

(1994) 10 BOM CK 0066

In the Bombay High Court

Case No : Civil Revision Application No. 426 of 1991

Vishwasrao Shankarrao Meghe since deceased through his
L.Rs.

APPELLANT

Vs

Bachharam Varumal Balwani and another

RESPONDENT

Date of Decision : 06-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 106, 115
Evidence Act, 1872 — Section 114(f)
General Clauses Act, 1897 — Section 27

Citation : (1995) MhLj 403

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : V.C. Daga, for the Appellant; S.P. Dharmadhikari, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—This revision application u/s 115 of the Code of Civil Procedure, 1908 (for short "CPC") was filed by Vishwasrao Shankarrao Meghe, who died during the pendency of the revision application and the present applicants have been substituted in his place as the legal heirs, taking exception to the judgment and decree passed by Second Additional District Judge, Wardha on 6-12-1989 in Regular Civil Appeal No. 102/88 whereby he set aside the judgment and decree passed by Civil Judge, Senior Division, Wardha on 22-11-1988 in Small Cause Civil Suit No. 271/87 and thus dismissed the applicant's suit for ejectment and possession.

2. Vishwasrao Shankarrao Meghe (since deceased) and predecessor-in-title of the applicants (hereinafter referred to as "Plaintiff") filed a suit for possession and mesne profits against the Non-applicant Bachharam Varumal Balwani (hereinafter referred to as "Defendant") in the Court of Civil Judge, Senior Division, Wardha on 22-11-1988. The plaintiff averred that he was the owner of the house bearing Municipal No. 23 in Ward No. 13 at Wardha and the said

house, the details of which were given in para 1 of the plaint, was let out to the defendant at the rate of Rs. 45/- per month. According to the plaintiff, the tenancy month of the defendant commences on the 1st day of each English calendar month and the rent was agreed to be paid regularly each month. The defendant was not paying rent regularly and, therefore, plaintiff was constrained to move the Rent Controller seeking permission to determine the tenancy of the defendant. The Rent Controller, Wardha by his order dated 24-6-1975 granted permission to the plaintiff to determine the tenancy of the defendant. The order of Rent Controller granting permission to the plaintiff to determine the tenancy of the defendant was challenged by the defendant in appeal and the said appeal was dismissed. The defendant took up the matter to the High Court and filed the Writ Petition No. 207/75 challenging the order of the Rent Controller, Wardha and the appellate Court's authority granting permission to the plaintiff to determine his tenancy. The writ petition was dismissed by the High Court on 25/28-2-1983. The defendant filed Letters Patent Appeal No. 33/83 and that too was dismissed and thus the permission granted by the Rent Controller to the plaintiff to determine the tenancy of the defendant vide his order dated 24-6-1975 became final. The plaintiff averred in the plaint that thereafter he sent the notice dated 6-3-1985 through his counsel to the defendant determining his tenancy by the midnight of 31st March, 1985 and the said notice was returned. The plaintiff waived the said notice and sent another notice dated 2-4-1985 through his counsel to the defendant and determined his tenancy by the midnight of 30th April 1985. The notice dated 2-4-1985 was sent by Registered Post as well as under Certificate of Posting to the defendant and one copy of the notice was affixed on the house in occupation of the defendant on 2-4-1985 in the presence of two witnesses. According to the plaintiff, the notice sent by Certificate of Posting was received by the defendant and the notice sent by registered post was returned to the plaintiff with the endorsement that the defendant was not available. The plaintiff submitted that the rent was outstanding for a period from 1-8-1984 to 30-4-1985, and therefore, claimed arrears of rent amounting of Rs. 405/- up to 30-4-1985, claimed damages from 1-5-1985 to 31-7-1987 amounting to Rs. 1,215/- and a sum of Rs. 100/- towards notice charges. Thus, the plaintiff prayed that the suit for possession and eviction be decreed and defendant be directed to hand over the vacant possession of the suit premises to the plaintiff and enquiry as to mesne profit under Order 20, Rule 12 of CPC be held.

