
(2000) 08 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 4458 of 1988

Narayan Ganpat Bhoite

APPELLANT

Vs

Rampyari Suchitram Gupta (Smt.) and Others

RESPONDENT

Date of Decision : 25-08-2000

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2), 12(3)
Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Article 52, 66, 67

Citation : (2000) 4 ALLMR 713 : (2001) 2 BomCR 158 : (2001) 3 MhLj 234

Hon'ble Judges : J.N. Patel, J

Bench : Single Bench

Advocate : G.R. Rege, for the Appellant; N.V. Walawalkar, for respondent No. 1-A to 1-E and V.A. Thorat and V.B. Nighot, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, J.—Heard learned Counsel for the parties. The petitioner landlord has impugned the decision of the Appellate Bench of the Small Causes Court, under which, the judgment and decree passed by the Judge of the Small Causes Court in favour of the plaintiff landlord directing the defendant tenant to vacate and handover peaceful possession of the suit premises to the plaintiff, came to be dismissed.

2. The plaintiff landlord was required to file suit against the defendants seeking a decree for eviction against his tenants on the grounds that the tenants failed to pay monthly rent from 1-9-1960 till the giving of the demand notice dated 4-12-1970. The demand notice was issued u/s 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as Bombay Rent Act, 1947). The landlord was required to join the original tenant Smt. Rampyari Suchitram Gupta as defendant No. 1 and her son Mevalal Gupta as party defendant No. 2. It appears that during the pendency of the suit the original tenant Smt. Rampyari Gupta expired and therefore her legal heirs were

brought on record.

3. The suit was filed by the plaintiff landlord claiming thereby the possession of the suit premises on the ground that the tenant having failed to pay the rent within a period of one month from the service of notice of demand, she was liable to be evicted.

4. The defendant raised various pleas in their defence to the extent of disputing the title of the plaintiff landlord to the suit premises. The defendants also specifically denied the receipt of the alleged notice of demand dated 4-12-1970, and therefore, according to the defendants there was no valid notice of demand and/or quit. The defendants tenants also disputed the quantum of rent which was claimed to be Rs. 80 per month and submitted that the standard rent would not exceed Rs. 20 per month, and accordingly, requested the Court to fix the standard rent at the said rate.

5. The trial Court found that the plaintiff has proved, that the defendant No. 1 was the tenant of the suit premises, and that the tenancy was duly terminated by a notice to quit dated 4-12-1970. The trial Court also found that the plaintiff has proved that the defendant No. 1 was in arrears of rent from 1-9-1960 at the rate of Rs. 80 per month, and defendant No. 1 also failed to pay the suit amount of arrears of rent within a period of one month from the receipt of notice to quit. Ultimately, the trial Court decreed the suit in favour of the plaintiff landlord.

6. The matter was carried in appeal before the Appellate Bench of the Small Causes Court by the tenants. The Appellate Court concurred with the findings of the trial Court and found that the service of notice of demand on the defendants was proper, but found that the defendants were entitled to get the benefit of Amended Rent Act, which plea was raised in appeal by their application dated 3rd December, 1987. Ultimately the Appellate Court dismissed the suit of the plaintiff so far as the eviction of the suit premises was concerned. Aggrieved by this decision of the Appellate Court, the petitioner landlord has invoked the jurisdiction of this Court under Article 227 of the Constitution of India.

7. Mr. Rege, the learned Counsel appearing for the petitioner landlord has submitted that the Appellate Court has proceeded on a wrong premise by dismissing the suit of the plaintiff for possession, by relying upon the Amending Act (Maharashtra Act) 18 of 1987 under which, sub-section 3(a) and (b) of section 12 came to be substituted by sub-section 3, and by holding thereby that the said amendment is retrospective in operation and it was held in reference to section 25 of the amended Act. Mr. Rege, learned Counsel for petitioner landlord submitted that the issue is no more res integra, as this Court in the case of Piroja M. Mehta Vs. Hambai Jamshedji Cama (Dr.) and Others, , has clearly held that the provision of the Amending Act were prospective in nature and that all suits for recovery of possession which have been filed prior to 1st September, 1987 are to be governed by the law prevailing at the time of institution of the suit, viz, section 12(3) of the Bombay Rent Act before its amendment by Maharashtra Act

18 of the 1987. Therefore, according to Mr. Rege, the suit of the plaintiff landlord for eviction of the defendants tenants and for possession thereof ought to have been decreed in favour of the plaintiff landlord.

