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Court : Kerala

Decided On : Jan-31-1957

Reported in : AIR1957Ker33

Judge : Kumara Pillai, J.

Acts : Evidence Act, 1872 - Sections 16

Appeal No. : C.R.P. No. 500 of 1955 (m)

Appellant : Kunhabdulla

Respondent : Krishnan

Advocate for Def. : V.P. Gopalan Nambiar, Adv.

Advocate for Pet/Ap. : A. Achuthan Nambiar, Adv.

Disposition : Revision allowed

Judgement :
ORDER

Kumara Pillai, J.

1. This is a Civil Revision Petition for revising the decree passed by the Additional District Munsiff of Tellicheny on 27-11-1954 in Small Cause Suit No. 56 of 1954 of his Court, a suit for recovery of arrears of rent of a shop building. The plaintiff in

the lower court is the revision petitioner here, In December 1951 he leased the plaint shop to the defendant on a monthly rent of Rs. 6 and the latter executed in his favour the lease deed, Ext. AI.

Subsequently the plaintiff went to Burma, and while he was in Burma the defendant sent him a registered notice on 29-7-1952 alleging that he had already paid some rent to the plaintiff and stating that he was no longer using the plaint shop and that as the plaintiffs brother-in-law had refused to accept his (defendant's) offer to surrender the shop the plaintiff must make arrangements to take possession of the shop and receive the arrears of rent subsisting after the payment made by him within a week of the receipt of the notice.

This notice, Ext. Bl, was returned to the defendant with an endorsement by the post-man that the addressee had refused to accept the same. According to the plaintiff, the endorsement is false and the notice was never taken to him at Burma. The plaintiff returned from Burma towards the end of August or at the beginning of September 1954, and after his return he brought Small Cause Suit No. 56 of 1954 for recovery of the arrears of rent from 10-1-1952 to 10-10-1954.

The defendant contested the suit. Contending that he had used the shop only for seven months and had afterwards terminated the tenancy by notice, Ext. Bl, and that he bad also discharged the arrears of rent due to the plaintiff in respect of the period he was using the shop by payments partly to the plaintiff and partly, to his brother-in-law. On the strength of the postal endorsement, on Ext Bl the learned District Munsiff found that the notice was actually taken to the plaintiff while he was in Burma, and that he had improperly refused to accept the same. He also held that the tenancy was terminated by the notice and that the plaintiff was therefore entitled to get rent only from 10-1-1952 to 10-8-1952. In addition to the rent for that period he allowed the plaintiff to recover the rent for a further period of one month, from 10-9-1954 to 10-10-1954, on the ground that the defendant had failed to produce the key of the shop in Court after this suit was filed as he should have done.

Finding the defendant's plea of discharge to be false, the learned District Munsiff gave a decree, to the plaintiff for the recovery of the rent for the two periods

mentioned above and also recorded a finding, 'The plaintiff will also be entitled to claim rent subsequent to 10-10-1954 until the date of surrender of -the shop separately in other proceedings'.

Interest was allowed on the arrears decreed only from the date of the plaintiff's return from Burma, . In the revision petition the plaintiff complains against the dismissal of his claim for arrears of rent from 10-8-1952 to 10-9-1954 and the disallowance of the interest for the period before his return from Burma. The rate of rent claimed is Rs. 6-per mensem and the rate of interest allowed by the District Munsiff and claimed by the plaintiff is 5 1/2 per cent perannum. Regarding those rates themselves there was no dispute in this Court

2. The question whether the tenancy has been terminated by a valid notice or not would depend upon the decision of the plaintiff's contention that Ext. Bl was not taken to him at Burma and that he had not refused to accept the same. It is solely on the strength of the endorsement of the post-man that the plaintiff had refused to accept the notice that the learned District Munsiff has found that the notice was actually taken to the plaintiff and that he had refused to accept the same.

