

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7314 OF 2011

Kuldipsingh Maankoo and others ... Petitioners
Vs.
Chandrakant Haribhau Ladkat ... Respondent

Mr. P. S. Dani, Senior Advocate a/w. Ms Jui Nerurkar for Petitioners.
Mr. S. S. Patwardhan a/w. Mr. Bhooshan R. Mandlik for Respondent.

CORAM : R. G. KETKAR, J.
DATE : 24TH OCTOBER 2016

P.C. :

Heard Mr. Dani, learned Senior Counsel for petitioners and Mr. Patwardhan, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 02.11.2007 passed by the learned Judge, Small Causes Court, Pune in Civil Suit No.328 of 2006 as also the judgment and decree dated 07.07.2011 passed by the learned District Judge-4, Pune in Civil Appeal No.1 of 2008. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as 'plaintiff' under the provisions of the Transfer of Property Act, 1882 (for short 'Act').

3. Plaintiff instituted Suit against the defendants inter alia contending that the open land bearing final plot No.19-C/1 under T.P.Scheme II-A, bearing C.T.S.No.419 (new), Mangalwar Peth, Pune-11 admeasuring 565.7 sq.mtrs. (for short 'suit premises') belongs to him. Late Jaswantsing Hajarasing Maankoo was a tenant of the suit premises. He was let out the suit premises for the purpose

of running a saw-mill. After his death, defendant No.1 became tenant. Plaintiff alleged that defendant No.1 has permanently shifted to U.K. Defendant No.1 has inducted defendant No.2 in the suit premises. Defendant No.2 is in a complete control of the suit premises. He is carrying on business therein. In short, plaintiff contended that defendant No.1 has transferred the suit premises to the defendant No.2 thereby committing breach under the Act. Plaintiff further contended that he had issued notice to the defendant No.1 at his address in U.K. The same however returned back with an endorsement "not at this address". Plaintiff thereafter issued notice dated 10.05.2005 on the last known address of defendant No.1 as mentioned in the cause title of the plaint and terminated the lease by giving 15 days notice. On these grounds, plaintiff claimed possession of the suit premises.

2. Defendants filed written statement inter alia denying the assertions made by the plaintiff. Defendants contended that defendant No.1 has not migrated to U.K. and in fact, is residing in plot No.31, Union Park, Dapodi, Pune. Plaintiff is fully aware of this fact. Despite that, plaintiff deliberately issued notice on the imaginary U.K. address of defendant No.1. Defendants denied that notice referred in paragraph 6 of the plaint was ever received by the defendant No.1.

3. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. After considering the evidence on record, the Courts below decreed the Suit. It is against these orders, defendants have instituted the present Petition.

4. In support of this Petition, Mr. Dani submitted that in the cross-examination, plaintiff's witness admitted that he had issued notice to defendant No.1 at the address of England before filing the Suit and that the said notice was not served on defendant No.1. He had also issued notice at the address of the suit property to the defendant No.1 and that the said notice was also not served on defendant No.1. The notice sent at the address of England and the suit property did not return back with an endorsement that "defendant No.1 refused to receive notice". Mr. Dani submitted that the notice issued by the plaintiff is not validly served on defendant No.1, and therefore, the Courts below were not justified in decreeing the Suit. He invited my attention to paragraph 16 of the District Court judgment. In paragraph 16, the learned District Judge considered the endorsement "not claimed" on the envelope exhibit-27 as also cross-examination of defendant No.2 and held that defendant No.1 was duly served with the notice issued by the plaintiff at the suit address.

5. Mr. Dani submitted that the endorsement on envelope exhibit-27 is 'not claimed'. He submitted that it cannot be treated as valid service. In support of this submission, he relied upon the decision of the learned Single Judge of this Court in the case of ***Lalmani Ramnath Tiwari Vs. Bhimrao Govind Pawar***, 2001 (2) Mh.L.J. 342, and in particular paragraphs 7 and 8 thereof. He, therefore, submitted that Petition requires consideration.

6. On the other hand, Mr. Patwardhan supported the impugned orders. He submitted that the Petition was heard earlier on 08.04.2015. After hearing both sides, this Court kept only issue about

valid service on defendant No.1 open for further arguments. He submitted that the only question now left is whether defendant No.1 was served with notice dated 10.05.2005 referred in paragraph 6 of the plaint. He invited my attention to paragraph 16 of the District Court judgment wherein the learned District Judge observed that the envelope exhibit-27 showed that it was dispatched to the correct address i.e. the suit premises. A copy of the notice was served upon the defendant No.2. In cross-examination, defendant No.2 admitted that the notice was served upon him and that, he informed defendant No.1 about plaintiff issuing fresh notice demanding vacant possession. The learned District Judge, therefore, held that the defendant No.1 had knowledge of this notice. He further submitted that whether the service was effected on defendant No.1 was within his exclusive knowledge. Defendant No.1 did not step into witness-box. He submitted that the learned District Judge referred to Section 27 of the General Clauses Act, 1897 as also Section 114(f) of the Indian Evidence Act, 1872. After considering the decision of Apex Court in the case of ***C. C. Alavi Haji Vs. Palapetty, 2008 (1) Mh.L.J. 44***, the learned District Judge held that service is effected on defendant No.1. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question that arises in the present Petition is whether defendant No.1 was served with the notice dated 10.05.2005 issued by the plaintiff. In the written statement and in particular paragraph 3, defendants contended that notice dated 10.05.2005 was not received by the defendant No.1. It is not in