8. Mr. Thorat, learned Counsel appearing for respondents tenants fairly conceded that in so far as the finding of the Appellate Court that the suit for possession will have to be dismissed by treating the amendment as retrospective, cannot be upheld, as the interpretation of the Amend Act stands today. Mr. Thorat, learned Counsel for the respondents tenants submitted that though the respondents tenants have not impugned the decision of the Courts below, still they have a right to agitate the issue, which arises in their favour, in the petition filed by the landlord, for and for that purpose it is not necessary that the respondents should file any cross objection. In support of his contention, Mr. Thorat, learned Counsel for the respondents tenants has placed reliance on the decision of the Supreme Court in the case of Shri Ravinder Kumar Sharma Vs. The State of Assam and Others, . According to Mr. Thorat, the trial Court by its judgment and order dated 15th October, 1982 has decreed the suit of the plaintiff landlord only on the ground of arrears of rent, and the Appellate Court by its judgment and order dated 3rd March, 1988 has confirmed the decree, however, the Appellate Court has granted relief to the tenants on the assumption that the amended section 12 of the Bombay Rent Act applies.

9. Mr. Thorat, the learned Counsel appearing for respondents tenants has raised on issue, whether the notice of demand dated 4th December, 1970 alleged to have been sent by the plaintiff landlord under Registered Post A.D. (RPAD) to defendants 1 and 2, and the copy of the same alleged to have been sent under Certificate of Posting to defendant No. 1, and another copy alleged to have been pasted on the door of the suit shop by the plaintiff landlord, can be accepted in law as a proper service of notice of demand and/or quit.

10. Mr. Thorat, learned Counsel for the respondents tenants submitted that there are various factors which are required to be considered by this Court in order to appreciate this contention. According to him firstly, that the notice of demand which is alleged to have been served on the defendants tenants, was not posted at the correct address. According to him, the correct, address of the suit shop was "Chana Kurmura Shop, Borkar Chawl, Borkar Wadi, Ranade Road, Bombay 28". whereas, the notice of demand was sent to the address "Gram Merchant, Bhoite Shed, Borkar Wadi, Ranade Road, Dadar 28", and therefore, in the absence of correct address, it cannot be said that the notices sent by RPAD or under Certificate of Posting were admitted to be served on the defendants tenants.

11. Mr. Thorat, has submitted that the defendant No. 2 has categorically denied the receipt of notice either by Registered Post A.D., Under Certificate of Posting or by pasting, either addressed to him or to his mother defendant No. 1. Rather it was the case of defendant No. 2 that in his absence, their servants used to accept the correspondence addressed to him and/or his mother. Therefore,

according to Mr. Thorat, in the absence of any evidence led by the plaintiff landlord viz. not examining anybody from the post office or the postman for establishing service of notice by Registered Post A.D. and/or by Under Certificate of Posting, the plaintiff has failed to prove that the said notice of demand was served on the defendants by such modes. It is further submitted by Mr. Thorat, that the plaintiff did not examine his advocate or his staff for establishing the service of notice, particularly when the notices sent by Registered Post A.D. were returned with remarks unclaimed and not found. According to him, since the Registered Post A.D. packets were returned back unserved, it would not lead to presumption u/s 114 of the Evidence Act read with section 27 of the General Clauses Act. Therefore, according to Mr. Thorat, for want of service of notice of demand and/or quit, the petitioner landlord cannot claim eviction and possession of the suit premises from the tenants.

12. Mr. Thorat, learned Counsel for respondents tenants further submitted that the trial Court has not given findings that the service by Registered Post A.D. in the present case was a good service, and that the Appellate Court has merely endorsed the findings of the trial Court without discussing the evidence and/or appreciating it as a First Appellate Court. It is therefore submitted that the Appellate Court, having not considered the issue independently as regards whether the service by Registered Post A.D. was a proper service or not, and not raising any presumption in relation to such service, it cannot be said that the notice of demand was duly served on the defendants tenants.

