
(2007) 08 AHC CK 0022
In the Allahabad High Court

Dr. Munish Chandra Gupta

APPELLANT

Vs

Additional District Judge, Court No. 5 and Others

RESPONDENT

Date of Decision : 07-08-2007

Acts Referred:

Evidence Act, 1872 — Section 114
Transfer of Property Act, 1882 — Section 106

Citation : (2008) 1 AWC 469

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—This is tenant's writ petition for quashing the decree of eviction passed against him in respect of a shop which belongs to the Madho Prasad Charitable Trust, respondent No. 3 herein.

2. J.S.C.C. Suit No. 18 of 1995 was instituted by Madho Prasad Charitable Trust through Shri Kailash Chandra Mittal, Head Trustee and Kailash Chandra Mittal, respondent Nos. 3 and 4 herein, against the present petitioner, on the pleas inter alia that plaintiff Madho Prasad Charitable Trust being a public charitable and religious trust, has got temples, dharamsala situate at Station Road, Chandpur District Bijnor. The said trust is running a public library in a small room and the disputed shop is needed to widen the entrance gate of Mandir which is presently 4-1/2 ft. towards north of the Mandir. It claimed that recently number of deities of Bhagwan Ram Chandra Ji", "Lakshman Ji", "Sitaji", "Radhaji", "Krishan Ji", "Hanuman Ji" and "Ganesh Ji", which were brought from Jaipur, have been installed and the plaintiff proposes to construct two other temples of "Shri Santoshi Mata" and "Mata Durgaji". The exemption from the operation of the provision of U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter called as Act No. 13 of 1972) was claimed on the basis of Section 2 (bb) on the ground that the building in question is a public charitable and religious institution. It was further pleaded that the tenancy of the petitioner

has been terminated by a registered notice dated 6.3.1995 which has been served by refusal. The said notice was given on his correct address but the tenant refused to vacate the disputed accommodation.

3. The defence set up was that the building in question is covered by the provisions of U.P. Act No. 13 of 1972 as the plaintiff is not a Public Charitable and Religious trust, no notice as required u/s 106 of the Transfer of Property Act was served on him. He did not receive any notice as stated in paragraph 9 of the plaint nor he ever refused to receive any such notice and the allegation that he refused to receive the notice tendered by the postman is wrong and incorrect.

4. It may also be placed on record that during the pendency of the suit plaint was got amended (amendment allowed by the order of 9.5.1996), a decree for mesne profit @ Rs. 1,500 per month from the date of institution of the suit up to the date of taking possession, was claimed. It is not in dispute that the defendant petitioner was the tenant on the monthly rent of Rs. 150.

5. The parties led evidence in support of their respective cases. The suit was decreed by the trial court by its judgment and decree dated 22.1.2002. The said decree has been confirmed in S.C.C. Revision No. 7 of 2002 by the court below. These two judgments and decrees are under challenge in the present writ petition.

6. Shri Sankhata Rai, learned Counsel for the petitioner raised the following three points in his arguments:

1. The notice dated 6.3.1995, Annexure-13 to the writ petition, was never served on the petitioner.

2. The landlord of the shop is not a Public Charitable Religious Trust as alleged by the plaintiff in paragraph-1 of the plaint. The document which was the basis of the plaint itself, has not been filed and as such any amount of oral evidence cannot be looked into.

3. The court below has erred in awarding mesne profit @ Rs. 1,500 per month from the date of the institution of the suit in the absence of any material on record in support thereof.

7. Point No. 1. The registered notice dated 6.3.1995 was indisputably sent by the plaintiffs on the correct address of the petitioner, i.e., at his residential address. When the postman reached at the residence of the petitioner to serve the notice he was informed that the petitioner is at his shop and therefore the notice be served there. The postman thereafter returned the notice to the post office for delivery to the another postman in whose area the shop wherein the petitioner sits, lies. The postman who thus received the notice went to the shop of the petitioner and the petitioner refused to accept it and it was returned to the sender with the endorsement of refusal.

8. In view of these facts, the question arises as to whether in the eyes of law it

may be presumed that the registered notice was served on the petitioner or not. Shri Niranjan Singh, the postman was examined by the contesting respondents (landlord) as P.W. 1. His statement has been annexed as Annexure-18 to the writ petition. In examination-in-chief he has stated that he went to Dr. Munish Chandra Gupta, petitioner, to serve the registered notice with acknowledgment due being papers No. C-8/2 and C-8/1 on 9.3.1995. Dr. Munish Chandra Gupta, to whom the registered notice was tendered for the purpose of service, refused to accept it and, therefore, the notice was returned by making endorsement of refusal on it. He confirmed that the word "refusal" was written in his own handwriting and he denied the suggestion that he never went to Munish Chandra Gupta for service or he did not refuse to accept the same.

