

(1994) 07 BOM CK 0035
In the Bombay High Court
Case No : Writ Petition No. 114 of 1990

Narsi Damaji Somaiya

APPELLANT

Vs

Ramdas Govind Kamat and Others

RESPONDENT

Date of Decision : 22-07-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 10, Order 5 Rule 19A, Order 5 Rule 20
Constitution of India, 1950 — Article 226
Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Rules, 1969 — Rule 10

Citation : (1995) 1 BomCR 675

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : S.D. Lotilkar, for the Appellant; J.E. Coelho Pereira and S. Chodankar, for the respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

E.S. Da Silva, J.—The challenge in this petition is the order of the Administrative Tribunal dated 23-3-1990 in Eviction Appeal No. 38 of 1988 dismissing the petitioners application for condonation of delay in filing the appeal against the order of his eviction passed ex parte by the Additional Rent Controller on 23rd June, 1988 in Case No. Bldg/3/ARC-III/88.

2. The case of the petitioner is that by a deed of lease dated 14-3-1984 the respondent No. 1 (hereinafter called "the respondent") let out to him shop No. 1 in his building known as Samadhan Co-operative Housing Society Ltd., at Malbhat, Margao, Goa, on a monthly rent of Rs. 800/-. Subsequently another shop being shop No. 2 in the very same building was leased to the petitioner on a monthly rent of Rs. 500/-. The petitioner is a permanent resident of Bombay and the suit shops are being used by him as office-cum-go downs for the purpose of his business of transportation of goods. On 26-2-1988 an application was filed by the respondent for the eviction of the petitioner before the Additional

Rent Controller on the ground of non-payment of rents. A notice fixing the date of hearing on 25-4-1988 was sent to the petitioner by registered post at the address of the suit premises which were leased to him, namely, shop No. 1 on the ground floor of building "A" of Samadhan Co-operative Housing Society. The notice was returned unserved and the matter was adjourned from 25-4-1988 to 5-5-1988 with an observation that the matter was being adjourned for alternative summons on the suit premises through the Mamlatdar of Salcete.

On 5-5-1988 the Additional Rent Controller ordered the case to proceed ex parte against the petitioner after observing that the petitioner had failed to appear although no order was passed holding that he was either duly served or not. The matter was then adjourned to 19-5-1988. On that day the Rent Controller recorded the deposition of the respondent and adjourned the case for arguments on 24-5-1988 and thereafter on 23-6-1988 on which date the eviction order was passed against him. It appears that prior to that the notices were sought to be served on the petitioner by substituted service by pasting them on the suit premises although the petitioner disputed that they were actually pasted on the premises. After the eviction order was passed on 23-6-1988 a notice dated 30-8-1988 was pasted on the suit premises on 1-9-1988 stating that the actual eviction of the premises would be carried out. This notice dated 30-8-1988 seems to have been issued by the Controller consequent upon an application filed by the respondent for execution of the eviction order. It was only on 1-1-1988 after the pasting of that notice that the petitioner came to know for the first time of the institution of the eviction proceedings and the order of eviction passed therein.

On 2-9-1988 the petitioner filed an application for stay of the eviction order before the Rent Controller who, by his order dated 5-9-1988, stayed the execution proceedings for a period of 30 days. On 19-9-1988, after obtaining a certified copy of the judgment and order dated 23-6-1988 of the Rent Controller, the petitioner filed an appeal against the said judgment and order before the Administrative Tribunal along with an application for condonation of delay and a further application for stay. The application for stay was granted ex parte and a notice was issued to the respondent for filing his say on the application for condonation of delay. The main Eviction Appeal was registered as Eviction Appeal No. 33 of 1988. Thereupon the tribunal by judgment and order dated 23-3-1990 which is impugned in this petition along with the order of the Rent Controller rejected the petitioners' application for condonation of delay on the ground that no sufficient cause for condoning the delay had been made out by him. While so holding the tribunal observed that the petitioner had not been able to substantiate his case on account of his failure to file his personal affidavit to this effect and that he had sought to justify the delay merely on the basis of an affidavit of his constituted power of attorney.