13. Mr. Thorat submitted that in so far as the claim of the plaintiff landlord that the notice was served under Certificate of Posting, cannot help the plaintiff landlord, because, the service of notice under Certificate of Posting, in its very nature, is doubtful and unreliable as held by the Apex Court in the case of Shiv Kumar and Others Vs. State of Haryana and Others, . It is submitted by Mr. Thorat that no presumption of service of notice can be raised under Certificate of Posting under the Evidence Act or the General Clauses Act, and that it is dangerous to accept such service when it can have drastic consequences u/s 12 of the Bombay Rent Act. It is the submission of Mr. Thorat that the said packets were not sent by the plaintiff himself, but the same were sent by his Advocate, who has not been examined.

14. As regards the service by pasting, Mr. Thorat has submitted that the evidence is contradictory and without any corroboration. According to him, it has come on record in the evidence of the plaintiff that he had pasted the copy of the notice on 5th December, 1970 viz. immediately on the next date of notice dated 4th December, 1970, however, in his cross-examination he has stated that the pasting of notice was done only after Registered Packets were returned back. This itself shows that the plaintiff's evidence is not reliable on this count as the plaintiff was not consistent as to the time, when he had pasted the said notice on the suit premises.

15. In support of his contention as regards the necessity of examining postman,

Mr. Thorat, learned Counsel for the respondents tenants, has placed reliance on various decisions; viz.

A. Meghji Kanji Patel Vs. Kundanman Chamanlal Mehtani, .

B. Hajrabi Abdul Gani Vs. Abdul Latif Azizulla and another, .

C. Sharad Vs. Vishnu, .

16. It is therefore contended by Mr. Thorat that the suit of the plaintiff for eviction and possession of the suit premises will have to be dismissed for want of service of notice of demand and/or quit and accordingly, the petition ought to be dismissed.

17. Mr. Rege, learned Counsel for the petitioner landlord submitted that, this Court should not interfere with the findings of facts arrived at by the two courts below, as regards the service of notice. In support of his contention, Mr. Rege placed reliance on the decision of the Supreme Court in the case of Achutananda Baidya Vs. Prafulla Kumar Gayen and others, of its judgment the Apex Court has held as under:---

"The power of Superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and Tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Art. 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior Court, the High Court should not quash the judgment of the sub-ordinate Court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate Court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse." (Para 10)

"If the evidences on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior Court or Tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact." (Para 11)

18. Mr. Rege, learned Counsel for the petitioner landlord therefore submitted that the Court will have to appreciate the contention of the learned Counsel for the

defendants tenants keeping in mind the scope of Article 227 of the Constitution of India. Mr. Rege submitted that the defendants tenants cannot raise the issue of service of notice, particularly when they have not filed any counter objection or cross objection challenging the findings of two courts below on this issue. According to Mr. Rege, the authority cited by Mr. Thorat pertaining to the case of Ravinder Kumar Sharma (supra) will not be applicable to the proceedings under Article 227 of the Constitution. In the case of Ravinder Kumar Sharma, the Apex Court was dealing with the statutory right of appeal under the CPC as provided under Order 41, Rule 22 and therefore, the same principle cannot be extended in the present case. This is the petition filed by the landlord under Article 227 of the Constitution.

19. Mr. Rege, learned Counsel for the petitioner landlord further submitted that the contention of the learned Counsel for respondent tenants that the plaintiff has failed to prove the valid service of demand notice, cannot be accepted in the face of evidence on record. Mr. Rege also submitted that the plaintiff landlord has served the notice of demand and/or quit, which he was required to serve as per the provisions of section 12(2) of the Bombay Rent Act, and which should be in accordance with the provisions of section 106 of the Transfer of Property Act. It is therefore submitted that the plaintiff has adopted all the modes of service of notice on the defendants tenants.

