

(1922) 05 CAL CK 0033
In the Calcutta High Court

Kedar Nath Sadhukhan and Others

APPELLANT

Vs

Madhu Sudan Das and Others

RESPONDENT

Date of Decision : 19-05-1922

Acts Referred:

Citation : AIR 1923 Cal 682 : 75 Ind. Cas. 105

Hon'ble Judges : Chotzner, J; Asutosh Mukerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the defendants in a suit for ejectment. The case for the plaintiffs was, that the defendants held as tenants and that they are tenancy which was of a terminable character had been duly terminated by the service of notice to quit. The Court of first instance held that the tenancy was permanent and dismissed the suit. Upon appeal the Subordinate Judge has held that the tenancy was terminable and had been duly terminated before the institution of this suit. On the present appeal, the conclusion of the Subordinate Judge upon each of the two points in controversy has been assailed on behalf of the appellant.

2. As regards the nature of the tenancy, the Subordinate Judge has found that the tenants have been in occupation for more than 40 years, and that during this period the rent has been paid at a uniform rate. The Subordinate judge however, has held that long possession and uniform payment of rent are not by themselves sufficient to justify the finding that the tenancy was permanent from its inception. We are of opinion that the view taken by the Subordinate Judge is well-founded.

3. Our attention has been drawn to the decision in Shoroshi Charan Ghoze v. Bhagloo Sah 57 Ind. Cas. 877 : 32 C.L.J. 85 as also to the judgment of the Judicial Committee in Surendra Nath Roy v. Dwarka Nath Chakravarty 30 Ind. Cas. 877 : 24 C.W.N. 1 : (1919) M.W.N. 811 ; neither of these cases is of real assistance to the appellant. We have not in the present case the very material elements which existed in the decisions to which our attention has been invited,

namely, that the land had been let out for purposes of residence, that it had been so occupied, that there had been instances of transfer and succession, and finally, that structures had been erected on the land. In these circumstances it is impossible for us to hold that the view taken by the Subordinate Judge as to the terminable character of the tenancy is erroneous in law.

4. As regards the second point, the Subordinate Judge has found that the notice to quit was duly served. The correctness of his conclusion upon this point must be tested by a reference to the provision of Section 106, Transfer of Property Act which governs this case. The second paragraph of that section provides that every notice under this section must be in writing, signed by or on behalf of the persons giving it, and tendered or delivered either personally to the party who is intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable), affixed to a conspicuous part of the property. In the case before us, the land was in the occupation of two sets of respondents--the Sadhukhans and the Bags. The Subordinate Judge has held on the evidence that the notices were duly served, because they were delivered to Kedar Nath Sadhukhan and Nagendra Nath Bag who were the respective heads of the two joint families. The appellants have contended, however, that even if these findings are accepted as correct, the fact of such delivery only raises the rebuttable presumption that the notices had reached the other joint tenants. In support of this proposition, reliance has been placed upon a passage from the judgment by the Judicial Committee in the case of Harihar Banerji v. Ramsashi Roy 48 Ind. Cas. 277 : 46 C. 458 at p 480 : 29 C.L.J. 117 : 23 C.W.N. 77 : 16 A.L.J. 969 : 35 M.L.J. 707 : 9 L.W. 148 : 25 M.L.T. 159 : 21 Bom. L.R. 522 : (1919) M.W.N. 471 : 1 U.P.L.R. (P.C.) 56 : 43 I.A. 222 (P.C.) where Lord Atkinson states that in case of joint tenants, each intended to be bound, and that it has long ago been decided that service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants. Reference is then made to the cases of Doe d. Macartney v. Crick (1805) 3 Esp 196 : 8 R.R. 848; Doe d. Bradford v. Watkins (1806) 7 East 551 : 8 R.R. 670 : 103 R.R. 213 : 3 Smi 517 and Solton v. Kelly 6 Ir. C.L.R. 367. An examination of the judgment in these cases shows that service on one of several joint tenants is prima facie sufficient for all, and that it has similarly been held that service on a corporation may be effected by a service on one of its officers. Doe d. Carlisle v. Woodman (1807) 8 Eas 228 : 9 R.R. 421 : 103 R.R. 329. The case before is, however, as we have stated, governed by the provisions of Section 106 of the Transfer of Property Act, which lays down a precise and definite rule for the service of the notice to quit required by that section. Such notice must be tendered or delivered either personally to the party intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to conspicuous part of the property. The appellant felt pressed by this provision and had to abandon the contention that tender or delivery to a member of the family is not sufficient, unless an attempt has been made to tender or deliver the notice personally to the party intended to be bound thereby. It is

remarkable, however, that a very different set of rules has been prescribed by the Legislature for the service of summons in suits and other judicial proceedings as is clear from an examination of the provisions of Order V of the CPC of 1908. Under that order substituted service is permissible, only when an attempt to effect personal service has failed. Here, however, the plain language of Section 106 indicates that service may be effected in one or other of the modes prescribed. The appellant has thus been driven to contend that the term "or" means--"or if, such personal tender or delivery is impossible." There are two manifest objections to this interpretation. In the first place, the word "or" is an alternative word, as was observed by Parke, B., in *Elliot v. Turner* (1845) 2 C.B. 446 : 15 L.J.C.P. 49 : 135 E.R. 1019 : 69 R.R. 501. It is, however, not always disjunctive and is sometimes interpretative or expository of the preceding word. *Hills v. London Gas Light Company* (1860) 5 H. & N. 312 : 29 L.J. Ex. 409 : 157 E.R. 1202 : 120 R.R. 604. But no instances have been brought to our notice where the term "or" is used neither as alternative nor as synonymous. In the second place, in Section 106 the Legislature uses the expression "if such tender or delivery, is not practicable", in one contingency, namely, when service is effected by fixing the notice to a conspicuous part of the property. If the Legislature had intended that the mode previously mentioned should not be alternative but that recourse should be permissible to one of the modes only when the other had proved infructuous, the Legislature could easily have framed the section in suitable terms. We are consequently of opinion that in the case before us, where there was a tender or delivery of the notice to the head member of the family, the service was sufficient, notwithstanding that there is no proof of prior tender or delivery to each of the joint tenants personally. We hold accordingly that the Subordinate Judge has correctly found that the notice was duly served.

5. The conclusion follows that the tenancy was terminable and has been legally terminated. The decree of the Court below is affirmed and this appeal dismissed with costs.