

(2012) 07 CAL CK 0245
In the Calcutta High Court
Case No : S.A. No. 461 of 1996

Sri Kanak Pramanik

APPELLANT

Vs

Sri Indrajit Bandopadhyay and Others

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 106

Citation : AIR 2013 Cal 60

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Probal Mukherjee, Mr. S. Das, Mr. S. Sarkar, Mr. P.C. Maity and Mr. Siddhartha Sarkar, for the Appellant; Hiranmoy Bhattacharya, C. Sarkar and Mr. S. Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Gupta, J.—This appeal is directed against the judgment and decree dated 15th June, 1995 passed by the learned Assistant District Judge, Baruipur, 24 Parganas (South), in Title Appeal No. 71 of 1993 affirming the judgment and decree dated 6th February, 1992 passed by learned Munsif, 1st Court at Baruipur, 24 Parganas (South) in Title Suit No. 300 of 1988. The respondent as the plaintiff filed said suit alleging that the defendant was a monthly tenant under him at a rental of Rs. 25/- per month payable according to Bengali calendar month in respect of the suit premises. Defendant defaulted in payment of rent and accordingly plaintiff sent a notice u/s 106 of the T. P. Act under registered post with A/D asking the defendant to quit and vacate the suit premises on expiry of the month of Agrahayan 1395 B. S. The defendant refused to accept such notice and did not also vacate the suit premises. Accordingly, the suit for ejectment and recovery of khas possession with consequential reliefs was filed.

2. The Appellant / defendant contested the said suit by filing a written statement denying the material allegations of the plaint and contending inter alia that the

defendant was a tenant under the plaintiff's father Haripada Banerjee and that on the death of Haripada Banerjee, all his heirs became joint landlord and that the plaintiff was not the sole landlord and had no authority to file said ejectment suit as the sole landlord. It was further alleged that defendant did not receive any notice and that plaintiff managed to obtain a postal endorsement "refused" in collusion with postal peon. The suit was liable to be dismissed.

3. Learned Trial Court framed several issues including an issue as to whether there was relationship of landlord and tenant between the parties and whether the notice u/s 106 of the T. P. Act was legal, valid and sufficient and was duly served upon the defendant.

4. Both sides adduced evidence. After contested hearing learned Trial Court decreed the suit for ejectment observing that the defendant was a tenant under the plaintiff and that the notice u/s 106 of the T. P. Act was legal, valid and sufficient and that on account of refusal on the part of the defendant to accept the same it amounted to good service.

5. Learned Lower Appellate Court also concurred to the aforesaid finding of the learned Trial Court by dismissing the appeal preferred by the defendant.

6. At the time of admission of second appeal, it was decided that this appeal will be heard as it arises a substantial question as to the propriety of the finding of the Court of appeal below on the point of service of notice.

7. Mr. Probal Mukherjee, learned counsel for the appellant, submits that learned Courts below failed to take note that the defendant tenant categorically stated not only in his written statement but also during his evidence that no notice was ever tendered to him by the postal peon. As such, there was no question of refusal on his part to accept the same and that the endorsement "refused" made by the postal peon on the envelope was not correct. According to Mr. Mukherjee, after said categorical assertion of the defendant tenant, both in the written statement as well as in his evidence, the presumption of due service in view of endorsement of postal peon on the envelope as "refused" stood rebutted. He further submits that under those circumstances the onus again shifted upon the plaintiff landlord to prove by bringing the postal peon on the dock that there was really any tender of said notice to the defendant by the postal peon and that the defendant refused to accept the same. According to him, learned Courts below failed to take note of this principle and accordingly came to a wrong conclusion that said endorsement of refusal made by the postal peon on the notice amounted to good service. In support of his contention he refers case laws reported in 1988 (1) CHN 219 (Mano Ranjan vs. Suchitra), Siddharta Sen and Another Vs. Prabhas Kumar Sengupta, , 2009 (1) CHN 660 (Arup Hazra vs. Manashi Hazra), Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, and M/s. Green View Radio Service Vs. Laxmibai Ramji and another,

8. In reply Mr. Hiranmoy Bhattacharya, learned counsel for the respondent/ landlord, on the other hand, submits that it came out from the admission of the

appellant tenant that the notice was sent in the correct address. According to him, when a notice under registered post with A/D with proper stamp and correct address is sent and it returns with the comment of the postal peon "refused" then it amounts to a good service in the absence of a convincing evidence that there was no tender or no refusal on the part of the addressee. In support of his contention he has referred case laws reported in *Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, Rameshwar Lal and Another Vs. Raghunath Das and Others*, and *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, . He further submits that mere denial of the appellant tenant in this regard cannot be said to be sufficient rebuttal of the presumption of service in view of said endorsement "refused" made by the postal peon. In this connection he further submits that the appellant tenant took the plea that on the relevant date he was in his office but no document in support of the same was filed and that learned Courts below also took note of the same.

9. His last but not the least important submission is that both the Courts below came to concurrent findings of fact that in view of the postal endorsement (refused) the notice was deemed to be served upon the tenant. This Court while exercising powers u/s 100 of the CPC should not interfere with the same as no substantial question of law is really involved in this case. In support of his contention he has referred case laws reported in *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, and *Kashi Nath (Dead) through Lrs. Vs. Jaganath*,

10. I have gone through the case laws referred by Mr. Bhattacharya relating to his submission regarding concurrent findings of fact by learned Courts below. There is no denial that the concurrent findings of fact of learned Courts below cannot be interfered by a Court of Second Appeal u/s 100 of the CPC unless a substantial question of law is involved in the matter. Now it has been well-settled that if it can be shown that said concurrent findings of fact of learned Court below were based on no evidence, or were based on extraneous matters or were passed disregarding settled principles of law then it amounts to a substantial question of law justifying interference by a Court of law u/s 100 of the Code of Civil Procedure.

