

Achamma Thomas Vs. E. R. Fairman

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Court : Karnataka

Decided On : Jul-26-1969

Reported in : AIR1970Kant77; AIR1970Mys77; (1969)2MysLJ179

Judge : K.R. Gopivallabha Iyengar, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 106; Mysore General Clauses Act, 1899 - Sections 27; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Civil Revn. Petn. No. 1563 of 1968

Appellant : Achamma Thomas

Respondent : E. R. Fairman

Advocate for Def. : N.K. Gopala Iyengar, Adv.

Advocate for Pet/Ap. : E.V. Mathew, Adv.

Judgement :

ORDER

1. The petitioner made an application for eviction of the respondent-tenant before the learned Munsiff, Civil Station, Bangalore, on the ground that she required the premises for her own occupation. After terminating the tenancy by issuing notice, she filed the application for eviction as the respondent-tenant refused to comply with the demand. The respondent contended that the petitioner's claim was neither

reasonable nor bona fide and greater hardship would be caused to him by passing a decree for eviction than by refusing to pass it. He also contended that there was no valid notice terminating his tenancy and therefore the petitioner has no right to seek his eviction from the premises.

2. The trial court found in favour of the petitioner on all issues including the question of notice which is the only one on which the arguments have been addressed in this court. The trial court held that the registered notice issued by the petitioner to the respondent has been returned undelivered. The learned Munsiff found that a copy of the notice was affixed on a conspicuous part of the premises. He also found that one of the notices was sent by certificate of posting and therefore a presumption of service of the notice arises under Section 114 of the Evidence Act. The learned Munsiff found that the petitioner had issued a valid notice to the respondent to quit. In the result, he allowed the petition for eviction.

3. On appeal in H. R. C. A. 11 of 1968 the learned First Additional District Judge, Bangalore concurred with the finding of the trial court that the petitioner required the premises reasonably and bona fide for her own use. On the question of hardship, the learned District Judge found against the tenant. He took the view that in the circumstances of the case, there was no valid termination of the tenancy in accordance with law; thus the petitioner had no right to seek eviction of the respondent-tenant and therefore he allowed the appeal and dismissed the petitioner's application for eviction. She has now filed this revision petition.

4. The most important question that arises for consideration in this case relates to the validity of the notice terminating the tenancy of the respondent. In paragraph 6 of the petition for eviction, the petitioner says that 'the respondent's tenancy has been terminated by a registered notice dated 8-12-1966 terminating his tenancy on the expiry of the month ending with 31st December 1966. The said notice has been sent by registered post to the respondent's house address and to his official address. Both the notices have come back unserved. Even on prior occasions 'the respondent has been successfully evading service of notice by deliberately returning them. As a matter of fact the notice of attornment was similarly sent back though the respondent has attorned to the petitioner with effect from 1st

September 1966. Realising this the petitioner got a similar notice issued terminating the tenancy of the respondent on the expiry of 31st December 1966 which was duly affixed on the schedule premises in the presence of two witnesses. The affixture was made on 10-12-1966.' The petitioner also produced a certificate of posting for having posted the notice by ordinary post on 22-11-1966. She also has produced the returned registered letter and also the unsigned acknowledgment. It is contended that the notice of termination referred to in the petition was with reference to the notice dated 8-12-1966 and not the earlier notices. It is not correct in view of the fact that the notices which were sent to the respondent to his official as well as residential address on 22-11-66 have been returned unserved. These letters and the postal acknowledgments have been produced along with the petition. Therefore, it is but correct to take all these notices into consideration while coming to a decision whether in this case there was a valid notice, terminating the tenancy of the respondent. It is not the contention of the respondent that the notice is invalid. It is his contention that he has not been served with the notice of termination of the tenancy.