20. Mr. Rege, learned Counsel for the petitioner landlord has submitted that the notices sent to defendant Nos. 1 and 2 by Registered Post A.D. and under Certificate of Posting, were on correct address. Merely because the notice contained the address as "Gram Merchant" instead of "Chana Kurmura Shop" does not materially affect the address. It is submitted by Mr. Rege that in the past also, the notices sent on the said address have been duly received by the defendants tenants and they have never disputed the correctness of the address. Referring to the case of Hajrabai Abdul Gani v. Abdul Latif Azizulla and another 1996 Bom.R.C. 59, the learned Counsel Mr. Rege submitted that, this Court, in the aforesaid case of Hajrabai, has placed reliance to the decision of the Supreme Court in the case of Anil Kumar Vs. Nanak Chandra Verma, wherein it has been clearly held that there can be no hard and fast rule in respect of complying the rule of presumption of service and it will depend on the facts of each cases. According to him, considering the facts of the present case, the presumption as to the service of notice will have to be raised in favour of the plaintiff landlord.

21. As regards presumption of service in favour of the plaintiff, Mr. Rege, the learned Counsel for the petitioner landlord placed reliance on the decision of the Supreme Court in the case of M/s. Green View Radio Service Vs. Laxmibai Ramji and another, . Mr. Rege placed reliance on the decision of the Supreme Court in the case of Kulkarni Patterns Pvt. Ltd. and others Vs. Vasant Baburao Ashtekar and others, . Mr. Rege submitted that in the aforesaid case of Kulkarni Patterns Pvt Ltd. even though the acknowledgement was not received by the sender, still

the Apex Court has held that relying on the postal receipts the presumption can be raised that the notice was duly served.

22. Mr. Rege, learned Counsel for the petitioner landlord also cited the authority in the case of M/s. Madan and Co. Vs. Wazir Jaivir Chand, to emphasis that as soon as the sender hands over the notice to the Postal Department which is to be sent on correct address by Registered Post A.D., and if same is returned for non-availability of the addressee, then, it is not the responsibility of the postman or the sender to arrange that the notice is served, and in such case the presumption of service can be raised in favour of the sender.

23. Mr. Rege, learned Counsel for the petitioner landlord also placed reliance on the decision of the Madras High Court in the case of A.E.K. Kaliappa Nadar Vs. S.V.K.R. Amirthavalavandammal and Another, . The Division Bench of the Madras High Court has held in the aforesaid case that where the notice sent by the landlord to the tenant on the correct address is returned with the endorsement "not found" such service will be presumed to be a good enough only when it is supported by an evidence to infer that the tenant had evaded service.

24. Mr. Rege submitted that the two courts below have categorically arrived at the findings that the notice of demand and/or quit was duly served on the defendants tenants, relying on the evidence led by the parties. It is submitted that the trial Court has dealt with the issue of service of notice, by each mode, by relying on the evidence of the parties, and therefore, the findings of the trial Court cannot be held to be improper. It is also submitted that the defendants tenants cannot take a plea that they have not received the notice. Mr. Rege submitted that the deceased defendants No. 1's Advocate Mr. J.M. Ratnani had addressed a letter dated 6-2-1971 to the plaintiff and the Advocate for the plaintiff had replied it on 22nd February, 1971. In the said reply dated 22-2-1971 sent by plaintiff's Advocate, it was mentioned that the deceased defendant No. 1's tenancy was terminated by the notice dated 4-12-1970 and she was called upon to pay the entire arrears of rent and permitted increase from 1-9-1960. It is therefore the contention of Mr. Rege that, inspite of the communication as mentioned above, the defendants and their Advocate ignored this fact, and therefore, it cannot be said that the defendants tenants were not aware of the notice of demand, and accordingly, their contention that they were not served with the notice of demand will have to be dismissed.

25. Mr. Walawalkar, learned Counsel appearing for the respondents 1A to 1E who are the legal heirs of deceased respondent No. 1-tenant, submitted that he will adopt the submissions made by Mr. Thorat, the learned Counsel for respondent No. 2. However, in addition to the said submissions of Mr. Thorat, the learned Counsel Mr. Walawalkar submits that the respondents are entitled to raise the legal issue of limitation in the matter.

26. It is submitted by Mr. Walawalkar that the landlord had demanded arrears of rent from 1-9-1960 by notice dated 4-12-1970, whereas, the suit came to be

filed in August, 1974 and therefore, the suit is barred by limitation in view of Article 52 of the Limitation Act, 1963. He submitted that for arrears of rent the suit can be filed within a period of three years from the date when the arrears become due, whereas, in the instant case, the suit was filed after the prescribed period of three years. As such, according to Mr. Walawalkar, the Court ought to have dismissed the suit of the plaintiff in view of section 3 of the Limitation Act, 1963.

