

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of judgment : 21.4.2011*

+ **RSA No.396/2006 & CM No.16448/2006**

SH.SYED ASHRAF Appellant
Through: Mr.Manoj Ohri, Advocate.

Versus

SMT.GUNEET KAUR (L.R. OF SMT.SURJEET KAUR)
.....Respondent.
Through: Mr.K.K.Sharma, Sr. Advocate
with Mr.Ahutosh Dubey and
Mr.L.K.Sharma, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1. Present appeal has impugned the judgment and decree dated 25.9.2006 which had endorsed the finding of the trial judge dated 29.7.2005 whereby the suit filed by the plaintiff for recovery of possession of the suit property i.e. B-2/64, Ground Floor, Safdarjung Enclave along with damages had been decreed in her favour. Rate of damages had been modified.

2. Plaintiff is stated to be the owner of the suit property; she had let out the suit property to the defendant vide lease agreement dated 01.10.1997. Rent of the property was ₹9500/- per month; it was payable in two parts i.e. ₹6000/- as rent and ₹3500/- towards her charges for fittings and fixtures. This agreement expired by

efflux of time dated 31.8.1993. Defendant continued to hold over the premises; rent was not paid in terms of the lease deed. Plaintiff did not wish to continue with the tenancy; vide legal notice dated 20.2.2002 the tenancy was terminated w.e.f. 31.3.2002. This notice had been served at the Delhi address and Bangalore address of the defendant. Despite service of the said notice defendant had failed to vacate the suit property. Accordingly the present suit was filed.

3. In the written statement, relationship of landlord and tenant was not disputed. It was not disputed that the rent was more than ₹ 3500/-. However, the receipt of legal notice was disputed. It was denied that the defendant had received the aforementioned legal notice dated 20.2.2002 either at his Delhi address or at the Bangalore address. It was stated that the AD card purportedly bearing the signatures of the defendant is a forged and fabricated document. Tenancy had not been validly terminated.

4. The following five issues were framed:

- “1. Whether suit is not properly valued for the purpose of valuation and jurisdiction? OPD
2. Whether the defendant has no privity of contract with the plaintiff? OPD
3. Whether the plaintiff is entitled for the relief of recovery of possession as prayed in the prayer clause (a)? OPP
4. Whether the plaintiff is entitled for damages as prayed in para (b) of the prayer clause?
5. Relief.”

5. Oral and documentary evidence was led. Issue no.3 is relevant for the purpose of controversy before this Court. The notice sent to the Delhi address of the defendant had been proved as Ex. PW-1/2. The computerized receipt evidencing the sending of the legal notice had been proved as Ex. PW-1/3. Legal notice sent

at the Bangalore address had been proved as Ex.PW-1/5 and postal receipt had been proved as Ex.PW-1/6 and the registered A.D. Card sent by the defendant was proved as Ex.PW-1/7. Defence of the defendant that the document Ex.PW-1/5 was a forged document as it is not verbatim the notice Ex.PW-1/2; contention of the plaintiff is that both the notices are dated 20.2.2002 but the phrasing of the two documents shows that the layout is different supporting his submission that this document is indeed a fabricated document. This contention had, , been repelled by the trial court. Trial court in this context noted as follows:

“To me this contention also does not have force. Now. Ex. PW-1/2 is posted through Ex. PW-1/3 on the same day i.e. 20.02.2002 while Ex. PW-1/5 is posted through Ex. PW-1/6 on 01.03.2002 i.e. after the lapse of 8 days. So possibility that after the span of 8 days it had been posted from some other post office, could not be ruled out. Moreover, it could also be not ruled out that there may different counter from which earlier Ex.PW-1/2 was posted then that later on Ex. PW-1/5, even though the post office are same. Now the defendant had not lead any evidence to prove this fact be calling any officials from the post offices. In the absence of this the defendant failed to discharge the initial onus which was upon him to prove forgery and manipulation. In the absence of that there is presumption of service through registered post as per Section 24 of General Clause Act. Now when the defendant has disputed that Ex.PW-1/6 and Ex.PW-1/7 are forged then he is not permitted to take defence that no one stay at the address mentioned in Ex.PW-1/5 and Ex.PW-1/7, though he tried to do so. To me even this defence is bleak one. In his cross examination DW-1 had stated that ‘I know several people and persons who are resident of Bangalore’. That means persons knowing to him are resident of Bangalore. Further in his cross examination in chief DW-1 had stated ‘there was never any need to serve me at Bangalore address mentioned in the AD card since I rarely stay there’. So, this is also the admission of the defendant that he stay there at Bangalore (though rarely). Now in his written argument, the defendant the argued that “plaintiff reside at first floor and is aware of the movement of the defendant”. So, this shows that when defendant himself had admitted that the plaintiff knows the movement of the defendant then it could be presumed that the plaintiff know that

defendant used to visit Bangalore and he must be also having the address of the person known to the defendant when the defendant used to stay at Bangalore. Even at Ex. PW-1/7 there are remarks of receiver "on behalf of Syed Asraf". So, it clearly suggest that Ex. PW-1/5 was duly served upon the defendant and Ex. PW-1/5 & Ex. PW-1/7 are genuine documents. So Ex. PW-1/5 is the notice u/s 106 TP Act terminated the tenancy of the defendant w.e.f. 31.03.2002 and the same was duly served upon the defendant, hence it has the effect that tenancy of the defendant was duly terminated w.e.f. 31.03.2002. Now plaintiff is the landlord/owner of the suit premises. There exist relationship of landlord and tenant between the parties. The rent is not covered under DRC Act and the lease is at Will. Ex.PW-1/5 had duly terminated that lease w.e.f. 31.03.2002. So, the defendant is liable to restore possession to the plaintiff."

