

(1984) 07 AHC CK 0016
In the Allahabad High Court
Case No : Second Appeal No. 2778 of 1972

Rama Devi and Another

APPELLANT

Vs

Ram Prakash and Others

RESPONDENT

Date of Decision : 25-07-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 114(1)

Citation : AIR 1985 All 17

Hon'ble Judges : M. Wahajuddin, J

Bench : Single Bench

Advocate : Sankatha Rai, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

M. Wahajuddin, J.—Respondents-plaintiffs filed a suit against the appellants for their ejectment, arrears of rent and mesne profit. The suit was filed on the allegation that the defendants were willful defaulters and a combined notice of demand and termination of tenancy has been given and their tenancy stands terminated.

2. Besides other pleas the defendants maintained that any notice was not served upon them so neither they are defaulters nor their tenancy stands terminated. It would appear that a registered notice was sent addressed separately to defendant No. 1, the mother as well as defendant No. 2, the son who were co-tenants at Varanasi address on 4-8-1970. On the two notices there is an endorsement of the postman dated 8-8-1970 that the addressee refused to accept the notice, and the service was claimed by denial. The stand of the defendants was that defendant No. 2 who is employed in Government Cement, Factory Dala, District Mirzapur and ordinarily resides there, had to perform Mundan ceremony of his son at Vindhyachal Mirzapur, so he sent a letter to his mother to come to Mirzapur by 6-8-1970 evening and they both would proceed for such Mundan on 7-8-1970 and they so proceeded and returned to Varanasi

only in the night of 8-8-1970. The trial Court believing the defendants' evidence and holding that the service of the notice is not proved dismissed the suit for ejectment while granting a decree for Rs. 339/- as rent up to Aug. 1970 and also granting a decree for further rent for subsequent period on payment of additional Court fee. The plaintiffs preferred first appeal. The first appellate Court found that the service of the notice dated 8-8-1970 is proved and not rebutted, so presumption would prevail and consequently the defendants are also liable to ejectment in addition to the decree for rent and mesne profit.

3. Aggrieved from such judgment and decree of the first appellate Court dated 22-7-1972 a second appeal has been preferred by the defendants.

4. The only point that calls for determination in this second appeal is whether notice dated 4-8-70 given by the plaintiffs has been served upon the defendants. There is no dispute concerning the proposition of law that there may be a presumption of service of notice by denial on endorsement by the postman to that effect even without producing the postman. There is also no dispute that such presumption is not conclusive but rebuttable. It is also settled law that if such a presumption has been rebutted the burden again shifts upon the plaintiffs to prove by his further evidence the service of the notice upon the tenant. In such situation production of the postman as a witness would become material. Though the proposition of law is not disputed as such I may also quote rulings which go to support such proposition.

(1) Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, ; (2) Ram Nakshatra v. Gridhar Das Kashva 1979 (U. P.) RCC 5 ; (3) Nawabzada Mohd. Ishaq Khan Vs. The Delhi Iron and Steel Co. Ltd., ; (4) Ranjit Singh v. Nirbhayanand (1970 ALJ 455).

5. In the case of Ishaq (supra) summons by registered post returned as refused. Statement made on oath by adverse party that summons was not tendered. Failure to summon postman was held sufficient ground for setting aside the ex parte order.

6. The first appellate Court after referring to statement of defendant No. 2 and certain papers and also alluding to the statement of plaintiff Ram Prakash found that the presumption is not rebutted.

7. Learned counsel for the respondents urged that such finding is a finding of fact and the matter cannot be considered by the second appellate Court u/s 100 C.P.C. In support of such argument reliance has been placed upon the following rulings: (1) R. Ramachandran Ayyar Vs. Ramalingam Chettiar, ; (2) Deity Pattabhiramaswamy v. S. Hanymayya AIR 1959 SC 57 ; (3) Sidh Nath Shukla and Others Vs. Smt. Roop Rani and Others, in which large number of earlier pronouncements have been considered. (4) Bhojai Vs. Salim Ullah and Others, .

