
(1925) 11 CAL CK 0026
In the Calcutta High Court

Beni Madhab Sapui and Another

APPELLANT

Vs

Jadu Nath Sapui and Others

RESPONDENT

Date of Decision : 26-11-1925

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 133, 134(1)

Citation : AIR 1926 Cal 1208 : 94 Ind. Cas. 907

Hon'ble Judges : Lancelot Sanderson, C.J.; George Rankin, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—This is a Rule calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside on ground No. 1 of the petition and also on the facts stated in para. 9.

2. The order complained of was an order made by a Deputy Magistrate of Alipore by which the petitioners were directed to remove an alleged obstruction from ascertain waterway or canal.

3. Ground No. 1 was as follows: "That the learned. Additional District Magistrate was wrong in holding that the notice of the conditional order u/s 133, Cr. P.C., was legally served upon the petitioners and that Sections 134(1) and 71, Cr. P.C., render such service valid." The facts stated in para. 9 of the petition were that there was no personal service upon the petitioners nor was there any proclamation as prescribed by law.

4. The point upon which the learned Vakil, who appeared for the petitioners relied, is not that which was stated in para. 9 of the petition; but, in my judgment, he is entitled to rely upon it having regard to the terms appearing in ground No. 1.

5. A return of the service of the notice of the conditional order, was made by the peon and it was to the effect that the petitioners were not found in their house and that two copies of the notice were hung up on the sadar door of their house.

6. The Magistrate in his explanation given in answer to the Rule said: "This service is legal according to Section 134 (1) read with Section 71, Cr. P.C."

7. Section 134 (1) of the Code provides: "The order shall if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons."

8. In order to ascertain the manner in which the summons may be served it is necessary to refer to Sections 69, 70 and 71, Section 69 provides, "The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons." Section 70 provides, "Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family" (then there are provisions with regard to the persons signing a receipt therefor). Then Section 71 says: ""If service in the manner mentioned in Sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served."

9. It is plain that the procedure, which is provided by Section 71, cannot be made use of unless service in the manner mentioned in Sections 69 and 70 cannot be effected by the exercise of due diligence,

10. It was admitted by the learned Vakil, who appeared to show cause, that the return of the peon was defective. The return of the peon showed that service could not be effected in the manner provided by Section 69 but it did not show that service could not be effected in the manner provided by Section 70. Consequently in my judgment it was not proved that service of the notice of the conditional order had been duly effected; in other words, it was not proved that the order which is referred to in Section 134 (1) had been served in the manner provided for service of summons. The Magistrate seems to have thought that if service of the notice was effected in the manner provided by Section 71, regardless of the question whether it could be served in the manner provided by Section 69 or by Section 70, that would be sufficient. In my judgment, that conclusion is not correct, and I am of opinion that the service of the notice of the conditional order was defective

11. The question remains whether this Rule should be made absolute. The learned Vakil who appeared for the opposite party argued that the petitioners had not alleged that there were any adult members living in the house upon whom the notice could have been served. It seems to me that it is not necessary for them to allege that they were" entitled to rely upon the argument that the return of service was defective.

12. It appears that in some previous proceedings relating to the same matter, the" petitioners had appeared and had succeeded in getting the order made in

those proceedings set aside. There is, therefore, no reason for assuming that the petitioners were willing to allow the present proceedings to go by default.

13. For these reasons, in my judgment, this Rule should be made absolute and the order absolute could be set aside. The conditional order will remain: the order absolute being set aside on the ground that service of the notice of the conditional order had not been duly and properly made.

Rankin, J.

14. I agree.