

(2008) 02 AHC CK 0173
In the Allahabad High Court

Sri Bhojraj Wadhwa and Another

APPELLANT

Vs

The IX Additional District Judge and Others

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

General Clauses Act, 1897 — Section 27
Transfer of Property Act, 1882 — Section 106

Citation : (2008) 02 AHC CK 0173

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dilip Gupta, J.—The Suit filed by the landlords for ejectment and for recovery of arrears of rent was decreed by the learned Judge, Small Cause Courts, by the order dated 8th September, 1997. This petition has been filed by the landlords for setting aside the judgment and order dated 14th December, 1998 by which the Revision filed by the defendants for setting aside the aforesaid order dated 8th September, 1997 was allowed and the matter was remanded to the Trial Court.

2. SCC Suit No. 13 of 1991 had been filed on 21st March, 1991 by the landlords impleading M/s. Ganga Medical Store (notice to be served through partner or any other person carrying on the business), Shyam Lal Paliwal and Chandra Dutt Sharma as defendant Nos. 1, 2 and 3 respectively. It was alleged that the shop had been let out at the rate of Rs. 475/- per month but the rent had not been paid from 29th May, 1990 along with the taxes and, therefore, a notice u/s 106 of the Transfer of Property Act for terminating the tenancy on the expiry of 30 days and for payment of arrears of rent was served upon the defendants.

3. The learned Judge, Small Cause Courts found that U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 was not applicable to the building in question since the building was first assessed on 1st April, 1982 and period of ten years had not lapsed from the date of construction of the building.

The Court also found that there was a presumption about the service of the notice u/s 106 of the Transfer of Property Act upon the defendants. The suit was, accordingly, decreed. The Revisional Court, however, observed that the aforesaid notice had not been served upon the defendants and, therefore, it remanded the matter to the Trial Court.

4. The basic issue that arises for consideration in this petition is whether the notice sent by the plaintiffs u/s 106 of the Transfer of Property Act had been served upon the defendants. It would, therefore, be relevant to refer to the facts relating to the service of the said notice. The case set up by the plaintiffs was that initially the notice u/s 106 of the Transfer of Property Act was sent to all the defendants by Registered Post on 19th November, 1990 at the address of the Firm. The postal receipts were marked as Exhibits 3, 4 and 5. The Registered notice sent to defendant No. 1 M/s. Ganga Medical Store was marked as Exhibit 7. The registered letter was returned with the endorsement of the postman "not met despite information" as even though the postman went to the medical store to serve the said notice daily from 21st November, 1990 to 27th November, 1990 yet he could not serve it. The registered notice sent to Shyam Lal Paliwal which was marked as Exhibit 8 was also returned with the endorsement of the postman that though he went daily from 21st November, 1990 to 27th November, 1990 to serve it but he could not meet the person despite information having been given. The registered notice sent to Chandra Dutt Sharma was marked as Exhibit 6 and it also contained the same endorsement of the postman ""not met despite information".

5. After the aforesaid notices sent by registered post were returned back, the landlords again sent the notices on 4th December, 1990 by registered post to all the defendants but this time at two addresses namely at the address of the shop and also at the residential address. The postal receipts of these notices were marked as Exhibits 16, 17 and 18. The notices sent to the firm were marked as Exhibits 10 and 13, the notices sent to Shyam Lal Paliwal were marked as Exhibits 11 and 12 while the notices sent to Chandra Dutt Sharma were marked as Exhibits 14 and 15. The notices sent by registered posts to the partners at their residential address were diverted to Indore and Kota but there also they were not received by the addressee. The postman made the endorsement on the envelope that though he made attempts to serve the notice on the addressee on various dates but he could not meet the addressees despite due intimation having been given and nor did the addressees make any attempts to obtain the registered letters. The notices sent to the firm by registered post also came back with the endorsement that they could not be served despite repeated attempts after due intimation.

6. Thereafter the landlords made the third attempt of serving the notice dated 25th January, 1991 personally upon the firm through Sri Rohtesh Singh Advocate who gave an affidavit that he went to serve the notice upon M/s. Ganga Medical Store but could not meet the partners. He, however, met Sri Dheerath and

Rakesh in the shop to whom he wanted to tender the notice meant for the firm but both the persons refused to accept the notice. In such circumstances, the notice meant for the firm was affixed on the front portion of the shop and he also took photographs. PW-1 B.R. Wadhwa who appeared as a witness proved the aforesaid facts.