9. The contention of Shri Sankatha Rai learned Counsel for the petitioner is that the notice was addressed for service on the petitioner at mohalla Kotla, whereas the shop in dispute is situate at a different mohalla. The postman has stated in his cross-examination that in the notice the address of the shop is not mentioned and as such no presumption of due service can be drawn.

10. I have perused the entire statement of the postman and find that the postman has stated in no uncertain term that he had received a registered article alongwith a delivery slip which was given by the post office clerk probably Mofaquat Hussain, and he delivered the registered article at the address as per delivery slip. On the cover of the notice the earlier postman had made endorsement which reads as follows:

Ghar par nahi hain, dookan par tamil ki jati hai.

11. With the above endorsement, he received the registered article for effecting service on the next day with the delivery slip. The postman has deposed that where an article is redirected to be delivered out of the town only then the address on which it is to be delivered is mentioned on such article. In other words, from his deposition, it is clear that when a registered article is re-directed for delivery in the same town, only a delivery slip is given and the record of the said delivery slip is maintained in the post office. On the basis of the aforesaid statement of the postman and with the help of Section 27 of the General Clauses Act it was argued that the registered article was never tendered to the petitioner for service and as such the courts below have committed illegality in drawing a presumption of valid service.

12. I have carefully considered the aforesaid submission but it is difficult to agree with it. The postman in his long cross-examination has deposed the procedure of delivery of a registered article to an addressee who is not available at the address given on such article but is available on a different address in the same town. No attempt was made by the petitioner to show that the said procedure disclosed by the postman is incorrect. There is a presumption of correctness of all the official acts unless otherwise true.

13. This Court in Ganga Ram Vs. Smt. Phulwati, has examined the relevant

provisions of the Post Office Act and the Rules framed thereunder. It has also taken into consideration Section 27 of the General Clauses Act as well as Section 114 of the Evidence Act and has held that it is not incumbent on the plaintiff to prove the endorsement of refusal on the notice sent by registered post by producing the postman or other evidence in case the defendant denies service on him. It also approved the orders of the courts below holding that in case of refusal of registered article by the addressee a presumption regarding service of such notice has also to be made u/s 27 of the General Clauses Act as well as u/s 114 of the Evidence Act. It has been observed that when a registered article or registered letter is handed over to an accepting or receiving post office, it is the official duty of the postal authorities to make delivery of it to the addressee. Human experience shows that except in a few exceptional cases, letters or articles received by the post office are duly, regularly and properly taken to the addressee. Consequently, as a proposition, it cannot be disputed that when a letter is delivered to an accepting or receiving post office, it is reasonably expected that in the normal course it would be delivered to the addressee. That is the official and the normal function of the post office.

14. There is no dearth of judicial pronouncements holding that a notice sent by registered post to a tenant which has been received back with the endorsement of refusal, a presumption of service of notice on the addressee can be drawn. In *Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani*, it has been held that 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 tendered 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.

15. From the above, it follows that a rebuttable presumption is available in case of refusal of a registered article regarding service of the article on the addressee. However, the said presumption is rebuttable. Coming to the facts of the case on hand it may be noted here that except making a bare statement of denial, the petitioner has not produced any evidence to rebut the said presumption. The landlord examined the postman though they were not required to do so in view of the pronouncement of the Full Bench decision of this Court in *Ganga Ram v. Phoolwati* (supra). No material was placed before this Court to discard or disregard the oral testimony of the postman.

16. In view of the fact that the registered notice was correctly addressed indisputably, the courts below have committed no illegality in drawing a presumption of due service of notice on the petitioner. In the additional written argument, the petitioner's counsel has referred *Badri Prasad Vs. Lakshmi Narain*, and *In Re: L.C. De Souza*, . These two pronouncements should be read in the

light of the Full Bench decision of this Court in the case of Ganga Ram v. Phoolwati (supra).

17. In the case of Badri Prasad v. Laxmi Narain (supra) the statements of postman was disbelieved and in this fact situation it was held that no question of raising of presumption u/s 27 can arise. The said decision is rested on the special facts of that case and has no application in the present case inasmuch as the statement of postman has been believed by the two courts below and the said statement at this stage, i.e., at the stage of writ petition cannot be disbelieved.

18. In the case of L.C. De Souza (supra) it was held that the presumption raised is a rebuttable presumption. Therefore, these decisions do not advance the case of the petitioner any further. The point No. 1 is decided accordingly and it is held that notice dated 6.3.1995 terminating the tenancy was duly served on the petitioner.

