CALCUTTA HIGH COURT

Sushil Kumar Chakravarty

Vs

Ganesh Chandra Mitra

(K.C. Das gupta and B Guha, JJ.)

26.11.1957

JUDGMENT

K.C. Das Gupta, J.

1. This appeal under Clause 15 of the Letters Patent against the decision of Renupada Mukherjee J., dismissing a second" appeal to this Court against a decree for ejectment raises the question whether when the letter containing a notice to quit has been proved to have been properly addressed, prepaid and posted by registered post and the original cover containing the notice which is Put in evidence is found to have the word, "refused", written on it, the Court is entitled to hold, without the postal peon being examined to prove the fact of refusal by the addressee, that Proper service has been effected. All the Courts below have held that proper service was effected. It appears that in the trial Court and in the court of first appeal certain other endorsements appearing on the covers were taken into consideration. Renupada Mukherjee J. held that those other endorsements should not have been admitted in evidence or looked into by the Courts below without the authors thereof being examined in Court. He held, however, that the Court was entitled to take into consideration the endorsement "refused" as appearing on the covers without the postal peon being examined and that thereupon it was entitled to presume without the peon being examined that proper service has been effected.

2. The argument, that unless the postal peon is examined such an endorsement "refused" is of no use and cannot justify the presumption that it was actually tendered and refused is based on the decision of this Court in the case of *Gobinda Chandra v. Dwarka Nath,*[1] *Their* Lordships pointed out that the endorsement was at best a record of a statement by the peon and could not be treated as evidence of the events recited therein unless the peon was examined except where there was evidence of circumstances which would allow the statement to be put in evidence under Section 32(2) of the Indian Evidence Act. Their Lordships observed further:

> "Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been

> delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered Co the addressee on a particular date."

It has to be observed that a view opposite to what found favour with Mookerjee and Walmsley JJ. in 19 Cal WN 489: (AIR 1915 Cal 313) (A), was taken in a large number of cases. There is also, as noticed by Renupada Mukherjee J., a full discussion of the question in *Nirmalabala Devi v. Provat Kumar Basu*[2], where Chakravartti J.. (now Chakravartti C. J.) held that the preponderance of authority was in favour of the view that even without a peon being examined in support of an endorsement of refusal appearing on the cover, a Court was justified in holding that proper service has been affected.

3. Before entering on a discussion of the question whether in the absence of the postal peon's evidence, a Court can hold that service has been refused, it is worth pointing out that in this particular case, the notice had been sent by registered post. The question at once arises as to what presumption can and should be made under Section 27 of the Indian General Clauses Act. That section is in these words :

> "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, 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."

Under this section, the service of the notice to quit, which is required by the Transfer of Property Act, shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the notice to quit. As soon, therefore, it is Proved that the letter containing the notice to quit was properly addressed, prepaid and posted by registered post, service shall be deemed to be effected. This "deeming" has been held to amount to a presumption, which, unless rebutted, would prove the fact of service. Even if, therefore, the actual refusal by the addressee is not proved, service of the notice may well be held to be proved.

4. In spite, however, of the great authority which always attaches to any decision of Sir Ashutosh Mookerjee, it is difficult to see why the examination of the postal Peon is an essential prerequisite of the Court accepting the fact of refusal as appearing in the endorsement on the cover. Examination of the peon who can come and speak about his offering the letter in question

