

(1971) 09 BOM CK 0011

In the Bombay High Court

Case No : Special Civil Application No. 2715 of 1967

Shamsadbi Naga Pinjari

APPELLANT

Vs

Gunvantibai Ramsnehi

RESPONDENT

Date of Decision : 21-09-1971

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12
Evidence Act, 1872 — Section 114, 32, 33
General Clauses Act, 1897 — Section 27

Citation : (1972) 74 BOMLR 723

Hon'ble Judges : Bhole, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhole, J.—The petitioner here is a tenant, who has been ejected by the decree of the District Court, Dhulia in appeal from the judgment and decree passed by the Civil Judge (Junior Division), Taloda. The petitioner-defendant is a monthly tenant at a rent of Rs. 4 per month. The petitioner did not pay rent and she was, therefore, according to the landlady in arrears of rent from September 12, 1962. Because she was in arrears of rent therefore a notice of payment was issued to her on June 21, 1965, but it was refused. Because there was no compliance on the part of the petitioner therefore the landlady filed, a suit on July 26, 1965 on two grounds. The first ground was that the petitioner was in arrears of rent for a period more than six months. The second ground was that she wanted the premises for personal requirement. The petitioner contested the claim of the landlady by stating that she had not refused the notice at all; that on the other hand she had paid Rs. 254, which amount was not accounted for and that the landlady had also refused to accept four money orders. On the basis of these pleadings the trial Court framed a number of issues and found as a fact that the landlady had established that the petitioner was a wilful defaulter for more than six months from September 12, 1962; but the landlady did not establish that she required the suit premises reasonably and bona fide for her own use; and it was

held that the amount of Rs. 86 from September 12, 1963 to February 11, 1965 and the amount of Rs. 48 from July 12, 1965 to July 11, 1966 were due. As regards the issue of refusal of money orders by the landlady the trial Court held that there was refusal of money orders of the sum of Rs. 11 and of another sum of Rs. 23-25 P. In view of these findings the trial Court ordered that the petitioner should pay a sum of Rs. 134 and dismissed the landlady's suit for possession. The landlady, therefore, went in appeal against this decree of the trial Court to the District Court, who reversed certain findings of fact recorded by the trial Court. The learned District Judge also held that the landlady was entitled to take possession of the suit premises on the ground that the petitioner was in arrears of rent for more than six months and that she had not paid the same within one month of the notice. It is this decree of the learned District Judge which is sought to be corrected here.

2. The first contention of Mr. Kotwal, the learned advocate for the petitioner, is that the tenancy of the petitioner was not validly terminated because there was no valid service of the notice by the landlady. According to him there is no evidence to establish that the notice was refused by the petitioner. He further contended that the landlady did not given evidence during the course of her deposition either as regards the notice or its refusal on the part of the petitioner. He further contended that the landlady ought to have examined the postal peon if she wanted to establish that there was refusal on the part of the petitioner. The endorsements on the registered letter, not being legally proved according to him cannot be said to be admissible in evidence. It is, however, difficult for me to accept these contentions of Mr. Kotwal for the obvious reason that the landlady had mentioned all the details regarding the service of her notice on June 21, 1965 and also regarding the refusal of the notice by the petitioner on June 24, 1965 in her plaint. She has also deposed about the giving of notice. She has further tendered the refused registered letters containing notices with acknowledgments bearing endorsements made by the postman who must have gone to serve the notice on the addressee i.e. the petitioner-tenant. But Mr. Kotwal has relied on (1) *Gobinda Chandra v. Dwarka Nath* A.I.R.[1915] Cal. 313 ; (2) *Butto Kristo Roy and Others Vs. Gobindaram Marwari and Others*, and (3) *Vaman v. Khanderao* [1934] 37 Bom. L.R. 376 in support of his contention that if the postal peon was not examined, then the endorsement made by the postal peon cannot be admissible in evidence. Now it is true that in *Gobinda Chandra v. Dwarka Nath* that Court did observe in the context of the facts and circumstances of that case that the postal peon's statement of refusal of acceptance on certain date must be proved unless the statement is admissible u/s 32(2) of the Evidence Act. According to the observations of that Court the endorsement on the cover of a letter by a postal peon that the cover was tendered to the addressee on a certain date and was refused, is at best a record of statements by the peon and the events recited therein but they must be proved by calling him as a witness, unless the statement becomes admissible under Sections 32(2) or 33 of the Evidence Act. According to that Court such a