6. This was endorsed in first appeal.

7. This is a second appeal. It has been admitted and on 07.12.2006 the following two substantial questions of law were formulated:

1. Whether the presumption drawn by the trial court and the first appellate court under Section 27 of the General Clauses Act are valid notwithstanding the appellant denied the service of notice?
2. Whether the termination of tenancy of the appellant having not been affected at the residential address of the appellant could be taken as valid termination of tenancy as per Section 106(4) of the Transfer of Property Act."

8. On behalf of the appellant, it has vehemently been urged that the notice Ex.PW-1/2 was admittedly not served upon the defendant which was sent at the Delhi address. The AD card clearly shows that it has not been received by the addressee. The notice Ex.PW-1/5 purported to have been sent at the Bangalore address was also addressed at Bangalore which does not tally with the address given by the defendant in the lease deed. The lease deed has not been proved on record. This is, however, an admitted document. This contention of the learned counsel for the appellant

is that the Bangalore address mentioned in the lease deed does not correspond with the address at which Ex.PW-1/5 was sent.

9. This submission of the appellant does not in any manner advance the case of the plaintiff. The plaint has been perused and in the memo of the parties the defendant has been described at two addresses i.e.

“Sh.Syed Ashraf
S/I Syed Yaseen,
R/o B-2/64, Ground Floor,
Safdarjung Enclave,
New Delhi-110029
Also at
190, 6th Main , 2nd Block,
R.T.Nagar, Bangalore-560032
Karnataka”

In para 8, it has been specifically averred that this notice has been sent to the defendant at his Bangalore address which has been received by him. The written statement of the defendant is relevant. In para 3 of the preliminary objections, it has been admitted by the defendant that he maintains his residence at Bangalore also; he has further stated that this is evident from the fact that in the memo of parties plaintiff has given both the addresses of the defendant; however, it was denied that the defendant had received this legal notice was received either at the Delhi or at the Bangalore address. It is relevant to state that in the entire written statement there is not a whisper that the Bangalore address given of the defendant in the plaint is not his correct address as has now been vehemently urged before this Court. In fact in the written statement it has been admitted that the defendant was a resident of Bangalore as well. His contention is that in his evidence he had deposed that he rarely used to visit

Banglore; this word “rarely” had been interpreted by the courts below as his admission of his visit to Banglore but on rare occasions. Thus this argument of the learned counsel for the appellant that the notice has not been sent at the correct address at Banglore hold no water.

10. The second submission of the learned counsel for the appellant is that Ex.PW-1/5 is a forged and fabricated document; presumption under Section 114 of the Indian Evidence Act, 1872 and under Section 27 of the General Clauses Act, 1897 could not have been drawn in favour of the plaintiff and against the defendant. It is submitted that both the said presumptions are rebuttable; evidence had discharged this onus; defendant had come into the witness box and on oath deposed that Ex.PW-1/5 is a forged document. To support this submission learned counsel for the appellant has placed reliance upon 1977(2) RLR 436 Jagat Ram Khullar Vs. Shri Battu Mal ; 1994 (1) RCR 468 United Commercial Bank Vs. Bhim Sen Makhija as also another judgment the Apex court reported in (1990) 4 SCC 497 Green View Radio Service Vs. Laxmibai Ramji & Anr. For the same proposition reliance has been placed upon (1992) 2 SCC 46 Kulkarni Patterns Pvt. Ltd. Vs. Vasant Baburao Ashtekar.

11. Arguments have been rebutted. It is pointed out that interference by this Court at the stage of a second appeal is circumscribed by the provisions of Section 100 of the Code. Interference is called for only if the findings are perverse; no such perversity has been pointed out.

12. Record has been perused. This court has to answer the substantial questions of law as aforenoted.

13. The arguments urged and noted hereinabove have been dealt with the sum in paras 11 and 22; the said paras read as follows:

“11. The appellant has taken the defence in the written statement that he did not receive the alleged legal notice either at Delhi or Bangalore address. In his affidavit to lead evidence, the appellant had deposed that there was never any need to serve him at Bangalore address since he rarely stayed there. He has also disputed the legal notice by alleging that the same is a manipulated document and the appellant was never served with the said notice. However, during the entire trial the appellant did not take the defence that the Bangalore address was in use and occupation of Sh. K. Mohd. Aharif who was running a Guest House under the name and style of M/s Akash Paints Pvt. Ltd. since 1995 or that the permanent address of the appellant is:- Opposite Lady Hospital, P.O. Sirsa 572137, Distt. Tumkur, Karnataka. These averments have been raised for the first time in the appeal.

