

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****CIVIL REVISION APPLICATION NO.139 OF 2007**

Indira Rani Ugrasen.] ... Applicant

Versus

Vijaya B. Desai and Ors.] ... Respondents

Mr. Anil Kumar Patil for Applicant.

Mr. S. G. Deshmukh for Respondents.

CORAM :- M. S. SONAK, J.

DATE :- AUGUST 07, 2015

ORAL JUDGMENT :-

1. This Civil Revision Application is directed against the Judgments and Decrees dated 30/06/1999 and 27/10/2005 made by the Trial Court and the Appeal Court dismissing Applicant's R.A.E. Suit No.2489 of 1978 seeking eviction of the Respondents, *inter alia*, on the ground of default in the payment of rent.

2. The Trial Court and the Appeal Court have held that there was no proper service of notice under Section 12(2) of The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ('1947 Act') and further since the suit premises were located in the area declared as 'slum area' under The Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 ('Slum Act'), permission under Section 22 from the competent authority was mandatory and in absence thereof, the suit itself was not maintainable.

3. Mr. Anil Kumar Patil, learned Counsel for Applicant, has submitted that in this case, the suit was instituted in the year 1978. The notification, on basis of which it is alleged that the concerned area has been declared as the 'slum area', was issued in the year 1979. In such circumstances, upon a bare reading of the provision of Section 22 of the Slum Act, it would be clear that the suit was very much maintainable. At the highest, if it was indeed established that the concerned area had been declared as a 'slum area', permission would be necessary before putting the decree into execution. Mr. Patil placed reliance upon the decision of this court in the case of *Yamunabai Dattoba Taware Vs. Nana Bhikoba Nagade*¹, and *Hari Dhondur Gurav Vs. Jhonney Augustine Gomes*².

4. In the context of service of notice under Section 12(2) of the Rent Act, Mr. Patil submitted that in the present case, notice was served by 3 modes i.e. Registered Post Acknowledgment Due (R.P.A.D.), Certificate of Posting and finally affixing on the conspicuous part of the suit premises. The evidence on record clearly bears this out. The two Courts, however, held against the Applicant for failure to examine the postman. Mr. Patil submits that in view of the statutory presumption contained in Section 27 of the General Clauses Act and the decision of this Court in the case of *Krishna Ramchandra Jadhav @ Yadav and Others Vs. Smt. Shankari B. Ajimal*³ and the decision of the Hon'ble Apex Court in the case of

1 2006 (6) Bom.C.R. 31

2 2011 (5) Bom.C.R. 150

3 2005 (4) Mh.LJ 577

Basant Singh and Another Vs. Roman Catholic Mission⁴, there was no necessity for examining the postman. Mr. Patil submitted that, in fact, this is a case where the Respondents have led no evidence whatsoever to rebut the statutory presumption.

5. Mr. S. G. Deshmukh, learned Counsel for Respondents, submitted that two Courts, on the basis of material on record, have returned a concurrent findings of fact that there was no effective service of notice under Section 12(2) of the Rent Act. The service of such notice under Section 12(2) of the Rent Act is mandatory and without the same, there cannot be a decree for eviction on the ground that arrears in payment of rent. Mr. Deshmukh placed reliance on the decision of this Court in the case of ***The New India Assurance Co. Ltd. Versus Smt. Nasibunnisa Mohd. Israr Khan and others***⁵ to submit that notice which is returned with remark 'unclaimed' cannot be regarded as good service. In exercise of jurisdiction under Section 115 of the CPC, there is no scope to re-appreciate evidence and disturb the concurrent findings of fact. For these reasons, Mr. Deshmukh submitted that the Civil Revision Application is liable to be dismissed.

6. Rival contentions now fall for my determination.

7. Section 22 of the Slum Act reads thus :-

“22.(1) Notwithstanding anything contained in any other

⁴ (2002) 7 Supreme Court Cases 531

⁵ Civil Application No.1979 of 2011 in First Appeal (Stamp) No.13185 of 2011, dated 14th October 2011.

law for the time being in force, no person shall except with the previous permission in writing of the Competent Authority, -

(a) institute, after commencement of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, any suit or proceeding for obtaining any decree or order for the eviction of an occupier from any building or land in a slum area or for recovery of any arrears of rent or compensation from any such occupier, or for both; or

(b) when any decree or order is obtained in any suit or proceeding instituted before such commencement for the eviction of an occupier from any building or land in such area or for recovery of any arrears of rent or compensation from such occupier, or for both execute such decree or order; or

(c) apply to any Judge or the Registrar of the Small Cause Court under Chapter VIII of the Presidency Small Cause Courts Act, 1882, in its application to the State of Maharashtra, or to any Court of Small Causes under Chapter IV-A of the Provincial Small Cause Courts Act, 1887, in its application to the State of Maharashtra, for a distress warrant for arrears of rent against any occupier of a house or premises in a slum area.”