3. The defendant contested the claim of the plaintiff and submitted that he has been paying the rent regularly and since no notice was sent by the plaintiff demanding the regular payment before starting rent control proceedings seeking permission of the Rent Controller to determine his tenancy, the order of the Rent Controller granting permission to serve quit notice on the defendant was not legal and proper. The defendant also set up the defence that the quit notice dated 2-4-1985 terminating the tenancy of the defendant was not legal and proper.

4. The Civil Judge, Senior Division, Wardha observed that in view of the fact that

the defendant has deposited the rent in the court till 31-10-1988 and in view of the statement made by both the sides evidence on the point of arrears of rent is not required to be recorded and further the defendant has already deposited the rent from the date of the presentation of the suit, the issue in respect of claim of arrears does not survive and hence the following issues :

- (1) Whether the tenant is entitled to the vacant possession of the suit premises from the defendant as alleged?
- (2) Whether the plaintiff is entitled to an amount of Rs. 1,215/-towards the damages as alleged?
- (3) Whether the plaintiff is entitled to notice charges of Rs. 100/- as prayed for?
- (4) What decree and costs?

The plaintiff in support of his case examined himself as P.W.1, Moreshwar (P.W.2) and Kashinath (P.W.3). The plaintiff also produced and proved the documents viz. the original notice dated 2-4-1985 (Ex. 27), the registered cover under which the original notice dated 2-4-1985 (Ex. 29), the copy of notice dated 2-4-1985 (Ex. 25), the Certificate of Posting (Ex. 26) and the first notice dated 6-3-1985 (Ex. 22). On the other hand, the tenant defendant examined himself as D.W.1.

5. The trial Court after considering the entire evidence on record held that the service of the notice dated 2-4-1985 is duly proved, and therefore, the tenancy of the defendant has been terminated. The trial Court thus held that plaintiff is entitled to the decree for vacant possession of the suit house from the defendant. As regards mesne profit, the trial Court held that an enquiry under Order 20, Rule 12 deserves to be held for determination of mesne profits from the date of the institution of the suit till the actual delivery of vacant possession of the suit premises to the plaintiff. The trial Court thus decreed the plaintiff's suit for possession and ordered enquiry of the mesne profits vide its judgment and decree dated 22-11-1988.

6. The defendant challenged the judgment and decree passed by the Civil Judge, Senior Division, Wardha on 22-11-1988 against him in appeal before the Second Additional District Judge, Wardha. The Additional District Judge, Wardha framed the following points for determination for his consideration in the appeal:

- "(1) Whether the notice sent by the respondent plaintiff demanding regular payment if he wished to insist upon it was necessary to be served on the appellant defendant before starting rent control proceeding for permission to serve quit notice on the appellant defendant to terminate his tenancy?
- (2) If yes, whether the order of the Rent Controller granting permission to serve quit notice on appellant defendant was legal and proper ?
- (3) Whether the quit notice (suit notice) dated 2-4-1985 terminating the tenancy of the appellant defendant is legal and proper?

(4) Whether the respondent plaintiff could be entitled for claim of ejection against the appellant defendant?

(5) Whether the judgment and decree passed by the learned lower Court is sustainable in law?

(6) What order?"

The Appellate Court held that it was necessary for the plaintiff to send the notice to the defendant demanding regular payment if he wished to insist upon it before starting rent control proceedings for permission to serve quit notice on the defendant. The Appellate Court also held that the order of Rent Controller granting permission to serve quit notice on appellant defendant was not legal and proper. The Appellate Court also concluded that the quit notice dated 2-4-1985 terminating the tenancy of the defendant was not legal and proper, and therefore, plaintiff was not entitled to the decree for ejectment against the defendant. Consequent to these findings, the Second Additional District Judge, Wardha vide his judgment and decree dated 6-12-1989 set aside the judgment and decree passed by Civil Judge, Senior Division, Wardha in Small Cause Civil Suit No. 271/87 passed on 22-11-1981.

