

property is depicted in red colour in the site plan; this was the 1/3rd share of the plaintiff.

iii. This property had been let out to the defendant who was his nephew at a monthly rental of Rs. 500/- for a period of 11 months. Defendant failed to vacate the suit property. Legal notice dated 05.10.1988 was served upon the defendant but to no avail. Suit was filed.

iv. Defendant contested the suit. His contention was that he had purchased this property from the plaintiff on 06.02.1985 for a consideration Rs. 19500/-; plaintiff had executed a general power of attorney, agreement to sell and a receipt which were duly registered documents. Defendant claimed ownership of the suit property. He denied that he was a tenant of the plaintiff.

v. Trial Judge framed four issues which inter alia read as follows:-

i. Whether the defendant purchased the suit property by way of power of attorney, agreement to sell and registered receipt from the plaintiff as alleged in P.O. No. 1? OPD

ii. Whether the defendant is tenant in the suit property? OPP

iii. Whether the plaintiff is entitled to the relief of possession as claimed? OPP

iv. Relief.

vi. Trial Judge examined the oral and the documentary evidence. Three witnesses have been examined on behalf of the plaintiff and one witness had come into the witness box on behalf of the defendant. It was held that the defendant is not a tenant in the suit property. He had purchased this suit property in terms of an agreement to sell, general power of attorney and a receipt. Suit of the plaintiff was dismissed.

vii. This finding of the Trial Judge was reversed by the First Appellate Court. The impugned judgment had disbelieved the defence of the defendant that he had purchased this suit property from the plaintiff vide an agreement to sell, general power of attorney; all these documents have been marked as Mark A, A1 and A2. The thumb marks on the said documents purported to be of the plaintiff were disbelieved; claim of the defendant that he had title to the suit property was disbelieved. Defendant was held to be a tenant and his tenancy was validly terminated by a legal notice Ex.PW-3/2. Suit of the plaintiff was decreed.

3. This is a second appeal on 10.05.2000; the appeal had been admitted and the following substantial questions of law were formulated which inter alia reads as follows:-

1. Whether the first appellate court, on the basis of presumption and assumption could decide issue no. 2 by holding that the appellant is the tenant of the respondent?
2. Whether the first appellate court was justified in law by holding that the appellant is the tenant of the respondent without looking into the evidence led by the parties and could have reversed the judgment and decree of the trial court had not relied upon the testimony of the respondent's witness.
3. Whether the courts below erred in ignoring the invalidity of the notice for termination of tenancy served by the respondent on the appellant. No doubt it is new plea being taken by the appellant for the first time in the second appeal but the same is a legal one and mere reading of the notice can determine the same.

4. On behalf of the appellant, it has been urged that in para one of the replication, the plaintiff had admitted that the defendant might have got his thumb impression under the impression of alcohol; this admission of the plaintiff cannot be washed away; this had been illegally ignored in the impugned judgment. Attention has been drawn to the testimony of PW3 who was the plaintiff. It is pointed

out that his contrary stand in the cross-examination that the documents i.e. GPA, receipt and agreement to sell did not bear his thumb mark and his categorical denial that he had not signed on any blank paper is a conflicting version. It is pointed out that under Section 106 of the Transfer of Property Act (hereinafter referred to as "T.P.Act") there are two twin requirements to be fulfilled; the notice must give a clear 15 days period to the tenant to vacate the property coupled with the second requirement that it must terminate on the last date of the calendar month; Ex.PW-3/2 does not fulfill the second requirement; the tenancy was not terminated on the last date of the calendar month.

5. Arguments have been countered by learned counsel for the respondent. It is pointed out that the plea of the validity of a notice cannot be raised in a second appeal. This notice was never in dispute before the two Courts below. The findings of fact on the documentary evidence also cannot be re-agitated before this Court.