3. Shri Lotlikar, learned Counsel for the petitioner, has made several grievances against the impugned judgments and orders of both the Administrative Tribunal

and Rent Controller. It was firstly urged by the learned Counsel that the Tribunal failed to appreciate that the petitioner was sought to be served by substituted service inspite of the fact that no order has been passed by the Additional Rent Controller treating the said service as valid and effective. Therefore the tribunal ought to have held that the petitioners' appeal was not even barred by limitation since in the circumstances the limitation period for the petitioner ought to have been held as commencing from the date of his knowledge of the eviction order which was 1st September, 1988 when he learnt that the said order already passed against him was bound to be executed. The tribunal also overlooked the fact that the petitioner had not been served personally in the proceedings and he being a permanent resident of Bombay it was not possible therefore to say that he had deliberately remained absent from proceedings which were ordered to proceed ex parte against him. As such the learned Counsel urged that it was only fair and proper that the petitioner should be allowed to contest the proceedings because the ex parte order passed against him would result in his eviction from the premises in clear violation of principles of natural justice. The learned Counsel submitted that therefore the first point which is to be considered in this case was to find out whether the procedure followed by the Rent Controller to serve the first notice of the proceedings to him has been done according to the rules which regulate such proceedings. In this respect the learned Counsel invited my attention to Rule 10 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Rules, 1969 (hereinafter called "The Rules") which prescribes the manner of giving or serving notices of orders and provides that every notice under the Act may be served either by tendering or delivering a copy thereof or sending a copy by post by registered post A/D to the person on whom it is to be served or its authorised agent or if service in the manner aforesaid cannot be made, by affixing a copy thereof at his last known place of residence.

On behalf of the petitioner it was then contended that admittedly in this case the first notice was addressed by the Rent Controller to the place of the leased premises being thus obviously defective. Thereafter the second notice of substituted service which has been allegedly pasted in the suit premises could not be said as being a notice at all because, apart from the fact that the petitioner is disputing that the pasting of that notice was done, in this respect the Rent Controller was supposed to record prior to that his satisfaction that personal service of the notice was not possible. Further even after the pasting of that notice the Rent Controller has failed to record his satisfaction that the service of the notice by substituted service had been duly complied with. Further though the Rent Controller has purportedly proceeded with the case ex parte against him he has done so without passing any formal order directing that the case should go ex parte. Therefore the limitation against the petitioner would run only from 1st September, 1988 when the petitioner came to know for the first time of the order of eviction and thus his application for condonation was to be held within time. The learned Counsel made it clear that his application for

condonation was done without prejudice to his contention that the appeal was within time.

It was further contended by the learned Counsel that the eviction order was pronounced in the open Court and no communication was sent to him. After the alleged pasting of the notice on the suit premises the next pasting was done in respect of the notice of eviction. The tribunal has dismissed his application for condonation on the sole ground that the affidavit produced by him in support of his lack of knowledge about the proceedings was sworn not personally by the petitioner but by his power of attorney. In this respect the learned Counsel submitted that it is nobody's case that after the order of eviction was passed the same was communicated to the petitioner except by pasting on the suit premises the notice regarding the execution of the said order on 1-9-1988. The learned Counsel reiterated that although the eviction order was passed on 23-6-1988 the same was not known to him for lack of communication till he came to know about the notice of the execution on 1-9-1988. That apart, the learned Counsel urged, the application for condonation of delay should have been done in terms of the rules, namely, Rule 11, either personally or through an authorized agent. In the instant case the only authorized agent, that is to say, the petitioner's power of attorney was a person locally available in Goa to do so since the petitioner is a permanent resident in Bombay. Thus, according to the learned Counsel, the petitioner could have known about the eviction order only through his representative in Goa and therefore it was only his representative who could have told him when the notice became known to the petitioner through the said power of attorney. Besides the learned Counsel submitted that nowhere the respondents sought to say that the petitioner had come to know about the order earlier, i.e., prior to 1st September, 1988 or at any other given point of time. Thus, the learned Counsel concluded, since there was no valid service of the original notice or even through substituted service there could not be said there was any delay. The pasting of the notice in the suit premises being illegal no valid service of the eviction application was to be held as having been done by the Rent Controller. Hence, all the proceedings which followed the pasting or irregular service were contrary to the principles of natural justice.

