

(1999) 09 AHC CK 0102
In the Allahabad High Court
Case No : Civil Revision No. 361 of 1999

Umesh Chandra Srivastava	Vs	APPELLANT
Sheela Srivastava		RESPONDENT

Date of Decision : 29-09-1999

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (1999) 09 AHC CK 0102

Hon'ble Judges : D.K.Seth, J

Judgement

D. K. Seth, J.—Mr. Salil Kumar Rai, learned Counsel for the revisionist in this revision under Section 25 of the Provincial Small Cause Courts Act has assailed the impugned order dated 30th August, 1999 passed by the learned Additional District Judge, Xth Court, Gorakhpur, in S.C.C. Suit No. 9 of 1998 on the ground that the plaintiff landlady having not appeared as a witness offering to be crossexamined, the notice terminating the tenancy cannot be said to be proved in her absence only on the basis that the said notice was sought to be proved by her father. He secondly contends that the issue with regard to the validity of the notice under Section 106 of the Transfer of Property Act has not been considered in its proper perspective by the learned trial Court and the finding therein appears to be wholly perverse and is not a decision on a particular issue as is apparent on the face of it. In support of his contention, he relied on the decision in the case of Sardar Gurbaksh Singh v. Gurdial Singh and another (AIR 1927 Privy Council 230); Iswar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and Another (1999 SC 1341); Vidhyadharv.Mandakraoand another (AIR 1999 SC 1441) and Rambaran Paswan v. Smt. Kalo Dei and another (AIR 1974 Patna 333).

2. Learned Counsel for the opposite party on the other hand contends that it is an admitted position that the plaintiff herself resides in Meghalaya, which fact was known to the defendant himself all through and that the property was being looked after on behalf of the plaintiff by her father. The rent was used to be collected by the father and the father had proved the notice that it was issued at the instance of his daughter. He also contends that there was no specific issue

framed with regard to the question as raised by Mr. Rai. Issue No. 5 which relates to the validity of the notice was decided rightly against the defendant by the learned trial Court. He then contends that this finding on the issue No. 5 is a finding of fact, which should not be gone into in exercise of revisional jurisdiction. He relies, on the decision in the case of Laxmi Kishore and Another v. Har Prasad Shukla (1981 ARC 545). He contends that only on the ground of notice, the finding cannot be set aside, which is purely a technical question. The suit being a suit within the scope and ambit of the Provincial Small Causes Courts" Act, it remains a summary trial, for which those questions cannot be gone into as elaborately as that by a Civil Court.

3. I have heard both the learned Counsel at length.

4. Admittedly, the plaintiff is a resident of Shillong and the suit property was being looked after by her father. The relation between the plaintiff and her father is also not in dispute that she happens to be the daughter of the person looking after the suit as her father. Order III, Rule 2 of the Code of Civil Procedure describes recognised agent to the extent empowering such agent to act on behalf of a party. The expression "act" includes all actions in the proceeding itself as agent of the party. A person can represent himself in a suit through his agent. Rule 2(b) prescribes that a person carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearance, applications and acts. Thus a person can be represented through an agent if the person is not a resident within the local limits of the jurisdiction of the Court as in the present case. But such person shall be taken to be carrying on trade or business for and in the names of parties. Now it is to be seen as to whether collection of rent on behalf of the landlady is trade or business in the name of the landlady.

5. Be that as it may. We may refer to this question at a later point of time if it is so necessary. In the present case a notice under Section 106 of the Transfer of Property Act was issued to the defendant. Section 106 of the said Act provides that every notice under the said Section must be in writing signed by or on behalf of a person giving it and either by sent by post to the parties who is intended to be bound by it or be tendered or delivered personally to the said party or one of the agents for service at his residence. In the present case, the service of the notice has not been disputed. It is also not disputed that the notice was signed by the pleader on behalf of the landlady. It is also admitted that the notice was in writing and that the notice was given on behalf of the landlady. The only question that has been raised is that there was no proof that the notice was issued at the instance of the landlady, since the landlady did not appear and got herself examined whereas the plaintiff had examined her father as a witness on her behalf.