6. Perusal of the record shows that the first limb of the arguments addressed by the learned counsel for the appellant has been dealt with in deep detail in the impugned judgment. The impugned judgment had discarded the power of attorney, agreement to sell and receipt i.e. the purported documents of sale which had been set up by the defendant and purported to have been thumb marked by the plaintiff. In this context this finding in the impugned judgment reads as follows:

"4. By the very nature of the defence, the defendant has admitted the ownership of the plaintiff. Similarly the possession of the defendant over the suit property is also admitted. The plaintiff alleges that the defendant came into the possession of the suit property under a contract of tenancy. On the other hand, the defendant claims that he came into possession of the suit property

under an agreement to sell and on payment of the consideration money. According to the plaintiff the tenancy was oral. Accordingly no document of tenancy could be produced. On the other hand the defendant relied upon the documents. In view of the pleadings the parties, the onus of proof in this case is very heavy on the defendant. The ownership of the plaintiff is admitted. Therefore unless the defendant establishes his title to continue in possession, he is liable to be evicted. In case defendant's right is not established then he is either a tenant or an unauthorized occupant.

5. The documents produced by the defendant are agreement to sell mark A-1, receipt mark A-2 and a General Power of Attorney mark A. All these three documents are purported to have been thumb marked by the plaintiff. The plaintiff is an illiterate person. The thumb marks, as per signatures appearing on the document, were taken in presence of one Khacheru and one Chhotu Singh. The receipt also carries the signatures (initials) of one Mr.M.N.Sharma, advocate. None of the three persons has been produced in the witness box by the defendant. The thumb impressions on the document mark A-1 are dim. The thumb impression on mark A-2 is ink smudged. The thumb impression on mark-A is partly clear and partly smudged. The defendant, however, has made no efforts to get the thumb impressions examined by an expert. The thumb impressions are not like signatures which one can admit or deny on a visual inspection. The plaintiff categorically denies that he ever agreed to sell the suit property to the defendant or that he received the alleged consideration money for the suit property. In his replication while denying the alleged transaction the plaintiff says that he is an alcohol addict and that the plaintiff might have got his thumb impression under the influence of alcohol. This plea of the plaintiff cannot be taken as an admission of the thumb impression on the document. The entire plea of the plaintiff in this respect has to be read. The plaintiff says:-

"That para Ist of P.O. is wrong and denied. It is emphatically denied that premises in dispute was sold, alienated or transferred to the Defendant. As far as the plaintiff remember he had not signed any document pertaining to the sale of premises in question. The plaintiff is addict of alcohol and defendant might have got his thumb impression under the influence of alcohol and which is wrong and illegal under the eyes of law."

6. The possibility of his thumb impression being taken under influence of alcohol is pleaded only as a possible defence in the event of the thumb impression being proved.

7. The learned trial court has taken this averment of plaintiff in the replication quoted above into consideration and has also given emphasis to the fact that the receipt mark A-2 is a registered document. The argument given by the learned trial court is that the documents could not have been registered without the presence of the plaintiff. If such argument is accepted, then no registered document should require any proof. The requirement of Evidence Act however is quite different. Even a registered document is required to be proved by proving the executing of the document. In the present case none of the three documents relied upon by the defendant is proved. Even the defendant does not state on oath that the thumb impressions were obtained by him or were obtained in his presence. In my opinion, no credit can be given to any of the three documents. I have no option but to hold that the defendant has failed to establish any right over the suit property by virtue of agreement to sell or on receipt of payment of the consideration amount.

8. In view of this situation, the defendant is either a tenant or an unauthorized occupant. The court cannot make out a third case. Therefore the only possible case is that the defendant is a tenant. The tenancy of the defendant has been terminated by a notice of termination of tenancy. No argument is advanced in appeal against the service and validity of the notice. The tenancy of the defendant having been terminated by the notice. The defendant is liable to be evicted.

9. There is no other defence raised in the written statement. Hence the appellant/plaintiff is entitled to a decree for possession."