By way of abundant caution the learned Counsel tried to impress upon me that, even assuming that the service was valid, even so in the facts and circumstances of the case this Court should allow a fair trial to the petitioner and the landlord was not required to take advantage of the ex parte order passed by the Rent Controller so as to get the unfair situation on which the petitioner was placed consequent upon that order to be perpetuated.

4. Mr. Coelho Pereira, learned Counsel for the respondent, has strongly joined issue with the petitioners learned Counsel on the points sought to be raised by him that the notices of the proceedings given to the petitioner either by registered post or by substituted service were invalid and not according to the procedure laid down by the rules. The learned Counsel disputed at the very

outset that the premises leased to the petitioner were meant only for a godown or a store-room. According to the learned Counsel, the lease agreement clearly refers to a shop situated on the ground floor of his building Samadhan Co-operative Housing Society Limited which has been agreed to be taken by the petitioner on lease for his business purposes which shop has been provided with water and electricity connections in respect whereof the petitioner was bound to pay all the charges as per Clauses (5) and (10) of the agreement. Therefore, the suit premises could not be just called as godown and instead it should be held as being leased for the purpose of office-cum-store-room of the petitioner who appears to run a business of transportation of goods. Therefore, the learned Counsel submitted, the petitioner could not be heard as saying that he was not in a position to receive the initial notice which was addressed to the said shop and claimed the knowledge of the proceedings only when he saw the notice of eviction pasted on the said premises. The petitioner, therefore, even assuming that he had not received the postal notice addressed to the premises, should have seen also the notice which has been pasted on the suit premises consequent upon the order of the Rent Controller directing the service of the notice by substitute service. The learned Counsel contended that this notice was actually pasted on the premises by the bailiff of the Mamlatdar in the presence of the witnesses. Hence, there was no question of the petitioner remaining in the dark with regard to any of these modes of service followed in this case.

On the question of as to whether the pasting of the notice could have been done by the Rent Controller on the premises of the shop and not on the residence of the petitioner in terms of Rule 10, the learned Counsel contended that the provision should be read as enabling this type of service by pasting the notice on the premises which were the subject-matter of the lease when such lease was not meant for residence but instead for business purposes. It was only a question of construction of the statute which was required to be done for the purpose of satisfying the true spirit of the law. According to the learned Counsel Rule 10 does not exclude the service by affixation or pasting on the very premises leased to the tenant and which is the subject-matter of the proceedings. The learned Counsel has drawn my attention to the wording of the said Rule 10 which in its first part refers to the service to be done either by hand delivery or by registered post addressed to the person on whom it is to be served or to his authorized agent. Thus, according to the learned Counsel, this service does not necessarily mean that it has to be done at the residence of either the lessee or of his authorized agent and could have been done at the place of the leased premises more so when in the instant case the premises are being used as office-cum-store-room wherein it is natural that one manager or at least a clerk would remain for the purpose of carrying the petitioner's business. The learned Counsel has referred to the CPC which contemplates various modes of service by substitute service including publication in the newspapers and hence, in a case where a person has business premises in Goa while he himself resides in Bombay, when a situation arises consequent upon the fact that the lessee has