6. In the light of these facts, the question is to be gone into. In Indian

subcontinent the relationship between the father and daughter or the relation in the family is wellknown, to be very closely knit. It is not a case that a stranger or an outsider is dealing with the property of the plaintiff. Admittedly, the daughter is living in Shillong, therefore, the property is being looked after by her father. It is not a case covered within the scope and ambit of the decision in the case of Sardar Gurbaksh Singh (supra) by the Privy Council, wherein the consideration was altogether different. The ratio decided in the said case does not apply in the facts and circumstances of the present case. In the said case the witness was not related to the plaintiff and the matter was proceeded with the view that true object is to be achieved with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicious attaching to it. If the father looks after the property of the daughter, it cannot be a ground for suspicion since the father, a legal agent or custodian, is acting on behalf of the landlady or the landlord. If the father comes and deposes that he personally knows that his daughter had engaged the Counsel and instructed him. This is a matter which is personally known to the father and, therefore, his testimony satisfies the object of propriety for dispelling suspicion. Therefore, the said case does not help us in the facts and circumstances of the present case.

7. The decision in the case of Vidhyadhar (supra), related to an execution of a saledeed, which was alleged to be a fictitious transaction. The nonappearance of the executor, who alleged to have received the consideration, was held to be fatal in the facts and circumstances of the said case. In the present case, it is only a giving of a notice which could be given by an agent on the instruction of the landlady. The lawyer engaged had indicated in the notice that he was instructed to serve the notice on behalf of his client landlady and the said notices was proved by the father. Though it is contended by Mr. Rai that the father cannot be an agent within the meaning of Order III, Rule 2 of the Code, yet having regard to the relation between the daughter and the father, who had been looking after the property, it cannot be denied that he was looking as an agent of the landlady. That this relation and the residence of the landlady at a far away place only with regard to the question as to whether landlady had instructed the Counsel or whether the notice was issued on behalf of the landlady, cannot become as fatal as was held in the case of Vidyadhar (supra).

8. In this case admittedly, the notice was issued by a lawyer on behalf of the plaintiff. When the lawyer sends the notice stating therein that he was doing so on the instruction of his client, the Court, unless contrary is proved, has to presume that the common course of business has been followed in such cases in view of Section 114 illustration (f) of the Evidence Act. Order III, Rule 1 of the Code recognises pleaders appearing, applying or acting as the case may be on behalf of a party. To act for a client is to take on his behalf the necessary steps in order that his case maybe properly laid before the Court. It was so held in Kali v. Nabin (12 R 6 Cal. 585) and Sawarmalv. Kunjilal (AIR 1939 Rangoon 1.).

9. Under Section 47 of the Evidence Act the opinion of any person acquainted

with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact for the formation of opinion by the Court that the same was written or signed by such person. In the Explanation appended thereto a person is said to be acquainted with the handwriting of another person when he has seen that person write. Section 67 of the Evidence Act requires such handwriting or signature to be proved. But it does not prescribe any particular mode of proof. In addition to normal mode, it can be proved by circumstantial evidence. In most cases the nature of evidence will depend on the nature of the document and the circumstances of each case. It may be proved by (1) direct evidence viz: the written or person who saw the document when written or signed; and (2) circumstantial evidence which may be of various kinds viz; (a) age, (b) custody, (c) official seal and signature, (d) contents of documents or (3) by an expert or (4) by the opinion of a person who is acquainted with the handwriting as explained in Section 47 of (5) companion on or (6) by admission.

10. Therefore, the notice could be proved by the father of the plaintiff, if he happened to be a person acquainted within the meaning of Explanation to Section 47 of the Evidence Act. The service of a notice under Section 106 of the T.P. Act in such a suit is an act necessary for presenting a suit for recovery of possession of a landlord or eviction of a lessee or tenant. It is ordinarily done through a lawyer. The plaintiff may either instruct the lawyer directly or through an agent. The father is surely an agent of the plaintiff daughter unless it is denied or disputed by her. If she does not deny or come to dispute the presumption would be that the father was so authorised to instruct the lawyer. The father of the plaintiff was examined as witness for the plaintiff. He could have been crossexamined on this point that he was not so authorised by the plaintiff. If the defendant omits to do so then he cannot insist that the plaintiff who is residing outside the Courts' jurisdiction, should examine herself.

11. The decision in the case of Iswar Bhai C. Patel (supra), relates to a suit for recovery of money given to defendant No. 1 by the defendant No. 2 who was the father of the plaintiff and who operated the plaintiff's bank account on the suggestion of the defendant No. 1 and noncontroverting of the testimony of the defendant No. 2 by the defendant No. 1 who did not enter the witness box, would enable the Court to draw an adverse presumption against the defendant No. 1. The fact of the said case is completely different from the present one. Here, there was no conflict between the interest of the landlady and that of her agent, who had been processing the same. If the testimony of the father proves that she had given instruction to issue the notice, nonappearance of the landlady is to be inferred to support the contention of the agent and cannot controvert to the contrary in her absence. It is only between the agents and the principal, which should be used and not by a third party. The third party, cannot allege any conflict of interest between the plaintiff landlady and her agent. Therefore, the said decision also cannot help us in the facts and circumstances of the present case.