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22. Per contra on behalf of the respondent it was argued that the appellant has admitted both the address i.e. at Delhi as well as of Bangalore in the written statement. He has not denied that he did not reside at the Bangalore address. No fresh address has been furnished in the written statement. The appellant has also not denied that the acknowledgment card was not received on his behalf. Thus, the notice Ex. PW1/5 has been validly served on the appellant terminating his tenancy.”

14. It is relevant to state that the defendant had set up a plea that Ex.PW-1/5 was forged and it had not been received either by himself or any other person on his behalf. In his written statement he had admitted that he was a resident of the Bangalore address where Ex.PW-1/5 had been posted; he had not disputed that this Bangalore address mentioned in the plaint is not his correct address. The AD card duly signed by the defendant has been proved as Ex.PW-1/7 who had signed Ex.PW-1/7 as ‘Syed Ashraf’ has not been explained. Setting up this plea at a later stage is surely a falsity.

15. The application under Order 41 Rule 27 of the Code before the first appellate court had been rightly rejected. What the appellant sought to adduce by way of additional evidence was that his Bangalore address at that time was in use and occupation of one K.Mohamed Aharif who was running a guest house under the name of M/s Akash Paints Pvt. Ltd; however, this was never his contention either in the written statement or even in his evidence on oath. The statutory provision as contained in Order 41 Rule 27 does not allow a party to fill in gaps or lacuna. Unless and until the conditions as contained in the said provision are satisfied the Court cannot permit additional evidence to be adduced.

16. The first appellate court had rightly noted that this plea was never taken in the court below; there appears to be no explanation as to why these documents which had surfaced before the first appellate court could not be produced before the court below; first appellate court had rightly rejected the said application.

17. The impugned judgment in para 23, 28 and 29 had noted as under:

“23. It was further contended the mere fact that one postal receipt Ex. PW1/3 was hand written whereas the other postal receipt Ex. PW1/6 was computer generated in itself does not show that the said postal receipts are forged. There can be a situation when the computer is not working then the postal receipt might have been prepared in hand. It was contended that appellant has not cross examined the respondent on the question of damages. Thus the appeal is not maintainable.

28. The Ld. Counsel on behalf of the appellant vehemently argued that service of notice Ex. PW1/5 is a manipulation. The lay out of both the notices Ex. PW1/2 and Ex. PW1/5 is different, there are defects in the postal receipts. Though, both the notices are of same date but have been posted from different post offices which clearly shows that the later notice Ex. PW1/5 is an after thought and the postal receipts have been manipulated in order to prove

the service. It was contended that a person would not post two notices of the same date from different post offices.

29. The mere fact that the lay out of the two notices though dated 20.02.2002 is different or have been posted from different post offices is not sufficient to prove any manipulation until and unless it is also supported with other circumstances. It is also immaterial that the complete address has not been mentioned on the postal receipt Ex. PW1/6 or the same is hand written. The postal receipt is a piece of evidence to prove that the alleged letter has been delivered in the post office to be sent by post to the addressee. The correct and complete address of the addressee is required to be written on the envelope or on acknowledgment card. It has not denied that complete address at Bangalore has not been mentioned on the acknowledgment card Ex. PW1/7. Thus, it cannot be said that the notice Ex. PW1/5 was not received by the postal office vide receipt Ex. PW1/6."

18. These findings call for no interference; they can in no manner be said to be perverse. The concurrent finding of the two fact finding Courts cannot be disturbed unless and until a perversity is pointed out. No such perversity has been pointed out.

19. Judgments relied upon by the Ld. Counsel for the appellant are inapplicable.

20. In the judgment of Jagat Ram Khullar (supra) the landlord had proved the postal cover addressed to the tenant which had been returned with the endorsement "refused"; the presumption raised under Section 114(f) of the Evidence Act has been disallowed. In the present case the AD Card had been returned duly signed by the defendant. In the judgment of United Commercial Bank (supra) also there was no acknowledgement card; ratio is inapplicable. The judgment of Green View Radio Service (supra) is also distinguishable; in that case the Supreme Court had held that if the addressee comes into witness box and denies his signatures on the envelope and such a statement is

believed it would be sufficient rebuttal of the presumption which had been drawn against him. In this case both the two fact finding courts below had disbelieved the defence of the defendant that his signatures had been forged on Ex.PW-1/7. The judgment of Kulkarni Patterns (supra) was a case where initially the plaintiff had stated that the acknowledgement receipt had contained the signatures of defendant no.3; subsequently he had denied his stand and stated that AD Card bore the signature of defendant no.2; it was in these circumstances that this version was disbelieved.

21. In view of the aforementioned discussion, both the substantial questions of law are answered against the appellant and in favour of the respondent. There is no merit in the appeal. The appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

APRIL 21, 2011
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