JOONOOS
v.
CHANDRARATNE

COURT OF APPEAL,
K. PALAKIDNAR J. AND H. W. SENANAYAKE J.,
C.A. No. 198/90,
D.C. MT. LAVINIA No. 2300/RE,
JUNE 25, 1990.

Landlord and Tenant – Traversal of jurisdiction – Secondary evidence of notice to quit – Civil Procedure Code S. 75 and S. 76 – Evidence Ordinance S. 66.

(1) If jurisdiction is being denied by a defendant, he must traverse jurisdiction by a separate and distinct plea.

(2) Where receipts of notice is denied, secondary evidence is permissible without calling upon the defendant to produce the original under S. 66 of the Evidence Ordinance.

Cases referred to:

1. *Podisingho v. P. A. W. Perera 75 NLR 332.*

Application in revision of the order of the District Judge of Mt. Lavinia.

Maureen Seneviratne, P.C. for petitioner.

P. A. D. Samarasekera, P.C. with *Harsha Amerasekera* for respondent.

Cur. adv. vult.

July 24, 1990

H. W. SENANAYAKE, J.

The Plaintiff-Respondent instituted this action against the Defendant-Petitioner to eject him from premises No. 10, 40th Lane, Colombo 6 on the ground that the said premises were reasonably required for occupation as residence for the Plaintiff-Respondent and the members of the family.

The Defendant-Petitioner filed answer, *inter alia* he denied that the Court had jurisdiction to hear and determine the action and that no cause of action had accrued to the Plaintiff-Respondent to sue him for ejectment from the said premises.

The Defendant-Petitioner (hereinafter referred to as the Petitioner) raised issue No. 7 which reads as "has the Court jurisdiction to hear and determine this action?". To this issue the Plaintiff-Respondent (hereinafter referred to as the Respondent) objected to the issue and the Learned District Judge upheld the objection of the Respondent on the grounds that the petitioner had failed to comply with the provisions of Section 76 of the Civil Procedure Code.

The Respondent marked the copy of the alleged "notice to quit". This was objected to by the Petitioner as there was no notice given to the petitioner to produce the said document in terms of Section 66 of the Evidence Ordinance. The Learned District Judge overruled the objection and admitted the copy in evidence.

The Learned Counsel for the Petitioner made submission only on these two matters before court. She submitted that the Learned District Judge had misdirected himself on the law when he disallowed, issue No. 7, pertaining to jurisdiction. The Learned Counsel also submitted that the Learned Trial Judge erred on the law when he allowed the copy of the "quit notice" be admitted in evidence without compliance of the provisions of Section 66 of the Evidence Ordinance.

The Learned Counsel for the Petitioner submitted that the Petitioner in paragraph (2) of the answer amongst others denied jurisdiction of the Court. She submitted that this was a sufficient compliance of the provisions of Sections 75 and 76 of the Civil Procedure Code.

Section 75 of the Civil Procedure Code reads as follows:–

"Every such answer shall be distinctly written upon good and suitable paper . . . . . and shall contain the following particulars:–

(*a*) the name of the Court . . . . . ;

(*b*) the name of the Plaintiff ;

(*c*) the claim, description and residence of the defendant ;

(*d*) a statement admitting or denying the several averments of the plaint and setting out in details plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence."

Section 76 reads as follows :

"If the defendant intends to dispute the averments in the plaint as to the jurisdiction of the Court he must do so by a separate and distinct plea expressly traversing such averments".

The submission was made that there was sufficient compliance of the provisions of Section 76 of the Civil Procedure Code by the Petitioner. I am unable to accept this submission. In my view the provisions of the Section 76 contemplates a separate and distinct plea expressly traversing such averment. It was essential for the petitioner in his answer to expressly traverse the averment regarding jurisdiction by a separate and a distinct plea. I am of the view in reading that section that it precludes and do not contemplate a denial in general combining with the other denials of the averments of the plaint. A distinct and separate plea does not mean a separate averment but it definitly contemplates a distinct and a separate plea distinct from an "omnibus plea of denial of several averments. This must be read with the provisions of Section 75(*d*) of the Civil Procedure Code, the Petitioner while denying the averments in the plaint he must set out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence. If it is pecuniary or territorial want of jurisdiction this matter should be averred in the answer. In the instant case there has been an omission on the part of the petitioner to plead.

The next submission was that the Learned District Judge should have disallowed the application to mark the copy of the notice to quit as there was a failure to give notice to the petitioner to produce the said document in terms of the provisions of Section 66 of the evidence ordinance.

Secondary evidence of documents are admissible–

(*a*) When the original is in possession or power of the opposite party;

(*b*) or of any person legally bound to produce it when such person does not produce it after demand.

In the instant case the Petitioner denied the receipt of the notice to quit. In such circumstances it would be futile for the Respondent to notice the Petitioner to produce the original. Further more this being a "notice to quit" the Court could exercise its discretion to dispense with notice as no useful purpose would be served by issuing the notice when there is a denial.

In my view this being a notice to quit where the pleadings by implication gives notice to quit produce the notice, no express notice to produce is necessary. In the instant case the notice was pleaded as part and parcel of the plaint. In the circumstances I do not think where there is a denial by the Petitioner there is a requirement to notice the Petitioner to produce the document which he had denied the receipt of it. There was proof of posting by registered post. This document was produced as 12A without any objection. Therefore the Court has to presume that the notice to quit was duly posted in terms of Section 114 of the Evidence Ordinance.

The Learned Counsel for the Petitioner cited the authority *Podisingho v. P. A. W. Perera*, but the facts of the case differ and has no application to the instant case. It was suggested that in that case the Plaintiff or his employees had every opportunity of intercepting letters meant for the defendant as the Plaintiff was carrying on a business on the adjoining premises and that there was no evidence called from the lawyer to establish that the letter was sent to the addressee in the copy. But in the instant case the Respondent's wife who was the witness stated that she posted the letter and produced the registered article receipt on $P12^A$ without any objection, the Court is therefore entitled to presume that the letter P^{12} has been duly posted. With great respect I am unable to accept

the conclusion of Justice Wimalaratne in 75 NLR 322. There was no evidence to the contrary to show that there was a disruption of the postal service in the circumstances the Court must presume, that under normal circumstances the letter reached the addressee.

I am of the view that the Learned District Judge had come to a correct finding.

In the circumstances I dismiss the Petition with costs fixed at Rs. 1,050.

In view of this order the application CALA 33/90 stands dismissed.

PALAKIDNAR, J. – I agree.

Application dismissed.