
(2013) 11 BOM CK 0098
In the Bombay High Court
Case No : Second Appeal No. 299 of 1995

Vithalrao Narayanrao, Ganesh, Sau. Sandhya and Sau.
Ranjana

APPELLANT

Vs

Surendrakumar

RESPONDENT

Date of Decision : 26-11-2013

Acts Referred:

Citation : (2014) 4 ALLMR 34 : (2014) 4 MhLj 667

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : Sumit G. Joshi holding for Mr. Anil Mardikar, for the Appellant; Amit Madiwale, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—This appeal is preferred against the judgment and decree passed in Regular Civil Appeal No. 11 of 1994 by the Additional District Judge, Gondia, thereby allowing the Appeal and reversing the judgment and decree passed in Regular Civil Suit No. 424 of 1987 by the Civil Judge, Jr. Dn., Gondia, on 5.1.1994. Appellants are the legal heirs of deceased original defendant and respondent is the original plaintiff. For convenience, they are being hereinafter referred to as defendant and plaintiff, as they were before trial Court. The plaintiff being the landlord of Block No. 3, situated in the chawl on sheet no. 4, plot no. 8/14, 8/15 and 8/24, at Railtoli, Gondia, hereinafter referred to as suit premises, filed a suit against his tenant, the defendant, for recovery of possession of suit premises and damages, after obtaining necessary permission to issue quit notice from the Rent Controller.

2. The plaintiff submitted that after receiving necessary permission, he had issued several notices u/s 106 of Transfer of Property Act, 1882, to the defendant informing him that the tenancy had been terminated and calling upon him to vacate the suit premises by the end of 15.9.1987. It was the contention of the plaintiff that five quit notices issued by him to the defendant were returned

unserved, but the sixth notice issued on 28.8.1987 was received by him. He had also submitted that additionally he had sent quit notice through telegram. As the defendant did not respond to these notices, the plaintiff" filed the afore-stated suit against the defendant.

3. The defendant resisted the suit by denying that any permission by Rent Controller was granted to the plaintiff" and that no notice, as required by law, determining the tenancy and vacating of the suit premises was received by him. He also submitted that he did not receive any notice dated 28.8.1987 nor any telegram. On these grounds, he urged that the suit be dismissed with costs.

4. The trial Court after finding that the defendant was a tenant of the plaintiff, found that there was no valid notice issued by the plaintiff to the defendant terminating his tenancy and accordingly dismissed the suit with costs.

5. The first appellate Court in the appeal filed against the judgment and decree of the trial Court, after hearing both the sides, allowed the Appeal. It found that the plaintiff" had rightly terminated the tenancy of the defendant by serving upon him a notice dated 20.7 (sic-August) 1987. Accordingly, the first appellate Court directed the defendant to hand over vacant possession of the suit premises to the plaintiff" within one month from the date of judgment and order rendered on 5.4.1995. He also directed initiation of separate enquiry for mesne profits under Order XX Rule 12 of Code of Civil Procedure. The present appeal is against the afore-stated judgment and order passed on 5.4.1995 by the first appellate Court. This appeal has been admitted by this Court on 14.6.1996 on the following substantial question of law:

Whether a telegram sent besides unserved notices u/s. 106 T.P. Act amounts to a compliance of notice not signed by the sender within the meaning of Section 106 T.P. Act?

6. I have heard learned counsel for the appellants (defendants) and learned counsel for the respondent (plaintiff). With their assistance, I have gone through the paper-book of appeal and record of the trial Court.

7. The only substantial question of law involved in this case relates to the requirement of law. Learned counsel for the defendant has submitted that it is the requirement of sub-section (4) of Section 106 of T.P. Act that notice must be in writing and signed by the lessor. According to him, this requirement of law has not been fulfilled in this case, as the only notice which has been stated to be sent to the defendant by the plaintiff" was a telegram dated 28.8.1987. He submits that it is now well settled law that a telegraphic notice is no notice in the eye of law and, therefore, the substantial question of law has to be answered in the negative and in favour of the defendant. Learned counsel for the plaintiff, however, submits that apart from telegraphic notice, there also has been another notice received by the defendant. He submits that there is yet another question involved in this case and it relates to the time at which the objection as to the validity of the notice should be raised. He submits that it should have been taken

at the earliest possible opportunity or otherwise as per settled law, it is deemed to be waived.

