

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

CHANDMAL AND OTHERS v. BACHRAJ *alias* MOTIRAM.*

1883

August 7.

Landlord and tenant—Notice to quit—Proof of service—Publication in newspaper—Termination of tenancy—Adverse possession—Limitation Act IX of 1871, Sch. II, Art. 140.

Proof of service of a notice to quit on a tenant, which is confined to proving that such a notice, addressed to the tenant, was published in a local newspaper under circumstances which made it highly probable that the notice in question came to the knowledge of the tenant, is not, without more, such proof of service as will suffice to terminate the tenancy, or entitle the tenant to contend that he remained after, the date fixed by the notice for vacation, in adverse possession of the premises.

THIS was an appeal from the judgment of W. Wedderburn, District Judge of Poona, confirming the judgment of A. G. Bhawe, Joint Subordinate Judge of Telegaon.

The plaintiffs sued to recover possession of a house in the city of Poona, and Rs. 1,400 on account of rent and mesne profits. They set forth that the house was ancestral property; that it was rented to defendant for Rs. 10-8 *per mensem*; and that on 25th September, 1876, they called upon defendant by notice either to vacate the house, or pay rent at Rs. 40 *per mensem*, but that defendant did not vacate it.

Defendant answered that plaintiffs had no right to sue; that the case was *res judicata*; that the suit was time-barred; that plaintiffs had no interest in the house, and had not been in possession for sixty years; that defendant was never their tenant; and that defendant was owner of the house.

The Subordinate Judge found all the issues in favour of the plaintiffs, except one, and on that he found that the suit was barred by limitation. He found that the defendant had been the tenant of the plaintiffs of the premises in question down to the 14th April, 1866. On the 14th April, 1866, as he held, the defendant was served by the plaintiffs with a notice to quit, which operated to terminate the tenancy; the defendant's possession from that date, consequently, he held to have been wrongful and adverse, and more than twelve years having elapsed between

* Second Appeal, No. 427 of 1882.

that date and the 30th October, 1879, the date of the filing of the plaint, the plaintiff's claim he held was barred by limitation under article 140 of Act IX of 1871.

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The notice to quit, which the Subordinate Judge held had terminated the tenancy, was one addressed by one Khubchand, the agent in Poona of the plaintiffs (who themselves resided in Ajmir), to the defendant and a number of other tenants of the plaintiffs, and published in a local newspaper, called the *Dnyan Prakash*, on the 14 April, 1866, calling on the persons addressed to vacate their respective premises within a week of the date of the notice, or otherwise they would be held liable for an enhanced rent. The plaintiffs, thinking that it was to the advantage of their case to do so, tried to prove service of the notice on the defendant, but all they could prove was that the notice was published in the issue of the *Dnyan Prakash* of that date. The plaintiffs failed to prove that a copy of the paper had been served personally on the defendant, while the defendant said he had no recollection of having had any notice to quit at that time. Both the Subordinate Judge and the District Judge, however, were of opinion that service of this notice had been sufficiently proved. The latter Judge remarked upon this point as follows:—"The first point for determination is, whether the notice of 1866 was served? Originally, when it was thought advantageous to plaintiffs to prove that they had given defendant notice to quit plaintiffs but in the notice which was published in the *Dnyan Prakash* newspaper, and proved the publication by two witnesses,—that is, the printer and the plaintiff's agent, Khubchand. At that time the defendant answered: "I do not remember whether Khubchand gave me notice to vacate. He never directly asked me to vacate." Plaintiffs now wish to set these admissions against one another, and leave upon defendant the burden of proving service. But I do not think this argument can be accepted. For, apart from any admission, the publication of the notice is proved; and, according to the ordinary course of business, the plaintiffs, who at that time were anxious that defendant should vacate, no doubt took steps that he should become aware of the notice intended to hasten his departure. Also the eviction then

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attempted by plaintiffs was on a wholesale scale, the notice being addressed to no less than fifteen persons. The notice must, therefore, have been a matter of notoriety in the neighbourhood, so that we must presume that, as a matter of fact, the notice was effectually served on defendant, although after a lapse of fifteen years he states that he does not remember its being done. I decide the first point in the affirmative."

Other objections were taken, in the Court below, on the part of the plaintiffs, as to the validity of this notice to terminate the tenancy; but in view of the decision of the Appellate Court they are unimportant.

The plaintiffs appealed.