refused or failed to accept the service at his place of residence, there was nothing wrong in the service being done at the place of business in Goa either personally or by substituted service. In such circumstances the service by affixation of the notice to the business premises would be a valid service so much so the rules do not provide for any mode of substitute service by way of publication. On the other hand the learned Counsel tried to justify the stand taken by the tribunal in refusing to entertain the petitioners application for condonation of delay which was filed by him on the basis of the affidavit sworn not by the petitioner personally but instead by his power of attorney. When the appeal was filed the petitioner moved an application for condonation on the background of his contention that no personal service either by hand delivery or registered post or even by substitute mode of service consequent upon pasting was done in respect of the proceedings instituted by the respondent. In such circumstances the question which would arise was as to whether there has been or not a good or valid service of the proceedings. The petitioner contends that he had no knowledge of the proceedings till he came to know about the pasting of the eviction order of the suit premises. In support of his stand the petitioner has filed only an affidavit of his power of attorney. The tribunal has held that the power of attorney who has sworn the affidavit was not the local manager who could have known the facts and therefore, even assuming that the power of attorney had sworn such affidavit on the basis of information given to him by the said manager, it was clear that whatever the power of attorney has sworn before the tribunal was only a matter of hearsay knowledge of his. Besides the learned Counsel pointed out that the application for condonation was not filed either by the petitioner or by his power of attorney but instead by his advocate without even carrying the signature of any of them. Further, the said application in its paras 4 and 5 clearly refers to the fact that it was the petitioner who immediately after he got the information of the pasting of the eviction order on the shutter of his shop on 1st September, 1988 through his local manager aimed directing the petitioner to hand over vacant and peaceful possession of the suit shops to the respondent, he move an application for stay and applied for certified copies of the relevant orders in order to prefer the appeal. It is thus seen that none of these moves were done in the instant case by the petitioners power of attorney who has filed the application for condonation of delay but instead by the petitioner himself and that also purportedly in person. In his affidavit, which appears to have been filed along with the application for condonation, the manager of the petitioner, one Dnyaneshwar Anant Sawant, has denied that any bailiff of the Mamlatdar's Court had fixed a notice on the shop premises on 28th April, 1988, which he himself calls as office-cum-godown of the petitioner and states that it was only on 1st September, 1988 that the notice of the eviction was pasted on the shutter of the said office directing the petitioner to hand over vacant and peaceful possession of the office premises to the respondent. Then he had shown the notice to one Shri Nagda on 1st September, 1988 when he came to visit the premises. The said Nagda has also filed an affidavit on 28th September, 1988 which is found on the record of the Administrative Tribunal and

wherein he confirms the contents of the affidavit of the manager Sawant sworn subsequently on 10th January, 1989 to the extent that he acknowledged that he came to learn for the first time of the order of eviction having been pasted on the shutter of the suit shop only on 1st September, 1988. The learned Counsel for the respondent has made available to me a copy of the said affidavit which discloses that the verification in this affidavit shows that Nagda verifies the averments contained in the affidavit as being true to his own knowledge. A similar verification about the knowledge of the facts contained in his affidavit has been done by the manager Sawant also. It thus follows, the learned Counsel submits, that if the petitioner came to know about the eviction order only through the manager Sawant who informed this fact to his power of attorney Nagda and he was not aware of the proceedings prior to that, namely, that there has been no valid service effected on him or that the service in the proceedings was caused to be done by the Rent Controller by affixation of the summons on the shop premises on 28th September, 1988 there was nothing wrong on the part of the tribunal to hold that the affidavit of manager Sawant and for that matter of Nagda himself would not constitute conclusive evidence to justify the petitioners absence of any knowledge in respect of eviction proceedings, namely, of the eviction order pasted by the Rent Controller on 23-6-1988 earlier than 1st September, 1988. Thus, the learned Counsel urged, the tribunal had no material before it to come to a different conclusion than that the petitioner has not made out any case to substantiate his prayer for condonation of delay in filling the appeal.