8. In the case of ***Yamunabai Dattoba Taware Vs. Nana Bhikoba Nagade (supra)***, the suit was instituted prior to the area being declared as a 'slum area'. However, during the pendency of the suit, notification was issued under the Slum Act declaring the concerned area as 'slum area'. In this context, this Court held that the suit as instituted, was competent and a decree could have been always

passed in such a suit. However, permission under Section 22 of the Slum Act from the competent authority would be necessary before such decree is put into execution. The necessary discussion on this aspect is contained in para 6, where, after quoting the provision contained in Section 22 of the Slum Act, this court observed as under :-

“6.

On a plain reading of Clauses (a) and (b) of Section 22(1) of the said Act it will be revealed that Section 22(1)(a) prohibits the institution of any suit or proceeding for obtaining any decree or order for eviction of an occupier from any building or land in a slum area or for recovery of any arrears of rent or compensation from any such occupier, or for both, except with the previous permission in writing of the Competent Authority. Section 22(1)(b) provides that no person shall except with the previous permission in writing of the Competent Authority when any decree or order is obtained in any suit or proceeding instituted before such commencement for the eviction of an occupier from any building or land in such area or for recovery of any arrears of rent or compensation from such occupier, or for both, execute such decree or order. Thus, by Sub-section (1)(a) of Section 22 the institution of the suit after the commencement of the said Act is prohibited. The premises come under the Act as a result of the declaration under Section 4 of the said Act, and therefore, from the date of declaration, institution of suit is prohibited. However, in the present matter, admittedly the suit was instituted when the Act was not applicable. Therefore, the suit as filed was competent and decree could have been passed in the said suit. The combined reading of Sub-section (1)(a) and (1)(b) of Section 22 of the said Act is that after the commencement of the Act

the suit cannot be instituted. However, decrees which are passed prior to the commencement of the Act and the decrees which were obtained in suits which were pending on the date of commencement of this Act cannot be executed unless the previous permission in writing is obtained from the Competent Authority. Therefore, the decree which could have been passed in the present matter would not have been executed unless the permission in writing is obtained from the Competent Authority. It was an error on the part of the Appellate Court to hold under these circumstances that the suit cannot continue unless the permission from the Competent Authority is obtained. In fact, suits which were filed before the commencement of the Act can be decided and the decree can be passed by the Civil Court, but the said decree cannot be executed unless the permission is obtained from the Competent Authority. Therefore the reasoning adopted by the District Judge is erroneous one.”

9. In view of the aforesaid ruling of this Court, the conclusion recorded by the two Court as to the maintainability of the suit shall have to be interfered with. The suit, as instituted, was certainly maintainable. However, any decree therein may not be liable to be put into execution unless permission under Section 22 of the Slum Act is obtained.

10. The second issue is whether there was proper service of notice under Section 12(2) of the Rent Act. The material on record does indicate that the Applicant adopted 3 modes for service of such notice. The first being R.P.A.D. The material on record indicates that the notice, along with the envelope in which it was enclosed, was sent

to the Respondents at their correct address. However, the same was returned with the endorsement '*Not found, intimation given*'. The second mode adopted by the Applicant was to send the notice Under Certificate of Posting (U.C.P.). In this case, though the necessary postal endorsement with regard to the delivery of the envelope and notice to the postal authority is submitted, there is no further material in the context of receipt of the envelope/notice therein. In matters of service under U.C.P., there is no acknowledgment as such ever received. The third mode adopted by the Applicant was pasting of the notice upon conspicuous portion of the suit premises i.e. main door of the suit premises.

11. On the aspect of pasting of the notice on conspicuous portion of the suit premises, although, this is a mode contemplated by Section 106 of the TP Act, Mr. Deshmukh is right that the two Courts, upon appreciation of the evidence on record, have held that such affixation is not proved. In the exercise jurisdiction under Section 115 of the CPC, it would, therefore, be difficult to reverse this findings of fact. However, as regards service by R.P.A.D. and U.C.P. is concerned, there are certain statutory presumptions arising out of the provisions contained in Section 27 of the General Clauses Act, 1897 read with 114 of the Indian Evidence Act, 1872. No doubt, such presumptions are rebuttable, but the onus of rebutting the same shall be upon the addressee provided certain basic predicates stand satisfied.

