

Bench: K Chandiwal

1

C.R.A. NO.52 of 2010

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.52 OF 2010

Mohanlal s/o Ukchand Soni,

Age 55 years, Occ. Nil,

R/o Shivshakti, Metal Lane No.4

Shah Market, Tar Galli, Dhule,

Taluka & District Dhule ... PETITIONER VERSUS

1. Mandakini Ramchandra Shah,

Age 66 years, Occ. Nil.

2. Yogesh Ramchandra Shah,

Age 43 years, Occ. Business.

3. Ramesh Ramchandra Shah,

Age 38 years, Occ. Nil.

All R/o Lane No.4, Dhule

4. Jitesh Ramchandra Shah,

Age 22 years, Occ. Service,

R/o Mumbai

5. Giribala Ashok Shah,

Age 32 years, Occ. Service,

R/o Mumbai. ... RESPONDENTS

Shri V.D. Sapkal, Advocate for the petitioner Shri L.D. Vakil, Advocate holding for

Shri D.L. Vakil Gangapurkar, Advocate for the respondents

CORAM : K.U. CHANDIWAL, J.

DATE : 20th December, 2010

ORAL JUDGMENT :

1. Heard. Rule. Rule made returnable forthwith. With the consent of learned counsel for the parties, taken up for final hearing at 2

C.R.A. NO.52 of 2010

admission stage.

2. The decree of eviction recorded in Regular Civil Appeal No. 79/2007 by the learned District Judge at Dhule, reversing the judgment of dismissal of Regular Civil Suit No.126/2004, is questioned by the tenant. On 9.3.2010, after hearing both the learned counsel, this Court inform to decide the appeal finally at admission stage and it was fixed to 17.6.2010. The matter was adjourned under several circumstances.

3. The controversy hinges on finding recorded by learned Principal District Judge, Dhule, holding default by the applicant in terms of Section 15 of the Maharashtra Rent Control Act and the statutory notice could be a proper service required under Section 15 of the Maharashtra Rent Control Act, 1999. The landlord came with a case that the suit notice dated 7.10.2003 was served. The tenant disputed the same by establishing that between the period from 8.10.2003 to 17.10.2003 he was not at Dhule and consequently, the notice dated 7.10.2003 could not be served upon him. Alleged service on his son was denied. Evidence of P.W.2 Shaligram, Postman, was scanned by the learned Civil Judge, Senior Division, Dhule and did not believe his assertion of having served the notice to son of the tenant Mukesh. The reasons assigned by the learned Civil Judge, Senior Division are in tune with the evidence of the tenant coupled by contrary pleadings of the landlord, which incorporate as under :

3

C.R.A. NO.52 of 2010

" The notice dated 7.10.2003 was sent by Registered Post A.D. demanding the arrears and stating other reasons. Said notice was served to the defendant, however, the defendant did not remit the rentals and the agreed cess nor handed over occupation of the suit premises. Consequently, the suit is filed.

This has been specifically denied and dealt with, with elaboration by the tenant defendant in written statement in paragraph No.5. The defendant states, these contentions are totally illegal and false. The defendant was not at Dhule for the period from 8.10.2003 till 17.10.2003 and the defendant has not received the alleged notice of the plaintiff and under the circumstances, the alleged notice is totally invalid and the suit, based on such notice is not maintainable."

There is no legal cause of action to file the suit against this defendant and the cause of action, as stated by the plaintiffs in para No.9 of the plaint is totally illegal. As the alleged notice, dated 7.10.2003 itself, is invalid and as it is not served upon the defendant, the suit based on such notice deserves to be dismissed."

4. In the situation of the matter, the landlord was consciously aware that service was upon son of tenant, he should have necessarily inform the same in pleadings. The examination of the postman by itself will not demonstrate the responsibility cast on the landlord to establish that there was effective service upon the tenant. Recourse taken by the learned counsel for the landlord to the judgment of Apex Court in the matter of Madan and Company Vs. Wazir Jaivir Chand (1989 SCC-1-264 : AIR 1989 SC 630) will have to be read in proper

perspective. The Hon'ble Lordships of the Apex Court were dealing with the service and its import. Effect of the term "served", "accepted" and "left without address, returned to sender". It is observed as under : 4

C.R.A. NO.52 of 2010

"6. We are of the 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 post. All that a landlord can 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 addressee'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, as 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. 5

C.R.A. NO.52 of 2010

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 gone, or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "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 person 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."

