

(1966) 02 PAT CK 0014
In the Patna High Court
Case No : A.F.A.D. No. 668 of 1960

Commissioner of Hazaribagh Municipality
Vs
Fulchand Agarwala

APPELLANT

RESPONDENT

Date of Decision : 15-02-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 114
Transfer of Property Act, 1882 — Section 113

Citation : AIR 1966 Patna 434

Hon'ble Judges : S.N.P. Singh, J;H. Mahapatra, J

Bench : Division Bench

Advocate : Prem Lal and Parmeshwar Prasad Sinha, for the Appellant; J.C. Sinha, Ramanandan Sahai Sinha and B.P. Rajgarhia, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is by the Municipality of Hazaribagh who brought the suit for ejectment of the defendant on the grounds of non-payment of rent and breach of conditions of tenancy and for damages for use and occupation of the premises after the determination of the lease. The defendant had taken lease from the Municipality of two stalls at a monthly rent of Rs. 14 for each, for the period from 1st September, 1936 to 31 December, 1937, but the defendant held over his possession after that date. Plaintiff-Municipality served a notice by registered post addressed to the defendant to his known address, on the 3rd March 1956, asking him to quit the premises from 1st April, 1956. There was no response from the defendant. Ultimately, the suit was instituted on the 24th September, 1956. The defendant in his written statement pleaded that he had no concern with that premises, and was not in possession of the same in 1924, in a family partition, those premises fell to the share of his brother Nathulal Agarwal who was in possession of these two stalls.

Secondly he denied the relationship between him and the Municipality as that of

the landlord and tenant and asserted that no notice had been served upon him before the institution of the suit. Another plea also was taken that full payment of rent for the said premises had been made to the Municipality, The trial Court decreed the plaintiff's suit but it was reversed by the appellate Court. The second appeal is, therefore, by the Municipality.

2. The two main grounds on which the lower appellate Court has dismissed the plaintiff's suit are that the notice dated 3rd March, 1956, issued by the Municipality by registered post, was not proved to have been served upon the defendant and in absence of such service the suit was not maintainable. Secondly that assuming that the notice was served, the Municipality by accepting rent for a period of two months after the notice waived its notice and, therefore, the suit also could not lie. The defendant's plea that he was not a lessee under the Municipality was disbelieved. But, all the same, the suit was dismissed.

3. Ext. 4 (b) is the postal receipt which shows that on the 3rd March, 1956, the notice was sent by registered post to the defendant's address. Ext. 7 is the postal acknowledgment from which it appears that one K. L. Jain received that registered notice on the 6th March, 1956. In evidence, on behalf of the Municipality, it was stated that K. L. Jain who had received the notice, though it was addressed to the defendant was the Munib of the defendant D. W. 2 and D. W. 4 denied him to be his Munib. But, in evidence, the defendant himself said that he could not say who was his Munib in March, 1956 when this notice was served at his end. He further stated that he could not say who were his Munibs in 1955 and 1956 without reference to papers that were with him. He admitted that the pay and allowance paid to the Munib were entered in Bahi-khatas which were maintained. He however, did not produce either any paper or Bahi-khata which would have thrown abundant light on the question as to whether K. L. Jain was his Munib in March, 1956 when he received the notice on behalf of the defendant.

It is well established that a party who has in his possession documentary evidence that is expected to throw light on the point at issue or in controversy between two parties, must produce it in Court. The ordinary rule that documents should be called for from a party, if wanted by other party, does not apply to cases where the documents in question are in possession of a litigating party. That rule is applicable to such cases where documents are sought to be produced by a third party. A party who fails to produce a document which is likely to throw light on the point of controversy involved in a litigation must be subject to an adverse Inference to the effect that if he had produced such document that would have gone against his own contention on the point. Reference may be made to the cases of *Hiralal and Others Vs. Badkulal and Others*, . AIR 1917 6 (Privy Council) and AIR 1929 95 (Privy Council) . The trial Court drew such inference against the defendant on his failure to produce his Bahi-khatas or other papers that would have shown if K. L. Jain was the Munib working with him in March, 1956.

The appellate Court has not considered this aspect at all. It made much of a

slight discrepancy that appeared from the evidence of the plaintiff's witness who had said in examination-in-chief that Kundan Lal Jain (K. L. Jain) was the Munib of the defendant whose hand-writing he knew and whose signature had appeared in the postal acknowledgment (Ext. 7). In cross-examination, that witness said that it was Kanak Lal Jain and not Kundan Lal Jain who was the Munib. "K. L." were the initials used in Exhibit 7 and the witness spoke about that. The appellate Court thought that this was a serious error that would be taken to be sufficient to negative all the evidence that was adduced on behalf of the plaintiff about the service of notice on the defendant. In our opinion, this was clearly a wrong approach.

