

DELHI HIGH COURT

Jagat Ram Khullar

Vs.

Battu Mal, (Delhi)

S.A.O. No. 74 of 1973.

(H. L. Anand, J.)

9.9.1975

JUDGMENT

H. L. Anand, J.

1. This Second appeal by a tenant against the appellate order of the Rent Control Tribunal setting aside an order of the Addl. Rent Controller dismissing the landlord's application for the ejectment of the tenant on the ground of want of notice raises an interesting question relating as to the presumption of fact and of law with regard to service of notice by post.

2. The facts leading to the present appeal, in so far as they are relevant may be briefly stated. The landlord sought the eviction of the tenant on various grounds which was resisted, inter alia, on the ground that the petition for eviction was liable to be dismissed for want of notice of termination of the tenancy as required under section 106 of the Transfer of Property Act. The plea of want of notice was converted on behalf of the landlord and at the trial of petition, the landlord proved the postal cover duly addressed to the tenant but returned by the postal authorities with the endorsement "refused" and stated on oath that the notice was sent to the tenant under the postal cover which was returned with the aforesaid endorsement. On the other hand the tenant stated on oath that he never received the notice and that the cover was neither tendered to him nor was there any occasion for him to refuse to take delivery. A plea was raised on behalf of the landlord that presumption of service must be raised by virtue of clause (f) of section 114 of the Evidence Act. On behalf of the tenant, it was contended that the presumption had been rebutted by his statement on oath denying the tender and the refusal of the postal cover and that in view of the rebuttal, service of notice could not be presumed in the absence of evidence of actual tender and

refusal. The plea of the tenant prevailed with the Addl. Rent Controller and the petition was accordingly dismissed. The landlord's appeal against the order was, however, allowed by the Rent Control Tribunal and it was held that although the presumption under section 114 of the Evidence Act was rebuttable, the bare statement the tenant was insufficient to rebut the presumption. The contention of the tenant that no other evidence could have been produced was rejected on the ground that evidence could have been produced that there was strike in the post office or something extraordinary had happened which prevented the delivery or tender of the cover. The Rent Control Tribunal sought support for this conclusion from a decision of this Court in the case of *Shri O.P. Bahal v. Shri A.K. Saroff*,¹ and a Full Bench decision of the Allahabad High Court in the case *Ganga Ram v. Smt. Phulwati*,².

3. Shri Sultan Singh who appears for the landlord raises a preliminary objection that the Second Appeal is barred by time. The appellate order was made on November 7, 1972. The tenant made separate applications on November 16, 1972 for certificated copies of the appellate order as well as the original order. Copy of the appellate order was ready on November, 25, 1972 but the copy of the original order was ready only on January 19, 1973. The appeal filed on January 22, 1973. The contention that the appeal was barred by time based on the hypothesis that the tenant was not entitled to deduct the additional time taken in obtaining the certified copy of the original order because a second appeal need not be accompanied by such an order. It was not disputed that if the second appeal must be accompanied by a copy of the original order, the appeal was within time. It was contended that the second appeal need not be accompanied by a copy of the original order because there was no such provision in the Code of Civil Procedure. This contention, however, overlooks the provision of Rule 2(a) of the Rules and Orders of the Punjab High Court, Volume V, Chapter 1, Part A-A(q), as applicable to this Court. The aforesaid Rule clearly enjoins that "in the case of Second Appeals in addition to the documents prescribed by Order 41, Rule 1 of the Code, memorandum shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith". It follows, therefore, that unless an appellant in the second appeal seeks exemption from filing the copy of the original order or the appellate Court dispenses with it, the second appeal is not complete until it is accompanied by a copy of the original order. No such exemption was either sought or granted. The appellant would, therefore, be

entitled to the exclusion of additional time that may be required in obtaining certified copy of the original order. The appeal was accordingly filed within time and the objection is overruled.

