

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.778 OF 2014

Lalmani Chotelal Dube and others ... Applicants
Vs.
Severina Fernandes wd/o Peter Fernandes
(decd) and others ... Respondents

Mr. Y. S. Jahagirdar, Senior Advocate i/b. Mr. Ashutosh R. Gole for Applicants.
Mr. Madhav Jamdar a/w. Mr. Durgaprasad Sabnis and Mr. Durgesh Kulkarni i/b. Lex Firmus for Respondent No.3.

CORAM : R. G. KETKAR, J.
DATE : MARCH 14, 2018

P.C. :

Heard Mr. Jahagirdar, learned Senior Counsel for the applicants and Mr. Jamdar, learned Counsel for the respondent No.3 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 29.11.2008 passed by the learned Judge, Court Room No.33, Small Causes Court, Bandra in R.A.E.&R. Suit No.1329/4808/82 as also the judgment and decree dated 09.05.2014 passed by the appellate Bench of the Small Causes Court, Bandra in Appeal No.35 of 2009. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', on the ground that the original defendant - Shivanath Dube is in arrears of rent for more than six months and has become defaulter as contemplated by Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

3. In support of this Application, Mr. Jahagirdar submitted that basically, a demand notice dated 28.07.1982 was never served on the original defendant. He submitted that plaintiffs alleged that the demand notice dated 28.07.1982 was sent by a Registered Post A.D. as also Under Certificate of Posting and the third copy was pasted at the suit premises. He submitted that in paragraph 1 of the plaint, plaintiffs themselves have described the nature of the suit premises and have contended that original defendant - Shivanath Dubewas a monthly contractual tenant of 18 Khilas stable portion of Mary E. Pereira Stable No.4-5 situate at Cemetary Road, Bandra, Bombay 400 050, on the monthly rent of Rs.72/-. He submitted that during the pendency of the Suit, original defendant died and his legal representatives were brought on record. They filed amended written statement inter alia contending that the address of the suit premises is not Mery E. Fernandes Stable 4-5, Bandra. The address of the suit premises is Kadeshwari Mandir Marg, Mumbai. In short, the legal representatives of the original defendant specifically contended that the notice was not sent at the correct address. That apart, having regard to the peculiar nature of the suit premises, it also cannot be said that the notice sent by R.P.A.D. or U.P.C. was served. There is also no question of pasting the notice at the suit premises in view of the nature of the suit premises.

4. Mr. Jahagirdar has invited my attention to the finding recorded by the appellate Court and in particular paragraph 15 to contend that the findings recorded by the appellate Court are based on surmises and conjectures. He submitted that basically, the case of the defendants is that the defendants have brought circumstances on record revealing hollowness in the case of service of notice and the defendants have rebutted the presumption. In these circumstances, the Courts below were not justified in decreeing the Suit under Section 12 of the Act.

5. On the other hand, Mr. Jamdar supported the impugned orders. He has taken me through the findings recorded by the learned trial Judge in paragraphs 10 and 11. In paragraph 11, the learned trial Judge referred to the injunction notice No.1334 of 1998 taken out by the original defendant for injunction restraining the plaintiffs from disturbing his possession over the open space lying in between Stable Nos.4 and 5. In that notice, defendant has clearly given the address as Mary Pereira Stable No.4 and 5, Cemetery Road, Bandra (W), Mumbai. The said statement was reiterated in his rejoinder of that notice as well. The learned trial Judge reproduced the relevant portion of that injunction notice. The learned trial Judge also referred to the written statement filed by the original defendant where it was not pleaded that the address in the demand notice was incorrect and the suit premises is not situate on Cemetery Road but on “Kandeshwari Mandir Marg”.

6. I have also perused the endorsement made on the Registered Post A.D., which show “not claimed”. The question is whether the endorsement 'not claimed' will amount to valid service or not. The said question is no longer *res integra*. In the case of The New India Assurance Co. Ltd. Vs. Nasibunnisa Mohd. Israr Khan, Civil Application No.1979 of 2011 in First Appeal (St.) No.13185 of 2011 decided by this Court (Coram: A. S. Oka, J.) on 14.10.2011, the learned Single Judge has considered the following decisions:

- a. ***Lalmani Ramnath Tiwari Vs. Bhimrao Govind Pawar*, 2001 (2) Mh.L.J.342;**
- b. ***David K. N. Vs. S. R. Chaubey (Chaturvedi)*, 2003 (4) Bom.C.R. 612;**
- c. ***Krishna Ramchandra Jadhav @ Yadav Vs. Shankari B. Ajimal*, 2005 (4) Mh.L.J.577;**
- d. ***P. T. Thomas Vs. Thomas Job*, (2002) 7 SCC 531;**
- e. ***M/s. Madan and Company Vs. Wazir Jaivir Chand*, AIR 1989 SC 630.**

7. After considering the law on this subject, it was observed thus,

“8. ... There are many decisions dealing with this issue. Once such decision is in the case of **Lalmani Ramnath Tiwari** (*supra*) where an issue arose regarding service of notice by the landlord on the tenant under Section 12 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Court considered the issue when such notice is returned back with the postal remark "not claimed", whether it can be a proper service of the notice contemplated by Section 12 (2) of the said Act. In this decision, the issue considered was whether presumption of service of notice arises in such a case. There is another decision in the case of **David K. N.** (*supra*). The issue which is considered therein is regarding the service of notice by a landlord to his tenant. It will be necessary to make a reference to what is held by this Court. In paragraph No.18 of the Judgment, this Court held thus:

"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 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.

