

(2008) 01 AHC CK 0015
In the Allahabad High Court
Case No : C.M.W.P. No. 14036 of 1989

Shanti Devi (D) through L.Rs.

APPELLANT

Vs

6th Additional District Judge and Another

RESPONDENT

Date of Decision : 07-01-2008

Acts Referred:

Evidence Act, 1872 — Section 63, 65
Transfer of Property Act, 1882 — Section 106
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 2(2)

Citation : (2008) 6 AWC 5979

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Advocate : A.K. Banerji, Santosh Kumar and Hari Prasad Pandey, for the Appellant; Shailendra, Ranjit Saxena and S.C., for the Respondent

Judgement

S.U. Khan, J.—Heard learned Counsel for the parties.

2. This is landlord's writ petition arising out of S.C.C. Suit No. 329 of 1979, filed by original landlady Petitioner since deceased and survived by legal representatives against Bengali Mal-tenant Respondent No. 2 before J.S.C.C., Agra. Property in dispute is a shop situate in Shanti Market, Belanganj, Agra rent of which is Rs. 40 per month. Suit was filed after termination of tenancy through notice, which was served upon the Defendant on 10.2.1979. Receipt of notice was admitted by the Defendant. It was further pleaded by landlord that ten years' period since construction of the shop in dispute had not expired till the filing of the suit, hence U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 was not applicable by virtue of its Section 2(2), J.S.C.C., Agra decreed the suit through order dated 16.7.1986 holding that the Act, was not applicable and tenancy has been terminated through notice. (In order to prove the notice, carbon copy of the notice (which was typed) was filed and husband of the landlady proved that it was true copy of the original sent to the tenant). Against the said judgment and decree, tenant filed Civil Revision No. 19 of 1986,

which was dismissed on 8.1.1988.

3. Before the revisional court, tenant filed review petition, which was registered as Misc. Case No. 7 of 1988. Even though the presiding officer, who decided the revision, was available at Agra still review petition was sent to another presiding officer, i.e., Presiding Officer of the Court of vIth A.D.J.

4.V Ith A.D.J., Agra allowed the review petition through order dated 6.4.1989 set aside the order dated 8.1.1988 through which revision was dismissed. Through order dated 6.4.1989 revision was allowed, judgment and decree of the trial court was set aside and matter was remanded to the trial court. This writ petition is directed against order dated 6.4.1989.

5. Revision was initially dismissed by Sri D. Chandra and subsequently, it was allowed on review by Sri N. L. Saxena.

6. The tenant in his written statement had admitted receipt of the notice but had asserted that it was invalid. Para 4 of the written statement is quoted below:

that in Para-4 of the plaint, only it is admitted that Plaintiff served the Defendant with a wrong and illegal notice for which a correct reply was sent. Rest of the allegations are wrong and not admitted.

7. The revisional court while dismissing the revision clearly mentioned that "no-objection was taken by the revisionist at the time of the recording the evidence."

8. Revisional court while allowing the revision on review held that copy of the notice filed by the landlord was secondary evidence and it was not proved in accordance with Sections 63 and 65 of the Evidence Act. Landlady's husband had stated that he and his wife got prepared the notice by the advocate and on the original notice as well as on its copy, the advocate signed and Paper No. 39-ga was copy of the notice and on this copy also the advocate signed in his presence. Thereafter, it is mentioned that in the statement the witness proved the notice. The said statement is quoted in the judgment of vIth A.D.J. dated 6.4.1989, passed on review petition. It is extremely strange rather baffling that even after recording the evidence of landlady's husband in verbatim, the vIth A.D.J. held that copy of the notice was not proved. Section 63, Evidence Act, requires that it must be proved that secondary evidence was copy of the original and copy means a copy made from the original by mechanical process or copy made from or compare with the original or oral accounts of the content of a document given by same person, who himself sent it. The oral statement of landlady's husband was hundred per cent sufficient to prove that copy was the correct copy of the original. The revisional court while allowing the review petition observed that witness should have stated that it was prepared by the same mechanical method or uniform process compared with original notice. Nothing further was required to be said.