27. With regard to the aforesaid issue of limitation raised by Mr. Walawalkar, Mr. Rege has submitted that the plaintiff did not file the suit claiming arrears of rent, but the suit of the plaintiff was for possession of the suit premises from the defendants tenants by seeking a decree of eviction as contemplated under sections 12(2) and 12(3)(a) of the Bombay Rent Act, on failure of the defendants tenants to pay the arrears of rent within a period of one month from the date of notice of demand and/or to quit. As such, according to Mr. Rege, that the suit of the plaintiff landlord would be governed by Article 66 of the Limitation Act which provides for a period of 12 years for filing the suit for possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition, or at the most the suit of the plaintiff landlord would be governed by Article 67 of the Limitation Act, which provides for a period of 12 years for filing the suit by a landlord to recover possession from a tenant when the tenancy is determined. Mr. Rege submitted that the notice of demand u/s 12(2) of the Bombay Rent Act is also the notice to quit and the cause of action has arisen on the failure of the defendant tenant to pay the rent within a period of one month from the date of receipt of such a notice, and therefore, the contention of learned Counsel for respondents 1A to 1E (legal heirs) that the suit was barred by limitation, cannot be accepted.

28. Mr. Thorat, the learned Counsel for the respondents tenants submitted that the he may be permitted to reply to the contention of Mr. Rege on the point of presumption of service of notice. According to Mr. Thorat the case cited by the learned Counsel for the petitioner landlord i.e. Kulkarni Patterns Pvt. Ltd. (supra) cannot help the petitioner. He submitted that in the said case the Apex Court has held that there can be no blanket presumption of service, in favour of the sender. According to him in the said case the defendants No. 2 in his evidence had nowhere stated that no notice was received by the company and the only denial is in respect of acknowledgement receipt Exhibit 51, and therefore the Apex Court has held that the only inference which could legitimately be drawn is that in respect of one notice, and it was not proved as to who acknowledged the receipt of the notice. The Apex Court has held that as there was no rebuttal on behalf of the defendants as regards the notice served, the presumption of service was to be drawn in favour of the sender. In the present case, the respondent No. 2 (defendant No. 2) has categorically denied the service of notice and therefore, the onus would shift on the plaintiff landlord to prove that the notice was served. In respect of the authority cited in the case of M/s. Madan and Co. (supra), the learned Counsel Mr. Thorat submitted that in this case the Apex Court was

dealing with the provisions of J. & K. Houses and Shops Rent Control Act (34 of 1966) under which the only mode of service of notice is through the registered post, and therefore the Apex Court has expressed its opinion in reference to the peculiar facts and circumstances of the case, and the said authority cannot be pressed into service by the plaintiff landlord.

29. Considering the submissions made at the bar by the learned Counsel for the parties, this Court finds that in view of the facts and circumstances which are not in dispute viz. that the tenant was in arrears of rent from 1-9-1960 till the filing of the suit and on the date of notice dated 4-12-1970, and therefore, the tenant having failed to make payment of rent within a period of one month from the receipt of the said notice, the plaintiff landlord was entitled for a decree of eviction u/s 12(3)(a) of the Bombay Rent Act. The Apex Court in the case of Raju Kakara Shetty Vs. Ramesh Prataprao Shirole and Another, , while dealing with the provisions of sections 12(3)(a) and (b) of Bombay Rent Act in reference to the amendment by section 25 of Act 18 of 1987, in para 7, has observed as under:

"Dr. Chitale, the learned Counsel for the appellant frankly conceded that in view of the decision of this Court in Arjun Khiamal Makhijani v. Jamnadas C. Tuliani the case would be governed by section 12(3) as it stood before its amendment by Amendment Act 18 of 1987, since the substituted section 12(3) was found to be prospective in nature. This Court in paragraph 14 of the judgment at Page 624 repelled the submission that it was retrospective in operation in the following words:

"In our opinion, the tenants are not entitled even to the benefit of the amended sub-section (3) of section 12 of the Act inasmuch as on a plain reading of the sub-section it is not possible to give it a retrospective operation."