7. Mr. V.C. Daga, the learned counsel for the plaintiff now represented by his legal representatives present applicants, strenuously urged that the Appellate Court has committed serious error of jurisdiction in holding that the order of Rent Controller granting permission to serve quit notice was not legal and proper since no notice was sent by the plaintiff demanding regular payment before starting rent control proceedings for permission to serve quit notice was sent by the plaintiff demanding regular payment before starting rent control proceedings for permission to serve quit notice on the defendant despite the fact that the order of Rent Controller granting permission to serve quit notice was found legal and proper by this Court and the writ petition and the Letters Patent Appeal filed by the tenant challenging the order of Rent Controller granting permission to serve quit notice were dismissed. The learned counsel for the applicant also submitted that there was no justification for the appellate Court to hold that the quit notice dated 2-4-1985 terminating the tenancy of the defendant was not legal and proper because the notice dated 2-4-1985 (Ex. 27) was sent to the defendant under registered cover (Ex. 29) and the said notice was returned since after repeated efforts by the Postman, the defendant was not available. According to Mr. Daga, the notice terminating the tenancy was rightly presumed to be served by the trial Court and there was no justification for the appellate Court to hold otherwise. In opposition to the submission made by Mr. Daga, on the other hand, Mr. S. P. Dharmadhikari, the learned counsel for the defendant non-applicant submitted that the appellate Court has not committed any error of jurisdiction and the findings recorded by the appellate Court on the points for determination framed by it were proper and do not call for any interference by this Court. Mr. Dharmadhikari, the learned counsel submitted that the plaintiff has not examined the Postman and presumption which could be drawn relating to the registered

notice (Exs. 27 and 29), the same stood dislodged and dispelled by the statement of defendant. Mr. Dharmadhikari submitted that so far as the notice sent by certificate of posting (Ex. 28) is concerned, it did not have full and complete address, and therefore, no presumption could be drawn. As regards the service by affixation, the learned counsel submitted that since the notice was not properly tendered to the defendant, the stage of serving the notice u/s 106 by affixation did not arise. Mr. Dharmadhikari thus submitted that the quit notice having not been properly served, the appellate Court was not unjustified in setting aside the judgment and decree of eviction passed by the trial Court.

8. Mr. Dharmadhikari, in support of his submissions placed reliance on the judgment of the Apex Court in *Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana*, . Mr. Daga on the other hand relied on the decision of the Apex Court in *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, and the judgment of this Court in *P. A. Kowli vs. Narayan Jagannath Mahale*, 1981 Mh.LJ. 355.

9. At the outset, it may be observed that the Second Additional District Judge, Wardha Shri Y. D. Bagde has exceeded all judicial propriety when he sat over the judgments of this Court dated 28-2-1983 delivered by Division Bench of this Court in Letters Patent Appeal No. 33/83 affirming the judgment of the learned Single Judge in Writ Petition No. 207/75 and upholding the order of the Rent Controller, Wardha dated 24-6-1975 granting permission to the plaintiff to determine the tenancy of the defendant. How could the Second Additional District Judge, Wardha hold that the order of the Rent Controller granting permission to the plaintiff to serve quit notice on the defendant was not legal and proper on the basis of judgment reported in 1989 Mh.L.J. 207 when the said order passed by the Rent Controller was challenged before this Court in writ petition and letters patent appeal referred to hereinabove and was upheld. As already stated, the plaintiff has filed the proceedings before the Rent Controller, Wardha, seeking permission to determine the tenancy of the defendant and the Rent Controller, Wardha by his order dated 24-6-1975 granted permission to the plaintiff to determine the tenancy of the defendant. The defendant filed appeal before the Appellate Authority against the order of the Rent Controller dated 24-6-1975, but the said appeal was dismissed. Then the defendant challenged the order of the Rent Controller, Wardha dated 24-6-1975 granting permission to the plaintiff to determine the tenancy of defendant and the order of the Appellate Court in Writ Petition No. 207/75 before this Court. The writ petition filed by the defendant was dismissed on 25/28-2-1983 and thus the order of Rent Controller dated 24-6-1975 granting permission to determine the tenancy of the defendant was upheld. The defendant challenged the judgment of the learned Single Judge and the order of Rent Controller and the Appellate Authority in L.P.A. No. 33/83 before the Division Bench of this Court and the said appeal was also dismissed by the Division Bench on 28-2-1983 and thus, the order of the Rent Controller dated 24-6-1975 granting permission to the plaintiff to determine the tenancy of defendant became final and was not open to scrutiny by the Additional District Judge. Despite the aforesaid facts having been brought to the notice of Second