7. The learned Judge, Small Cause Courts concluded that the notices sent by Registered Post to the defendants should be presumed to have been duly served and in any case it had been duly affixed on the front portion of the shop M/s. Ganga Medical Store which was the tenant. The Revisional Court, however, found that it cannot be presumed that the notices had been served by Registered Post and the affixation of the notice on the shop was not in accordance with the provisions of Section 106 of the Transfer of Property Act as no attempts were made to tender or deliver it personally to the party, or to one of his family member or servants of the parties at their residence.

8. Sri Bhupeshwar Dayal learned Counsel for the petitioners submitted that the Revisional Court committed an error in holding that the notices had not been duly served upon the defendants by Registered Post and in any case since the tenant was the Firm, the notice had been duly served in accordance with the provisions of Section 106 of the Transfer of Property Act by affixation of the notice on the front portion of the shop since it was not practicable to personally serve the notice as the two persons who were found running the shop refused to accept it.

9. Sri Pramod Kumar Jain learned Senior Counsel for the respondents, however, urged that the notices sent by Registered Post, in the facts and circumstances of the case, cannot be presumed to have been served. He also urged that the Firm cannot be a tenant and Section 106 of the Transfer of Property Act requires that in case it was not possible to deliver the notice personally to the party then it should be tendered to one of his family or servant at his residence and only if such tender or delivery was not practicable that the notice could be affixed to a conspicuous part of the property.

10. In order to appreciate the contentions advanced by the learned Counsel for the parties, it would be appropriate to reproduce Section 106 of the Transfer of Property Act as amended in U.P. by U.P. Act No. 24 of 1954 and the same is as follows:

In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six month's notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by thirty days' notice.

Every notice under this section 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.

11. It needs to be mentioned at this stage that earlier the landlords had instituted SCC Suit No. 57 of 1988 against Shyam Lal Paliwal as the tenant of the same premises but a defence was taken by Shyam Lal Paliwal that M/s. Ganga Medical Store was the tenant. The Court found that infact M/s. Ganga Medical Store was the tenant and, therefore, dismissed the suit as the firm had not been impleaded. The present suit was, therefore, filed by the plaintiffs by impleading M/s. Ganga Medical Store as defendant No. 1 and the other two defendants as partners of the firm. In the written statement filed in the present suit, the defendants did not take up any plea that M/s. Ganga Medical Store could not be a tenant and only oral arguments were sought to be advanced that M/s. Ganga Medical Store was a partnership Firm and it could not be a tenant. The Trial Court found that a Firm could be a tenant and the defendants had also not specifically denied in the written statement that the Firm could not be a tenant. In such circumstances, the Court found that the defendants cannot contend that M/s. Ganga Medical Store could not be a tenant and the tenants were, in fact, the two partners Shyam Lal Paliwal and Chandra Dutt Sharma. Having found so, the Trial Court proceeded to examine whether the tenancy of the Firm M/s. Ganga Medical Store had been terminated by the notice sent u/s 106 of the Transfer of Property Act. It recorded a finding that both the notices dated 19th November, 1990 and 4th December, 1990 had been sent by registered post at the correct addresses of the defendants. It also recorded a finding that in view of the endorsements made by the postman, the notices must be deemed to have been served upon the defendants. The Trial Court also found that even otherwise, the notice had been duly affixed on the property after attempts made to serve the notices personally on the Firm on 25th January, 1991 failed. The Trial Court, therefore, found that the notices had been duly served. However, according to the Revisional Court, the notice had not been served on the tenant.

12. The first question that is to be determined is whether the Firm could be a tenant. As noticed above, in the earlier SCC Suit No. 57 of 1988 in which only Shyam Lal Paliwal had been impleaded as a defendant a specific plea was taken by Shyam Lal Paliwal that he was not the tenant but in fact, the Firm was the tenant but since the Firm had not been impleaded, the suit should be dismissed. The Court found as a fact that the Firm was the tenant and, therefore, dismissed the suit. This led to the filing of the subsequent Suit No. 13 of 1991 in which the Firm was impleaded as defendant No. 1 and the two partners as defendant Nos. 2 and 3. In the written statement the defendant did not deny that the Firm was not the tenant and only oral submission was advanced that the Firm cannot be a tenant.

13. This Court in Krishna Kumar Awasthi v. Rent Control and Eviction Officer, Kanpur Nagar and Anr. 1999 (2) ARC 457 had observed:

The learned Counsel for the contesting respondent contended that since a firm is not legal entity it could not be let out any premises not a firm could be the tenant. Reliance was placed on a decision of this Court in Sangam Lal Gupta v. 1st Additional District Judge, Kanpur and Ors. 1984 A.C.J. 457 which was decided by Hon"ble R.B. Lal, J. on 3.4.1984. It was held that subject to specific provision in the Act a firm cannot be taken to be capable of becoming a tenant. Reliance was placed on a decision of the Supreme Court in Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur, wherein it was held that a firm unless expressly provided for the purpose of any statute is not a legal entity.

