

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO. 3257 of 1994

1. Tharumal Khiluchand Badeja (died)
through legal representatives:
 - a. Sudam Tharumal Badeja, age 34 years
 - b. Santosh Tharumal Badeja, age 32 yers
 - c. Ramdas Tharumal Badeja, age 30 years
 - d. Manohar Tharumal Badeja, age 28 years
 - e. Prakash Tharumal Badeja, age 27 years
 - f. Pritam Tharumal Badeja, age 20 years
 - g. Rajashri Tharumal Badeja, age 24 years
All residents of Bhusawal District jalgaon
 - h. Rani Sudamdas Tilani,
age 33 years, Tilani Cloth Stores,
R/o Dodaicha District Dhule
 - i. Kavita Sachanand Thadhani,
age 31 years R/o Karanja (Lad) District Akola
2. Kanhayyalal Khiluchand Badeja,
age 42 years R/o Bhusawal District Jalgaon. **...Petitioners**

VERSUS

Tarachand Sonu Patil,
age 56 years R/o Bhusawal District Jalgaon. **...Respondent**

Mr Aditya N. Sikchi, Advocate for petitioners (as Amicus Curiae)
Mr Girish V. Wani, Advocate for respondent.

CORAM : SUNIL P. DESHMUKH, J.

DATE : 28th June, 2018

ORAL JUDGMENT:

1. Despite notice after demise of the Counsel orginally engaged by petitioners, there is no response by the petitioners.

2. Heard learned Counsel Mr A.N. Sikchi, appearing as *Amicus Curiae* to workout the matter on behalf of petitioners and learned Counsel Mr Wani for respondent.

3. Writ petition has been preferred against dismissal of, the suit filed by petitioners/plaintiffs and the appeal filed by them. The proceedings for eviction were initiated on the ground of default in payment of rent for more than six months and non user of the premises.

4. It is case of petitioners/plaintiffs that suit premises had been rented out to respondent at the rate of Rs. 30/- per month and payment of taxes in addition. Respondent/defendant had defaulted payment of rent after 31st January, 1980 and had closed the suit premises and had locked the same. Notice had been issued by petitioners/plaintiffs on 28th November, 1980 by registered post acknowledgment due and also by certificate of posting and copy thereof had also been affixed on the door of the premises. Despite notice, respondent neither paid rent nor vacated the premises of the suit house. Petitioners/plaintiffs claimed arrears of rent, education cess to the tune of Rs.464/- including the notice charges.

5. Suit ensued and in response to the summons,

respondent/defendant had put in his appearance and had denied the claims made by petitioners *albeit* admitted the fact that he was tenant in suit premises. In defence the respondent contended that education cess and other charges were unauthorizedly claimed by plaintiffs and plaintiffs had not been entitled to recover education and other charges in addition to rent. It is his case that rent had been tried to be paid upto 31st November, 1980, however, plaintiff had refused to receive the same. The defendant had been required to issue money orders towards rent for the period from 1st December, 1980 to 30th September, 1981 plaintiff had refused to accept said money order. It was denied that the suit premises had been closed and locked. It had been contended that defendant is required to be away from the suit premises during agricultural season for a period of about 15 to 20 days. Defendant had denied receipt of notice dated 28th November, 1980. He has also questioned veracity of the claim of notice sent by registered post acknowledgment due, sending it under posting certificate or affixing copy thereof on the door of the suit premises. Defendant, as such, challenged the plaintiff to prove service of notice.

6. The Trial Court had framed issues with respect to default in payment of rent and about non user of the premises and two issues were framed casting burden on defendant to prove that

he had not been in arrears of rent and rent had been sent by him through money orders to landlord and the same had been refused.

7. The Trial Court held that the plaintiff was not in a position to prove default in making payment of rent or for that matter there had been non user of the suit premises for more than six months before the suit. The Trial Court simultaneously found burden cast on the defendant to have been discharged finding that the defendant had not been in arrears of payment of rent and that money orders had been sent and it was refused to be accepted by the landlord.

8. Perusal of the Trial Court's judgment shows that the claim on behalf of the plaintiff about service of notice cannot be said to be borne out from the evidence as the envelope bears endorsement about house being locked to which service was sought to be effected. Service of notice by affixing it on door could not be said to be proved. The proceedings had been initiated by father of present petitioner and the deponent had not been personally aware about antecedents. The Court further found that money order slips on record indicate attempt to pay rent and refusal thereof by father and further acceptance of rent by father in 1982. The Trial Court has recorded that there had been admission on behalf of plaintiff about family members of defendant residing

in the suit house. The Trial Court appears to have found it difficult to go by the case sought to be put up about service of notice finding that there is no corroboration in respect of service of notice.

9. Before the Appellate Court, there had been points for determination about default in payment of rent, valid termination of tenancy and about closure of suit premises for more than six months by defendant. The Appellate Court found that plaintiff was not in a position to prove his case about premises had been closed for more than six months. No other points had been raised. So far as valid termination of tenancy, the Appellate court has considered that it could not be said that tenancy had been validly terminated in absence of evidence of service of notice on the respondent/defendant.

10. Learned *Amicus Curiae* has made valiant effort contending that the Trial Court has not appreciated evidence properly with respect to issue of service of notice and the Appellate Court has been in error in disregarding and mis-appreciating factual aspects involved in the matter. He submits that there is no dispute over that notice of termination of tenancy had been sent by registered post acknowledgment due and same had been received back by plaintiff with endorsement of Postal Department as premises had been locked/not found. He submits that while respondent disputes

service of notice and shows ignorance about notice, under Section 114 of the Evidence Act and Section 27 of the General Clauses Act, presumption arises about notice having been issued and served on the addressee. He submits that it is not at all case of the respondent that address given on envelope of the notice is not that of respondent/addressee. In such a case, presumption, in factual scenario that, notice having been sent being not disputed, in respect of service ought to have received its due. He submits it ought to be presumed that respondent/tenant has been duly served. He submits that often there have been cases wherein ingenuous services being effected through Postal Department are evident on one or the other pretext and the courts have consistently been taking its cognizance.