Dr. Chitale was, therefore, justified in submitting that the decision of this case must rest on the question whether it attracted section 12(3)(a) or section 12(3)(b) as it stood prior to the amendment. According to Dr. Chitale since the tenant was obliged to pay the education cess and other taxes by way of permitted increases which were payable at the end of the year, the case would not attract section 12(3)(a) as a part of the rent became payable annually and not monthly. He further contended that there was nothing on the record to show that the landlord had paid the amount of education cess and other taxes and unless payment of the taxes to the local authority was established the landlord had no right to claim the same from the tenant. According to him, the landlord's right to recover the taxes arises not at the end of the financial year but on the date on which he makes the payment to the local authority. Dr. Chitale, therefore, submitted that the case attracted section 12(3)(b) and when the tenant deposited a sum of Rs. 37,740/- on January 18, 1986 before the issues were settled on February 13, 1986 he could be said to have made the full payment of the rent then due and therefore the courts below were not justified in granting an eviction decree for arrears of rent u/s 12(3)(a) of the Act. In support of his

contention he invited our attention to four decisions of the Gujarat High Court, namely, (1) Panchal Mohanlal Ishwardas v. Maheshwri Mills Ltd. (2) Prakash Surya v. Rasiklal Ishwerlal Mehta, (3) Vanlila Vadilal Shah v. Mahendrakumar J. Shah, and (4) Vishwambhar Hemandas v. Narendra Jethalal Gajjar. He also placed reliance on a Bombay High Court decision in Muktabai Gangadas Kadam v. Muktabai Laxman Palwankar and the decision of this Court in Bombay Municipal Corporation v. Life Insurance Corporations of India. On the question of sub-letting he stated that the trial Court had rightly pointed out that the evidence falls far short of proof of sub-tenancy and the Appellate Court as well as the High Court were in error in reversing that view of the trial Court."

30. The only question therefore requires examination is that whether the notice of demand dated 4-12-1970 was validly served on the defendants tenants or not. Sub-section (2) of section 12 of the Bombay Rent Act clearly provides that the notice in writing demanding the standard rent and the permitted increases is required to be served upon the tenant in the manner provided for u/s 106 of the Transfer of Property Act, 1882. Section 106 provides that every notice under this section 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. Therefore, the notice may be served on the tenant, by either sending it by post or delivering it personally, and if such tender or delivery is not practicable, the notice may be affixed to a conspicuous part of the property. Unless the notice to suit is duly served on the tenant which is a pre-requisite for determination of tenancy of the tenant as contemplated u/s 12(2) of the Bombay Rent Act read with section 106 of the Transfer of Property Act, the landlord cannot succeed in suit for possession. The issue of service of notice on the tenants has always remain a vexed question before the courts, and therefore, wherever it is contentious issue the same will have to be examined by considering the peculiar facts and circumstances of the case. In the present case the petitioner landlord has resorted to all the modes of service viz. he has sent the notice of demand and/or quit to the original defendants 1 & 2 through his Counsel by Registered Post A.D., under Certificate of Posting and also by affixing the copy of the said notice on the suit premises. The question is that, by which mode the landlord was successful in serving the said notice of demand and/or quit on the tenant. The Trial Court has considered this question in detail by examining each and every mode of service and found that the notices sent by Registered Post A.D. as well as under certificate of Posting, were sent on correct address, and the said notices were returned with remarks "unclaimed" and "not found" and the same were produced before the Court alongwith the postal receipts at Exhibit A collectively. The trial Court found that the notices sent by Registered Post A.D. having been returned with the endorsement "unclaimed" and "not found" may not be taken as a good service, but so far as notice sent under Certificate of Posting on the correct address and having been duly proved

