

(2004) 07 AHC CK 0023
In the Allahabad High Court
Case No : C.M.W.P. No. 3455 of 1980

Taqdirunnisa (Smt.) and Others

APPELLANT

Vs

Ist Additional District Judge and Others

RESPONDENT

Date of Decision : 05-07-2004

Acts Referred:

Evidence Act, 1872 — Section 65
Transfer of Property Act, 1882 — Section 106

Citation : (2005) 1 ARC 34

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

Bench : Single Bench

Final Decision : Allowed

Judgement

S.U. Khan, J.—This is landlords writ petition arising out of their suit for eviction filed against tenant respondent being suit (SCC Suit No. 486 of 1971 Munsif (West)/JSCC, Allahabad through judgment and decree dated 30.11.1973 decreed the suit for eviction and recovery of arrears of rent. Suit was decreed on the finding that tenant was in arrears of rent and that notice of termination of tenancy had been served through refusal. Tenant respondent filed a revision against the said judgment and decree being Civil Revision No. 97 of 1974. 1st Additional District Judge, Allahabad allowed the revision through judgment and order dated 4.8.1978, dismissed the suit for ejectment and recovery of arrears of rent and decreed the same only for recovery of electricity charges, hence this writ petition by landlords.

2. The only point on which Revisional Court allowed the revision was that the original notice which according to the plaintiff was sent through registered envelop and had been returned with the postman's endorsement of refusal had not been proved. The returned envelope had been filed by the plaintiff however the said envelope was not opened and plaintiff only proved copy of the notice. The same point has been urged by learned Counsel for the tenant respondent during arguments. The finding that the notice was actually refused has not been

seriously challenged. Even otherwise there is no error in the said finding recorded by both the Courts below in favour of the landlords petitioners.

3. Plaintiff proved the copy of the notice. In the said copy of the notice there is no legal error and it is in accordance with Section 106 T.P. Act Landlords stated that the said copy was true copy of the original notice.

4. The arguments of learned Counsel for the tenant respondent is that unless original notice was taken out after opening the envelop it could not that the copy of the notice was secondary evidence and it was not admissible unless loss or non-availability of original notice was proved in accordance with Section 65 Evidence Act. Learned Counsel for the petitioner has cited Marwari Kumhar and Others Vs. Bhagwanpuri Guru Ganeshpuri and Another, and Dr. Gurmukh Ram Madan Vs. Bhagwan Das Madan, , wherein it has been held that secondary evidence is permissible only when circumstances mentioned u/s 65 Evidence Act exist.

5. Learned Counsel for the tenant respondent has also cited an authority of this Court in 2001 A.W.C. 2152. However, in that authority it was admitted that the notice was not signed hence the above authority is also not applicable to the facts of the instant case.

6. An objection regarding inadmissibility of secondary evidence shall be taken at earliest opportunity before the trial Court. If it is not done, then such objection cannot be taken before Appellate or Revisional Court. This has been held by various High Courts, Privy Council and Supreme Court. Some of that authorities are given below:-

1. Dol Govinda Das Vs. Makbul Sekh"s infant heir and Others, .
2. AIR 1980 (NOC) 7 (Allahabad).
3. Mt. Basanti Vs. Pholo, .
4. Pramatha Nath Sarma and Another Vs. Tarini Charan Das, .
5. AIR 1951 P&h 223.
6. AIR 1946 Bom 193.
7. AIR 1917 Mad 671 (DB).
8. AIR 1924 Lah 273 (DB).
9. AIR 1925 Lah 347.
10. AIR 1933 Lah 601 (DB).
11. Collector, Cuttack Vs. Rajib Bhol, .
12. AIR 1953 Mys 49.
13. Ramlochan Misra and another Vs. Harinath Misra and others .

14. State of Rajasthan Vs. Jeo Raj and Another, .
15. The Land Acquisition Officer, Vijayawade Thermal Station Vs. Nutalapati Venkata Rao, .
16. Ajjarapu Subbarao Vs. Pulla Venkata Rama Rao and Others, .
17. (1907) 34 Cal 1059 (P.C.).
18. AIR 1915 P.C. 111.
19. Biswambhar Singh and Others Vs. The State of Orissa and Another, .
7. The reason for the above proposition is that in case objection is taken before the trial Court at the first opportunity, then other side may with the permission of the Court, if necessary, adduce or formally prove the original document.
8. In the instant case absolutely, no objection was taken by the defendant petitioner regarding admissibility of secondary evidence (copy of notice) either at the stage of evidence or even during argument before the trial Court. In fact even in grounds of revision, no such point was raised.
9. In view of the above, it was legally not permissible for the defendant to argue the said point before the Revisional Court where he was revisionist. It was also not legally permissible for the Revisional Court to allow the revision only on this point.
10. Accordingly, I hold that judgment and order passed by the Revisional Court is quite erroneous in law and is liable to be set-aside.
11. Writ petition is therefore, allowed. Judgment and order dated 4.8.1978, passed by the 1st Additional District Judge, Allahabad in Civil Revision No. 97 of 1974 is set-aside and the judgment and decree dated 30.11.1973 passed by JSCC, Allahabad in Suit No. 486 of 1971 is restored.
12. Tenants respondents is granted six months time to vacate provided that within one month from today he files undertaking before the JSCC to the effect that on or before expiry of the aforesaid period of six months he will willingly vacate and handover possession of the property in dispute to the landlords petitioners.
13. Tenant is further directed to deposit entire decretal amount due till 5.1.2005 within two months from today before the JSCC for immediate payment to the landlord. In case of default of either of the above two conditions, tenant respondent should be evicted in execution proceedings through process of Court after one month or two months as the case may be.