statement is not admissible even as a statement made by a public officer in the discharge of his duties. But this view was not accepted by the same High Court in the other case *Sushil Kumar Chakravarty Vs. Ganesh Chandra Mitra*, where the Division Bench of the Calcutta High Court referred to the above said case, *Gobinda Chandra v. Dwarka Nath*, and observed that the view opposite to what found favour with the Court in that case was taken in a large number of cases. The learned Judges of the Calcutta High Court in *Sushil Kumar v. Ganesh Chandra* observed that if the notice was returned with the endorsement "refused" then the presumptions u/s 114 (e) and (f) of the Evidence Act were available. It is not necessary to examine the postal peon at all because of these presumptions unless and until those presumptions were rebutted. It cannot, therefore, be said that the Calcutta High Court has taken the view on the basis of which Mr. Kotwal canvasses his argument.

3. It is also true that the Division Bench of the Patna High Court in *Butto Kristo v. Gobindaram Marwari* observed that the letter if posted and not received back through the dead-letter office shall be presumed to have been received by the addressee, but this presumption did not apply where the letter is purported to have been returned as being "refused" by the addressee. It appears that the Patna High Court took this view because it relied upon *Gobinda Chandra v. Dwarka Nath*, which as I have observed was not according to the consensus of Calcutta High Court. With respect, therefore, it is difficult for me to accept the proposition as laid down in *Gobinda Chandra v. Dwarka Nath* by the Calcutta High Court.

4. Mr. Kotwal then cited *Vaman v. Khanderao* wherein this Court was of the view that the postman should ordinarily be examined for the purpose of establishing refusal by the addressee. *Beaumont C.J.* while delivering the judgment in that case observed that the refusal in that case by defendants Nos. 4 and 5 of a registered letter containing notice was not proved because the postman who took the letter and brought it back was not called. At the same time the learned Chief Justice observed (p. 384):

...But in any case, even if the refusal had been proved, I should not be prepared to hold that the registered letter tendered to the addressee and refused and brought back unopened, was well-served. There are, I know, some authorities in this Court to the contrary, but it seems to me impossible to say that a letter has been served so as to bring the contents to the notice of the person to whom the letter is addressed, if the agent for service states that in fact the notice was not served, although the reason may have been that the addressee declined to accept it.

It is, therefore, clear from the judgment in that case that there were also other decisions of this very Court, which took a view contrary to that taken in the facts and circumstances of that case by *Beaumont C.J.*

5. It appears to me that so far as the facts and circumstances of the instant case

are concerned the presumption in illustration (e) of Section 114 of the Evidence Act can well be of help. According to that illustration the Court may presume that the official acts have been regularly performed. Therefore as the law entitles the Courts to presume that the official acts have been regularly performed the Courts are necessarily entitled to hold that the endorsement was made by the postman and it was correctly made. Therefore, a presumption of regularity of official business can easily be inferred. If, of course, there is some evidence to rebut this presumption then a different finding will follow. In the present case there is the plea of the landlady. There is also the registered letters with endorsements. The endorsements clearly show that the letter was refused on June 24, 1965. Of the four endorsements the first is dated June 23, 1965 and shows "not found"; the second is dated June 24, 1965, which shows "refused": the third is "refused and returned to the sender" made on the very day and the fourth one dated June 26, 1965 shows "not found". Therefore, in my view it is not open to the petitioner to contend that these endorsements were not made by the postal peon.