Additional District Judge, Wardha, the said Judge held that the order of the Rent Controller granting permission to the plaintiff to serve quit notice to the defendant was not legal and proper because before initiating the rent control proceedings for permission to serve quit notice on the defendant, the plaintiff did not send a notice demanding regular payment. The manner in which the Second Additional District Judge, Wardha (Mr. Y. D. Bagde) has dealt with points for determination Nos. 1 and 2 in the judgment deserves to be deprecated and calls consideration for serious disciplinary action. It was absolutely not at all open to the Second Additional District Judge to open the matter relating to order of Rent Controller granting permission to serve quit notice on the defendant when the said order had attained finality up to the Division Bench of this Court, and the settled legal position that the Civil Court has no jurisdiction to examine the question whether the permission granted by the Rent Controller was proper or not. The more surprising and shocking part is that all these factual and legal positions having been brought to the notice of Additional District Judge were duly noted in the impugned judgment, still the said Judge held that the order of Rent Controller granting permission to serve quit notice on the defendant was not legal and proper.

10. In this view of the matter, therefore, the conclusions arrived by the appellate Court that the order of Rent Controller granting permission to serve quit notice on defendant was not legal and proper because before starting rent control proceedings for permission to serve quit notice, to defendant to terminate his tenancy, no notice was served by the plaintiff demanding regular payment, cannot be sustained and is liable to be set aside. The findings recorded by the Appellate Court on points Nos. 1 and 2 for determination in the appeal are, therefore, quashed and set aside.

11. Now coming to the next question whether the Appellate Court was justified in holding that the quit notice dated 2-4-1985 terminating the tenancy of the defendant was not legal and proper, it may be observed that while arriving at this finding also, the Appellate Court has committed material illegality, and irregularity in exercise of its jurisdiction in disturbing the finding recorded by the trial Court. The trial Court has observed that the notice dated 2-4-1985 sent through registered post (Ex. 27 is the original notice and Ex. 29 is the envelope) was returned back to the plaintiff unserved with the endorsement "not found". The trial Court recorded its observation :

"The envelope shows that the postman visited the house of the defendant on 4th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 17th, 18th, 20th and 22nd April 1985. However, the defendant was not found at home and ultimately as the time limit for serving the said notice was over, the same has been returned back unserved. Later on the endorsement of the postman dt. 22-4-1985 shows that on all the above said dates the postman went to the house of the defendant, and this fact, the family members of the defendant must have told to him. However, the defendant avoided to receive the said notice."

This means that the notice contained in registered envelope Ex. 29 was returned to the plaintiff after the postman had made efforts to serve the said notice on the defendant, on 13 occasions. The Appellate Court has not at all considered this aspect of the matter that the Postman had gone to the place of the defendant 13 times and there was endorsement to that effect on the envelope in the right perspective and held that the conclusion of the trial Court was wrong, because it took support of envelope Ex. 22. The trial Court has not held that tenancy of the defendant has been terminated by the notice dated 6-3-1985 (Ex. 22), but that envelope could always be considered to infer the conduct of the defendant that the notice dated 6-3-1985 (Ex. 22) was also sent by registered post to the defendant and the Postman for that registered notice also repeatedly went to the house of the defendant and despite his information to the family members in respect of the said notice (Ex. 22), the said notice was returned unserved. There was nothing wrong when the trial Court considered the conduct of the defendant of avoiding the registered notice while referring to Ex. 22 as well. It may be observed that the appellate Court has found as a fact that the original notice Ex. 27 sent under the envelope (Ex. 29) dated 2-4-1985 was addressed to the defendant having full and correct address of the defendant. The postman went to the place of defendant 13 times as stated hereinabove and when the defendant was not available, the same was returned.

12. In *M/s. Madan and Co. Vs. Wazir Jaivir Chand*, the Apex Court held as under :

"All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee u/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 with the responsibilities of serving the summons of a Court under Order V of the Civil Procedure Code. 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. 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 peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by the tenant."