19. Point No. 2. The only contention of the petitioner under Point No. 2 is that the trust deed referred in paragraph 1 of the plaint being the basis of the suit was required to be filed alongwith the plaint, in view of the Order VII, Rule 14 of C.P.C. Having failed to do so, the suit is liable to be dismissed. Before examining the said issue it may be noted that the said argument does not find place in the manner in which it has been placed before this Court in the judgments of the courts below. Before the courts below it was urged that the plaintiff is not entitled to claim exemption from the operation of U. P. Act No. 13 of 1972 u/s 2 (1) (bb) of the Act as the plaintiff is not a public charitable or public religious institution. It has been found by the two courts below that the plaintiff is a public charitable and religious institution as the existence of dharamsala and temple etc. is not in dispute. The court below has placed reliance upon definition of "charitable institution" and "religious institution" as defined in sections 3 (r) and 3 (s) of the Act. However, this line of argument was not pressed or advanced before me and was completely given up even in the written arguments. In the argument and written arguments as well, emphasis has been laid by the petitioner's counsel that from paragraph 1 it is manifest that the plaintiff is a registered public charitable trust dated 25.2.1966, which has got mandir with religious discourse place situate at Station Road, Chandpur, District Bijnor, with a library in a small room.

20. The said paragraph carries on an impression that a trust was created and the trust deed is dated 25.2.1966, submits the petitioner.

21. In the written statement the creation of trust is not disputed. The case, on the other hand as pleaded therein is that It is a private trust of Kailash Chandra Mittal and his family members, vide para 11, thereof.

22. Shri V. M. Zaidi, learned Counsel for the contesting respondent referred the trust deeds dated 15.10.1966 registered on 17.10.1966 and 15.1.1977 registered on 17.1.1977 as also the statement of Kailash Chandra Mittal, respondent No. 4 herein, who has explained that he got constructed two temples

one of Kailashwar and another of Ram Mandir in accordance with the wishes of his father which were dedicated on 25.2.1966.

23. In the subsequent registered trust deed also, it is mentioned that the settler of the trust Kailash Chandra Mittal, one of the plaintiffs got constructed two temples one of Kailashwar and another of Lord Ram Mandir in accordance with the wishes of his father which were dedicated on 25.2.1966 so that the public at large may carry on bhajan and worship. The fact that trust was created earlier also finds place in the subsequent trust deed. The necessity to execute the second trust deed arose on account of the fact that Kailash Chandra Mittal dedicated some more properties for the benefit of the public at large. It appears that date 25.2.1966 has been mentioned in paragraph 1 of the plaint due to unintentional mistake and no such argument, as canvassed before this Court, was raised before the courts below, at any stage. The trust deeds are registered documents and they are on the record of the case, genuineness and correctness of which were not disputed or challenged by the petitioner during the course of the trial. The litigation before the court below was fought on the premise whether the trust in question is charitable or religious institution or not.

24. To prove that the building in question is a public religious and charitable institution, the plaintiff examined number of witnesses besides the documentary evidence. These witnesses in no uncertain terms stated that the building in question belongs to public religious and charitable institution.

25. The petitioner cannot be permitted to take the advantage of an inadvertent mistake of a date mentioned in paragraph 1 of the plaint. Kailash Chandra Mittal who created the trust and has been examined as P.W. 3 has stated that he created a trust by establishing temple on 25.2.1966. Initially temple of family of Lord Shiva was constructed. The trust deed was executed in September, 1966 which was registered in the October, 1966. The trust deed was placed in a public meeting and copy thereof is the document on the record, being paper No. C-20. After creating the first trust it was found that the income of the trust is not adequate as the land with the trust was not sufficient. He executed a second registered trust deed dated 15.10.1966 which was also placed before the public meeting for approval. The original copy of the said trust is not available but its true copy was filed and is on the record. Besides the above, the trust is running Madho Prasad Junior High School and constructed a dharamshala and running a library therein and newspapers are subscribed for the benefit of public in general. In the cross-examination no question was put to witness with regard to averment made in the paragraph 1 of the plaint. However, in cross-examination he has stated that the disputed property is a public religious and charitable trust.

26. A new line of agreement more technical in nature was sought to be raised for the first time herein in view of Order VII, Rule 14, C.P.C. It reads as follows:

Rule 14. Production of document on which plaintiff sues or relies.?(1) Where a plaintiff sues upon a document or relies upon document in his possession or

power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, where possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiffs witnesses, or handed over to a witness merely to refresh his memory.