When a letter is posted, it is presumed that it has reached its destination and delivered to the addressee. If the letter is sent under registered post, that presumption is still stronger. If any one at the other end received it and signed the postal acknowledgment receipt for the defendant-addressee, the presumption will be that it was received on behalf of the defendant. These are some of the well known presumptions which must be applied to a case of this nature. Undoubtedly, this presumption is rebuttable and could be contradicted by evidence adduced on the other side either to show that what would appear by way of presumption was not, in fact, true either on account of fraud or collusion or some such things.

In the present case, once the postal receipts were exhibited, it was for the defendant to show that the man who had received at his end the registered postal article was not his man. This he could have easily shown if he had liked to do so, provided it was true, from his own papers about which he spoke in evidence in Court. Failure on his part to do so should have been taken in law as strengthening the presumption arising out of postal receipts. Learned Counsel appearing for the respondent urged before us that the conclusion of the lower appellate Court that the notice was not served on the defendant was a question of fact and should not be interfered with in second appeal by this Court. The trial Court had referred to the presumption that ordinarily arises from the postal receipts. Before the lower appellate Court case *Ilarihar Banerji v. Ramshashi Roy*, reported in 45 IA 222 : AIR 1918 PC 102, was also placed in support of such presumption. This case was sought to be differentiated by the Court below by saying that in the reported decision there were a number of joint tenants and notice was received by some of them and the receipt for some other notices was signed by some others on behalf of the addressees. We do not see how this, in fact, affects the real essence of the decision. In our view, the appellate Court has failed to properly notice the presumption that arose in favour of the plaintiff in regard to the service of the notice from postal receipts and to take adverse inference against the defendant from his failure to produce his account books and other papers which would have thrown light on the question whether K. L. Jain was or was not the Munib working with him in March, 1956.

For these reasons, the conclusion of the Court below in this respect cannot be

taken to be a finding of fact unassailable in a second appeal. That finding was arrived without proper and full consideration, both of the legal position and also the inference that arises from the facts brought on the record by evidence. In our view, it must be held in this case that the plaintiff Municipality proved that it had given a notice dated the 3rd March, 1956 which was served on the defendant on the 6th March, 1956 and in that notice the plaintiff Municipality determined the lease and asked the defendant to vacate the premises from the 1st April 1956.

4. The next question that arises is whether the appellate court was right in holding that the plaintiff Municipality had waived this notice by accepting rent from the defendant for the suit premises for two months after March, 1956. Defendant's brother Nathulal Agarwal had some money due to him from the Municipality for some work executed by him. He wrote a letter (Ext. A/2) on the 19th January, 1955 to the Chairman of the plaintiff Municipality requesting him to adjust the rent of Rs. 1344 for the suit premises upto the 31st March, 1955 out of dues payable to him and to pay him the balance of Rs. 419/15. On the 24th April, 1957, the Municipality adjusted Rs. 1783.94 P. due to the defendant towards rent of the suit premises and granted a receipt in the name of the defendant [Ext. 6 (b)]. It appears from another receipt granted by the Municipality to the defendant that on the 3rd July, 1951 [Ext. 6 (c)] that rent had been received for the suit stalls till the end of March, 1951. From that date onwards, the rent calculated at the rate of Rs. 14 per stall per month, came to Rs. 1783.94 P. till the end of May, 1956.

This calculation was made by the lower appellate Court and on that basis, the receipt [Ext. 6 (b)] showing receipt of payment of Rs. 1783.94 P on the 24th April 1957 Inwards rent from the defendant was taken to be as acceptance of rent by the plaintiff from the defendant for the months of April and May, 1956, although the notice which was served upon the defendant on the 6th March, 1958 determined the lease with effect from 1st April, 1956. On this basis, the Court below thought that this kind of acceptance of rent will amount to waiver of notice on the part of the plaintiff within the meaning of Section 113 of the Transfer of Property Act. We are afraid, this again is not a correct approach. It is well known that the principles of waiver can be applied against a party if it is found that knowing his own rights and the consequence of his action, he chooses to waive the exercise of such rights. Section 113 of the T. P. Act lays down that a notice given u/s 111, Clause (h) is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. It is necessary, therefore, to find in a particular case that both the parties had the intention of treating the lease which is determined by notice u/s 111, Clause (h), to continue as subsisting. This intention may appear either as expressed by the parties or from any act done by the lessor with the consent of the other.