8. In all these four rulings the scope of Section 100 C.P.C. has been considered and the principle of law laid down therein is that a finding of fact even if

otherwise erroneous but based on appreciation of evidence cannot be interfered with and that an inference also based and drawn on a finding of fact will be a finding of fact. This is the gist of these rulings. It is, however, settled law that actually the Court has to go into the matter as to find out whether the matter stands concluded by a finding of fact and inference based on a finding of fact is as such in the legal sense. I may again stress upon the principles laid down in the case of *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, by the Supreme Court and also quote the relevant portion of the Head Note :

"The error or defect in the procedure to which Clause (c) of Section 100(1) refers is, as the clause clearly and unambiguously indicates an error or defect connected with, of relating to the procedure; it is not an, error or defect in the appreciation of evidence adduced by the parties on the merits. That is why, even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower appellate Court has placed the onus on a wrong party and its finding of fact is the result, substantially of this wrong approach, that may be regarded as a defect in procedure; if in dealing with questions of fact, the lower appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower appellate Court fails to consider an issue which had been tried and found upon by the trial Court and proceeds to reverse the trial Court's decision without the consideration of such an error or defect in procedure; if the lower appellate Court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of the fact, or makes out a new case for a party, that may in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court, however erroneous the said conclusions may appear to be to the High Court.

If a finding of fact has been recorded by the first appellate Court without any evidence that finding can be successfully challenged in second appeal, because a finding of fact which is not supported by any evidence can be questioned u/s 100, and in that connection, it may be said that the decree proceeding on such a finding discloses a substantial defect or error in procedure. This, however, does not mean that wherever the High Court thinks that the evidence accepted by the lower appellate Court could not have been reasonably accepted, the High Court would be justified in interfering with the decision of the lower appellate Court. All that it means is that it should be a case where the evidence, which is accepted by the lower appellate Court, no reasonable person could have accepted and that really amounts to saying that there is no evidence at all."

In the case of *Sidh Nath Shukla and Others Vs. Smt. Roop Rani and Others*, after referring to the various pronouncements certain observations by way of

conclusions have been made in para 35. There was an error concerning the place of residence of the witnesses. Hon. M. P. Mehrotra, J. observed that the lower Court has/given other reasons for not believing the said witnesses. He has come to the conclusion on the basis of the strength of the Statement of D.W. 3, an independent witness, and in view of the fact of that case it was held that in second appeal interference is not to be made. In the case of D. Pattabhiramaswami AIR 1959 SC 57 (supra), what has been held is that second appeal will not be entertained simply on the ground of erroneous finding. In the case of Bhojai Vs. Salim Ullah and Others, the proposition of law laid down is that inference on basis of fact is a finding of fact and cannot be interfered with. Learned counsel for the appellants has also relied upon one case namely Ranjit Singh v. Nirbhayanand 1970 ALJ 455 in which it was held that it has to be proved that notice contained correct address. However this ruling is not relevant at all on the point of scope of Section 100 C.P.C. and I have to actually consider that scope. One will have to necessarily look into the first appellate Court's discussion of evidence on this point so as to find whether any finding has been arrived at on the strength of any evidence or inference from a finding of fact. In fact, in the very Supreme Court case of R. Ramachandran Ayyar Vs. Ramalingam Chettiar, it has been also observed that if appreciation of evidence is such that no reasonable person would have accepted the evidence that amounts to saying that it is no evidence and in such circumstances it will always be open to the Court in Second appeal to interfere with any finding purporting to be a finding of fact or any inference purporting to have been drawn by any finding of fact which is not based on an evidence at all.

9-10. The first appellate Court while discussing the evidence on the point of service of the notice and evidence in rebuttal itself observed that the presumption of service is rebuttable and rightly so. Thereafter it proceeded to discuss the evidence. At the very outset the first appellate Court observed that plaintiff Ram Prakash has stated that the defendants had been at Varanasi on 8-8-1970 when the notice in suit was served. This said observation is factually wrong. I was taken through the statement of plaintiff Ram Prakash and I also afforded an opportunity to the learned counsel for the respondents to point out to this Court from such statement as to where Ram Prakash has stated that the defendants had been at Varanasi on 8-8-1970 when the notice in suit was served upon them. He could not point to such statement but his argument is that actually it is an inference drawn from the statement though there is no specific statement to that effect. There is a distinction between what is stated and what is inferred. The first appellate Court has not said that such and such statements have been given and from that this inference is drawn. It has misquoted the evidence by stating in the judgment that Ram Prakash has stated in evidence that defendants were at Varanasi on 8-8-1970 when notice was served. No such statement has been made by Ram Prakash. When that is the position certainly the matter will have to be looked into by this Court of Second appeal to find out what was really the statement and whether such statement led to any inference.