It cannot be disputed that in absence of specific provision in the Act a firm could not be a legal entity. The question arises whether the firm despite not being a legal entity could become the tenant or not. The learned Counsel for the petitioner relied on a latter decision of this Court decided by the same Hon"ble Judge, Hon"ble Mr. Justice R.B. Lal in the Surgical Clinic and Nursing Home, Civil Lines, Kanpur and Anr. v. District Judge, Kanpur and Ors. 1984 (2) ARC 92 decided on 20.4.1984. The attention of the Hon"ble Judge was brought to Clause (a) of the proviso to Sub-rule (6) of Rule 2 which provides that the District Magistrate shall allot the non-residential building in question afresh to the newly constituted or reconstituted firm. In view of this provision it was held "when the law itself provides for allotment in favour of the firm, the allotment order cannot be treated as null and void on the ground that the firm is not a legal person." In view of the latter decision the correct legal position is that a firm is capable of becoming a tenant. In view of this legal position it becomes necessary that the Rent Control and Eviction Officer should consider whether the godown in question was in the tenancy of the firm.

14. In view of the aforesaid decision it has to be held that a firm can be a tenant. Thus the contention of the learned Senior Counsel for the respondents that the firm, under any circumstances, cannot be a tenant cannot be accepted.

15. The second submission of learned Counsel for the petitioner that the notice had been served in accordance with the provisions of Section 106 of the Transfer of Property Act has now to be examined.

16. The Calcutta High Court in Sukumar Guha Vs. Naresh Chandra Ghosh and Another, which analyzing the provisions relating to service of notice u/s 106 of the Transfer of Property Act, observed that there are four modes of service of notice namely,

- (1) Sending by post to the party.
- (2) Tender or delivery to the party personally.
- (3) Tender or delivery to one of his family or servants at his residence.
- (4) Affixing the notice to a conspicuous part of the property.

17. In this connection the Court observed:

In my view principal modes of service of notice mentioned in Section 106, T.P. Act are two, either by sending by post or by tender or delivery to the party. Other two modes are alternatives to 2nd mode of tender or delivery, first of those alternatives, i.e. 3rd mode, being vicarious tender or delivery but that must be at the residence of the party and second alternative, i.e. 4th mode, being in substitution of 2nd and 3rd modes when none of those two modes are practicable. Understood that way, 2nd mode is independent alternative to first, while 3rd and 4th modes are alternatives to second, the 4th mode being available only when neither 2nd nor 3rd mode is practicable. It follows that when 1st mode is satisfied either by proof and/or presumption, none of the other modes are necessary or relevant; when 2nd mode is satisfied by proof of tender or delivery either by evidence or by presumption regarding delivery or tender by postman, neither 3rd nor 4th mode is necessary or relevant. If 2nd or 3rd mode appears to have been practicable but has not been availed, giver of the notice cannot avail of the 4th mode. Even when 4th mode can be availed, affixing must be nowhere else than at the property in suit. Affixing even at the residence of the party is not sufficient, unless that residence is the property in suit.

In that background the meaning of the word "residence" occurring in Section 106, T.P. Act should be understood. It is clear that the two principal modes of service of notice above mentioned may be effective at any place though that place is neither the residence of the party nor the property in suit. But vicarious tender or service must be at his residence and nowhere else; affixing the notice must be at the property in Suit and nowhere else, not even at his residence if property in suit is not the residence.

18. It is, therefore, clear that the principal mode of service of the notice u/s 106 of the Transfer of Property Act is either by sending the same by post to the party concerned or by tendering it or delivering it to the party personally. The other two modes i.e. by tender or delivery to one of his family or servants at his residence or affixing the notice to a conspicuous part of the property are merely alternatives to the second principal mode of service referred to above. In fact, the last mode i.e. affixation of the notice to a conspicuous part of the property is to be resorted to only when it is not possible to tender or deliver it to the party personally or tender or deliver it to one of his family or servants at his residence. It is also clear that when the first principal mode i.e. sending the notice by post to the party is satisfied either by proof or by presumption, none of the other modes are necessary.