as good and sufficient service, the presumption can very well be raised in favour of the plaintiff landlord. Over and above, being apprehensive that the notices sent by Registered Post A.D. and under Certificate of Posting were likely to be avoided by the defendants tenants, the plaintiff landlord has also resorted to serving the copy of the notice by affixing it on the door of the said shop premises. This evidence of the plaintiff is highly objected by the learned Counsel for the respondents tenants on the ground that the evidence is unreliable and contradictory, and that the plaintiff has contradicted himself on the point of time as to when the notice was came to be pasted on the suit premises. In his evidence it has come on record that the pasting of the notice of demand was done on 5-12-1970 i.e. immediately on the next date of notice dated 4-12-1970, however in his cross-examination the plaintiff has stated that "According to me I pasted the copy of notice dated 4-12-1970 after the R.P. packets were returned back". Therefore it is the contention of the learned Counsel for the respondents tenants that, so far as the evidence of the plaintiff landlord with regard to the pasting of the notice of demand is concerned, it is contradictory and cannot be considered. Well, this by itself would not dislodge the case of the plaintiff, as the defendant No. 2 who stated that no such notice was pasted, has not led any evidence. On the other hand in his evidence, the defendant No. 2 has specifically stated that there were three servants in his shop and he did not remember their names and that they used to sit one after another in the said shop premises. This evidence of defendant No. 2 rather supports the case of the plaintiff, particularly when it is stated by the plaintiff that at the time when he had gone personally to offer notice at the shop premises, the servant of the defendant No. 2 was present and that he refused to accept the notice, and that is why he pasted the said notice on the suit premises.

31. The Appellate Court has concurred with the findings of the trial Court on the aspect of service of notice, and in my opinion, the two courts below have not committed any error or illegality in doing so as their findings are based on the material placed on record. The very fact, that the copy of the notice dated 4-12-1970 was served under Certificate of Posting and that the copy of notice was also sent by Registered Post A.D. is evident from the fact that the Certificate of Posting bear the postal mark of the place of posting identical to that of postal receipt placed on record a Exhibit A collectively. There can be no hesitation in holding that the notice was sent under Certificate of Posting to the addressee.

32. It is the contention of Mr. Thorat, the learned Counsel for respondents tenants, that the service of notice under Certificate of Posting, in its very nature, is doubtful and unreliable as held by the Supreme Court in the case of Shiv Kumar & others (supra). I am of the view that such postal certificate may be manipulated, obtained or procured and therefore, such certificate may not inspire confidence, but in the present case the very document when it is examined with the postal receipt, rule out any such possibility, and therefore, there is no reason to disbelieve the plaintiff on this point. The notice sent under Certificate of Posting can also be held to be a good service by raising a presumption u/s 114 of

the Evidence Act. In the absence of anything indicating that the notice was not posted under Certificate of Posting and also in view of the fact that the said notice was not returned to the sender by the dead letter office of the Postal Department, it can be held to be a valid service.

33. It has come on record in the evidence of the plaintiff landlord, as well as in the evidence of defendant No. 2, that the defendant No. 1-original tenant has left Bombay and since about 1958 she resides at native place. According to defendant No. 2 the defendant No. 1 whenever comes to Bombay from her native place, she resides with defendant No. 1. This fact, is therefore sufficient to explain the remark "not claimed" on the notice sent to defendant No. 1 by Registered Post A.D. because at the relevant time when the notice was served, she might not have been present in Bombay. It is also clear that when the notice was tendered at the suit premises, no-one claimed it on behalf of defendant No. 1. Similarly, defendant No. 2 in his evidence has stated that he used to visit the suit premises for about hour in the morning as well as in the late evening, and therefore, this fact makes it clear that during the day time normally when the postman would have visited the suit shop, the defendant No. 2 might not have been available, and that is why the endorsement "not found" was made by the postman. It is also not the case of the defendants that the business carried on by the defendants tenants in the suit premises was closed and the premises were under lock. On the contrary, the defendant No. 2 admitted that the business was being conducted in the suit premises through their servants. It is in this background, that the presumption as to the service of notice, the copy of which was sent by the plaintiff's Advocate under Certificate of Posting, can be raised, and the notice of demand can be said to have been served on the defendants tenants.

34. The strength and weakness of particular presumption of fact depends on the circumstances and the presence and absence of alternative explanation. In the present case, as the copy of the notice of demand was duly sent to the defendants at their correct address of the suit premises, which is evident from the Certificate of Posting Exhibit A collectively, and as the same has not been returned to the sender by the Dead Letter Office of the Postal Department, there is no reason why such a presumption as regards service of notice of demand in favour of the plaintiff would not be justifiable.