4. On the merits, Sri Nayyar, learned counsel for the tenant contends that no presumption, either of fact or of law, with regard to the service of notice could have been raised in the absence of evidence of the postman that the postal cover containing the notice had been tendered to the tenant and its delivery was refused by him. He further contends that in any event, the tender of the postal cover and its refusal by the tenant having been denied by the tenant on oath at the trial of the petition, the presumption, if any stood rebutted reverting the onus on the landlord to establish by appropriate evidence that the postal cover had in fact been tendered to the tenant and its delivery was refused by him. Reliance was placed on *Appabhai Motibhai v. Laxmichand Zaverchand and Co*, (2) *Sundaram v. Sesh Aiyar Mahadeya Aiyar* (3), *Radha Kishan v. State of Uttar Pradesh* (4), *Meghji Kenji Patel v. Kundanmal Chamanlal Mehtanti* (5), *Parshotam Lal v. Kalyan Singh and another*³ and *Shrimati Bhagwanti v. Waryam Singh* (7).

5. On the other hand learned counsel for the landlord contends that on the material placed before the Controller, the landlord was entitled both to a presumption of fact under Section 114 of the Evidence Act as indeed to the presumption of law under Section 27 of the General Clauses Act with regard to service of notice on the basis of the postal cover containing the endorsement "refused" without any further evidence as to the actual tender and refusal to accept delivery. He further contends that a bare statement of the tenant, even on oath, denying the tender and its refusal by him would not dislodge the presumption either of fact or of law so as to shift the onus to the landlord or oblige the landlord to produce the postman so as to prove the actual tender and refusal to accept delivery. He sought to distinguish the cases relied upon on behalf of the tenant except the decision in *Shri Om Parkash Bahal v. Shri A. K. Shroff* (supra) which according to him supports the contention of the landlord. He also placed reliance on a Full Bench decision of the Allahabad High Court in *Ganga Ram v. Smt. Phulwati*,⁴ *Sher Afzal v. Mohan Lal* (9), *Raunaq Ram and others v. Prabhu Dayal and others* (10), *Mohan Lal Kojriwal v. Sunder Lal Nand Lal Saraf and others* (11), *Kodali Bapayya and others v. Yadavalli Venkataratnam and others* (12), *Balbhadar Mal Kuthiala v. The Commissioner*

of Income Tax, Punjab Sapra, Himachal Pradesh and Bilaspur, Simla (13), Sushil Kumar Chakraborty v. Ganesh Chandra Mitra (14), Kashilal Aggarwalla v. Jawaharlal Jaskeram and another (15), Dwarka Singh v. Ratan Singh Ahuja, ⁵(16), and Smt. Munni Devi v. Smt. Puspalatal Mondai and another (17).

6. What then is the law relating to presumption of service of notice by registered post ? Ordinarily, service of a notice on a person in the manner required by law has to be proved like any other fact by such oral or documentary evidence as may be appropriate. Proof of such a fact by the ordinary mode known to law may, however, be dispensed with if the service can be presumed either in fact or in law and when either of these presumptions are available, they are, unless rebutted, a substitute for proof. Presumptions may be of two kinds of fact and of law. Section 114 of the Evidence Act which incorporates the former and provides that "the Court may presume the existence of any fact which if it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case". According to illustration (f) to the Section, the Court may presume "that the common course of business has been followed in particular cases". It further provides that in considering whether common course of business had been followed or not, the Court shall also have regard to such facts as are set out in relation to each of the illustrations. The fact relevant to illustration (f) runs thus:

"The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances".

Section 114, therefore, entitles a Court to presume that a common course of business was followed so that if it is proved a postal cover duly addressed was sent by registered A.D. post, having regard to the common course of events, it would have been received by the addressee or if it is returned with the endorsement by the postal authorities that it was refused, that it was so tendered and refused. This would raise a presumption of fact which the Court may, but is not bound to rise. If however, it is shown at the same time that the common course was interrupted by an extraordinary situation, the presumption would not be available. Section 27 of the General Clauses Act on the contrary incorporates a presumption of law when it defines the meaning of service by post. The Section runs thus:-

"When any (Central Act) or Regulation made after the commencement of this Act authorizes 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."

Where, therefore, the conditions of the section are satisfied a presumption of law with regard to service would arise. There is a clear distinction between the presumption that may arise under section 114 of the Evidence Act and the one arise under section 27 of the General Clauses Act. The former is presumption of fact which the Court may, but is not bound to raise. The latter incorporates a presumption of law and the Court has no option but to raise such a presumption if the conditions of the provision are satisfied.