11. He submits that situation as in the present case about service being effected through registered post acknowledgment due and envelope being returned with an endorsement of Postal Department about 'not found' has been considered by the Courts on more than one occasion. He submits that in such a case if at the time of service when addressee is not available, it is expected that addressee while leaving premises ought to inform either the landlord or for that matter Postal Authority shall authorize a person to receive notices on his behalf. In absence of such

arrangement by addressee, the courts have considered that sending of notice coupled with the presumption under law would be deemed to be good service. In order to buttress his aforesaid submission, he relied on two decisions of the Supreme Court.

12. He submits that in the case of *M/s. Madan and Co. Vs. Wazir Jaivir Chand* reported in *Manu/SC/0313/1988 = AIR 1989 SC 630*, wherein in paragraph 5 it has been observed by the Supreme Court to the effect that addressee can easily avoid receiving letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to sender with vague endorsements and it has been observed further that 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 addressee's own conduct. In case he is compelled to be away for some time, he will have to give necessary instructions to the Postal Authority to detain letters addressed to him and, in such cases, word 'served' may have to be interpreted as 'sent by post' if properly and correctly addressed.

13. Other citation of the Supreme Court relied on *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr.* reported in *MANU/SC/0625/1999=AIR 1999 SC 3762*, is relating to Negotiable Instruments Act, 1881 wherein the Court has observed in

paragraph 24 referring to Section 27 of the General Clauses Act that service, by properly addressing, pre-paying and posting by registered post a letter containing the document shall be deemed to be effected, unless the contrary is proved.

14. He further refers to and relies on a case decided by this Court viz; *David K.N. Vs. Shri S.R. Chaubey (Chaturvedi)* reported in *MANU/MH/0168/2003 = 2003(3) ALL MR 511* making a reference to Sections 27 and 28 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, reiterating that it is for tenant to make necessary arrangement to receive notice addressed to him in his absence at suit premises and failure on his part would disable him from contending that on account of his absence at the premises, the presumption of service would stand rebutted.

15. On the other hand, learned Counsel Mr Wani appearing for respondent/defendant submits that evidence sufficiently bears that eviction proceedings had been initiated without valid termination of tenancy by proper notice and there is failure on the part of plaintiff to prove non user of premises by tenant for six months. He submits that while the suit had been instituted by plaintiff's father and it has come on record that the deponent giving evidence had no personal knowledge about antecedents in the matter, his evidence being not corroborated by any

contemporaneous material having been produced or for that matter no reliable evidence being adduced. He submits that even otherwise the testimony in support of eviction of tenant by plaintiff distrusts veracity of plaintiff and proper service of notice. He submits that although it has been vehemently argued about validity of termination of tenancy, evidence sufficiently has come on record that the plaintiff had been aware while issuing notice, the defendant/tenant would not be available on the address yet the notice had been sent which has been received with endorsement "premises having been locked". There is nothing on record placed about the tenant having any intimation about notice being issued by registered letter addressed to the defendant in order to lend opportunity to the tenant to arrange for receiving notice. He submits that in the peculiar facts of the case while respondent/defendant-tenant had been residing in the suit premises for a long time, it can never be imagined that while tenant is required to go out of premises on all occasions he would have to intimate the same to the Government Authorities like Postal Department or for that matter it is not on record that he had been aware that landlord was likely to issue notice on this occasion. Moreover, he submits that while it has come on record that the landlord had been aware that the tenant was not supposed to be available on the address at the time of service, the burden on

the tenant gets discharged and the presumption stands rebutted. He submits that two Courts hitherto have gauged the situation with reference to the evidence on record and the case put up by plaintiff is absolutely away from the factual position and is perverse. In such a case, the concurrent findings of the facts rendered by two Courts are not amenable for revision and disturbance under the superintending powers of this Court.

16. Perusal of the judgments of the Trial Court and the Appellate Court and particularly that of the Appellate Court shows that the Appellate Court has taken lot of pains and dwelt on point in respect of validity of termination of tenancy and has found that it cannot be said that the tenant had been served with the notice of termination of tenancy. The Appellate Court has considered that the plaintiff had been aware about tenant not in premises and notice had been sent and, as a matter of fact, there is no dispute over that envelope of registered post had been received by the landlord with endorsement 'premises have been locked'. There is no further evidence or any corroboration in respect of service of notice by any other modes. There is no record in respect of notice had been issued under certificate of posting nor there is any evidence about notice having been affixed on the door. The deponent himself had not been personally aware of such

movements by his father. In the circumstances, from peculiar facts of this case, it appears that the basic purpose underlying service of notice under the provisions of the Rent Act as those were then does not get satisfied and the tenant in the circumstances may not have an opportunity to do away with allegations in the notice.

17. In the present matter, additionally it appears that tenant appears to have paid all rent. It does not appear to be claim by the petitioner-landlord that tenant had been in arrears after the institution of the proceedings.

18. It is a case, wherein petitioners do not appear to be keen in prosecuting the matter. They have not appeared in the matter despite notice and the matter is argued by the *Amicus curiae*, No indulgence in the circumstances is required to be given to the petitioners. While leaving, it would not be out of place to refer to that *Amicus curiae* deserves special mention for taking lot of efforts rendering immense assistance to the Court.

19. *Amicus curiae* be paid Rs. 10,000/- (Rs. Ten thousand only) as honorarium.

(**SUNIL P. DESHMUKH**)
JUDGE.