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Court : Mumbai

Decided On : Apr-04-1977

Reported in : AIR1978Bom187

Judge : Gadgil, J.

Acts : Transfer of Property Act, 1882 - Sections 106; General Clauses Act, 1897 - Sections 27; Transfer of Property (Amendment) Act, 1929 - Sections 106

Appeal No. : Civil Revn. Appln. No. 68 of 1977

Appellant : Sharad

Respondent : Vishnu

Advocate for Def. : W.G. Somalwar, Adv.

Advocate for Pet/Ap. : J.P. Pendsey, Adv.

Judgement :
ORDER

1. The only point involved in this revision is as to whether the tenancy of the petitioner (original defendant) has been properly terminated.

2. The plaintiff filed Civil Suit No. 2461/1975 in the Small Causes Court, Nagpur, to recover possession of a house property with an allegation that by a notice dated May 20, 1975, the defendant's tenancy has been terminated by the end of the

tenancy month of June 1975. The learned Small Causes Court, after recording the evidence that was led before it, came to the conclusion that the tenancy has been terminated. Consequently, a decree for possession has been passed and the defendant has come in revision.

3. The contention of the defendant is that his tenancy has not at all been terminated and, as such, the plaintiff cannot claim possession of the rented premises. At the stage of this revision petition, there cannot be any controversy that the plaintiff sent a notice dated 20-5-1975 to the defendant by registered post. Ex. 17 is a copy of the notice and Ex. 18 is a receipt which the plaintiff obtained when he registered that notice. However, the acknowledgement signed by the defendant has not been produced. The defendant has, in his written statement, denied of having received any such notice. The plaintiff in his testimony has stated that he had received an acknowledgement from the post office but it was lost. He has also stated that the said acknowledgement was signed by the wife of the defendant. It appears that the wife of the defendant had gone on extensive tour of Southern India. The tour was conducted by Prasad Travels and it went on from May 16 to June 1, 1975. The defendant has led evidence in that respect. He has also examined his wife, and the learned Small Causes Court has come to the conclusion that the wife of the defendant was not at Nagpur between May 16 to June 1, 1975, Similarly, he has accepted the evidence of the defendant's wife that she had not received the notice and had not signed the acknowledgement.

4. Mr. Pendsey for the petitioner submitted that in view of the above-mentioned findings of facts, the learned trial Judge should not have come to the conclusion that the tenancy of the defendant has been terminated. The Small Causes Court has observed that the defendant has not entered the witness-box to prove that he did not receive the notice and that in the absence of such an evidence, the plaintiff would be entitled to rely upon the presumption that the notice duly sent by him to the defendant must have been received by the defendant.

5. Under Section 106 of the Transfer at Property Act, a provision is made as to how a notice terminating the tenancy has to be issued. The relevant portion of that section reads as follows:--

'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.'

Mr. Somalwar for the respondent relied upon the abovementioned underlined words for the purpose of contending that what is needed of the landlord is that he should send the notice by post to the party who is intended to be bound by it and as soon as this is done, the notice shall be treated as properly served or given. He vaguely suggested that an irrebuttable presumption would be in favour of the plaintiff whenever such a notice is sent by post. According to him, the question as to whether the notice was actually delivered to the addressee or not would not be relevant. I do not think that the provision of a notice can be construed in such a manner. It has to be remembered that the above-mentioned underlined words were added by the Amending Act of 1929. Prior to that amendment, it was necessary that the notice should be tendered or delivered to the addressee. However, the service of notice through post has been judicially accepted and it is this position that has been restated by amending Section 106 of the Transfer of Property Act in 1929. But it will be very difficult to accept the contention of Mr. Somalwar that by this amendment the Legislature has done away with the tender or delivery of the notice in case the notice has been sent by post. It will be convenient to refer to the provisions of Section 27 of the General Clauses Act, which deal with the definition or the meaning of the term 'service by post'. That section reads as follows:

'Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different Intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.' It was submitted by Mr. Somalwar that the words 'unless the contrary is proved'

would govern the subsequent words 'to have been effected at the time at which the letter would be delivered' to the addressee. According to him, these words do not control the question about the service of notice. He also submitted that the notice shall be deemed to have been served if it is sent in the manner laid down in the section and it will not be open to the addressee to prove that in fact the notice is neither delivered nor tendered to him. This question has been considered in Badri Prasad v. Lakshmi Narain : AIR1964 All426 . The relevant head note is as follows (at page 427):

'The words 'unless the contrary is proved' in the section refer both to the service of the letter and the time oi service and therefore even when a notice has been posted in a properly addressed prepaid, registered cover, the presumption as regards its service is not conclusive but is rebuttable.'

6. I agree with the said decision of the Allahabad High Court. Thus, there cannot be any irrebuttable presumption in favour of the proper service of notice simply because the notice has been sent as required by Section 27 of the General Clauses Act.