8. So far as sub-section (4) of Section 106 is concerned, it is clear from the language of the sub-section that it is the mandatory requirement of this provision of law that notice issued u/s 106(1) must not only be in writing but must also be signed by the lessor. The telegram, as the one issued in the instant matter, was not signed by the respondent and, in fact, no telegram for that matter would bear signature of the sender of the telegram. Therefore, any telegraphic notice purported to have been issued u/s 106(1) of the T.P. Act would not be in compliance with the requirement of its sub-section (4). In the case of *Maduri Satyanarayana Vs. Singamsetti Veerabhadraswamy*, the learned Single Judge of Andhra Pradesh High Court has also taken the same view. The learned Single Judge has held that telegraphic notice terminating the tenancy is not a valid notice as it does not satisfy the requirement of signature of the lessor u/s 106 of T.P. Act.

9. No doubt, objection as to the validity of telegraphic notice ought to have been taken by the tenant, i.e. the defendant at the earliest possible opportunity. It appears from the judgment of the first appellate Court that objection in this regard was indeed taken by the defendant at the first appellate stage. It was a different matter that the objection was over-ruled. The first appellate Court has observed that the telegram itself can be a valid notice as per the provision of Section 106 of T.P. Act. The first appellate Court has committed a serious error in recording this observation. It appears that it has lost sight of the provision contained in sub-section (4) of Section 106 of T.P. Act, which in clear terms lays down a rule that every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it. The language of this provision is imperative and admits of no exceptions. Whatever may be the finding of the first appellate Court, the fact remains that objection indeed was taken at the stage of the first appeal. Learned counsel for plaintiff would submit that it ought to have been taken before the trial Court. In support, he places reliance upon the decision in the case of *Parwati Bai Vs. Radhika*, . In this case, the Hon''ble apex Court in para 6 has observed that an objection as to the invalidity or infirmity of notice u/s 106 of T.P. Act should be raised specifically and at the earliest, else it would be deemed to have been waived. There can be no dispute about the law so laid down by the Hon''ble Supreme Court. But it must be noted here that these observations of the Hon''ble apex Court have appeared in the facts and circumstances peculiar to the said case of *Parvatibai*. In that case, the defendant had admitted receipt of notice in the written statement and had not taken any specific objection as to the validity of the notice. It was in this backdrop that the Hon''ble apex Court held that the defendant therein was deemed to have waived the objection as regards the validity of the notice u/s 106 of T.P. Act. In the instant case, the facts are different. The defendant had never admitted receipt of the notice rather he had specifically denied receipt of the notice. He had taken the objection as to its validity not in the suit but before the first appellate court.

This objection, one must say, was in the nature of an objection as to the requirements of law to be fulfilled by a party. Such an objection is of law and, therefore, can be taken at any stage of the proceedings. If the defendant had admitted receipt of the notice in the instant case, position would have been different and he would have been estopped from denying what he had admittedly received. Therefore, in my humble opinion, the law laid down in the said case of Parvati would be of no assistance to the plaintiff when he submits that the objection as to the validity of the notice ought to have been taken by the appellant at the earliest stage, i.e. in the suit proceedings.

10. The objection as to the validity of the notice can always be considered by this Court at the stage of the second appeal, except when the receipt of notice is admitted. I have already considered this objection and found that the telegraphic notice alleged to be sent by the respondent to the appellant was not in compliance with the requirements of sub-section (4) of Section 106 of T.P. Act. This telegraphic notice was, therefore, an invalid notice and, as such, it would not have been sufficient by itself to terminate the tenancy of the appellant. The substantial question of law is, therefore, answered in the negative.