5. I have elaborately narrated in detail all the submissions of the learned Counsel but only for the sake of record. However, in my view, the limited question which arises in this case for my determination is to find out whether the record of the proceedings shows that the initial service of the respondent's application for eviction was or not done on the petitioner in the manner prescribed in the Rules. Admittedly Rule 10 provides that such service should be done either in person by hand delivery or by registered post to the lessee or his authorized agent and only in case that this is not possible then substituted service is contemplated by affixing a copy of the summons at his last known place of residence. Admittedly the petitioner was a resident at Bombay and his address in Bombay was known to the respondent because the same is mentioned in the deed of lease. Contradictory submissions were made during the course of arguments by the learned Counsel as to whether any service was sought to be made by the respondent to the petitioner through the said petitioner's address in Bombay. In this respect while Mr. Lotlikar has contended that no such service was made to his residential address in Bombay and the only attempt to serve the petitioner was through the address of the business premises, being the shop situated at Malbhat, Margao, Mr. Coelho Pereira has submitted that the petitioner was sought to be served at his address in Bombay and because the service was refused or the letter came returned the service was done or sought to be done to the address of the business premises. In such circumstances I have called for the

original records of the trial Court and after perusing the file which was made available to me I find that, consequent upon the petitioner's application for eviction which is dated 26th February, 1988, the initial summons were issued to the petitioner to appear in person or by a duly authorized agent on 25th April, 1988 in this connection to both the addresses of the business shop of the petitioner at shop No. 1 of the building Samadhan Co-operative Housing Society, Margao by a notice dated 16th March, 1988 as well as to the residential address of the petitioner in Bombay being Hema Krupa Housing Society, Mulund, Bombay - 400 081 by notice dated 23rd March, 1988. It seems that none of these notices were actually served and were returned to the office of the Rent Controller. The envelope which contained the notice addressed to the suit shop carries an endorsement made by the Post Office on 18-3-1988 and 21-3-1988 indicating that the petitioner was found absent in the shop premises. Similarly the notice addressed to Bombay appears also to have been returned unserved inspite of the address of the petitioner being the correct address which can be found from the circumstance that prior to the petitioner was served by the respondent to the same address in respect of the advocate's notice sent to him by the respondent on 5-8-1988 which records I also find in the file of the trial Court at page 31/c. This shows that the petitioner has deliberately refused to accept the personal summons or the notice to appear in the proceedings sent to him by the Rent Controller at the very initial stage. The record shows that as a result of this situation the respondent's advocate has filed an application to the Rent Controller on 25th April, 1988 which was the date on which the petitioner was supposed to appear on the strength of the initial summons which were returned unserved praying that the service of the notice to the petitioner should be made by substitute service by pasting of the summons on the suit premises. This application was granted by the Rent Controller on the very day which fact can be ascertained also from the endorsement of the order in the same application. As a result of this application the Rent Controller adjourned the case for 5-5-1988 and directed that the petitioner should be served by substitute service of the notice by means of affixing the same to the most visible point of the suit premises through the Mamlatdar's Office. Such notice dated 25th April, 1988 is shown to have been served by the bailiff of the Mamlatdar's Office on 28-4-1988 in the presence of two witnesses certified by the said bailiff. It thus follows that the service of the petitioner by substitute service appears to have been done with strict compliance of the legal requirements. This being the position the petitioner can have no grievance that the initial service of the notice was invalid and all further proceedings have been vitiated for non-observance of principles of natural justice. Nowhere the petitioner has challenged the order of the Rent Controller which has clearly stated that the petitioner has been served by substitute service by means of pasting of the notice on the suit premises in the presence of two witnesses. The record of the file of the trial Court shows that this averment of the Rent Controller in the eviction order is substantiated by documentary evidence in respect of which I have no reason to doubt about its genuineness. Thus the contention of the petitioner and the affidavit of Manager