7. The result, therefore, is that presumption would arise in favour of the landlord if he has complied with the provisions of Section 106 of the Transfer of Property Act and Section 27 of the General Clauses Act. However, that presumption would be rebuttable and if the contrary proof is given, the landlord will not be able to bank upon the presumption for the purpose of contending that the tenancy of the defendant should be treated as validly terminated simply because the notice was sent.

8. In the present case, the landlord (plaintiff) has made a statement in the witness-box that the acknowledgement receipt was received by him through post and it bore the signature of the defendant's wife. I have already discussed the findings that have been recorded by the trial Court with respect to this evidence. The trial Court has held that the defendant's wife was not at Nagpur during the relevant period. In spite of this position, the trial Court has come to the conclusion that the notice would be presumed to have been received by the defendant. Mr. Somalwar urged that the presumption would still continue to be operative in favour of the

plaintiff even though the trial Judge has recorded a finding that the defendant's wife has not signed the acknowledgement receipt. He relied upon the decision of the Assam High Court in Saligram Rai Chunnilal Bahadur & Co. v. Abdul Gani AIR 1953 gua 206. In that case the plaintiff-landlord received back an acknowledgement duly signed through post. However, at the stage of evidence, the plaintiff had not examined the postal peon for the purpose of proving that the acknowledgement has been signed by the defendant. Assam High Court came to the conclusion that such sort of evidence was not necessary particularly when the acknowledgement duly signed was received by the plaintiff through post. It appears that in that case the defendant had not specifically alleged that he had not received the notice. There was a sort of technical difficulty that the acknowledgement receipt was not proved as the postal peon was not examined. In another case relied upon by Mr, Somalwar reported in Roshan v. Purushottani Lal : AIR1965 All287 , the main controversy was as to whether a notice refused by the tenant can be said to have been duly served on account of such refusal and it was held that there would be a valid service of notice as it was tendered and refused by the addressee. The Patna High Court has also considered this question about presumption in Matadin Sharma v. Upendra Sharma : AIR1972 Pat292 wherein it is laid down that where notice under Section 106 is properly addressed and sent by registered post, it would be presumed that the service of the notice has been legally effected and that the mere fact that the physical delivery of notice was made to a person other than the addressee would not be of any consequence and would not affect the presumption of proper service. But it cannot be forgotten that in that very case, it is laid down that the presumption arising in favour of the plaintiff is not an irrebuttable presumption and that the concerned party can lead evidence to rebut the presumption.

9. Mr. Somalwar contended that the plaintiff would be entitled to a presumption arising from the fact that the registered notice has been sent even though the evidence about the receipt of notice by the defendant's wife is not accepted. I do not think that such a presumption would be available in a case where the plaintiff has led positive evidence that the notice was served on the; defendant in a particular manner. This aspect has been considered by the above mentioned decision of the Allahabad High Court in : AIR1964 All426 in Badri Prasad's case in

the following words (at p. 427):

'Moreover the question of presumption arises only in the absence of other evidence, but where the sender of the letter produced the postman who is alleged to have delivered it and he is disbelieved by the Court, no question of presumption under Section 27 can arise. To allow the sender to fall back on the presumption after his evidence has been disbelieved would nullify the finding of the Court on the evidence itself.'

10. In my opinion, the plaintiff would be entitled to have the presumption in his favour only if there is no positive evidence about the service or absence of service one way or the other. But if the plaintiff has led evidence about the service of notice through the defendant's wife and if that case is disproved by they' defendant, it will not be open for the plaintiff to say that the service of notice should be treated as proved on account of the presumption that might arise by sending the notice by registered post.

11. The position will not be in any way favourable even if it is held that the plaintiff can bank upon a presumption in his favour. Even on merits I am satisfied that the defendant has discharged the burden of rebutting any presumption. It is true that the defendant has not entered the winess-box. No doubt the burden is on the defendant to rebut the presumption but the nature and quality of the evidence that would be required for this purpose will depend on the facts of each case. In the present case, it is not the allegation of the plaintiff that the notice has been tendered and/or delivered to the defendant. The plaintiff has deposed that the defendant's wife has signed the acknowledgment receipt. Thus the receipt of notice through his wife will be dependent upon the question as to whether the wife has really received the notice or not. It is in this background that the evidence of the wife is very much important. She has stated that she was out of Nagpur during the relevant period. The trial Court has accepted that testimony. The net result is that the acknowledgment receipt purported to have been signed by the defendant's wife is not in fact signed by her. She has not received the notice. Similarly, the defendant cannot be said to have received the notice either personally or through his wife. In this state of circumstances it was not at all

necessary for the defendant to enter the witness-box to show that he had not received the notice. I would, therefore, hold that on the facts that are available on record it would not be correct to draw a presumption in favour of valid service of notice. On the contrary, the facts placed before the Court prove that the defendant has discharged the burden. In this view of the matter, it is clear that the tenancy of the defendant has not been terminated and consequently, the decree passed by the lower Court for possession cannot be allowed to stand.

12. The rule is made absolute. The decree passed by the lower Court is set aside and the Small Cause Case No. 2461 of 1975 stands dismissed. However, the parties to bear their own costs, throughout.

13. made absolute.

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