing reasons, both the appeals are allowed, the judgments and decrees appealed against are hereby set aside, and the plaintiffs' suits are decreed with costs throughout. The defendant shall deliver vacant possession of the suit accommodation to the plaintiffs. The defendant shall also pay to the plaintiffs' mesne profits at the rate of Rs. 8,000.00 p.m. (Rs. 4,000.00 for the ground floor and Rs. 4,000.00 for the first and second floor of the suit accommodation) from the date of institution of the suit till the date of delivery of possession of the suit accommodation.