

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 5846 OF 2001**

Mr. Munnar Lavtan Yadav,

Adult, Indian Inhabitant,

Occ. Nil, Residing at Munnar

Lavtan Chawl, Karvalo Nagar,

Panchpakhadi, Pokhran Road No.1,

J.K. Gram Post, Pokhran Road No.1,

Thane-400 606

.....Petitioner

Vs.

Mr. Ashok D. Dalvi,

Since deceased through Legal Heirs &

Representatives

1a. Megha Ashok Dalvi.

1b. Sandip Ashok Dalvi.

(Both Residing at Mannar Yadav

Chawl, as Karvalo Nagar, in

C.T.S. No.160/4, Panchpakhadi,

Pokharan Road No.1, J.K. Gram,

Thane – 400 606.

.....Respondents.

Mr. Mandar Limaye for the Petitioner.

None for the Respondents.

CORAM : A. S. GADKARI, J.

DATE : 1st DECEMBER, 2021.

ORAL JUDGMENT :-

Petitioner-Original Plaintiff, landlord has preferred the present

Petition impugning the Judgment and Order dated 17th January, 2001 passed in Civil Appeal No.71 of 1997 by the learned IVth Additional District Judge, Thane, allowing the said Appeal preferred by the Respondent-Tenant. By the impugned Judgment and Order dated 17th January, 2001, the Appellate Court has quashed and set aside the Order dated 7th January, 1997 passed in Regular Civil Suit No.881 of 1990, by the Joint Civil Judge, Junior Division, Thane, thereby decreed the said Suit filed by the Petitioner-Plaintiff.

2 Heard Mr. Limaye, learned counsel for the Petitioner. Perused entire record.

3 The Board of listing present Petition for final hearing was published by the High Court Registry on 26th November, 2021. Record indicates that, the Respondents have been duly served and an Advocate has caused his appearance on their behalf.

Present Petition was called out for hearing on Monday i.e. on 29th November, 2021 when none appeared for the Respondents and therefore the present Petition was kept back. It was called out yesterday i.e. on 30th November, 2021 when again none appeared for the Respondents and therefore again it was kept back. As none appeared for the Respondents on two consecutive occasions, this Court thereafter heard Mr. Limaye, learned Advocate for the Petitioner and proceeded *ex-parte* against the Respondents.

4 Record discloses that, the Petitioner-plaintiff had filed the said R.C.S. No.881 of 1990 for eviction of the Respondent on the ground of default in payment of rent, as contemplated under Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, "*the Rent Act of 1947*").

 It was and is the case of the Petitioner that, he is the owner of the plot of land bearing Survey No.160, Hissa No.4, lying and situated at Karvalo Nagar, Pokharan Road No.1, Thane. That, he has constructed a chawl thereon known as '*Munnar Yadav Chawl*'. Respondent-tenant was allotted Room No. 3 in the said chawl No.2 on monthly rental basis. The rent of the Suit property was determined at Rs.37/- per month (inclusive of education cess). As the Respondent was in arrears of rent from 1st August, 1982 and did not pay it despite repeated demands, the Petitioner through his Advocate issued notice dated 19th March, 1990 and called upon the Respondent to pay the arrears of rent to the tune of Rs.3,367/- and also terminated his tenancy.

 It is the case of the Petitioner that, he sent the said notice by RPAD; by UCP; tried to serve it through personal service and by pasting it on the conspicuous part of the Suit premises on 30th March, 1990 in presence of two panch witnesses namely Fazal Mohd. Issaque Ahmed and Paras Yadav. The notice sent through RPAD was returned back with postal endorsement "*unserved*". As far as the notice sent by the UCP is concerned,

the Petitioner could not produce the acknowledgment of it at the time of filing of the Suit or at the time of recording of his evidence. As far as pasting of notice on the conspicuous part of the Suit premises is concerned, the Petitioner has proved the said fact by leading evidence of himself and examining a witness namely Fazal Mohd. Issaque Ahmed (PW-2).

5 Trial Court by its Judgment and Order dated 7th January, 1997 was pleased to decree the said Suit with costs. Trial Court has held that, the Petitioner has proved that the Defendant has committed default in payment of arrears of rent from 1st August, 1982 and despite receipt of notice dated 30th March, 1990, he failed to pay the said arrears to the Petitioner or deposit the same on the date of first hearing before the Trial Court.

6 Feeling aggrieved by the said Judgment and Order dated 7th January, 1997 passed by the Trial Court, Respondent preferred Civil Appeal No.71 of 1997, before the IVth Additional District Judge, Thane. The Appellate Court while allowing the Appeal preferred by the Respondent, has reversed the findings recorded by the Trial Court. The Appellate Court has recorded a finding that, the Petitioner did not attempt to serve notice upon the Respondent by the modes prescribed under Section 106 of the Transfer of Property Act, 1882 (for short "*the TP Act*") and on that predominant rather sole ground, reversed the findings recorded by the Trial Court.

7 Section 12(2) of the Rent Act of 1947, states that, "*No suit for*

recovery of possession shall be instituted by a landlord against tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act 1882”.