19. The Supreme Court in *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, in connection with the provisions of Section 11 of the Jammu & Kashmir Houses and Shops Rent Control Act 1966 elaborately considered the presumption of service of notice when it is sent by Registered Post. The petitioner *M/s. Madan & Company* was a firm which was the tenant of a portion of a building situated in Raghunath Bazar, Jammu on a rent of Rs. 2,000/- per month. A notice dated 26th November, 1976 was first sent by registered post by the landlord to the

petitioner firm calling upon it to pay the arrears of rent and the tenancy was terminated. The notice also called upon the petitioner to vacate the demised premises on or before 31st December, 1976. The postman called at the address on 7th December, 1976 and 8th December, 1976, but having failed to find there either the addressee or any person authorised to receive the notice on his behalf, returned it with the endorsement "left without address, returned to sender". Thereupon the landlord caused a copy of the notice to be affixed to one of the doors of the premises in question in the presence of two inhabitants of the locality on 9th December, 1976 and thereafter filed the suit seeking ejectment of the petitioner. The controversy before the Supreme Court turned on the question whether the notice sent by the respondents by Registered Post on 26th November, 1976 can be said to have been served and the petitioner can be said to have been in receipt of the said notice.

20. The provisions of Section 11 of the Jammu & Kashmir Houses and Shops Rent Control Act, 1966 which were involved in the case are quoted below:

Section 11: Protection of a tenant against eviction-

(1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any house or shops shall be made by any Court in favour of the landlord against a tenant xx xx xx

Provided that nothing in this sub-section shall apply to any suit for decree for such recovery of possession.

xxx xxx xxx

(i) subject to the provisions of Section 12, where the amount of two months rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with Section 14:

Provided that no such amount shall be deemed to be in arrears unless the landlord on the rent becoming due serves a notice in writing through post office under a registered cover on the tenant to pay or deposit the arrears within a period of fifteen days from the date of the receipt of such notice and the tenant fails to pay or deposit the said arrears within the specified period.

21. The Supreme Court made the following observation:

We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to Clause (i) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through post. All that a landlord can do to comply with this provision is to post a

prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee u/s 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the addressee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under Order V of the C.P.C. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, as addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found" "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served to him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone, or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post" correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a

landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant.

22. It is in the light of the aforesaid principles laid down by the Supreme Court that the facts of the present case have to be examined.

23. The defendant firm M/s. Ganga Medical Store was the tenant and defendant Nos. 2 and 3 were the partners. The plaintiffs initially sent the notices by Registered Post on 19th November, 1990 at the address of the firm to all the defendants. When these notices were returned back by the postman, the plaintiffs again sent the notices dated 4th December, 1990 by Registered Post but this time, the notices were sent at two addresses namely, the address of the firm and at the residential address of the partners. These notices were also returned back. The endorsements made by the postman on the notices sent by Registered Post on 19th November, 1990 and 4th December, 1990 clearly shows that repeated attempts were made by the postman to serve the notices upon the addressees after due intimation but the notices could not be served and nor did the addressees make any attempts to receive the notices from the post-office. Thus, in view of the decision of the Supreme Court in M/s. Madan & Co. (supra) where almost identical endorsement was made by the postman, it has to be presumed that the notice had been served upon the defendants. The finding to the contrary recorded by the Revisional Court is perverse and is set aside.

24. In such circumstances, as observed by the Calcutta High Court in Sukumar Guha (supra), it was not necessary for the landlords to have taken recourse to the alternative modes of service of notice. However, as the Revisional Court has recorded a finding that service of notice by affixation of the notice to a conspicuous part of the property could not have been resorted to since no attempts were made to tender or deliver the notice to one of his family or servants at his residence, it is necessary to examine this issue. As noticed above, the firm was the tenant. The landlords had made an attempt to tender or deliver the notice on the firm. In this context the lawyer had also filed an affidavit that he went personally to tender the notice but none of the partners was found in the shop. He then made an attempt to tender it to the two servants who were present in the shop but they refused to accept it and, therefore, in such circumstances, the notice was affixed to a conspicuous part of the property.

25. The contention of the learned Senior counsel for the respondents is that attempts should have been made by the landlords to personally serve the partners at their residence and not at the shop. This contention cannot be accepted because in the present case the firm was the tenant and, therefore, the attempt should have been made to serve the partners in the shop. This is what was precisely done by the landlords and it is only when the partners were not found in the shop that an attempt was made to personally serve the servants in the shop but since they refused to accept the notice, it was affixed to a conspicuous part of the property. In such circumstances, the finding recorded by the Revisional Court is liable to be set aside and is, accordingly, set aside.

26. The aforesaid discussion leads to the inevitable conclusion that notice u/s 106 of the Transfer of Property Act had been duly served upon the tenant firm. The Revisional Court had set aside the order passed by the learned Judge, Small Cause Courts only on the ground that the aforesaid notice had not been served. In such circumstances, the writ petition deserves to be allowed.

27. The writ petition, therefore, succeeds and is allowed. The judgment and order dated 14.12.1998 passed by the Revisional Court is set aside and that of the learned Judge, Small Cause Courts is restored. There shall be no order as to costs.