5. I may here refer to a few facts that can be gathered from the pleadings and evidence produced by the parties. The petitioner is also a tenant paying a rent of Rs. 120 per mensem for the premises she occupies. The respondent pays a rent of Rs. 75 per mensem for the premises in question. It is in the evidence that the respondent has a house of his own and he gets a rent of Rs. 120 per mensem. The petitioner purchased the premises with a view to occupy the same herself. After purchasing the same she appears to have notified the tenant by a registered letter marked as Ex. P-4 (a) dated 29-8-66 wherein she has stated that she has purchased the house on 26-8-66 and that the tenant should attorn to her. There is material in the evidence of the respondent to show that he had an intention of purchasing this property himself. In any event, it is clear from Ex. P-4 envelope containing Ex. P-4 (a) that the letter was returned with an endorsement that he was not found at the leased premises. Therefore, the petitioner issued the second notice on 10th September 1966 again asking him to attorn to her. This letter came back with an endorsement that he was not found at the delivery time. Again, the petitioner sent a letter Ex. P-6(a) addressed to the tenant through his official superior. Even this letter came back with an endorsement 'not found'. It is useful to

refer to the fact that in Ex. P-6 (a) the petitioner's counsel through whom notices were issued, has stated that it is the third notice that is being issued to him in connection with the attornment since he has evaded receiving the first two notices. It may also be mentioned that Exbts. P-4(a) and P-5(a) are also letters sent through the petitioner's counsel. There is no dispute in this case that the respondent attorned to the petitioner and has been paying rents to her. On 22nd November 1966, the petitioner's counsel issued a notice terminating the tenancy with the month ending 31st December, 1966. This is marked as Ex. P-7 (a) and is enclosed in the envelope marked Ex. P-7, addressed to his office. In the said notice there is a post script stating 'since our clients' experience in sending notices to you has been that of continuous evasion by you, we are sending this notice one to your residence and the other through office, both registered post, the third one to your house address 'under certificate of posting'. The registered letters came back with the endorsement 'not found during delivery time* same as before. Exhibit P-8 is the certificate of posting bearing the postal seal addressed to the residential address of the tenant. Exhibit P-9 (a) is the notice enclosed in Exbt. P-9 sent to the residential address of the respondent. Exhibits P-7(a), P-9(a) and P-11 are in the same terms and Exhibit P-1 is dated 8-12-1966. They purport to terminate the tenancy of the respondent by the end of December 1966. The fact that Ex. P-1 was affixed to a conspicuous part of the tenement, is held in favour of the petitioner by the trial court. The lower appellate court does not agree with that finding on account of some discrepancies in the evidence of P. Ws. 1 and 2. In my view, the learned Judge has attached undue importance to these discrepancies. The discrepancies are in regard to the nomenclature of the place where the notices were affixed. This does not, in the absence of any material to show that these witnesses are interested in the petitioner, mean that such notice was not affixed to a conspicuous part of the premises. It must be held in this case that the notice was affixed as required under Section 106 of the Transfer of Property Act. In the view I propose to take this question of affixture of the notice on a conspicuous part of the premises will not be of much consequence. It is contended by Sri E. V. Mathew, the learned counsel for the petitioner that from the series of notices that have been issued to the tenant terminating his tenancy it must be presumed that there has been due service of the notice of termination of the

tenancy and therefore the petitioner is entitled to succeed. He also invites my attention to the provisions in Para 2 of Section 106 of the Transfer of Property Act which prescribes that the notice of termination referred to in Para 1 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 resident, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property. It is pointed out that the notice has been sent by post to the party, i. e. lessee in this case who is intended to be bound by it. Further it is contended that since the registered notices sent to the respondent-tenant have come back to the petitioner without being delivered personally to him, the petitioner affixed the notice to a conspicuous part of the property as delivery personally to the tenant was not practicable.

6. There is no dispute that the petitioner has sent several notices by registered post. Firstly, what is the consequence of the notice sent by registered post being returned with postal endorsement 'not found during my delivery time'. In this connection the learned counsel for the petitioner invites my attention to Section 27 of the Mysore General Clauses Act, 1899, which is in the following terms:--

'27. Meaning of service by post. -- Where (any Mysore Act) (substituted by Act 12 of 1953) 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, prepaying 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.'