8 Sub-Section 4 of Section 106 of the Transfer of Property Act prescribes that, every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

9 This Court, in the case of *B.S. Mahajan since deceased by his heirs and legal representatives Versus Chapsey R. Mistry*, reported in *1988(3) Bom. C.R. 535*, while considering Section 12(2) of the Bombay Rent Act, 1947 in sub-para 7 has held as under-

“The whole purpose of the section 12(2) appears to be that a demand should be made from the tenant of the arrears of rent by a notice in writing which should be served upon the tenant in the manner provided in section 106 of the Transfer of Property Act, 1882 and sub-section (2) bars any suit for the recovery of possession unless such a notice in writing of

the demand of the standard rent has been served in the manner provided in section 106 of the Transfer of Property Act. The whole purpose of making a provision for such notice is frustrated if notice or intimation does not reach the tenant and he is not fixed with knowledge thereof. Section 106 of the Transfer of Property Act indicates four modes of service---

- (i) by post to the party,*
- (ii) by tender or delivery personally to the party,*
- (iii) by tender or delivery to one of his family or servants at his residence, and*
- (iv) if such tender or delivery is not practicable, by fixing to a conspicuous part of the property.”*

10 In the case in hand, the evidence on record reveals that, the Petitioner-Plaintiff has not proved the service of Suit notice dated 19th March, 1990 upon the Respondent by adopting first two modes mentioned in Section 106 of the TP Act.

As far as third mode of service is concerned i.e. by tender or delivery of the notice to one of the family members or servants at the residence of tenant is concerned, the Petitioner has averred that, though he tried to serve the said notice upon the Respondent personally, he refused to accept it. Respondent in his evidence has denied the said fact and therefore doubt is created in the mind of the Court about service of notice by adopting third mode by the Petitioner.

As far as service of notice by the Petitioner by adopting fourth mode i.e. by fixing it on a conspicuous part of the Suit property is concerned, the Petitioner apart from leading his own evidence in that behalf, has also examined a panch witness by name Fazal Mohd. Issaque Ahmed (PW-2) to establish the fact of pasting of the said Notice. Perusal of his testimony would reveal that, the said witness has categorically stated that, on 30th March, 1990, he along with the Petitioner had been to the residence of the Respondent. The Petitioner tried to serve the Suit notice upon the Respondent personally, however the Respondent refused to accept it. Petitioner therefore affixed the Suit notice in his presence and in presence of other panch witness by name Paras Yadav on the Suit premises. In his cross-examination, the said witness has denied the suggestion that, he is deposing falsely to the effect that such a notice was never affixed in his presence on the door of the Respondent. According to me, the evidence of PW-2 is impeccable and of sterling quality. As far as pasting of the suit notice on the door of the Respondent is concerned, the evidence of the Petitioner and his witness (PW-2) is unshaken in their cross-examination.

11 In this background it appears that, the Appellate Court has taken into consideration service of notice by the Petitioner only by first three modes and has not considered rather even touched the vital aspect of the service of notice upon the Respondent by adopting fourth mode by the Petitioner.

A minute perusal of para No.8 i.e. reasoning part of the impugned Judgment and Order dated 17th January, 2001, clearly reveals that, the Appellate court has not taken into consideration this vital aspect of the matter. The first Appellate Court, being the last fact finding Court, has failed to take into consideration the necessary and relevant evidence available on record, rather has not taken into consideration it at all and therefore has committed an error in reversing the findings and passing of decree by the Trial Court.

12 As noted earlier, perusal of entire record would clearly indicate that, the Petitioner has in fact served the notice as contemplated under Section 12(2) of the Rent Act of 1947 upon the Respondent by adopting the mode prescribed under Section 106 of the TP Act.

In view thereof, this Court is of the opinion that, the Appellate Court has committed error in not appreciating the evidence available on record in its proper perspective. Therefore interference of this Court in its jurisdiction under Article 227 of the Constitution of India, in the impugned Judgment and Order passed by the Appellate Court is necessary.

13 A corollary of the aforestated deliberation is that, the impugned Judgment and Order dated 17th January, 2001 deserves to be quashed and set aside and is accordingly done. The Judgment and Order dated 7th January 1997 passed in Regular Civil Suit No.881 of 1990 by the Joint Civil Judge, Junior Division, Thane, is upheld and restored.

Respondents are directed to hand over the vacant and peaceful possession of the Suit premises in favour of the Petitioner within a period of two months from the date of uploading of the present Judgment on the official website of the Bombay High Court.

Respondent is also directed to pay the entire arrears of contractual rent if any, till today to the Petitioner within a period of two months from the date of uploading of this Judgment on the Official Website of the Bombay High Court.

14 Writ Petition is allowed in the aforesaid terms.

No order as to costs.

(A.S. GADKARI, J.)

SANJIV
SHARNAPPA
MASHALKAR

Digitally signed
by SANJIV
SHARNAPPA
MASHALKAR
Date:
2021.12.27
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