GOMES
v.
SHAKIR

SUPREME COURT.
FERNANDO, J.,
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 39/95.
C.A. NO. 423/86.
D.C. COLOMBO NO. 5665/RE.
NOVEMBER 28, 1995.

Landlord and Tenant – Notice to quit – Proof of receipt by Tenant – Evidence of due dispatch – Evidence Ordinance, sections 16 and 114(e).

The postal receipt issued for the registered letter in which the quit notice was sent to the defendant mentioned the addressee as "H. P. A. Shakir, Colombo 10". The assistant post master who testified to the genuineness of the receipt said that he wrote it and normally, the full address was not entered. But the plaintiff's Attorney-at-Law said in evidence that it was his practice to scrutinize quit notices after they were typed by his clerk. After correcting any errors he checked that the address on the envelope tallied with that on the notice. This procedure was followed in regard to the notice in question. The defendant's address (including street name and assessment number) was correctly set out in the notice; the letter was not returned by the authorities.

Held:

1. The practice spoken to by the plaintiff's Attorney-at-Law was relevant under section 16 of the Evidence Ordinance. That evidence established that the letter sent to the defendant did have the name of the street and the assessment number.

2. The trial judge was justified in drawing the presumption (under section 114(e) of the Evidence Ordinance) that the notice to quit had been received by the defendant.

Case referred to:

Podisingho v. Perera (1972) 75 N. L. R. 333.

APPEAL from judgment of the Court of Appeal.

Gamini Jayasinghe with *Miss. P. de Silva*, for plaintiff-appellant.

R. K. W. Goonesekera with *H. Wickremesinghe*, for defendant-respondent.

Cur. adv. vult.

December 14, 1995.
FERNANDO, J.

The question which arises in this appeal relates to the manner of proving the receipt of a notice to quit, sent through the post.

The plaintiff-respondent-appellant ("the plaintiff") instituted action for the ejectment of her tenant, the defendant-appellant-respondent ("the defendant"), on the ground that the premises were reasonably required for her own occupation. The trial Judge held in her favour on that issue, and that finding is no longer in dispute. It is common ground that one year's notice was required, and the only question is whether the plaintiff had proved that the notice to quit, sent by an Attorney-at-Law on her behalf, had been received by the defendant.

The plaintiff succeeded on that issue at the trial, but on appeal that finding was reversed. Special leave to appeal was given on the following questions:

1. Was the Court of Appeal justified in reversing the finding of the District Court that the notice to quit was duly sent to the defendant?

2. Does the presumption under section 114(e) read with section 16 of the Evidence Ordinance arise upon the evidence relating to the notice to quit?

FACTS

The plaintiff's case depended on the evidence of two witnesses, whose credibility was not attacked at any stage.

Mr. C. V. Vivekanandan, the Attorney-at-Law who sent the notice to quit, testified that the plaintiff came to him, having previously sent another notice to quit. As that notice was defective, he drafted another, withdrawing the previous notice and giving notice afresh. He explained the procedure which he usually followed in regard to notices to quit. In view of their importance, and as a defect could result in an action being unsuccessful, it was his practice to scrutinize such notices after they were typed by his clerk; after correcting any errors, he checked that the address on the envelope tallied with that on the notice; such notices were sent by registered post, that being a task entrusted to his clerk. He said that he followed the same procedure in regard to the notice in question. The registered article receipt and the office copy of the notice were filed together with the instructions given by the plaintiff; these were produced as "P4" and "P5" respectively. The defendant's address (including street name and assessment number) was correctly set out in P5, but P4 was difficult to decipher. The letter was not returned, undelivered, by the postal authorities.

The clerk who took the letter to the post office was not called.

The Assistant Post Master from the relevant Post Office testifed to the genuineness of P4; he said that the duplicate was not available, because in the ordinary course duplicates were not kept for more than two years. In cross-examination, Counsel for the Defendant asked the witness in whose handwriting P4 was, and he replied that it was his. In re-examination plaintiff's Counsel asked him to read what was written, somewhat illegibly, on P4, and the witness replied that the sender's name was "C.V. Vivekanandan" and the addressee was "H.P.A. Shakir, Colombo 10"; he added that normally the full address is not entered. Counsel for the Plaintiff neither objected to this evidence nor sought permission to cross-examine further.