dispute and is rather evident from record that defendant No.1 did not enter into witness-box. Mr. Dani relied upon paragraph 2 of the cross-examination of plaintiff's witness, which reads thus,

“2] It is true that the suit summon issued at the address of defendant No.1 of England has not been served on him. I had issued notice to defendant No.1 at the address of England before filing of this suit. It is true that the said notice was not served on defendant No.1 at the address of England. I had issued a notice at the address of the suit property. The notice issued at the address of the suit property has also not been served on defendant No.1. It is true that the notices at the address of England and at the suit property were not returned back with an endorsement that “defendant No.1 refused to receive the notice” I have no knowledge that defendant No.1 is residing at Flat No.31 Union Park, Dapodi, Pune. It is not true that I had been to that flat of defendant No.1. I have no knowledge that the said flat belongs to defendant No.1. it is not true that I have intentionally issued notice to defendant No.1 at the address of England even though I was well aware of his address at Dapodi.”

8. Relying upon the above extracted paragraph, Mr. Dani submitted that even plaintiff's witness admitted that the notice issued at the address of the suit property was not served on defendant No.1. It is not possible to accept this submission. The learned District Judge has considered this aspect in paragraph 16, which reads thus,

“16. It is on this background one is to see whether the notice can be said deemed served in view of the endorsement “not claimed”. The perusal of the address written on envelope Exh.27 shows that it was dispatched to the correct address i.e. of suit premises. The copy of notice was also served upon the defendant No.2. The defendant No.2 in his cross-examination clearly admits the service of notice upon him. He further admits to have informed the defendant no.1 that the plaintiff had issued quit notice, demanding vacant possession. This admission again clearly shows that the defendant No.1 had knowledge of quit notice. The defendant no.2, who examined himself as a power of attorney holder of defendant No.1, in his evidence maintains that defendant no.1 is permanently staying at Dapodi, Pune. He tried to explain that as defendant no.1 was out of station, he had not come forward to step into witness box. ...”

9. It is material to note that defendants have not established that plaintiff was aware of address of defendant No.1 at Union Park, Dapodi. If that be so then plaintiff was justified in issuing notice on the last known address of defendant No.1. The learned District Judge considered Section 27 of the General Clauses Act as also Section 114(f) of the Evidence Act. Section 27 of the General Clauses Act reads thus,

“27. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

10. In paragraph 14 of the decision in **C. C. Alavi Haji** (*supra*), the Apex Court observed that Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. Unless and until, the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. Perusal of exhibit-27 shows that the notice by registered A.D. was sent at the suit address and there is endorsement to the effect “not claimed”. In view of Section 27 read with Section 114(f), the learned District Judge rightly came to the conclusion that the notice was duly served on defendant No.1. No attempt was made by defendant No.1 to prove contrary. That apart, in paragraph 16, the learned District Judge also referred to the admissions given by the defendant No.2 in cross-examination. The findings recorded by the Courts below about service on defendant No.1 are findings of fact

which cannot be interfered while exercising power under Article 227 of the Constitution of India. In view of the order dated 08.04.2015, Mr. Dani did not agitate any other point. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

11. At this stage, Mr. Dani orally applies for stay of this order for a period of 12 weeks from today. He states that petitioners are in possession of the suit premises and nobody else is in possession. Petitioners have neither created third party interest nor parted with possession and petitioners will hereafter neither create third party interest nor part with possession. He assures that defendants and all adult family members using the suit premises will file usual undertaking on or before 18.11.2016 with advance copy on the other side, incorporating therein that,:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;
- (iv) that they will pay arrears of rent before 18.11.2016 to the respondent-plaintiff;
- (v) that they will not apply for further extension of time;
- (vi) that in case they are unable to obtain suitable orders from the higher Court within 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondent.

12. In view thereof, notwithstanding dismissal of the Petition,

eviction decree shall not be executed for a period of 12 weeks subject to defendants filing undertaking in the aforesaid terms on or before 18.11.2016 and serving copy in advance on the other side. It is made clear that in case arrears upto and inclusive of 12 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed on or before 18.11.2016 , the interim order shall stand vacated without further reference to the Court. Order accordingly.

(R. G. KETKAR, J.)

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