7. There is no perversity in this finding. The impugned judgment after a detailed examination of the documentary and oral evidence had drawn a conclusion that the defence of the defendant that he had purchased this suit property vide the aforementioned documents i.e. the agreement to sell, GPA, and receipt was a sham defence; the contention of the plaintiff that the defendant was a tenant in the suit premises had been upheld. It is not the case of the appellant that the evidence had been ignored by the Courts below; the argument

that the evidence has been mis-appreciated is an argument worthy of little merit as the second Appellate Court is not a third fact finding court; it cannot allow a party to re-agitate and reopen questions of fact which have been adequately dealt with by the Courts below. This answers the first and the second substantial question of law framed by this Court.

8. Qua the third substantial question of law, it is relevant to state that the legal notice sent by the plaintiff Ex.PW-3/2 is dated 5.10.1988. Reply to the said notice had been filed by the defendant/appellant Ex.DW-1/B. It is nowhere the contention of the defendant that this notice was not a valid notice; that it did not fulfill the requirements of Section 106 of the TP Act. This plea cannot be taken at this stage i.e. before the Second Appellate Court. In (1983) 1 Andh LT 344 Bondill Satyanaray Ana Singh Vs. Rajagopalaswamy Vari Derasthaaam Madhavaripalem, it was held that it would not be permissible for a tenant to contend for the first time at the stage of second appeal that the notice period does not synchronize with the end of the month of tenancy; in this case it was held that such a plea not having been advanced by the defendant in the two Courts below it could not be said that the notice was not in accordance with Section 106 of the T.P. Act. In AIR 1987 SC 759 Dipak Kumar Ghosh Vs. Mrs.Mira Sen, the Supreme Court in the context of this particular situation had held as follows:

“Even assuming that it is a notice under Section 106 of the Transfer of Property Act and, accordingly, the instant notice to quit is bad, yet the respondent having accepted the notice to quit, it will not be open to the appellant to contend that it is invalid and cannot be relied upon by the respondent as a ground for eviction. A notice to quit even if it is defective can be accepted by the landlord, and after such acceptance the tenant will be estopped from challenging the validity of the notice given by him. Indeed,

the question came up for consideration before this Court in the Calcutta Credit Corporation Ltd. and Anr., v. [Happy Homes \(P\) Ltd. MANU/SC/0343/1967](#) : [1968]2SCR20 . It has been held by this Court that a notice which does not comply with the requirements of Section 106 of the Transfer of Property Act in that it does not expire with the end of the month of the tenancy, or the end of the year of the tenancy, as the case may be or of which the duration is shorter than the duration contemplated by Section 106, may still be accepted by the party served with the notice and if that party accepts and acts upon it, the party serving the notice will be estopped from denying its validity.”

9. Even otherwise on the perusal of the Ex.PW-3/2, it is clear that the twin requirements of Section 106 of the T.P.Act stand met with. This notice is dated 5.10.1988; it clearly stipulates that the tenancy of the defendant is terminated asking him to vacate the suit property within 15 days from the receipt of this notice. The first requirement of a 15 day clear notice is fulfilled; the second requirement that this tenancy will terminate on the last day of the calendar month is also clear from a reading of this document. It states that the rent of Rs.500/- has not been paid after February 1988 and from February to September 1988; it comes to Rs.4000/-. It is implicit from the a reading of the language of this notice that the tenancy had stood terminated on the last day of the month as rent had not been paid from February 1988 onwards; thereafter demand of Rs.4000/- was raised for the months of February 1988 to September 1988.

10. The Supreme Court in Dipak Kumar Ghosh (supra) held that a notice under Section 106 of the T.P.Act must be construed liberally and not with a view to find faults in it but with a view to its validity. There is no particular form of notice. Its plain reading must bring out the intention on the part of the lessor to terminate the lease; no hard or fast rule or technical formula can be laid down about the language of a notice under Section 106. The precise words are

immaterial provided the notice terminates the tenancy; it must express a clear and unequivocal intention to terminate the tenancy.

11. At this juncture i.e. at the stage of second appeal, when till date the notice has not been disputed and in fact has been accepted by sending the reply Ex.DW-1/B to the same, the appellant is now precluded from challenging its validity.

12. Appeal has no merit; it is dismissed.

INDERMEET KAUR, J.

OCTOBER 08, 2010

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