No attempt was made by the plaintiff to obtain from the postal authorities any proof of delivery to the defendant, in particular the acknowledgement which is invariably obtained from the recipient upon delivery. Counsel for the plaintiff submitted to us that probably such documents too would have been destroyed after two years, but of that there is no evidence.

This evidence is not conclusive. It does not exclude the possibility that two envelopes might have got interchanged in Mr. Vivekanandan's office, resulting in the notice being enclosed in the wrong envelope; but it is likely that such a mistake would not have remained undiscovered, because at least one addressee would have pointed out that he had received a letter not intended for him. It is also possible that the clerk might have tampered with the letter: by changing the street name, or by substituting an incorrectly addressed envelope, in order to prevent the letter reaching the defendant. But there was never any suggestion that the plaintiff or Mr. Vivekanandan was a party to any such scheme, or that the clerk might have tampered with the letter.

In these circumstances, Mr. Vivekanandan's evidence establishes that the notice was enclosed in an envelope having the same address as that which appears on the office copy of the notice. The possibility that the envelope was interchanged, or tampered with, must be excluded, as being too remote. Despite the lack of direct evidence to show that the clerk took the letter to the post office, the Assistant Post Master's evidence makes it very probable that the receipt P4 was issued in relation to that very same envelope. It is very probable therefore that the original notice to quit was enclosed in an envelope duly addressed to the defendant, and was handed to the postal authorities for despatch by registered post. Since the letter was not returned, it was either delivered to the defendant, or went astray in the post.

The defendant gave evidence, and denied that he received the notice to quit. The trial Judge took two matters into consideration in concluding that his evidence could not be accepted. He said that he received the first notice to quit, but did nothing about it because it was in English, and he could not read English; nor did he ask anyone to read it for him. It was his position that although he could identify the letters of the alphabet, he could not read words in English. However, he was confronted with a letter which he had said was written by him; this was in English, in flowing script. He tried to explain this by claiming that he had written it by looking at letters and words in another letter which was typewritten. Considering that the

handwritten letter was reasonably neat and free of mistakes or deletions, the trial Judge was justified in concluding that the defendant was not speaking the truth when he claimed that he could not read English. It is also difficult to believe that he made no attempt to find out what that letter was about. The second matter was his claim to have paid an advance of Rs. 5,000/- to the plaintiff when he obtained the tenancy; he said that he had told his Attorney-at-Law about this before answer was filed, but there was no claim or averment in the answer about that advance. He also claimed that he had a receipt for three months rent, and since the monthly rent, admittedly, was Rs. 100/- it would seem that he had only paid an advance of Rs. 300/-.

On this evidence, the learned trial Judge held that the plaintiff had proved the receipt of the notice to quit. However, he made no express reference to section 16 or section 114(e) of the Evidence Ordinance.

COURT OF APPEAL JUDGMENT

The Court of Appeal reversed that finding, giving its reasons very briefly; firstly, that P4 –

> "has only the letters A P B (sic) and the name of the sender is C. V. Vivekanandan which is decipherable. The evidence of the (Assistant) Post Master is that ... the recipient (is) H. P. A. Shakir, Colombo 10. We are of the view that the learned trial Judge misdirected himself in accepting this evidence **as the document P4 does not support this evidence.** The word 'Shakir' is indecipherable and 'Colombo 10' is also indecipherable." (emphasis added)

Having observed that the presumption (of the receipt of a letter) properly arises only if the letter was correctly addressed and posted, and that P4 was only proof of posting, the Court observed:

> "Attorney-at-Law Vivekanandan states that normally he checks the addresses. This evidence **without specific reference to this letter** is not satisfactory and sufficient for us to come to the

conclusion that the particular letter referred to by P4 had the address that was on the envelope which had P5 ... the learned District Judge misdirected himself when he came to the conclusion that the letter contained the notice of termination, and had been properly addressed and duly served on the defendant." (emphasis added)

Finally, the Court concluded:

"In any event, there is no evidence to show that this letter ... was in fact served on the defendant **by evidence of (a) witness as to its service.**" (emphasis added)

RELEVANCE OF EVIDENCE

The relevant provisions of the Evidence Ordinance are as follows:

16. When there is a question whether a particular act was done, the existence of any **course of business,** according to which it naturally would have been done, is a relevant fact.