12. The material on record amply establishes that the notices were sent to the Respondents at their correct address. In fact, the Respondents, in the course of their evidence, have admitted this aspect in no uncertain terms by stating that the address upon which the notices were sent, were their correct address and that they normally receive their correspondence at the said address. No doubt, the Respondents have denied receiving notice under Section 12(2) of the Rent Act, the question which therefore arises, is whether such bald denial is sufficient for the purposes of rebutting the statutory presumption arising out of the provisions contained in Section 27 of the General Clauses Act read with Section 114 of the Indian Evidence Act.

13. The Appeal Court, in terms, has held that the mere bald assertion that the notice was not received is sufficient to rebut the presumption arising out of Section 27 of the General Clauses Act read with Section 114 of the Indian Evidence Act. However, this Court, in the case of *Krishna Ramchandra Jadhav Vs. Smt. Shankari B. Ajimal*, has held that the presumption cannot be rebutted by a mere denial. In the said case as well, notice which was addressed to the tenant was returned with endorsement 'unclaimed', 'intimated', 'not claimed'. In the said case as well, the landlord had adopted 3 modes to serve the notice under Section 12(2) of the Rent Act. In this context, this Court did not accept the plea that it was for the landlord to examine the postman and in absence of examination of the postman, the presumption of proper service stands rebutted.

14. In the case of ***Lalmani Ramnath Tiwari Vs. Bhimrao Govind Pawar***⁶, this Court, in the context of notice under Section 12(2) of the Rent Act, has held that a notice which is returned back with the postal remark 'not claimed' can be regarded as good service, unless the tenant rebuts the presumption arising out of Section 27 of the General Clauses Act read with Section 114 of the Indian Evidence Act. Similarly, in the case of ***David K. N. Vs. S. R. Chaubey (Chaturvedi)***⁷, in the similar context, the presumption under Section 114 of the Indian Evidence Act, was invoked. At para 18, this Court observed as under :-

“18. In fact, as far as the contention of the petitioner about his absence in the premises and therefore absence of occasion to receive notice and, on that count presumption being rebutted, a complete answer is to be found in the decision of Apex Court in M/s. Madan & Co.'s case (supra). Mere absence of the tenant in the premises cannot rebut the presumption arising under section 28 of the Bombay General Clauses Act. It is for the tenant to make necessary arrangement to receive the notice addressed to him in his absence at the suit premises and, failure on the part of tenant in that regard cannot enure to his benefit to contend that on account of his absence at the premises, the presumption of service would stand rebutted. It is further to be noted that postal endorsement is not of refusals to receive but to the effect

⁶ 2001 (2) Mh.L.J. 342

⁷ 2003 (4) Bombay Cases Reporter 612

that the letter was not claimed. In other words, there was presumption not only regarding service of the notice but also regarding intimation of a letter having been received in the post office addressed to the tenant and failure to collect the same by the tenant as he was found absent in the premises at the time when postman approaches the premises to deliver the same. The presumption regarding intimation would arise under section 114 of the Evidence Act, as it is observed by the Apex Court, it is general practice for the postman to intimate either orally or in writing about the letter having been received in the post office addressed to the tenant when the tenant is found absent in the premises at the time when the postman approaches to serve the same. Undisputedly, there was no such efforts made by the petitioner either to receive the notice at the address sent to him during his alleged absence nor any explanation forthcoming as to why arrangement was not made to collect the letter from the postal authorities on intimation thereof. Being so, the presumption of service has not been rebutted.

(emphasis supplied)

15. In the case of ***M/s. Madan and Company Vs. Wazir Jaivir Chand***⁸, the Hon'ble Apex Court, in the context of service of notice of landlord upon the tenant, has, at para 6, observed thus :-

⁸ AIR 1989 Supreme Court 630

“6. We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to Cl. (i) of S. 11(1) and the proviso to S 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insists that before any amount of rent can be said to be in arrears, a notice has to be served through posts. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under S. 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such

registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a Court under O. V of the C.P.C.

The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task.

If we interpret the provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, an addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is

away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has B gone or to deliver them to some other person authorised by him. In this situation, we have to chose the more reasonable, effective, equitable and practical interpretation and that would be to read the words "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant."