27. Emphasis was laid that the trust deed of date as mentioned in para 1 of the plaint has not been filed. The trust deed dated 15.10.1966 is on the record wherein, dedication of two temples to the public on 25.2.1966 clearly finds place. This has been further clarified by the plaintiff in his deposition which is uncontroverted. The contents of para 1 of the plaint should be read in the light of the trust deed of 15.10.1966. This position stands further clarified by the second registered trust deed dated 15.1.1977, which is also on record.

28. In the written arguments, the learned Counsel for the petitioner has referred Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, for the proposition that if a party in possession of best evidence which would throw light on the issue in controversy withholding it, the Court ought to draw an adverse inference against him. This submission has been made with reference to his argument that in paragraph 1 of the plaint it has been stated that the trust was created on 25.2.1966. But the trust deed of dated 25.2.1966 has not been filed. The date 25.2.1966, already explained above, is not the date of execution of trust deed. The trust deed was executed subsequently and it is on record.

29. The learned Counsel for the petitioner did not utter a single word in respect of those two trust deeds already on the record. The aforesaid decision has been explained in Municipal Corporation, Faridabad Vs. Siri Niwas, by the Apex Court subsequently and it has been held that in Gopal Krishnaji's case (supra), the Apex Court did not lay down law that in all situation, the presumption in terms of Section 114 of the Indian Evidence Act must be drawn. The said decision has been followed in M. P. Electricity Board v. Narain JT 2004 (8) SC 1998, wherein it was held that where the labour court not having drawn any adverse inference, on facts and circumstances of the case, the Industrial Court or the High Court could not have based an order solely on the basis of an adverse entry.

30. Viewed as above, there is no substance in the second point also.

31. In view of the above discussion, it is held that the landlord of the shop is a public charitable and religious trust and the said trust is created on the basis of

registered trust deeds which are on record.

32. Point No. 3. It was submitted under Point No. 3, that the court below has committed illegality in granting a decree of mesne profit @ Rs. 1,500 per month from the date of the institution of the suit. Elaborating the argument it was submitted that no issue was framed on the above point by the trial court nor it discussed any evidence thereon. In contra, the learned Counsel for the respondent submits that the plaintiffs have proved by oral evidence that shop in question can be let out on a monthly rent of Rs. 15,000. It was further submitted that the said point was not urged before the revisional court and as such, it would be presumed that the petitioner has given up the said point.

33. On a careful consideration I find that there is no discussion in the entire judgment of the trial court as to how it has arrived at a figure of 1,500 per month towards mesne profit. The evidences were led by the parties on this issue. Before the revisional court in ground No. 5 a grievance has been raised by the petitioner to the effect that the trial court has wrongly awarded mesne profit @ Rs. 1,500 per month without discussing the material on record.

34. Shri V.M. Zaidi, learned Counsel for the respondent submits that instead of remanding the matter to the trial court on this point, he is prepared to give up the claim of mesne profit @ Rs. 1,500 and will be satisfied if the mesne profit is granted @ Rs. 150 per month. In this view of the matter, it is appropriate that the judgment and decree of the trial court be modified to the extent that the petitioner shall be liable to pay mesne profit @ 150 per month instead of Rs. 1,500 per month.

35. The petitioner obtained the stay order from this Court in the month of December, 2002 which continued till the disposal of the writ petition. During this period, the petitioner is liable to pay damages at the market value, as held by the Apex Court in Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., and South Eastern Coalfields Ltd. Vs. State of M.P. and Others,

36. The Apex Court in the case of Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., has held that the appellate court while exercising jurisdiction under Order XLI, Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent.

37. In the aforesaid decision it has relied upon its earlier decision in South Eastern Coalfields Ltd. Vs. State of M.P. and Others, wherein the Apex Court

while dealing with interim orders granted in favour of any party to litigation of the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour ; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand : (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the Court.

38. Looking to the fact that the petitioner has enjoyed the stay order for more than four years, the damages for this period, i.e., from December, 2002 to August, 2007 is fixed at Rs. 2,500 per month. The petitioner shall be liable to pay damages @ Rs. 2,500 per month since December, 2002 to the date of actual eviction and the decree of the courts below stands modified to this extent.

39. In view of the above discussion, it is found that the judgment and decree of the courts below so far as it relates to ejectment etc. are concerned are hereby confirmed except with regard to the rate of mesne profit, for the period up to November, 2002. The judgment and decree of the courts below granting the mesne profit @ 1,500 per month stands modified to the extent that the petitioner shall be liable to pay Rs. 150 per month. However, he will be liable to pay damages @ Rs. 2,500 per month since December, 2002 to the date of actual dispossession.

41. With the aforesaid modification, no interference is called for in the writ petition on other points. The writ petition is, therefore, allowed in part as indicated above with costs of Rs. 5,000 to be paid by the petitioner to the contesting respondent Nos. 3 and 4.