to the addressee and the addressee refusing to accept it, is certainly one way and a very good way of proving the fact of refusal but where the Evidence Act has laid down the rule that a Court can presume certain things, the Court can act on the view of the facts under the presumption without any evidence being given. In my judgment, two different presumptions are of assistance to the plaintiff in this case. One is the presumption as mentioned in Illustration (f) of Section 114 of the Evidence Act, namely, that "the Court may presume that the common course of business has been followed in particular cases." The common course of business in dealing with a registered letter after it has been posted is that it is taken by the postal peon of the destination post office to the addressee and delivered to him, "if he is found; to return it undelivered, if he is not found and to return it with a note of the fact of refusal where, though he has been found, he has refused to accept it. In this case, evidence has been given that the cover was received back. That obviously shows that it was not delivered to the addressee. That may have happened for two reasons, one that the person was not found and the other that though found, he refused to accept it unless of course the peon did not go there at all or deliberately refused to try to find him. Such deliberate refusal or such omission to go, does not, however, commonly happen and as soon as the Court presumes that the common course of business has been followed, it is entitled to hold that the peon did go to the address and the return of the cover was due to one of two reasons, either that the man was not found or that though found, he has refused. It is also the common course of business that the postal peon would make an endorsement of the reason of his return. Looking at the cover, we find there is no note that the addressee had left or could not be found but there is a note, "refused." In my judgment these circumstances entitle the Court to hold, unless the contrary is proved, that the endorsement "refused" was made by the Peon himself and that it was correctly made.

5. Apart from this, the presumption mentioned in Illustration (e) of Section 114 of the Evidence Act is also, in my opinion, of great assistance to the plaintiff. That Illustration says that "the Court may presume that judicial and official acts have been regularly performed." All that happens in the post office from the time of posting of a letter to the point of delivery to the addressee or returned to the sender are official acts. As the law entitles the Court to presume that official acts have been regularly performed the Court is entitled to hold that the endorsement was made by the peon and it was correctly made. It is noticeable that in Gobinda Chandra Saha's case (A), there is a fleeting reference to this presumption of regularity of official business. In the concluding portion of the judgment the learned Judges Fay that "where..... the defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of regularity of official business as conclusive against him." This mention of the presumption of regularity of official business, shows that the scope of such a presumption was present in their Lordships' mind though in the previous portion of the Judgment, the reference is to Illustration (f) of Section 114 of the Evidence Act and not to Illustration (e). In my opinion, even if, there was no other evidence on record on which a decision that the endorsement was actually made by the peon and not by somebody else was available, the presumption that the Court may make under Illustrations (e) and (f) of Section 114, entitles the Court, in my judgment, to hold, in the first

place, that the endorsement has been made actually by the peon and then that the endorsement "refused" that has been made is a correct statement of fact. In the present ease, it may be pointed out that the defendant himself suggested in his, cross-examination of the plaintiff that the plaintiff had induced the peon to make a false endorsement, It is, therefore, not open to him to contend that the endorsement was not made by the peon. His case at the time of the trial was that the endorsement was really made by the peon but it contained a false statement of facts. If the Court chooses to make a presumption under Section 114 of the Evidence Act, the Court is entitled to hold that this is the correct statement subject to this that if there is evidence to the contrary and that evidence is believed bv the Court, the presumption must be held to be rebutted.

6. On behalf of the appellant, it was suggested that the decision in Gobinda Chandra, Saha's case (A), was an authority for holding that as soon as there was denial of the service by the defendant, the presumption stood rebutted. I am unable to see anything in that case to support this suggestion. All that the learned Judges said after expressing their view that "proof of the fact that a letter has been duly posted and has been returned by the Postal authorities does not Justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date", was that this was a presumption of fact "and where, as in this case, the defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of regularity of official business as conclusive against him." In my opinion, this statement, that the presumption of regularity of official business could not be treated as conclusive, was intended to be confined to the facts of that particular case. The ordinary way of rebutting a presumption of service was denial on oath by the defendant. Where this denial is believed, the presumption certainly stands rebutted. It is, however, open to the Court to believe him or not to believe him. If the Court is not prepared to believe his testimony, the presumption stands unrebutted. In the present case, Renupada Mukherjee J. has held, on consideration of the evidence, that the presumption has not been rebutted. We do. not think, it is open to us to enter into the question whether Renupada Mukherjee J. has wrongly refused to accept the testimony of the defendant denying the service.

7. I have, therefore, come to the conclusion that Renupada Mukherjee J., was right in holding that the notice to quit has been duly served and in dismissing the appeal as this was the only point canvassed before him.

8. I would, therefore, dismiss this appeal with costs.

B.K. Guha, J.

9. I agree.

Cases Referred.

119 Cal WN 489: (AIR 1915 Cal 313) (A)
252 Cal WN 659 (B)