Anderson (instructed by Messrs. *Macfarlane and Edgelow*) for the plaintiffs.—No sufficient proof of service of the notice of the 14th April, 1866, has been given. The defendant had been found to be the tenant of the plaintiffs; the *onus*, therefore, of proving that the tenancy terminated was on the defendant. The plaintiffs' mistaken attempt to prove service did not change, or in any way affect, the burden of proof; it only *pro tanto* relieved the defendant of what otherwise would have lain entirely on him. The defendant added nothing to what the plaintiffs proved. Would the defendant have been debarred by such defective evidence of service from claiming to be still the tenant of the plaintiffs? If he could have done so when it was for his benefit, he cannot do otherwise when it turns out to his hurt. There is nothing of the nature of estoppel in the case, as the Court below seems erroneously to have thought. Proof of service of a notice to quit is always required to be definite and precise. Gaps in the evidence cannot be supplied by presumptions such as the Court below has drawn. Personal service on an occupant of the house in which the tenant is residing, without more, is not enough.—*Burross v. Lucas*(¹). Service even on the tenant's wife, if off the demised premises and without proof that the house where she was served was the house where the tenant was then living, is not enough.—*Blair v. Street*(¹). See also *Woodfall's Landlord and Tenant* (11th ed.), p. 319. In both the above cases the presumption that

(1) 5 Esq., 153.

(2) 2 A. & E., 323.

the notice really came to the knowledge of the tenant was much stronger than in this case, even ignoring, what we have here, the defendant's denial of all knowledge of it. There is no authority for holding such proof of service as this sufficient. This point alone is sufficient to entitle the appellants to succeed.

Telang (*Shántárádm Náráyan* with him) for the defendant.—The plaintiffs alleged that they had served the defendant with this notice, and did their best to prove it. They are estopped from now turning round, and saying it was not served. The defendant did not deny it; he merely said he could not recollect one way or the other. He must have read it, or come to know of it, and the presumption the learned District Judge draws is a natural one, and his conclusion therefore should be supported.

The other points argued, with respect to the notice, are immaterial in view of the single ground on which the case was disposed of.

The judgment of the Court was delivered by

WEST, J.—We think that the case must be disposed of on the assumption of a tenancy having existed, and on the single consideration that the alleged notice to the tenant by Khubchand is not so proved to have come to the tenant's knowledge—brought so near to his positive personal cognizance—as the law requires to give it effect in determining a tenancy. What appears is that Khubchand gave notice to vacate to the defendant, along with several other tenants, by means of and advertisement in the *Dnyan Prakash* newspaper. It does not appear that the same form of notice was handed to the defendant, or any member of his household, or that even a copy of the newspaper was sent to the defendant by hand or by post. The defendant's non-recollection of whether any notice reached him, or not, cannot supply the defect of positive testimony bringing the notice home to him. He is certain that Khubchand never personally asked him to vacate, and Khubchand does not say that he did make any such request otherwise than by the advertisement in the newspaper, to which he received no answer. His receiving no answer, if it had any signification at all, implied that the defendant was not acquainted with the advertisement. We think that both reason

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and authority are against our allowing a mere advertisement in a newspaper to take the place of a notice delivered to the tenant (or, conversely, to the landlord) in terminating a tenancy. The person to be affected must be addressed in a way which leaves no reasonable doubt of his knowledge; otherwise very serious evils would probably arise.

As the tenancy, supposing a tenancy in fact existed, was not terminated in the way intended, and the tenant could not safely have left the premises on a supposition that he could not be charged with further rent, it continued for his benefit at the time, though now, as it has turned out, to his ultimate disadvantage. The tenancy, not having been determined, continued in 1876. What precisely the nature of the tenancy was, and whether the notice then given was sufficient with reference to the character of the tenancy as monthly or otherwise, are questions on the merits of which the Courts below must determine. We reverse the decision that the suit was barred by limitation, and remand the cause for re-trial by the Court of first instance, and disposal on the merits, apart from the question of limitation. The costs of the appeals in this Court and the District Court to be borne by the respondent.

Case remanded.

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Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

MOHANSINGH CHAWAN (ORIGINAL PLAINTIFF), APPELLANT, v. HENRY CONDER, GENERAL TRAFFIC MANAGER, G. I. P. RAILWAY COMPANY, AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (XV of 1877, Sch. II Arts. 30, 49 and 115—Carrier by railway—Loss—Non-delivery of goods—Onus of proof.

563 bags of grain were made over to the defendants at Cawnpur and Nagpur for carriage to Sholapur. All that was proved was that the defendants delivered to the plaintiff, the owner of the grain, 512 bags only, having previously obtained from his agent receipts for the full number as arrived at Sholapur. In a suit by the plaintiff to recover the price of the bags not delivered, brought after more than two, but within three, years of the time when the rest of the goods were delivered,

* Second Appeal, No. 454 of 1882.