Illustration (b). The question is, whether a particular letter reached A. The facts that it was posted in due course and was not returned through the dead letter office are relevant.

114. The court may presume the existence of any fact which 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.

Illustration (e). That the common course of business has been followed in particular cases.

159(1). A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

160. A witness may also testify to facts mentioned in any such documents as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

The Court of Appeal erred in rejecting the evidence of the Assistant Post Master on the ground that the document P4 did not support his evidence – seemingly treating P4 as contradicting or being inconsistent with the oral evidence. His evidence confirmed that P4 was a genuine postal article receipt, and that a letter addressed to the defendant had been duly accepted for despatch by registered post. Obviously, he could not have had an independent recollection of having accepted any particular letter, or of the name and address on it. But when it turned out that he had written P4, it resulted in any uncertainty as to the sender and the addressee being completely cleared up; in particular, that the addressee was the defendant, of "Colombo 10". The maker of the document was thus testifying as to what exactly he had written, just as a witness might clarify what he had written in shorthand, or in code, or in a foreign language. A Court cannot reject such evidence – if the veracity of the witness is not challenged – on the ground that the contents of the document do not "support" such clarification or interpretation. Considered from another angle, the witness was using a document contemporaneously prepared by him to refresh his memory (under section 159(1) or to testify to the transaction to which it related (under section 160).

That evidence established that a letter addressed to the defendant of "Colombo 10" was duly posted. The next question was whether that letter did contain the name of the street and the assessment number.

The Court of Appeal erred in holding that Mr. Vivekanandan's evidence was "not satisfactory and sufficient", "without specific reference to the letter", Mr Vivekanandan stated that he had followed the same practice in relation to the notice in question, as he did generally. But even if he had only said that "he **would have** followed" the same procedure which he generally followed, that would have

been relevant under section 16. The question arose as to whether this particular notice was enclosed in an envelope duly addressed and sent to the post office; he testified as to the "course of business" in his office, "according to which it naturally would have been done", i.e. duly addressed and sent to the post office. It should not have been rejected.

That evidence established that the letter which the Assistant Post Master accepted did have the name of the street and the assessment number.

I now turn to the presumption under section 114(e). If the circumstances were such that the trial Judge was entitled to draw the presumption, the Court of Appeal was not justified in reversing his conclusion on the ground that there was no evidence from a witness as to the service of the notice; for, when duly applied, the presumption will generally be a substitute for such evidence.

Mr. Goonasekere for the defendant submitted that the presumption was a presumption of fact, of the weakest kind; one which "may", and not "must", be drawn; he urged, with justification, that in the field of landlord and tenant, where so much turns on whether a notice had been received, the presumption should not too easily be drawn; and he pointed out that the plaintiff had made no effort to obtain the best evidence of delivery, in the form of an acknowledgement of delivery, through the postal authorities. Replying to the submission on behalf of the plaintiff, that the defendant's evidence was "only a barefaced denial", he posed the question, if the defendant had not received the notice, what more could he do than simply deny its receipt?

In *Podisingho v. Perera*, the presumption was not drawn. There the Proctor who had sent the notice did not give evidence, to say that the notice was enclosed in a properly addressed envelope; the registered article receipt did not have the name of the street and the assessment number; and the parties were occupying adjoining premises, and it had been suggested to the plaintiff in cross-examination that his employees might have intercepted the letter in the course of delivery.

That case is distinguishable because there, evidence that the envelope had been duly addressed was lacking. Further, in this case, the trial Judge had good reason to hold that the defendant's evidence was not worthy of credit. The notice to quit was in English; if the defendant had not bothered to find out what the first notice was about, would he have treated the second differently? There are other curious features. In the defendant's answer and amended answer, having denied the receipt of the notice, he went on to plead that "in any event, the notice to quit ... is bad in law and of no force or avail in law"; and when the office copy was sought to be produced, Counsel for the defendant objected on the ground that the plaintiff had not given the defendant notice to produce the original, as required by section 66. This conduct was inconsistent with the original not having been received by the defendant.

In these circumstances, the trial Judge was justified in drawing the presumption that the notice to quit had been received by the defendant, and the Court of Appeal erred in interfering with the exercise of the discretion of the trial Judge. The appeal is allowed, and the judgment and decree of the District Court is restored; the defendant will pay the plaintiff a sum of Rs. 5,000/- as costs of appeal in both Courts.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.