

(1983) 02 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 1783 of 1982

Chhotalal Hariram and Another

APPELLANT

Vs

Nagindas Jagjiwan Shah

RESPONDENT

Date of Decision : 28-02-1983

Acts Referred:

Evidence Act, 1872 — Section 80

Citation : (1983) 2 BomCR 480

Hon'ble Judges : D.M. Rege, J

Bench : Single Bench

Advocate : C.R. Dalvi, for the Appellant; N. Dinkar Rao, for the Respondent

Judgement

D.M. Rege, J.—This writ petition is by the plaintiffs against the judgment and order of the Appellate Bench of the Court of Small Causes dated 1-4-1982, allowing the defendant's appeal against the judgment and order of the learned trial Judge dated 11-3-1981, rejecting the defendant's Misc. Notice bearing No. 806 of 1978, dated 8-8-1978 in the plaintiff's suit for eviction being R.A.E. Suit No. 8762 of 1975 for setting aside the ex parte decree passed by the trial Court in that suit dated 14th June, 1978.

2. The point raised lies in a very narrow compass. On 6th May, 1975, the petitioners herein, i.e. the plaintiffs in the suit, sent a notice by Registered Post A.D. to the defendant-respondent u/s 12 of the Rent Act, demanding arrears of rent for the period between 1-5-1974 to 30-4-1975. A copy of the said notice was also affixed on the premises. However, the notice sent under Registered Post was returned by the post office with a remark "not claimed". The defendant neither replied to the notice, nor did he pay the amount, nor did he make any application for fixation of Standard Rent.

3. Therefore, on 24-7-1975 the plaintiffs filed a suit for eviction of the defendant from the premises and for possession on the ground of arrears of rent. On 27th August, 1975, the writ of Summons was sent to the defendant by registered post

and the acknowledgments showed that it was received on 29th August, 1975 by the defendant under his signature. On 8th September, 1975, the defendant under a covering letter sent to the plaintiff a bank draft in the sum of Rs. 3,250-50 being the arrears of rent demanded. On 16-9-1975, the plaintiff returned the said draft under his covering letter on the ground that the same was made beyond the time. According to the defendant he came to know from the letter of the Bank dated 2-8-1977 that draft was not presented for payment.

4. In the mean time the plaintiffs made an application for amendment of the plaint as regards the parties to the suit due to a change of the trustees in the plaintiff-trust. A notice of such amendment sent by a Registered Post A.D. was received by the defendant. At the hearing of the suit on 14-6-78 the defendant neither having put in a written statement, nor having remained present, the Court recorded the evidence on behalf of the plaintiff and passed an ex parte decree for eviction.

5. Thereafter the defendant took out a notice being Misc. Notice No. 806/78 on 7-8-78 for setting aside the ex parte decree alleging therein that he was never served with the writ of Summons.

6. The trial Court by its judgment and order dated 11-3-1981 negated the contention of the defendant and rejected the notice. In the course of his order, the trial Court mentioned that at the hearing of the said application he had compared the specimen signature of the dependent, which had been obtained in the Court along with the disputed signature on the Acknowledgement receipt and had found that the specimen signature did not tally with the signature on the postal acknowledgement. However, inspite of the said finding, the learned judge held that the defendant had not made out sufficient ground for setting aside the ex parte decree.

7. Against the said order, the defendant filed an appeal on the Appellate Bench of the Small Causes Court being Appeal No. 241 of 1980. The Appellate Court in its judgment and Order Dated 1-4-1982 pointed out that the defendant in his application has denied that he was served with the Writ of Summons and had rebutted the presumption, while the plaintiff had not shown by examining the postman that defendant was in fact served with the summons. The Court also pointed out that the trial Court had, by comparing the specimen signature of the defendant with that on the postal acknowledgement, found that they did tally. The Court, therefore, following the ratio of the decision of this Court in the case of Meghji Kanji Patel Vs. Kundanman Chamanlal Mehtani, , held that the order of the trial Court was not correct and set aside the same Against the said order this writ petition has been filed.

8. The defendant's case in his application was that the writ of Summons was not served on him, and therefore, he would be taken to have denied that the signature on the postal acknowledgement produced was his. The trial Court had also found on comparing the specimen signature of the defendant obtained in

Court with the signature on the postal acknowledgement, that the same did not tally. Therefore, the presumption arising under the Indian Evidence Act stood rebutted and it was for the plaintiff to prove either by examining the postman who is supposed to have delivered the registered letter to the defendant and taken his signature on the postal acknowledgement or otherwise, to prove that in fact the letter containing summonses was delivered and received by the defendant in token of which he had signed the postal acknowledgement. This, in view of the ratio of the decision of this Court in the case of *Meghji Kanji Patel Vs. Kundanman Chamanlal Mehtani*, was necessary for the plaintiff to do.

9. It is true, as pointed out by the learned Counsel for the plaintiffs that the above decision of this Court in *Meghji Patel*'s case was as regards the refusal of the letter bearing an endorsement "Refused" to that effect on the letter and that was why while holding that the defendant had rebutted the presumption by his denial of the letter being even tendered to him, the Court required the plaintiff, by examining the postman who is supposed to have tendered the letter and made the endorsement, to prove that the letter was in fact tendered to the defendant and he had refused to accept the same.

10. However, in principle the position cannot be different in this cases as well when the signature on the postal acknowledgement supposed to be that of the defendant was found by the Court to be not of the defendant and the defendant had denied having been served with the summons. In view of the said fact the presumption arising under the Evidence Act stood rebutted and thereafter it was for the plaintiffs to prove by leading evidence that the letter containing summons was in fact tendered to and received by the defendant. Such evidence may take any form, either by examining the postman or an expert or otherwise. However in the absence of any such evidence, it would not be said that the plaintiffs had proved that the summons was served on the defendant. In that view of that matter, that order of the Appellate Bench, setting aside the order of the trial Court and setting aside the ex parte decree, passed by it appears to be correct.

11. However, the suit is of 1975, filed about 8 years ago. The Appellate Bench had in fact, while setting aside the order of the trial Court, given directions to the defendant to file written statement on 26-4-1982 and had directed the trial Court to hear the suit as expeditiously as possible, in any event, on or before 31-3-1982. Both the dates have now gone by. Therefore, it was necessary to give fresh directions for disposal of the suit. The defendant had already filed his written statement. The Court in Court Room No. 6 is directed to hear and dispose of the suit, expeditiously, in any event, on or before 30-4-1983.

12. In the result, the order of the Appellate Bench is confirmed. The ex parte decree is set aside. The trial Court to dispose of the suit expeditiously, as directed above.