Curiously enough Ram Prakash was totally silent in his evidence in the statement concerning presence of the defendant on any particular date. He has also admitted that neither the Postman visited the defendant's place in his presence nor the notices were delivered or refused in his presence. Sometimes it happens in the subordinate Court that the very defendants' lawyer puts some question so as to bring out certain statement. By this I do not mean that such statement is not to be looked into. The defendants have, however, to thank their lawyer for the evidence in cross-examination against the defendants which was not there in their examination-in-chief at all. The evidence however has to be read and I will deal with that part of the evidence. The witness at first stated he got the notice drafted at Varanasi and thereafter he went back to his place which is not Varanasi proper. However, he then added that he went back two-three days thereafter. The notice was got drafted and despatched on 4-8-1970 hence his statement would mean that either he went back on the very day or in 2-3 days by 7-8-1970. A suggestion was then made to him from the defendants' side that the defendants were not at Varanasi on the date the notices are said to have been served and that suggestion was denied and the witness then volunteered by way of explanation that he is making the denial because he was at Varanasi on 8-8-1970. He thereafter again stated that he was at Varanasi on 6, 7 and 8 of Aug., 1970. No reasonable man can accept such type of statement, besides when there is a wrong quote of statement by the first appellate Court this Court would be fully entitled to enter into the question. I may add that the witness does not say when, on what date and where he saw the defendants. His statement, apart from wavering and changing statement is vague and uncertain and there is no evidence quoted that plaintiff Ram Prakash has stated that defendants were at Varanasi on the date of service on 8-8-1970. The observation made by the first appellate Court has, therefore, no basis but is misquoting of the statement and I hold that so far as the statement of Ram Prakash is concerned it does not serve any purpose whatsoever nor it can be treated as rebuttal of statement of deft 2.

11. When the first appellate Court has been confused on account of wrong reading of evidence and has referred to such wrong evidence naturally it will be now open to this Court to consider whether the evidence of Moti Lal, defendant No. 2, amounts to or serves as rebuttal of the initial presumption raised. Moti Lal has stated that the Moran of his son was to be performed at Vindhyachal and he has sent a postcard to his mother to reach Mirzapur by 6th evening so that she can accompany Moti Lal and others to Vindhyachal for such Mooran ceremony and his mother so accompanied and after performing the Mooran ceremony the party returned to Varanasi in the night of 8th Aug. 1970. True that if there is conduct or admission of the party belying such denial or rendering it improbable then their denial will not be proof but the conduct of the party denying the service does not appear to be such, rather circumstances are available to considerate be Moti Lal. (sic) A postcard was addressed to the mother much earlier and that evidence could not have been created later as an after-thought. This would mean that Mooran was planned as alleged and even defendant No. 1

the mother was summoned to accompany. There is another circumstance, namely, the leave taken by Moti Lal for 7-8-70, 8th being Saturday. I am really surprised how the lack of any permission to leave the station would be relevant. In fact, he was out of station all right. The plaintiff's case is that he was in Varanasi proper. The defendant's case is that Moti Lal had gone to Mirzapur. I for one cannot apply two standards. If lack of permission is vague it is also vague against the case alleging that defendant No. 2 was at Varanasi so the question of permission has become irrelevant. The first appellate Court has fallen in error by misreading the evidence of the plaintiff and this Court can therefore well interfere with the findings of the first appellate Court. Moti Lal's evidence rebutted the presumption of service of notice by denial and in such situation it became incumbent upon the plaintiff to lead further evidence to prove otherwise. The first appellate Court has observed that there should have been some additional evidence including production of the mother. The mother's production as the other party would have simply meant multiplication of evidence in case of denial when it is a negative statement and the circumstances supporting or rebutting such statement are the only relevant facts of importance and this aspect has been overlooked by the first appellate Court. The presumption having stood rebutted the plaintiff should have given additional evidence as the burden again shifted upon the plaintiff to prove the service of notice which has not been done.

12. In the result this appeal must succeed and is allowed. The judgment and decree of the first appellate Court directing the ejectment of the defendant is set aside. Parties will bear their own costs.