12. In the decision in the case of Rambaran Paswan (supra), it was alleged that there was no averment, in the plaint that notice under Section 106 of the Act determining the tenancy has been duly served and, therefore, the plaint was fit to be rejected outright under Order VII, Rule 11 of the Code of Civil Procedure. Though there was pleading with regard to the notice under Section 106 of the Act but it was not found that such notice was not in consonance with the provision of that Section and the learned Single Judge had proceeded upon the assumption that such a notice was not in consonance with the said Section and the Counsel for the respondents was unable to satisfying the Court from which an inference may be drawn that the notice was legal and valid. In such circumstances, it was held that non examination of the plaintiff was fatal since it was incumbent on him to prove the notice to be legal and valid within the meaning of the provisions of the said Section

13. In the present case the question was confined to the fact that the plaintiff landlady did not instruct the Counsel. When a Counsel issues a notice, it is to be presumed that he was instructed by his client, unless contrary is proved. Unless there is something to show that the lawyer was not instructed by the landlady, the onus shifts since it was a dispute raised by the defendant. It was for him to discharge such onus. He could have summoned the lawyer in order to elucidate the point if he was so advised. Then again having regard to the relation between the landlady and the agent as that of a daughter and father having looked after the property of her behalf as an agent having proved the same through the knowledge personal to him since it is expected that between the father and daughter, there would be personal knowledge. In the distinguishing features as it apparent in the facts and circumstances of the case, I am unable to agree with contention of Mr. Rai that the ratio decided in the decision in the case of Rambaran Paswan (supra), could be attracted in this case.

14. At the same time, in the case of Laxmi Kishore and another v. Har Prasad Shukla (1981 ARC 545), the Division Bench of this Court had held that in exercise of jurisdiction under Section 25 of the Provincial Small Cause Courts Act, this Court is not supposed to enter into the question of finding of fact or assess evidence as was held" in paragraphs 16,17 and 18 of the judgment, which are quoted below:

"15. The question is what is the effect of exclusion of Section 103 from the purview of the prescribed powers and procedure for revisions under Section 25 of the Small Cause Courts Act. The answer is evident. The Court exercising revisional power under Section 25 does not possess jurisdiction to determine issues of fact itself, by entering into the evidence and assessing it.

16. This aspect makes" the Full Bench decision of this Court in Maulvi Muhammed v. Syed Husain. distinguishable. In that case, the Full Bench was considering the scope of phrase "may call for the record" of the case and pass such orders with respect thereto as it thinks fit occurring in Section 622 of this Act corresponding to the present Section 115 C.P.C. It was held that under it, the

Court had to pass all orders which it can pass in second appeals. In second appeals, the Court, can, in given circumstances, determine the question of fact. As already seen, a Court acting under Section 25 of the Provincial Small Cause Courts Act has no such power. The power to determine question of fact has been expressly taken away.

17. Our attention was invited to Bombay High Court;" decision in *Bettram Kaikrushru Irani v. Ardeshir Kavasji*. That was a case under the Presidency Small Cause Courts Act. The Court was interpreting Sections 9 and 38 of the Act. It was held that the rules framed under Section. 9 of the Act which included the long practice in the High Court enabling the High Court to reappraise the evidence in a revision under Section 38 of the Presidency Small Cause Courts Act. The case turned on interpretation of the rule making power of the High Court which governed the procedure in revisions. There is no comparative provisions under the Provincial Small Cause Courts Act. The case is clearly distinguishable.

18. The Court deciding a revision under Section 25 of the Provincial Small Cause Courts Act has to satisfy itself that the trial Courts" decree or order is according to law. Of course, the Revisional Court should keep in mind the Supreme Court"s dictum in *Naickers*" case (*supra*) that a wrong decision on fact is also a decision according to law."

15. In view of the above finding, it is not necessary to go into the question as to whether looking after the property on behalf of daughter by the father would amount to trade or business carried on in the name of the landlady.

16. For all these reasons, I am not inclined to interfere with the order impugned since I am unable to persuade myself to agree with the contention of Mr. Rai.

17. The revision application, therefore, fails and is accordingly dismissed. No cost. Revision dismissed.