5. It is more than clear, the presumption under Section 27 of General Clauses Act is rebuttable and it will not in all situation will be of a final stroke to the defence of the adversary. Postal notice is not served to the addressee. The presumption that the usual course of the post was followed through evidence of the postman would not be available, if it is shown that the service was interrupted by disturbances. It was established by

the tenant, that the common course of business was not followed while effecting service upon him by the concerned postman. The postman did not produce any corresponding entries in the delivery register illustrating that there was an acknowledgement from Mukesh. Such event has been materially considered by the learned Civil Judge. The proof of service of notice was beyond pleadings. 6

C.R.A. NO.52 of 2010

6. The learned counsel for the landlord criticised on comparison of signature of Mukesh on the postal acknowledgement and the summons. This exercise is not to be readily put in motion, as has been indicated by the Hon'ble Supreme Court in the matter of O. Bharathan Vs. K. Sudhakaran and another (AIR 1996 SC 1140), and in the matter of State (Delhi Administration) Vs. Pali Ram (AIR 1979 SC 14(1)). The Apex Court has observed, that the matter can be viewed from another angle also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."

There cannot be a contest and quarrel to the above proposition of law enunciated by the Hon'ble Supreme court.

7. The moot question in the present controversy is, it is not the sheet-anchor that was the formulation of the opinion of the learned 7

C.R.A. NO.52 of 2010

Judge to negate the case of the landlord, the learned Judge passingly referred the comparison of signature. He was consciously alive to limited scope for carrying such exercise, referred in his judgment in paragraph No.19.

8. The learned Judge, ultimately, on analysis of the evidence, reached to conclusion that there was no service upon the tenant. Having analysed such observation critically in tune with the evidence, I have no reason to discard the finding recorded by the learned Civil Judge, Senior Division, Dhule.

9. Learned Principal District Judge did not evaluate the findings in proper perspective and reached to an inappropriate finding. This situation has created may-hem to the substantial right which the statute provide in favour of the tenant as the very language of Section 15 of the Maharashtra Rent Control Act, 1999 comes with a rider "no ejectment ordinarily to be made if the tenant pays or is ready and willing to pay standard rent and permitted increases." Clause (2) of Section 15 ordains, "No suit for recovery of possession shall be instituted by a landlord". Such restriction is in the context of serving a notice as is indicated in Section 106 of the Transfer of Property Act, 1882.

10. The learned counsel for the landlord repeatedly harped on the effect of service at the residence of any person. However, that eventuality will not be germinating as the matter revolves to serving the 8

C.R.A. NO.52 of 2010

tenant through his son at commercial suit premises.

11. The learned counsel for the appellant has relied to the judgment of this Court reported in 2005 (2) Bom. C.R. (Cri.) 111 in the matter of Vasco Urban Co-op. Credit Society Ltd. Vs. Shobha D. Korgaonkar. Said judgment relates to effect of service in a matter under Negotiable Instruments Act (Section 138) and this Court found the tenuous position if an unscrupulous addressee avoids the service of notice by discovering illusory ways and cause delusion in the affairs.

12. In the matter of Madhavsingh Tulsidas, since deceased through L.Rs. Vs. Bhaktiben Narandas Paleja, since deceased, through L.Rs. (2006 (5 Bom. C.R. 604). The position of Section 12(3)(a) of the Bombay Rent Act was to be looked into. The question of service was not germinating and the claims for arrears of rental was the basic issue, the increase in the rentals falls within the definition of permissible increases was also considered. Even if tenant has failed to place on record positive evidence of no dues for 1988 to 2003, however, the mandate of service being missing, it will not provide a solace to landlord.

13. The findings of learned Judge that landlord failed to establish Rs.11,929/- is due towards tenant, is based on scanning plaintiff No.2's evidence, no error could be demonstrated.

14. The observations of the learned Principal District Judge on 9

C.R.A. NO.52 of 2010

the facts being not properly evaluating the correct position, requires to be set aside. Civil Revision Application is allowed. The order of learned Principal District Judge is set aside. The dismissal of Regular Civil Suit No.126/2004 is confirmed. Rule made absolute. No costs. K.U. CHANDIWAL

JUDGE