(emphasis supplied)

16. Reliance placed by Mr. Deshmukh upon the decision in the case of *The New India Assurance Co. Ltd. Versus Smt. Nasibunnisa (supra)* is not quite appropriate. The issue involved in the said decision was whether a notice issued by the Court by R.P.A.D. which is returned back with the remarks of the postman 'intimation posted' and 'unclaimed' or 'not claimed' can be taken as good service. In the said decision, this Court took specific note of the decisions in the cases of *Lalmani R. Tiwari Vs. Bhimrao G. Pawar (supra)*, *David K. N. Vs. S. R. Chaubey (Chaturvedi) (supra)*, *Krishna Ramchandra Jadhav and Others Vs. Smt. Shankari B. Ajimal* and *M/s. Madan and Company Vs. Wazir Jaivir Chand* and has held that the settled law of invoking presumption of service of notice by the landlord to the tenant will not apply to service of summons or notice. This Court has taken note of and accepted in terms, the position in law with regard to the presumption arising under Section 27 of the General Clauses Act and Section 114 of the Indian Evidence Act in matters of service of notice by landlord to the tenant. However, this Court, taking note of the distinction made in between the responsibility of the process server and the postman and in the context of the specific provision contained in Order V Rule 9(5) of the CPC, had held that the principles in the two situations differ. Accordingly, the decision in the case of *The New India Assurance Co. Ltd. Versus Smt. Nasibunnisa (supra)*, far from assisting Mr. Deshmukh, endorses the settled position in law that presumption under Section 27 of the General Clauses Act read with Section 114 of the Indian Evidence Act will arise in case of service of notice by a landlord upon his tenant.

17. Even in the context of service of summons sent by registered post to the correct and given address of the Defendant, the Hon'ble Apex Court, in the case of ***Basant Singh and Another Vs. Roman Catholic Mission (supra)***, has held that once it is proved that summons was duly served by registered post to the correct and given address, the Defendant's own conduct assumes importance. Where the Defendant does not lead any evidence to rebut the presumption, service can be deemed as complete. Further, the presumption does not stand rebutted on the basis of some bald statement that the registered notice or letter was not received by him. The relevant observations are contained in para nos.10 and 11, which read thus :-

“10. *It is nobody's case that the postal addresses of the defendants are not properly addressed and, therefore, the registered summons could not be served. It is also nobody's case that the registered summons are not pre-paid and not duly sent. In fact the registered summons, bearing receipt Nos. 875 and 876 dated 24.4.1986, were issued is borne out from the record.*

11. *Once it is proved the summons were sent by registered post to a correct and given address, the defendants' own conduct becomes important. Before the Trial Court, the appellants were allowed to lead evidence in support of their contentions. An order to this effect was passed by the Trial Court on 11.1.1991. The premises in question is occupied by two defendants jointly - Hari Singh and Basant Singh. Hari Singh appeared and*

examined himself stating that he did not receive the registered letter. However, the defendant Basant Singh did not appear and no evidence whatsoever, on his behalf, has been led to rebut the presumption in regard to service of summons sent to him under registered post with acknowledgment due. His own conduct shows that the registered summons had been duly served on him. As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the Statute. This apart, it is inherently improbable that the registered summons were duly served on Basant Singh but not to Hari Singh when they occupied the tenanted premises jointly.”

18. In view of the aforesaid facts as well as the legal position, the impugned Judgments and Decrees are required to be set aside. The finding that there was no valid service of notice under Section 12(2) of the Rent Act is vitiated by perversity as well as material irregularity and illegality. This is a case where the onus of proof was incorrectly and in any case excessively cast upon the Applicant-landlord. The presumption arising out of Section 27 of the General

Clauses Act and Section 114 of the Indian Evidence Act was not allowed its full play. As noted earlier, the Respondents have admitted in the course of their evidence that the address to which the envelopes containing the notices were addressed, are correct addresses. The Respondents have also admitted that they normally receive their correspondence at such address. There is material on record which establishes that the notices were indeed sent by R.P.A.D. and U.C.P. There is no evidence led by the Respondents either by way of examination of postman or otherwise to establish that such notices were not served. The Appeal Court, in such circumstances, was not right in holding that a bald statement that the notices were not served, suffice to rebut the statutory presumption. The Appeal Court, has already recorded the findings of fact that the Respondents were clearly in arrears in the payment of rent for a period of in excess of six months. Such findings have not been challenged by the Respondents. For all these reasons, the impugned Judgments and Decrees are liable to be set aside.

20. In the result, this Civil Revision Application is allowed. The Judgments and Decrees dated 30/06/1999 and 27/10/2005 are set aside. Instead, the Applicant's R.A.E. Suit No.2489 of 1978 is decreed. However, since the Trial Court and the Appeal Court have already recorded finding that the suit premises are located in a slum area, in terms of the Notification of 1979, such decree shall not be put into execution until permission, is contemplated by Section 22 of the Slum Act is obtained from the Competent Authority.

21. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M. S. SONAK, J.)