11. I have perused the case laws referred by learned counsels of both sides on the point of presumption of service in view of postal endorsement "refused" on the envelope. This point is no longer *res integra*. It is now settled law that once a notice is sent under registered post with A/D with proper stamp and proper address and is returned with an endorsement of the postal peon "refused" then there is a presumption of tender and refusal amounting to a good service of notice. However, said presumption is rebuttable. If the addressee denies said tender and alleged refusal on his part in his pleadings as well as in his evidence and the same is found believable to the Courts then the presumption of service will be deemed to be sufficiently rebutted. In that case the onus will shift back to the addressor for proving such alleged tender and refusal by calling the postal

peon in the witness box.

12. In the case in hand, admittedly the appellant tenant took specific plea not only in his written statement but also in his evidence that there was no tender of said notice to him by the postal peon and as such there was no question of refusal on his part to accept the same. Learned Courts below, however, refused to accept his version on the ground that he did not file any document to show that he was present in his office on that day. The respondent landlord has also admitted that the appellant tenant was an employee of the Government mint at Alipur. It also came out from evidence that the defendant remained absent from the suit shop room during the working period of the working days and that a barber shop was run therein through his employee Gour Chandra Pramanik. A Government employee is expected to be in his office during the office hours in a working day, in absence of any evidence to the contrary. Neither of the parties produced any evidence to show that on the relevant date of alleged tender or alleged refusal the appellant tenant was present in the said suit shop by not going to his office.

13. During hearing Mr. Mukherjee, learned counsel for the appellant tenant drew the attention of the Court to the cross-examination of the appellant landlord wherein he categorically stated that the postal peon told him that he went to the defendant's shop room but he did not meet with him. According to Mr. Mukherjee said admission of the plaintiff coupled with denial on the part of the appellant tenant belied the story of alleged tender by the postal peon to the defendant or refusal on the part of the defendant.

14. Mr. Bhattacharya, learned counsel for the respondent landlord, in this connection submits that the evidence of the witness has to be read as a whole and not by going through a sentence from here or from there. According to him, the Court should appreciate the evidence of witness as a whole in a harmonious way. In this connection he refers a case law reported in Chikkam Koreswara Rao Vs. Chikkam SubbaRao and Others,

15. The above proposition of law is not disputed. But admittedly the plaintiff was not a witness of the alleged tender of the notice by the postal peon to the tenant as well as refusal on the part of the tenant. He claimed about due service of notice in view of endorsement of the postal peon "refused" on the body of the envelope. As such he had no personal knowledge about said alleged tender and refusal, but during his cross-examination he categorically stated that the postal peon told him that he went to the defendant's shop room but he did not meet with the defendant. Said specific evidence of the respondent landlord cannot be brushed aside in view of the discussions made above. In this connection the referred case of Chikkam Koreswara Rao (supra) has no application in this case as the facts as well as the nature of evidence were quite different in that case.

16. Section 106 of the Transfer of Property Act requires that notice to quit has to be sent either by post to the party or be tendered or delivered personally to such

party or to one of his family members or servants at his residence / place of business or if such tender or delivery is not practicable, it be affixed to a conspicuous part of the property. In the case in hand, only one notice to quit was sent to the appellant tenant under registered post with A/D. It returned with the endorsement of the postal peon "refused". The appellant tenant took specific plea not only in his written statement but also in his evidence that the postal peon did not tender any notice to him and accordingly there was no question of refusal on his part to accept the same. It also came out from evidence that the suit premises is a barber shop being run by appellant tenant through an employee Gour Chandra Pramanik. As such even in absence of the appellant tenant if the postal peon tendered the notice to his employee Gour Chandra Pramanik to be refused to be accepted by Gour still it might amount to refusal on the part of the tenant treating it to be good service of notice. But there is no evidence to that effect also from the side of the respondent landlord. Rather the appellant tenant also examined said employee Gour Chandra Pramanik (P.W.2) who categorically stated that on the relevant date i.e. 17.10.1988 postal peon did not visit said barber shop for service of the notice not to speak of tendering the same to him. Said evidence remained unshaken in spite of cross-examination. In view of the aforesaid evidence on record it is palpable that the appellant tenant was able to rebut the presumption of due service in view of postal endorsement "refused" on the envelope of notice and that it was a duty of the respondent landlord to produce the postal peon on the dock to discharge the burden of proving the service of notice. Learned Courts below unfortunately failed to take note of this evidence on record in the backdrop of the settled legal position as stated above and accordingly came to a palpable wrong conclusion that the postal endorsement "refused" amounted to good service in the facts and circumstances of the case.

17. Proper service of notice to quit is the very backbone of a suit of ejectment filed under the Transfer of Property Act. In this case the deemed service of notice in view of postal endorsement "refused" is found to be not acceptable. As such, the Ejectment Decrees passed by learned Courts below banking on said deemed service of notice were not sustainable in law.

18. As a result, the appeal succeeds. The impugned judgment and decree passed by learned Lower Appellate Court are hereby set aside.

19. However, I pass no order as to costs.

20. Send down Lower Court record along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgement be supplied to learned counsels of the parties, if applied for.