

ALLAHABAD HIGH COURT

Shiv Dutt Singh

Vs.

Ram Dass

Second Appeal No. 1599 of 1971

(M.P. Saxena, J.)

13.02.1980

JUDGEMENT

M. P. Saxena, J.

1. This is a plaintiff's appeal against the judgement and decree dated 27-4-1971 passed by the 1st Addl. Civil Judge, Meerut.

2. Briefly stated the facts are that the plaintiff is the owner of the disputed shop and the defendant-respondent was its tenant on a rent of Rs. 5 per month. This accommodation was governed by the provisions of U.P. Act No. 3 of 1947. The plaintiff-appellant filed that suit for the recovery of Rs. 172 as arrears of rent from 1-8-1966 to 16-6-1969 and for pendente lite and future damages amounting to Rs. 6.33 up to 30-7-1969. He had also prayed for ejection of the defendant from the disputed shop.

3. The simple allegations were that the defendant was in arrears of rent from 1-8-1966 to 30-4-1969 and he did not pay it in spite of service of notice of demand and ejection on 17-5-1969.

4. The defendant contested the suit, *inter alia*, on the grounds that; he had been regularly paying the rent and on the plaintiff's refusal he had sent it by Money Order and also deposited the same under Section 7-C of the said Act. He further pleaded that he had not refused to take any notice and that the notice to quit, if any, was waived as the plaintiff accepted the rent during the pendency of the suit.

5. The learned trial court came to the conclusion that the defendant had really

refused to take the notice and there will be presumption of its service. In spite of it the defendant did not pay the arrears of rent and was liable to ejection. The plea of waiver of the notice was negated and the suit was decreed as claimed.

6. The defendant filed an appeal and the learned lower appellate court agreed with the trial court that rent was due from 1-8-1966 but in his opinion the presumption of service was rebutted by the statement of the defendant. It further held that even if notice was presumed to have been served it was waived by acceptance of rent during the pendency of the suit. The appeal was allowed in part and the judgement and decree regarding ejection were set aside. Hence this appeal by the plaintiff.

7. The defendant has not turned up in spite of service of notice. I have heard the learned counsel for the appellant. The finding that rent was due from 1-10-1968 is a finding of fact and does not call for interference at this stage.

8. So far as a service of the notice to quit is concerned it was given on 15-5-1969 and was received back with an endorsement of refusal by the defendant. Therefore, presumption of its service under Section 114 of the Evidence Act and Section 27 of the General Clauses Act was rightly raised. The question for consideration is whether this presumption was rebutted by the defendant. There was the solitary testimony of the defendant who gave out that no notice was brought to him by the postman and he never refused to take it. The learned trial court believed his statement but the learned lower appellate court disbelieved him merely on the ground that he was interested in making that statement (sic). In my judgement it was not a correct approach because the presumption raised under Section 114 of the Evidence Act or under Section 27 of the General Clauses Act can be rebutted even by the solitary statement of the defendant but it will depend on the facts and circumstances of each particular case. In *Meghji Kanji Patel v. Kundan Mal Chaman Lal Mehtani* ¹ a writ of summons sought to be served by registered post had been returned with the endorsement of refusal. The Bombay High Court held that presumption of service had been rebutted by the defendant's statement on oath that he had not refused it as it was never brought to him. In that case it was held that unless the postman was produced the statement of the defendant on oath must prevail.

9. The aforesaid view found favour with the Supreme Court in *P.V. Rao v. C.V. Ramana* ² It was held that where a notice sent by a registered post is returned with endorsement as refused it is not always necessary to produce the postman who tried to effect service. The presumption can be rebutted by the testimony of the defendant provided it is convincing.

10. In *Jagat Ram Khullar v. Battu Mal* ³ it was observed that a statement of the addressee on oath that the postal cover said to have been refused by him, was never tendered to him would be sufficient to dislodge the presumption and shift the onus on the other side to establish by evidence that the service had been duly effected. It is, therefore, not possible to accept the contention that the bare statement on oath of the addressee in such a case would not, as a matter of law, be sufficient to dislodge the presumption that may be raised either under Section 114 of the Evidence Act or under Section 27 of the General Clauses Act. A statement on oath of a party to the proceedings is a piece of oral evidence like statement of any other witnesses - and there is no rule of law that such a statement should not be accepted merely because it is made by a person who is interested in the proceedings nor is there any requirement of law that the statement on oath of a party to the proceedings must always be corroborated by any independent evidence before it could be accepted by court of law. Once the presumption is raised the matter of rebuttal need not be limited to the instance given in the counter illustration to Section 114.

11. In the instant case the defendant clearly gave out that the postman never came to him to offer this notice nor he refused to take it. Nothing was elicited in cross-examination to show that he was not telling the truth. He could not have examined the postman as he would not have deposed against his own endorsement and more so if it was done to oblige the plaintiff. The defendant could not have produced any other witness as that would have been stamped as got up evidence. As a party to the suit, having knowledge of the facts, he was bound to examine himself otherwise another presumption would have been raised against him. Therefore, the presumption of service in the circumstances of this case was amply rebutted by his solitary statement and the suit was bad for want of a notice. The question of waiver of notice does not arise when service of notice itself has not been proved. The appeal has, therefore, no force and is dismissed. The appellant will bear his own costs.

Appeal dismissed.

Cases Referred.

1. (AIR 1968 Bom 387)
2. (AIR 1976 SC 869)
3. (AIR 1976 Del 111)