11. But the question still remains, despite answer to the substantial question of law going in favour of the defendant, whether any consequential relief should be granted to the appellant or not. Consequential relief in the nature of dismissal of the suit could have been granted by this Court, had the decree of the first appellate Court been based upon only the telegraphic notice and unserved notices. On going through the judgment and decree of the first appellate Court, this does not seem to be the case. It is seen that the decree is not purely based upon the telegraphic notice and unserved notices. It is also based upon a notice dated 28.8.1987, copy of which was held to be received by the defendant in addition to telegraphic notice. Therefore, in my opinion, no further consequential relief to the appellant can be granted.

12. Learned counsel for the defendant has submitted that the findings recorded by the first appellate Court with regard to service of notice dated 28.8.1987 are not only erroneous but perverse as well. He points out from the pleadings of the parties that the plaintiff had never pleaded in his plaint that the notice dated 28.8.1987 was also served upon the defendant through the mode of personal service. He further submits that in the absence of such a material pleading, the first appellate Court could not have found that the notice was personally served upon the appellant. In support, he places reliance upon the principles of law laid down in the cases of Kisan Khandare Vs. Kausalyabai and Others, and Govind Vishwanath Bansode and Radhabai Kshirsagar Vs. Manika Gangaram Bansode, Bhujanga Gangaram Bansode, Shankar Gangaram Bansode and Madhav Gangaram Patve, . In the case of Kisan, supra, it has been held by the learned Single Judge of this Court that the Court cannot consider vague pleadings in the plaint and if they are to be considered, then, it would be difficult to expect appropriate reply to such pleadings by the other side. In the case of Govind,

supra, it has been held that evidence cannot be adduced against pleadings. Relying upon these decisions, learned counsel for the defendant submits that in the instant matter basically there have been no specific pleadings with regard to mode of service of notice dated 28.8.1987 and whatever pleadings were there in that regard, were vague, not capable of being replied appropriately by the defendant. Therefore, according to him, the first appellate court's findings recorded in this behalf are perverse.

13. Now, it would be necessary to consider the pleadings in the plaint in order to appropriately deal with these submissions made on behalf of the defendant. It is seen from the plaint, page no. 2, that the respondent had specifically mentioned that, "vide notice dated 28.8.1987, the plaintiff terminated the tenancy of the defendant no. 1" On page 3 of the plaint, the plaintiff further pleaded in the words "..... plaintiff has prior to the notice dated 28.8.1987 has sent the notices four times but the defendant has avoided to receive the notice. The plaintiff has also served the defendant notice by telegram on 28.8.1987." It is clear from these pleadings that the plaintiff has generally pleaded about sending of notice dated 28.8.1987 and also about sending of telegraphic notice. These pleadings, in my opinion, are sufficient to give notice to the defendant of what was sought to be contended and proved by the plaintiff in the suit filed by him against the former. What is important to state and canvass is, sending of notice and this has been done in the instant case by the plaintiff. The averment relating to service of notice by personal delivery relates to only evidence of the pleading. Under Order 6 Rule 2, Code of Civil Procedure, only the material facts are to be pleaded and not the evidence by means of which they are to be proved. (See *Bharat Singh and Others Vs. State of Haryana and Others*,). Mode of service of a notice is a matter of evidence. Therefore, I am not inclined to accept the argument of learned counsel for the defendant that even the mode of service of notice ought to have been pleaded in the instant case. There was neither any vagueness in the pleadings as far as sending of notice dated 28.8.1987 is concerned nor, as seen from the evidence adduced by the plaintiff, any tendering of evidence against the pleadings on record. Pleadings generally were already there on record. Therefore, the reliance placed by the learned counsel for the defendant on the cases of *Kisan* (supra) and *Govinda* (supra) is misplaced.

14. Learned counsel for the defendant has further argued that the defendant had never received the notices and that he had denied his signature appearing on the second page of the document vide Ex. 53. He submits that this document Ex. 53 was alleged to be a copy of the notice dated 28.8.1987 sent by the plaintiff to the defendant and served upon the defendant on 28.8.1987. According to him, the evidence on record would show that the plaintiff has falsely stated that a notice was sent by him on 28.8.1987 and that it was also received by the defendant on 28.8.1987. From the evidence of plaintiff's witness Shankarlal (P.W. 1), learned counsel submits, falsity of the claim of plaintiff could be very well seen. In the evidence of P.W. 1 Shankarlal, it has appeared on record that the defendant had approached the plaintiff after receipt of the telegraphic notice