Service of notice by registered post, shall be deemed to be effected on the addressee if the letter is properly addressed, pre-paid and contains the document in this case the notice of termination of tenancy. It is contended by the respondent's counsel that in this case the very fact that the registered letter has come back with the endorsement as mentioned above, shown that the contrary

has been proved, namely that there has been no due service effected on the tenant; on the other hand, it is submitted that the service should be deemed to be effected if the four conditions are fulfilled namely, sending the letter by registered post, it being properly addressed, pre-paid and the letter contains the document; the contrary that is required to be proved to take away the presumption is with reference to the four requirements referred to above. It appears to me that this contention is not without force. It is only to meet the contingency of a person who is to be served with the notice trying to evade it, that the service shall be deemed to have been effected if the four conditions are fulfilled. If the contrary to be proved has reference to the actual service, then provision of Section 27 could be rendered useless by the addressee avoiding to receive the letter or even refusing the registered letter. Therefore, it appears to me that in this case the notice having been sent by registered post complying with the four requirements referred to earlier, in law, it must be deemed that there is due service of the notice of termination of the tenancy.

7. The next submission is that para 2 of Section 106 of T. P. Act does not prescribe that the notice of termination should be sent by registered post; it could also be sent by ordinary post. In this case, there is un-impeachable evidence that the petitioner's counsel sent the notice of termination under 'certificate of posting'. The certificate of posting bearing the postal seal is marked Exbt. P-8. Therefore, a presumption arises under Section 114 of the Evidence Act that there has been due service. In support of this _contention the learned counsel for the petitioner drew my attention to a decision reported in Sukumar Guha v. Naresh Chandra Ghosh, : AIR1968 Cal49 , wherein at paragraph 13 it has been observed as follows:--

'In view of the history of legislation that added the relevant phrase in Section 106, T. P. Act and the language of the phrase that says only 'sent by post' in the relevant part, I unhesitatingly reject that argument of Mr. Mukherjee and hold that though presumption under Section 27, General Clauses Act can only arise when the notice is sent by Registered post, there may arise a presumption under Section 114, Evidence Act when notice is sent by ordinary post or under certificate of posting.'

8. It was contended by Mr. Gopalalyengar, the learned counsel for the respondent-tenant that this presumption is rebutted by the evidence of the respondent that he did not receive these letters having been sent by 'certificate of posting'. I am unable to accept this evidence of the respondent. In the circumstances of this case, I feel no doubt that the presumption under Section 114 does arise and the tenant should be held to have received notices of termination of tenancy.

9. The last question relates to the validity of the affixtures of a copy of the notice dated 8-12-1966 to a conspicuous part of the property. As a fact I have found that such notice was affixed to a conspicuous part of the property. Shri Gopala lyengar's contention is that in this case the stage at which the affixture of the notice to a conspicuous part of the property under Section 106 of the Transfer of Property Act has not arisen inasmuch as the notice has not been tendered or delivered personally to the tenant or to one of his family members or servants at his residence and that such tender or delivery has not become impracticable. Therefore, he contends that before the affixture of the notice could arise, an attempt must be made to tender or deliver the notice personally to the party or to one of his family members or his servants at his residence. It is only after attempt is made to serve on all the said classes of persons that the landlord can take advantage of the affixture of the notice on a conspicuous part of the property. Shri E. V. Mathew, on the other hand contends that if it is proved that it is not practicable to tender or deliver personally the notice to the party that would be enough to justify the affixture of the notice. This appears to be sound. Therefore, I am unable to accept the contention of the respondent. If the tender or delivery to the party is shown as impracticable, it is open to the Landlord to adopt the procedure of affixture.

10. In this case, from the several notices that have come back to the petitioner for the reasons already mentioned and the previous conduct of the tenant in connection with the notice of attornment, it would not be unreasonable for the landlord to proceed on the basis that it is not practicable to tender or deliver notice personally to the tenant. This is enough to justify the conclusion that by affixing of the notice on a conspicuous part of the property, there has been due service of the notice.

11. Quite apart from what I have stated with regard to the service of registered notice or affixation of the notice on a conspicuous part of the premises, it is enough to hold that in this case, there has been due service of notice by virtue of the fact that the notice has been sent by post under 'certificate of posting' and the presumption arises under Section 114(f) of the Indian Evidence Act that the letter has been duly delivered to the addressee as the letter has been addressed to the residential address of the respondent tenant.

12. For these reasons, I find no substance in the contention of the respondent and allow this revision petition with costs.

13. The respondent-tenant is directed to vacate and deliver possession of the premises to the petitioner within three months from this date.

14. Petition allowed.

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