7. It is not in dispute in the present case that the postal cover was correctly addressed to the tenant and was sent by registered post and if that be so, the presumption with regard to service would arise under both the provisions. I am unable to see why the evidence of actual tender and the refusal to accept delivery was necessary to bring about the presumption. To my mind, such evidence would be wholly redundant to raise the presumption because if such an evidence was necessary, such evidence by itself would be sufficient to prove service. The aid of the presumption would in that case have been unnecessary. As has been pointed out above, the presumption in such cases is intended to be a substitute for proof and it is, therefore, not possible to accept the contention that the existence of proof independently of on the presumption is necessary to raise it. The extreme proposition proboundeal behalf of the tenant, therefore, that no presumption could arise unless it is established by evidence that the postal cover was in fact tendered and its delivery was refused, could not, therefore, be accepted. None of the numerous decisions cited at the bar on behalf of the tenant would appear to me to support such a proposition. This contention must, therefore, be rejected, and I have no hesitation in holding that on the material placed on the record before the Controller, a presumption of service arose both under section 114 of the Evidence Act, as indeed, under section 27 of the General Clauses Act.

8. What then is the impact of the oral testimony of the tenant denying the tender and the refusal to accept delivery on the presumption of service that thus arose ? This question, by my mind, must be answered in favor of the tenant. It is well settled that the presumption of fact under section 114 of the Evidence Act, as indeed, the presumption of law under section 27 of the General Clauses Act, are not irrefutable but, on the contrary, are rebuttable. This is so because neither of the two presumptions are conclusive but only dispenses with the need of evidence and could not, therefore, be placed at a pedestal higher than evidence itself. If oral and documentary evidence, produced by litigant in a cause could be rebutted by evidence produced by the other side, there would be no reason to hold that the presumptions could not be dislodged by evidence in rebuttal. It was not seriously disputed that the presumption may be rebutted but the real controversy between the parties turns on the question if a bare statement on oath by the tenant denying the tender and refusal to accept delivery was sufficient to rebut the presumption. This question to my mind must be answered in favor of the tenant because by making such a statement on oath, the tenant has really produced the best possible evidence he could. The presumption raised is with regard to the tender to him of a postal cover and refusal by him of its delivery. The best he could do is to make a statement on oath that no such tender was ever made to him and there was, therefore, no question to refuse the delivery. What other evidence could be possibly given in such a case ? Such an evidence would, to my mind be sufficient to shift the onus to the landlord to establish actual tender and refusal to accept delivery, inter alia, by producing the postman concerned.

9. The numerous cases cited at the bar do not appear to me to point out any direction to the contrary. The case of Sher Afzal (supra) merely laid down as to when the presumption would arise. It did not deal with the question as to how it was to be rebutted. It was not a case in which the tenant denied on oath the tender or the refusal of its delivery. This case is, therefore, of no assistance to the landlord. The case of Raunaq Ram (supra) was also a case in which no attempt was made by the addressee to rebut the presumption which was said to arise. In the case of Mohan Lal Kojriwal (supra) also, the question was if a presumption arose on the endorsement "refused". The further question as to what evidence would be sufficient as to rebut the presumption was neither raised nor considered. The case of Balbhadar Mal Kuthiala (supra) was likewise concerned with the abstract question as to when a presumption would arise. The

question as to its rebuttal was not involved. Kodali Bapayya (supra) was also a case in which there was no evidence regarding denial of tender. Similar was the case of Sushil Kumar Chakravarty (supra). In Om Parkash Bahal (supra), also there was no evidence of denial. That was a case in which that tenant pleaded that he was out of station and that being so, it was pointed out that no relation of the tenant had been produced to say that the postal cover was never tendered. In Koshilal Agarwalla (supra) also, there was a mere plea of denial but no statement on oath in support of it. In Dwarka Singh (supra) likewise, there was no statement denying the tender. In Ganga Ram, (supra), there was no denial of tender although the postman was examined and was unable to identify the addressee.