In the present case, the only act on which the lower appellate Court depended

was the grant of the receipt [Ex. 6 (b)] on the 24th April 1957 to the defendant when the suit was pending. The notice, dated the 3rd March 1956 and the institution of the suit were clear indications of the intention of the plaintiff-Municipality that they wanted to and did determine the lease with effect from 1st April 1956. The receipt [Ex. 8 (b)] does not indicate the period for which rent was taken. Waiver was not pleaded in the written statement against the plaintiff's suit. In evidence, the defendant did not say anything as to the period for which rent was collected from him under receipt (Ex. 6/b). In such circumstances, it cannot be said that there was any act done by the plaintiff which showed intention on his part to treat the lease as subsisting. If the question would have been raised, the plaintiff-Municipality could have explained why and in what circumstances and for what period a sum of Rs. 1,783.94 P. was taken on account of the defendant under receipt Ex. 6 (b).

It could have also shown that it was received by mistake for two months in excess. An act done by mistake will not be an act of waiver on the part of the party concerned. All these are questions of facts which were necessary to be determined to find if Ex 6 (b) could be taken to be an act on the part of the plaintiff showing their intention to continue the lease, in spite of the notice given and the suit filed and in spite of continuing with that suit after receipt Ex. 6 (b) was granted. It does not appear that at any stage defendant had insisted upon the plaintiff withdrawing the suit in view of their acceptance of rent for two months more after determination of the lease.

5. We may refer to the case of *Puran Mal Jaiswal Vs. Onkar Nath Choudhary and Others*, which was placed before us by the appellant. In that case, two suits were brought in respect of a house claiming possession and recovery of rent from the defendant. Notice had been given u/s 111, Clause (h) by the plaintiff to the defendant to determine the lease, but in the two claims filed by them, they had included a claim for rent for period beyond determination of the lease. During the trial, they asked for amendment of the plaint which was allowed and restricted their suit-claim for arrears of rent for a period prior to the determination of the lease. When the matter came up in appeal to this Court, it was urged on behalf of the defendant that for the simple reason that the plaintiffs had made demand in their plaint for rent for a period subsequent to the notice, that would amount to waiver of the notice on their part and continuance of the lease within the meaning of Section 113. That argument was repelled and their Lordships observed:

"Further, as will appear from the above question whether or not there was waiver of notice to quit is purely a question of intention of the parties. It is quite manifest from the provisions of Section 113 that in order to constitute waiver there must be an intention not only on the part of the lessor but also on the lessee to treat the lease as subsisting. In order, therefore, to determine whether or not in a particular case there was waiver of notice to quit one has to see whether from the conduct of the landlord and tenant, by demand and acceptance

of rent or by demand followed by express promise to pay or otherwise an intention to treat the lease as subsisting can be inferred and this would certainly depend upon the facts and circumstances of each case."

Similar view was taken in some other cases which were relied upon by the learned Counsel: AIR 1953 Nag 219, Illahibux v. Munir Khan ILR (1951) Cal 404 Nemai Chand Sen v. Kumud Behari Basu Mahadeo Prasad Vs. Sm. Sulekha Sarkar, , and Abdul Karim Bhai Vs. Abdul Rehman, . It is not necessary to refer to these cases in detail because the principles on which we have depended in this case appear to have been followed in those cases.

6. Learned Counsel for the respondent pressed that the finding of the lower appellate Court on the question of waiver is a finding of fact and should not be interfered with by this Court. An inference about waiver is a mixed question. No doubt, such an inference can be drawn from certain facts but whether inference like that can be drawn on a particular set of facts is not purely a question of fact and, therefore, can be scrutinised in second appeal We have given our reasons why we cannot agree with the conclusion taken by the lower appellate court on this point.

7. Both the courts below have found that defendant's plea that he was not a lessee under the Municipality was not correct. In that view, after service of notice on the 6th March 1958 determining the lease, the plaintiff's suit was maintainable for recovery or damages for use and occupation of the stalls and for recovery of possession of the premises from the defendant. The plaintiff's suit shall, therefore, be decreed with costs. The judgment and decree of the lower appellate Court shall be set aside. The appeal is allowed with costs.