6. Moreover, Section 27 of the Indian General Clauses Act provides that where a Central Act or legislation made after the commencement of the Act authorises or requires any document to be served by post where expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post. Under this section, therefore, the service of notice to quit shall be deemed to be effected by properly addressing, pre-paying and posting by a registered post a letter containing notice. Since, therefore, it is true that the letter containing the notice to quit was properly addressed, pre-paid and posted by registered post service shall be deemed to be effected. Of course this service shall be deemed to be proved unless rebutted. Thus the refusal in this case can be said to be established.

7. It is next contended by Mr. Kotwal that the notice claiming arrears of rent from September 12 1962 i.e. Rs. 136 is also invalid because both the lower Courts found that Rs. 254 were already sent and because they also found that four money orders which were refused were of Rs. 15.25 P; Rs. 19; Rs. 23.25 P and Rs. 93.25P. According to him, therefore, there cannot be any arrears at the time when the notice was given and there cannot be any arrears of rent for more than six months on June 21, 1965. Even this contention is without any basis, because after taking into consideration the finding of fact by both the lower Courts the petitioner can well be said to be in arrears of rent for more than six months on the date when the notice was issued. The learned District Judge found that a sum of Rs. 254 was actually paid long before June 21, 1965. It appears that there was some other litigation against the petitioner because of the arrears of rent and, because of this he started paying during that period. These sums were

paid in March 1961, July 1963 and April 1964. The trial Court even after considering this payment found as a fact that Rs. 86 were still due from the petitioner as arrears of rent from September 12, 1963 to July 7, 1965 and Rs. 48 from July 12, 1965 to July 11, 1966. It is contended that the learned District Judge did not even consider the four money orders which were refused. But that is not correct. The learned District Judge did after considering these four money orders observe that the trial Court had held that the petitioner had proved that the money order of the sum of Rs. 19 and Rs. 23-25P. were only shown to be refused. Even after considering these sums the petitioner did not seem to have cleared off his arrears. The petitioner would be still in arrears for a period more than six months even if it is considered that Rs. 19 and Rs. 23-25P. on July 12; 1964 and August 13, 1964 respectively were refused by the landlady. In this view of the matter the contention of Mr. Kotwal is without substance.

8. Mr. Kotwal further says that the claim of the landlady is excessive and therefore the notice was invalid. He relied on the decision of this Court in *Nihalchand Tarachand v. Shantikumar Dharamsey* (1962) Civil Revision Application No. 1406 of 1961 by Chandrachud J. But the Supreme Court did not agree with the view while deciding *Raghunath Ravji Dandekar v. Anant Narayan Apte* (1966) Civil Appeal No. 387 of 1964. Their Lordships have held that even if there is a demand of excessive sum on account of some mistake, the notice cannot be said to be invalid. It appears to me therefore that this contention of Mr. Kotwal also is without substance.

9. Mr. Kotwal also contended that there is evidence to show that the petitioner was ready and willing to pay and according to him if he was ready and willing to pay, then u/s 12(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, he would be protected. It is true that u/s 12(1) a landlord shall not be entitled to recover possession as long as the tenant pays or is ready and willing to pay the standard rent and permitted increases, if any. But here is a case where the petitioner was in arrears for a period of six months or more. There was no dispute regarding standard rent. Rent is payable by the month. The tenant had neglected to make payment within one month after the notice. Therefore, the instant case would fall within the four corners of Section 12(3)(a) and not Section 12(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. If the petitioner u/s 12(3)(a) is in arrears for a period more than six months and if he neglects to pay arrears within one month, after the notice, the Court has no other alternative but to pass a decree for eviction. It appears to me, therefore, that this contention of Mr. Kotwal is also without any basis.

10. In the above view of the matter the petition stands dismissed. Rule discharged with costs.