10. The only decision which appears to have taken the view canvassed on behalf of the landlord is of Smt. Muni Devi (supra). The decision in that case, however, turned on the peculiar facts of that case. The tenant stated on oath in that case that during the material period, she was away from house and this evidence was sought to be supported by the evidence of two witnesses. Both the Courts below had declined to accept the evidence because of its discrepant nature and the High Court concurred with their conclusion. It was pointed out that "the defendant's denial on oath is, by itself, hardly sufficient particularly, having regard to the nature of that denial in the present case". I am unable to read this decision as an authority for the proposition that the presumption could not be rebutted by the mere statement on oath of the tenant that there was in fact no tender or refusal to take delivery.

11. On the contrary, there is some authority for the proposition that the denial on oath of an addressee that the postal cover was tendered to him and was refused by him would ordinarily be sufficient to dislodge the presumption so as to oblige the other side to establish by evidence that the service had been effected. In the case of Appabhai Motibhai (supra), Chagla, C.J. as he then was, expressed the view that the Court must allow a defendant a retrial, if, after the decree has been passed against him on the evidence that summons was sent by registered post and had been returned with the endorsement that it had been returned, he appeared and denied that the postal cover was ever delivered to him by the postal authority. Similar view was taken by the Travancore-Cochin High Court in the case of Sundaram (supra) and the judgment of the Bombay High Court was followed. In the case of Meghji Kanji Patel (supra), the earlier

view of the Bombay High Court was reiterated by Nain, J. and it was held that a statement on-oath by the addressee that the postal cover was never tendered to him dislodged the presumption raised under Section 114 of the Evidence Act. In the case of Parshotam Lal (supra), the Jammu and Kashmir High Court took a rather extreme position when it expressed the view that mere presence of the post card and the acknowledgement form with certain postal seals and as endorsement will not lead to any presumption that the post card was addressed by and on behalf of the plaintiff to the addressee if acknowledgement was refused by the latter. It was further held that it was not a public document, and required to be duly proved by calling the writer of the post card or one who is conversant with his writing or at least the person who posted it and also by the postman who made the endorsement when the acknowledgement of the post card is denied by the defendant. In the case of Smt. Bhagwanti (supra) it was pointed out by Chief Justice Falshaw as he then was, that where a registered letter was returned undelivered with the endorsement that the addressee had refused to accept service, the addressee could not possibly produce any evidence to show that the cover was never tendered to him except by denying the allegations, and that when there was a denial of particular mode of service, it was upto the other party to produce some evidence and not merely rely on something written by a postman from whom not even an affidavit had been obtained. It was further pointed out that if such a practice was followed, there would be many fraudulent ex-parte decrees.

12. It would thus appear that ordinarily 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 affected. It is, therefore, not possible to accept the contention that the bare statement on oath 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 witness 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 proceeding nor is there any requirement of law that the statement on oath of a party to the proceeding must always be corroborated by any independent evidence before it could be accepted by a Court of law. It is not possible to lay

down any hard and fast rule of law with regard to sufficiency of evidence. If a statement of a party on oath inspires confidence, the Court is entitled to accept it and base its conclusion on it. Learned counsel for the landlord has not been able to point out any discrepancy in the statement or any other feature of it which may justify its rejection. It is also not possible to accept the conclusion of the Rent Control Tribunal that the tenant should have given better evidence such as the existence of an extraordinary situation in which the tender could not have been made. Such an evidence is visualized by the counter illustration referred to above but that is a circumstance which a Court is entitled to consider before raising a presumption. Once the presumption is raised, the manner of rebuttal need not be limited to the instance given in the counter illustration. The only possible evidence that could have been given by the tenant in such a case would be to deny the tender on oath and that is exactly what the tenant has done in the present case. This evidence could not be rejected out of hand merely because it was made by a party to the proceedings or because any better negative evidence could have been given by the tenant.

13. In the result, the appeal succeeds. The order of the Rent Control Tribunal is set aside and that of the Addl. Rent Controller is restored with the result that the petition for eviction would stand dismissed. The tenant would have his costs both in this Court and before the Rent Control Tribunal.

Appeal allowed.

Cases Referred.

1. 1972 RCR 960
2. 1970 RCR 485
3. 1970 RCR 833.
4. 1970 RCR 485.
5. 1969 RCR 849.