This Court in *P. A. Kowli vs. Narayan* (cited supra) held :

"It must also be held in the present case, that the tenant has refused the registered packet which was sent to him. The only endorsement which has been construed by the Courts below, is the endorsement "not claimed". Now the meaning of the words or expression "not claimed" has not been construed. It seems to me that the expression is tantamount to refusal."

13. Thus from the endorsements on the envelope (Ex. 29), it is apparent that the Postman went to the place of the defendant more than a dozen times and when he was not found, the same was returned and since despite the repeated visits by the Postman, the defendant did not claim the envelope, it would be presumed that the notice was refused by him and it was properly served. The presumption u/s 114(f) of the Evidence Act as well as section 27 of the General Clauses Act therefore, arises and it will be presumed that the said notice was served on the defendant. However, since the defendant has stated in his statement that he did not receive any notice and that it was not tendered and delivered to him personally, can it be said that the presumption stands rebutted and dislodged. The evidence of the defendant is not to the effect that the postman did not come to his house on the dates on which the endorsement is made. It is not the evidence of the defendant that the endorsement has been made falsely or

incorrectly by the Postman. Merely because the defendant has said that no notice was received by him nor it was tendered or delivered to him personally, it cannot be said that the presumption which has arisen has been rebutted by the defendant. The defendant has also not said in his evidence that during the period and the dates on which the postman has made endorsement neither the house was closed or none of the family members, servants or agents were available at site. That being the position, looking to his previous conduct that for the previous notice (Ex. 22) also despite the repeated efforts made by the postman and the information having been given to the family members of the defendant, the said notice was not claimed, it could be inferred that the present notice (Ex. 27) contained in the envelope (Ex. 29) was not claimed by the defendant intentionally, and therefore, there was proper service of the said notice on the defendant in view of the presumption u/s 114(f) of the Evidence Act and the said presumption has not been rebutted by the defendant. Merely because, the postman has not been examined by the plaintiff, it cannot be said that the presumption in favour of the plaintiff cannot be drawn. It is not always necessary to produce the postman who tried to effect service and who made the endorsements of "not found".

14. In *Puwada Venkateswara vs. C. V. Ramana* (cited supra), the Apex Court held as under:

"It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct."

15. In the present case also, looking to the defendant's conduct, the trial Court was justified in holding that the defendant will be deemed to have been served with the notice and that he had full knowledge of the notice.

16. Since the service of the notice (Ex. 27) under envelope Ex. 29 has been held to be proper and sufficient by me in view of the aforesaid discussion, it is not necessary to examine the two other modes of service which found favour with the trial Court, but the same was not held to be proper by the Appellate Court. Quit notice has only been challenged on the ground that it was not served and not on any other ground.

17. The Appellate Court acted illegally and with material irregularity in exercise of its jurisdiction in not properly considering the reasons given by the trial Court for holding that the notice terminating the tenancy sent through registered envelope (Exs. 27 and 29) could be presumed to be served. The trial Court has rightly held on the basis of the material on record that the notice terminating the tenancy sent through Registered Post, in the facts and circumstances can be held to have been validly served and shall be presumed to have been validly served and the said finding has been reversed by the appellate Court on erroneous

approach, non-consideration of the entire facts and the correct position of law.

18. In the result, this Civil Revision Application deserves to be allowed and the same is hereby allowed and the judgment and decree passed by Second Additional District Judge, Wardha on 6-12-1989 in Regular Civil Appeal No. 102/88 (Bachharam vs. Vishwasrao) is set aside and the judgment and decree by Civil Judge, Senior Division, Wardha on 22-11-1988 in Small Cause Civil Suit No. 271/87 is restored. The Additional Registrar (Judicial) is directed to send a copy of this judgment to Registrar (Appellate Side), Bombay High Court, Bombay for placing the same before Honourable the Chief Justice for considering whether any disciplinary action needs to be taken against Shri Y. D. Bagde (the then Second Additional District Judge, Wardha) for not following the judgments of this Court as observed hereinabove.