(underline supplied)"

Thus, this Court invoked presumption under Section 114 of the Indian Evidence Act while dealing with the issue of service of notice by the Landlord to the tenant.

9. In the case of **Krishna Ramchandra Jadhav @ Yadav** (*supra*), the same issue was considered by this Court. This Court relied upon presumption under Section 27 of the Bombay General Clauses Act and Section 114 of the Evidence Act. In all the aforesaid cases, this Court was dealing with service of notice to the tenant in accordance with Section 106 of the Transfer of Property Act, 1882. It must be noted that this Court considered the question of invoking presumption under the Indian Evidence Act or Bombay General Clauses Act on the basis of the evidence adduced in the suit. My attention was invited to a decision of the Apex Court in the case of **P. T. Thomas** (*supra*). In paragraph Nos.14 and 15, the Apex Court observed thus:

"14. It was he, in fact, who had provided the amount which was deposited on 7-4-2003 and not on 8-4-2003 as assumed by the High Court. It is, thus, seen that the appellant has performed his obligation. He had sent the notice on 30-10-2001 and it was well before the expiry of time on 5-10-2001. Though the notice was correctly addressed and despite the intimation by the post office, the notice was not accepted by the respondent and was returned unserved. In such circumstances, the presumption of law is that the notice has been served on the respondent.

15. The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act, 1898. The requirement of the Section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the postman has made the endorsement. This presumption is correct in law. He had given notice and

intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act, 1872 operates apart from that under the Post Office Act, 1898."

In this case, the Apex Court was not dealing with service of summons or notice of Court. The Apex Court was dealing with service of notice by the parties to the proceedings. The Apex Court has dealt with the issue of the presumption.

10. It will be necessary at this stage to make a reference to the decision of the Apex Court in the case of *M/s. Madan and Company (supra)*. It will be necessary to make a reference to what is held by the Apex Court in paragraph No.6 of the decision, which reads thus:

"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.

(underline supplied)"

11. It will be material to note that in the aforesaid decision, the Apex Court has observed that the Indian Post Office Rules do not prescribe any detailed procedure regarding delivery of the registered letters where the postman is unable to contact the addressee or a person who is authorized to receive the letter. The Apex Court noted the general practice that after making an attempt to deliver the letter on one or two days, the Postman returns the letter to the sender. The Apex Court held that the responsibility of a postman cannot be equated to that of a process server (Court bailiff) entrusted with the responsibility of serving the summons of a Court under Order V of the Code."

8. Mr. Jahagirdar submitted that having regard to the peculiar nature of the suit premises, it cannot be said that the notice sent by R.P.A.D. or Under Certificate of Posting was served. There is no question of pasting the notice having regard to the peculiar nature of the suit premises. With the assistance of the learned Counsel appearing for the parties, I have perused the evidence on record. Paragraph 3 of the affidavit in examination-in-chief of defendant No.1(b) - Pankumari Murari Mishra, it was stated that the original defendant - Shivnath Dube was never served with plaintiffs' Advocate notice dated 28.07.1982 and such alleged notice was never tendered to the original defendant nor any such alleged notice was received by the original defendant Under Certificate of Posting. Copy of the alleged notice dated 28.07.1982 was never pasted at the suit premises. In the case of **David K. N.** (*supra*), the learned Single Judge has observed in paragraph 10 that mere statements that "I have not received the notice sent to me" or that "notice allegedly sent was never received by me" or the like by themselves would not rebut the presumption.

9. For the reasons recorded by the trial Court in paragraphs 10 to 13

and by the appellate Court in paragraphs 10 to 18, it has to be concluded that deemed notice was duly served on the defendants. Both the Courts have concurrently found that notice is served on the original defendant. Both the Courts have concurrently held that defendants are in arrears of rent from 01.08.1981 to 30.06.1982; that the plaintiff has validly terminated tenancy. The said findings are arrived at after appreciating the evidence on record. It will, therefore, be not permissible for this Court, while exercising power under Section 115 of C.P.C., to re-appreciate the evidence on record. It cannot be said that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Merely because on the basis of evidence, other view is possible that itself is no ground for taking a different view. It also cannot be said that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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