9. Moreover, original was admitted to be received by the tenant. Original was in his possession. If he wanted to assert that it was illegal, then he should have

filed it. Non-filing of original warranted drawing of adverse inference against the tenant. Receipt of notice was admitted. Burden to prove its illegality was upon the tenant. However, the tenant could not even point out any particular illegality in the notice.

10. Admissibility and mode of proof are two different things. Objection regarding mode of proof shall be taken at the earliest otherwise it cannot be taken. The tenant did not take any objection at the trial stage, hence he was not entitled to take any such objection afterwards.

11. I have discussed this aspect in detail in *Taqdirunnisa and Anr. v. Ist Additional District Judge, Allahabad and others* 2006 (2) ARC 444 . In the said authority, I have placed reliance upon several authorities including the authority of the Supreme Court in *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another*, of the said judgment of the Supreme Court is quoted below:

20. The learned Counsel for the Defendant-Respondent has relied on the *The Roman Catholic Mission Vs. State of Madras and Another*, in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence ; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit," an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there ; and secondly, in the event of

finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

12. I am constrained to observe that the view taken by vIth A.D.J., Agra, while allowing the review petition borders on absurdity. Such type of approach and judgment invites and instigates such type of criticism as "law is an ass" (Oliver Twist by Charls Dikens).

13. Accordingly, I hold that judgment and decree passed by the trial court and judgment and order passed by the revisional court at the earlier stage, i.e., judgment dated 8.1.1988 was perfectly in accordance with law and the judgment and order by vIth A.D.J. allowing review petition is utterly erroneous in law.

14. Writ petition is accordingly allowed. Judgment and order passed by vIth A.D.J., Agra dated 16.4.1989 is set aside. Judgment and decree passed by the trial court dated 16.7.1986 and judgment and order of the revisional court dated 8.1.1988 are restored.

15. Shop in dispute is situate in Agra. Current rent of the shop in dispute may not be less than Rs. 10,000 per month. Supreme Court in Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., has held that until decree of eviction passed by the first Court, tenant is liable to pay only the agreed rent. However, thereafter, he may be directed to pay reasonable rent/damages for use and occupation. Accordingly, it is directed that w.e.f. 16.7.1986, when the suit was decreed till date, tenant shall be liable to pay rent/damages for use and occupation @ Rs. 750 per month.

16. Tenant-Respondent is granted six months time to vacate provided that:

1. Within six weeks from today tenant files an undertaking before the prescribed authority to the effect that on or before the expiry of aforesaid period of six months he will willingly vacate and handover possession of the property in dispute to the landlord-Petitioner.

2. Entire decretal amount due till date is deposited before trial court within six weeks for immediate payment to landlord-Petitioner.

3. For this period of six months, which has been granted to the tenant-Respondent to vacate, he is required to pay Rs. 30,000 (at the rate of Rs. 5,000 per month) as rent/damages for use and occupation. This amount shall also be deposited within six weeks before the trial court and shall immediately be paid to

the landlord-Petitioner.

17. In case of default in compliance of any of these conditions tenant-Respondent shall be evicted through process of Court after six weeks. It is further directed that in case undertaking is not filed or decretal amount and Rs. 30,000 are not deposited within six weeks then tenant-Respondent shall be liable to pay damages at the rate of Rs. 7,500 per month since after six weeks till the date of actual vacation.

18. Similarly, if after filing the aforesaid undertaking and depositing decretal amount and Rs. 30,000 the accommodation in dispute is not vacated on the expiry of six months then damages for use and occupation shall be payable at the rate of Rs. 7,500 per month since after six months till actual vacation. It is needless to add that this direction is in addition to the right of the landlord to file contempt petition for violation of undertaking and file execution application for execution of the decree.