35. Another important aspect in the present case is that the knowledge about such notice of demand being sent, was also communicated to the then Advocate Mr. Ratnani who represented defendant No. 1-tenant, by the plaintiff's Advocate reply dated 22-2-1971 which is a part of Exhibit B collectively. There is no dispute about this fact that this reply has been received by Mr. Ratnani, the learned Advocate, who was representing defendant No. 1 tenant. The mentioning of the notice dated 4-12-1970 in the said reply of plaintiff's Advocate dated 22-2-1971 would have definitely met with immediate reply from the defendant No. 1 tenant thereby refuting the claim of the plaintiff's Advocate regarding such

service of notice on the defendants tenant. The conduct of defendant No. 1 tenant in keeping mum over the issue also corroborates the plaintiff's case that the notice of demand dated 4-12-1970 was duly served on the defendants. The trial Court has properly appreciated this part of the evidence in coming to the finding that the notice of demand was duly served on the defendants, and therefore, in the facts and circumstances of the case, it cannot be disputed that the notice of demand dated 4-12-1970 was served on the defendants who have chosen not to comply with the same and ultimately failed to pay the arrears of rent, and as such, they are liable to be evicted from the suit premises.

36. As rightly, argued by Mr. Rege, the contention of Mr. Walawalkar, the learned Counsel appearing for the legal heirs that the plaintiff's suit was barred by limitation, cannot be accepted. According to Mr. Rege, the case of the petitioner would be governed by Article 66 of the Limitation Act, 1963 which prescribes 12 years period for filing the suit for possession of immovable property when the plaintiff had become entitled to possession by reason of any forfeiture or breach of condition. As the suit filed by the plaintiff is for possession of the suit premises in default on the part of the defendants tenants to pay rent in terms of the notice of demand, Article 52 of the Limitation Act would not be attracted. It is clear that the suit of the plaintiff was not for arrears of rent, but the suit of the plaintiff was for possession of the suit premises, and therefore, it was not barred by limitation as the prescribed period for filing the suit for possession of immovable property under Articles 66 and 67 is of 12 years.

37. Before I conclude, there is one aspect which requires consideration. Mr. Rege, the learned Counsel for the petitioner landlord submitted that though the trial Court has granted a decree of possession in favour of the petitioner landlord, it is not mentioned therein as to why an enquiry into the future mesne profits cannot be ordered, and therefore, this Court should grant the said relief in favour of the petitioner landlord. As the trial Court has failed to exercise the discretion in favour of the petitioner landlord to which otherwise the petitioner landlord would have been entitled on the strength of the suit for possession and where there can be no quarrel over the issue as the litigation between the parties has been pending since 1974, not granting such relief of enquiry into future mesne profit would only result in miscarriage of justice. Once the Court having come to the finding that the plaintiff landlord is entitled to possession by executing the decree of eviction, the Court has discretionary power to pass the decree directing an enquiry into future mesne profits also. The Apex Court in the case of Gopalakrishna Pillai and Others Vs. Meenakshi Ayal and Others, , has observed that the Court has such discretionary power to pass a decree directing an enquiry into future mesne profits. This Court is informed that the respondent tenant, as a condition imposed by the Appellate Court while dismissing the suit for possession, has deposited certain sum in the Court. If that is the case, the petitioner landlord would be entitled to withdraw that amount so deposited by the respondent tenant, which could be appropriated towards future mesne profit, if, after due enquiry, it is found by the Court that the petitioner landlord is

entitled for the same.

38. Under the aforesaid facts and circumstances of the case, petition is therefore allowed. Plaintiff's suit is decreed. Respondents defendants are directed to hand-over the vacant and peaceful possession of the suit premises to the petitioner landlord. There shall be an enquiry into future mesne profits as contemplated under Order 20, Rule 12(1)(c)(i) of the Code of Civil procedure, 1908. The petitioner landlord would be entitled to the costs through-out. Decree to be drawn up accordingly. Rule is made absolute in the aforestated terms with costs.

39. The learned Counsel for the respondent tenant says that the execution of decree for possession, may be stayed for a period of three months. The learned Counsel for the petitioner landlord says that, on the respondents tenants filing the usual undertaking, the execution of decree for possession may be stayed. Therefore, execution of decree for possession is stayed for a period of three months, on respondents tenants filing such usual undertaking. Undertaking to be filed within a period of two weeks from today.

40. Issuance of certified copy is expedited. Court Stenographer to issue an ordinary copy of this order to the parties.