Sawant that no pasting was done of the notice on the shutter of the suit premises on 24-4-198 cannot be accepted on its face value and is thus to be summarily rejected. The learned petitioners counsel's submission that even assuming that such pasting was done the same could not have been done at the suit premises but instead at the residence of the petitioner appears also to be misconceived. Admittedly the petitioner is a permanent resident of Bombay and the record shows that even the personal summons addressed to him to his residential address returned unserved, obviously on account of his refusal to accept it bearing in mind that the address to which the letter was sent was correct and on the same address the petitioner had already acknowledged the receipt of the legal notice sent by the respondent's advocate on the earlier occasion. It is therefore impossible to argue that in such circumstances the petitioner could expect that the service by substituted service should have been done to him by pasting the notice at the __. The petitioner has a place of business in Goa which are the shop premises which have been leased to him by the respondent and were the subject-matter of the eviction proceedings. The shop premises, as per the own admission of his Manager Sawant, is an office-cum-store-room wherein the said manager on his own statement used to sit. It therefore stands to reason that the pasting of the substitute service of the notice could have been perfectly done at the premises of the petitioner's business in the suit shop-cum-office. Therefore the contention of Mr. Coelho Pereira that in such circumstances, when the lease agreement is meant for the purpose of business of the lessee, the provision of Rule 10 insofar as it refers to the affixation of the notice at the residence of the lessee should be read as referring to the place of the business premises, that is to say, to the place where the premises rented are located, appears to be sound and well conceived thus deserving acceptance. I therefore hold that Rule 10 is to be so construed in the instant case so as to comply with the spirit of the law and to advance the cause of justice. Further the submission of the petitioner's learned Counsel that no proceedings could go ex parte against the petitioner unless there was an order of the Rent Controller so directing which order has not been made by the Rent Controller appears to be negatived from the record of the file wherein it is clearly shown in the Roznama dated 5-5-1988, that the Rent Controller has in so many words made such order by saying that since the respondent failed to appear on the date fixed for hearing the case should be proceeded ex parte against him. In my view nothing more was required to be done and if the learned petitioners counsel intends to mean that inspite of this direction given by the Rent Controller in the Roznama which is shown to have been signed by him the Rent Controller was required to issue another separate formal order to this effect, certainly this contention is impermissible and lacking in foundation either in facts or in law. On the other hand the grievance made by the learned Counsel that no express satisfaction was recorded by the Rent Controller that service either by hand delivery or registered post was not possible and thus a case for substitute service would arise appears also to be misconceived in the facts and circumstances of the case. Once the record shows that an attempt to serve the

petitioner, inspite of being resident of Bombay by postal service sent to his residential address in Bombay and also to the address of his business premises which attempts failed in respect of both, the fact of the Rent Controller having granted the respondent's advocate's application dated 19th April, 1988 that in such circumstances the petitioner should be served by substitute service clearly reveals that the order allowing such substitute service was passed with due application of mind and in the express terms of the prayer made by the respondent. Therefore no separate or special wording would be required for the Rent Controller to record his satisfaction about the existence of a situation which would justify the service of the petitioner by means of substitute service. Hence, the contention of the learned petitioner's counsel in this regard fails and is also to be discarded.

6. This being the position, in my judgment the concurrent findings of both the Rent Controller and the Administrative Tribunal as well, to the extent that they have held that the petitioner has failed to make out a case to justify the condonation of delay in filing the appeal on the ground that he came to know of the order of eviction only on 1st September, 1988, need not require any interference since these findings appear to have been based on material and relevant evidence available on record and bearing in mind the special circumstances which had led both the courts below to the conclusion that the petitioner has deliberately and wilfully avoided the service of the summons in order to forfeit the legitimate right of the respondent to evict the petitioner on the alleged ground of non-payment of rent, which right was sought to be adjudicated by him through his application dated 26th February, 1988. The reason given by the Tribunal to refuse to entertain the present application for condonation of delay due to the fact that the petitioner sought to justify ignorance of the proceedings as well as of the eviction order in time till 1st September, 1988 through an affidavit of his power of attorney, when such attempt should have been done by the petitioner himself in an affidavit to be sworn personally by him, cannot be said to be a perverse or illegal finding which is required to be unsettled.

7. In the result nothing survives in the petition which is bound to be rejected. Rule is accordingly discharged with costs.