and had paid him the amount of arrears of rent and thereafter had received the copy of the notice which is at Ex. 53. Learned counsel for the defendant submits that the receipt issued in acknowledgment of payment of arrears of rent at Ex. 54 is dated 31.8.1987. He submits that it would mean that arrears of rent were paid on 31.8.1987 and then going by the own evidence of plaintiff, said notice could not have been received before 31.8.1987, as the plaintiff claims that after payment of rent arrears, the defendant had received copy of the said notice. He submits that the alleged acknowledgment of receipt appearing on second page of notice copy at Ex. 53 is dated 28.8.1987 and this shows falsity of claim of plaintiff. He, therefore, submits that a serious doubt is created about the service of notice upon the defendant.

15. In this appeal, no substantial question of law as regards presence of any perversity in the findings recorded by the first appellate Court on receipt of notice dated 28.8.1987 by the defendant has been formulated. Upon going through the judgment and decree of the first appellate Court as well as the evidence available on record, one can very well see that no perversity could be found in the finding recorded by the first appellate Court as regards service of notice and, therefore, no substantial question of law can be seen to be involved in this case. No doubt, the signature on the acknowledgment appearing on page 2 of the copy of the notice vide Ex. 53 is of 28.8.1987. The signature appearing in this acknowledgment purported to be of the defendant has also been denied by him. But one can see from the reasons stated by the first appellate Court that the first appellate Court has considered the evidence in its entirety. It has also considered not only the acknowledgment vide Ex. 53 but also the conduct of the parties. It has found that the plaintiff had submitted that the defendant was not in arrears of rent and he had so claimed on the basis of the receipt of arrears of rent vide Ex. 54. The first appellate Court has observed that, on the other hand, the defendant had also admitted that he was not in arrears of rent. According to the first appellate Court, in such a situation, it fell upon the defendant to show as to when or on what date he had paid the arrears of rent and since he did not do so, the first appellate Court drew an inference against him that he had impliedly admitted to have paid the arrears of rent as evidenced by the receipt Ex. 54. The first appellate Court has also found that the defendant had not claimed that his alleged signatures on the copy of the notice and the rent receipts were forged by somebody. The first appellate Court has further found that the defendant, by his own conduct, had shown that he was not a man worthy of credence as he had denied his signature even on his own written statement. These observations of the first appellate Court were based upon the evidence available on record and this evidence only reasonably indicated that the rent arrears must have been paid on 28.8.1987 and the rent receipt issued on 31.8.1987. It must be noted here that it was not the case of the plaintiff that the defendant had received the copy of notice after issuance of rent receipt (Ex. 54). His case was, defendant received copy of notice after he had paid rent arrears. This is also not the case where the first appellate Court took into account any inadmissible evidence or

left out from consideration any admissible evidence while coming to its conclusion as noted above. Therefore, I see no perversity in the findings recorded by the first appellate Court with regard to service of notice dated 28.8.1987.

16. There can be another view possible upon appreciation of evidence available on record. But, the well settled law on the scope of second appeal u/s 100, Code of Civil Procedure, 1908, would not permit me to do so. It has been held by the Hon"ble apex Court in catena of judgments that re-appreciation of evidence in second appeal is not permissible, howsoever erroneous the appreciation of evidence by the Courts below might be, and howsoever gross the error might be. [See Navaneethammal Vs. Arjuna Chetty, and Pakeerappa Rai Vs. Seethamma (Dead) by LRs and Others, .]

17. In the circumstances of the case, the finding recorded by the first appellate Court that the defendant had indeed received quit notice dated 28.8.1987 cannot be upset and interfered with, as it is based upon the appreciation of evidence available on record. No perversity could be seen in the finding recorded in that behalf by the first appellate Court. Therefore, no consequential relief could be granted to the defendant/appellants in spite of the fact that the substantial question of law involved in this appeal has been answered in favour of the defendant/appellants. The appeal, therefore, fails and it deserves to be dismissed. Accordingly, the appeal stands dismissed. In the circumstances of the case, parties to bear their own costs.