No doubt such an endorsement can be admitted in evidence even without examining the post-man and it would be prima facie evidence of the fact that the notice was taken to the addressee and refused by him. But it is open to the party who disputes the truth, of the statement in the endorsement to rebut the prima facie evidence furnished by the endorsement, and he is entitled to ask the court to take into consideration all the proved circumstances in the case for deciding the question whether the endorsement is true or false. The respondent's learned counsel relied upon the decision in Babayya v. Venkata-ratnam, (1952) 1 Mad LJ 227: (AIR 1953 Mad 884) (A) in support of the proposition that the postal endorsement is by itself evidence of the fact of the refusal of the notice by the addressee. In that decision itself it has been said,

'We think that the postal endorsement is admissible in evidence even if the postman is not examined and that unless rebutted it would be sufficient notice under Section 106 of the Transfer of Property Act'.

After saying this, the learned Judges examined the other facts proved in the case and held in the endorsement and did not disprove the same. There fore, their Lordships accepted the postal endorsement and held that there was a proper notice in that case. That decision is no warrant for holding that the postal endorsement by itself is conclusive evidence of the fact that the notice was taken to the addressee and was refused by him.

In the present case the finding of the learned District Munsiff is based solely on the postal endorsement and he has not considered the evidence and circumstances lending to disprove the truth of the same. In the first place the plaintiff clearly swears that it was not taken to him at Burma. In 1952-1 Mad LJ 227:(AIR 1953 Mad 884) (A) one of the Circumstances relied upon by the learned Judges who decided that case is that some of the defendants had not denied the tender of the notice.

So far as the present case is concerned the notice could have been tendered only to one person and that person has come forward and sworn distinctly and clearly that the notice was not taken to him. There is no evidence in the case that the address given in Ext. Bl, was the correct address of the plaintiff in Burma. According to the defendant he did not know the correct address of the plaintiff in Burma, and in paragraph 6 of his judgment the learned District Munsiff has accepted this case of the defendant and exonerated him from liability for the interest on the arrears of rent saying that as he had not intimated his address in Burma to the defendant and directed the latter to send the rent to Burma the defendant could not send the rent to him.

In the light of this finding and the circumstances mentioned above there could be no gaurantee that theplaintiff's address given in Ext. Bl was the correct address. Further, the other circumstances of the case also clearly show that in sending the notice the defendant was only trying to create evidence and that he had no real intention to give up the tenancy. He sent the notice without being sure of the plaintiff's address. He put forward a plea of discharge of the arrears of rent and that has been definitely found to be false by the lower court. To the man in Burma he was writing that within a week of the receipt of the notice he should make

arrangements in India for taking possession of the shop building, and yet even after the plaintiff's return to India he did not hand over to him the key of the shop. Not only that even after this suit was filed he did not surrender the key, and he stated at the time of his examination in Court that the shop was being kept locked and the key was with him.

It is clear from his evidence that he was unwilling to surrender the shop to the plaintiff and that he was in actual possession and occupation of it even at the time of his examination.

In the circumstances I hold that Ext. Bl was not tendered to the plaintiff or refused by him and that there was no proper notice in this case terminating the tenancy. It follows that the plaintiff is entitled to get all the arrears of rent claimed by him in the plaint. In view of the learned District Munsiff's finding in paragraph 6 of his judgment referred to above I would refuse the plaintiff's prayer for interest before the period of his return from Burma.

3. In the result, in addition to the amounts which the plaintiff has been allowed to recover from the defendant by the decree of the lower court, the plaintiff is also allowed to recover arrears of rent for 25 months from 10-8-1952 to 10-9-1954 amounting to Rs. 150 and interest at 5 1/2 per cent per annum on the said amount of Rs. 150 from 10-9-1954.

The order of the lower court's decree regardingcosts is also set aside, and the plaintiff is allowed torecover from the defendant proportionate costs in thelower court calculated on the aggregate amount founddue to him as the result of this civil revision petition,and the defendant is directed to bear his costs in thatcourt. The civil revision petition is allowed withcosts to the extent indicated above and the decree ofthe lower court is modified accordingly.

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