
(1983) 05 GAU CK 0014
In the Gauhati High Court
Case No : Second Appeal No. 102/77

Hazi Masaraf Ali Mazumdar

APPELLANT

Vs

Makar Sekh and Others

RESPONDENT

Date of Decision : 31-05-1983

Acts Referred:

Evidence Act, 1872 — Section 114, 114

Citation : (1983) 2 GLR 194

Hon'ble Judges : B.L.Hansaria, J

Bench : Single Bench

Advocate : M.A.Laskar, S.C.Das, Advocates appearing for Parties

Judgement

1. The plaintiff who instituted this suit for obtaining khas possession of the suit land, has lost in both the courts below in the second round of litigation. Earlier to the institution of the present suit, the plaintiff had filed T. S. 365/66 for selfsame purpose, but he was nonsuited then, as submitted by Shri Laskar, for nonjoinder of necessary parties. By adding those parties, the present suit was filed in 1970. But this time he has lost on two counts. First, the Courts below have held that there was no service of notice terminating the tenancy, as required by section 106 of the Transfer of Property Act, Secondly, the present was a case of splitting up of tenancy. Feeling aggrieved, the plaintiff has approached this Court.

2. In so far as the question of service of notice is concerned Shri Laskar, learned Counsel for the appellant," states that under the law the plaintiff was entitled to presumption of service of notice inasmuch as the notice had been sent by registered post and was correctly addressed. Reliance is placed on a decision of this Court in Kashilal vs. Jawaharmal, AIR 1966 A & N 134. This decision was relied on in the Court below as well. But, as pointed out in the impugned judgement the presumption available to the noticegiver in a case is rebuttable one as has been observed in the aforesaid decision as well. To find whether the presumption had been rebutted or not, the learned Courts below went into the evidence led by the defendants in the case and referred to not only the denial of

service of notice in the written statement, but to the evidence of defendant No. 1 Makar Sekh in whose name the registered letter was addressed, as would appear from Exts. 2 and 3 therein he has testified that the postal peon had never tendered the registered letter to him, nor had he refused to accept the same. It may be stated that according to the plaintiff, the registered letter in question had been refused on the same being tendered to defendant No. 1. In support of this case, however, the postal peon was not examined. It has been held by this Court in Kashilal (supra) the examination of postal peon is not always necessary. Even so there can be no denial that the presumption which can be drawn under section 27 or section 114 of the Evidence Act read with section 16 along with what has been stated in section 106 of the Transfer of Property Act is a rebuttable presumption. Reference may be made, in this connection to *Puwada Venkateswara vs. C. V. Ramana*, AIR 1976 SC 869, "wherein the Court had accepted the view expressed in *M.K. Patel vs. Kundan Lal*, AIR 1968 Bombay 387 that presumption of service of notice can be repelled by the defendant's statement on oath that he had not refused the letter. The decision in *Nirmalabala Devi vs. Provat Kumar*, 52 CWN 659 was also noted wherein it was held that if a registered letter is returned back with an endorsement "refused", the same would raise the presumption of due service of notice without the postman having been examined. As such it all depends upon the facts and circumstance of each case which would include the evidence adduced by the defendant in rebutting the presumption. Mere denial of the defendant in this regard might not be always sufficient as on a closer examination of evidence or record, the Court may come to the conclusion that despite the denial the defendant had true knowledge of the notice and had actually refused it knowingly. In such a case, it is not always necessary to produce the postman.

3. In the case at hand, when defendant No. 1 had stated on oath that he had not refused to accept any notice, this was not challenged in cross-examination. It has, therefore, been held by the learned Assistant District Judge that the presumption was rebutted. Shri Laskar, however, submits that the simple statement on oath was not sufficient in this regard. Sitting in second appeal, it is not open to this Court to disturb a finding of fact whether the notice was duly served or not when the Court below has accepted the statement of defendant No. 1. This was within the domain of the Court below and it cannot be said that any error was committed in this regard. Had the matter rested on pure question of law, the question might have been different. But that is not so. Therefore, it appears to me that this finding cannot be disturbed in the present proceeding. I am also not inclined to agree with Shri Laskar that the matter should go back to give a proper finding on this issue, as the Courts below had duly applied their mind to all the materials on record.

4. As to the finding regarding the splitting up of tenancy, Shri Laskar contends that the finding arrived at in T. S. 365/66 would operate as *res judicata* inasmuch as in that proceeding it had been held that there was no splitting up. This argument has not been appealed to the courts below because all the defendants of

this case were not parties in the first round of litigation. According to the learned Counsel, this would not matter in view of Explanation VI to section 11, Civil Procedure Code. It is also urged that of the newly added defendants, 7 and 8 had not contested the present case and defendants 5 and 6 had nothing else to say on the point beyond what was averred by defendants 1 to 4 in the first title suit. Indeed, the case of these two defendants is in part material with what defendants 1 to 4 had stated earlier. It is also brought to my notice that defendants 5 and 6 are none else than the wife and daughter of Inshan Sekh whose four sons are defendants 1 to 4. On these facts it is urged that the right claimed in the two suits was common and the four defendants in the first suit had completely represented the interest of others as well. Some sustenance is sought to be derived from the decision in *Ishwar Das vs. State of Madhya Pradesh*, AIR 1979 SC 551 in which the fact of addition of some parties in the subsequent suit was not held to debar the operation of principle of *resjudicata* as the plaintiff in both the suits was the same and so also the contesting defendants.

5. Shri Das, learned Counsel for the respondents, however, urges that as defendants 5 and 6 in particular were not before the Court in the first suit, any finding arrived at in that proceeding, cannot operate as *resjudicata* against these defendants. In view of what is stated earlier, I am inclined to agree with Shri Laskar, as the above would show, that the newly added defendants and defendants 1 to 4 had really fought out a common battle against the same plaintiff. I would, therefore, hold that the finding in the earlier suit operated as *resjudicata* in so far as splitting up of tenancy is concerned. But then this suit has to meet the same fate as earlier one for want of service of proper notice on the defendants.