

(2006) 03 AHC CK 0158

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 33248 of 1991

Smt. Sudha Agarwal

APPELLANT

Vs

VII Additional District Judge, III Additional Civil Judge and
Narendra Kumar

RESPONDENT

Date of Decision : 24-03-2006

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 106(4)

Citation : (2006) 2 AWC 1965

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

Bench : Single Bench

Advocate : A.K. Banerjee, Anurag Srivastava and Santosh Kumar, for the Appellant; Pankaj Mithal, Nitin Gupta and V.K. Jaiswal and S.C., for the Respondent

Final Decision : Allowed

Judgement

S.U. Khan, J.—This is landlady's writ petition. Petitioner filed suit for eviction and for recovery of arrears of rent against tenant respondent No. 3 Narendra Kumar in the form of SCC Suit No. 26 of 1987. JSCC/ III Additional Civil Judge, Ghaziabad through judgment and decree dated 12.7.1989 decreed the suit for eviction and recovery of arrears of rent. Against the said judgment and decree tenant respondent No. 3 filed SCC Revision No. 96 of 1989. VII Additional District Judge, Ghaziabad through judgment and order dated 21.7.91 allowed the revision, set-aside the judgment and decree passed by the trial court and dismissed the suit hence this writ petition by the landlady.

2. Notice was served through refusal and Postman was also examined by the landlady. Carbon copy of the notice was proved by the landlady. The envelope containing the original notice, which had been refused by the tenant, was also filed. Revisional court only and only on the ground that the envelope containing the original notice was not opened held that notice had not been proved. I have dealt with this point in detail in writ petition No. 3455 of 1980, Taqdirunnisa v.

A.D.J. decided on 30.1.2006. Facts of the said case were exactly similar as the facts of the instant case. After placing reliance upon several authorities of different High Courts and an authority of Supreme Court reported in R.V.E.V. Gounder v. A.V.V.P. Temple 2004(1) ARC 137. I have held that if any party wants to raise the objection in respect of admissibility of secondary evidence then the said objection shall positively be raised at the trial stage so that the other side may have an opportunity of removing the deficiency. In the aforesaid 2004 authority, Supreme Court has held that where the objection is directed towards the mode of proof alleging the same to be irregular or insufficient, the same should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular can not be allowed to be raised at any stage, subsequent to the marking of the document as an exhibit (para 18). The original notice was very well in the file of the trial court. In case tenant had raised the objection, the landlady would have then and there requested the trial court to open the envelope and she would have proved the original notice. Copy of the notice was marked as exhibit 1 by the trial court. Accordingly I am of the opinion that the revisional court committed an error of law in holding that notice was not proved.

3. learned Counsel for the tenant has also argued that notice was defective. Annexure 5 is copy of the notice. I do not find any defect in the said notice. At the top of the notice, it is mentioned that it is from Sudha Agarwal through Sri Fateh Chand Goel, Advocate. In the notice, it is shown that it is to (Banam) Narendra owner of Narendra Photostat, 20 Navyug Market, Ghaziabad.

4. learned Counsel for the respondent No. 3 tenant has also argued that a notice u/s 106 T.P. Act can be served only at the residence of the tenant as provided u/s 106(4) of T.P. Act which is quoted below:

Every notice under Sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, 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].

5. There is no comma immediately after the words "or to one of his family or servants". The portion between the last two commas is as follows:

or to one of his family or servants at his residence

6. It is therefore quite clear that the words "at his residence" relate only to service upon family or servants of the tenant. Notice in the instant case was sent at the tenanted shop in dispute in the suit. Service through refusal was proved by the Postman also, hence it was perfectly valid. In this regard reference may be made to H. Banerji v. R.Ray AIR 1918 PC 102 and D. Tyagi v. A. Kumar 1986 ALJ 1047 . In this regard learned Counsel for the landlord has also cited an authority reported in Balgovind Rastogi Vs. Bhargava School Book Depot,

7. In the end, learned Counsel for the respondent tenant argued that by maximum it was a case of remand. I do not agree. A pure error of law has been committed by the revisional court, which can be corrected, by this Court in exercise of writ jurisdiction without any fresh enquiry into facts. There is therefore absolutely no necessity to remand the matter.

8. Writ petition is accordingly allowed. Judgment and order passed by the revisional court is set-aside. Judgment and decree passed by the trial court is restored.

9. Tenant respondent No. 3 is granted six months time to vacate provided that:

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

(2) For this period of six months which has been granted to the respondent to vacate he is required to pay Rs. 6000/- (at the rate of Rs. 1000/- per month) as damages for use and occupation. This amount shall also be deposited within six weeks before the prescribed authority and shall immediately be paid to the landlady-petitioner.

(3) Entire decretal amount due till date shall also be deposited by the tenant within six weeks from today after adjusting the amount already deposited for immediate payment to the landlady petitioner.

10. It is further directed that in case undertaking is not filed or amount of Rs. 6000/- and entire decretal amount due till date is not deposited within six weeks then tenant respondent shall be liable to pay damages at the rate of Rs. 2000/- per month since after six weeks till the date of actual vacation.

11. Similarly if after filing the aforesaid undertaking and depositing Rs. 6000/- and entire decretal amount due till date, the property 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. 2000/- per month since after six months till actual vacation.