
(1924) 06 CAL CK 0018
In the Calcutta High Court

Dina Nath Pati and Others

APPELLANT

Vs

Upendra Nandan Das Mahapatra and Others

RESPONDENT

Date of Decision : 19-06-1924

Acts Referred:

Citation : AIR 1924 Cal 1004

Hon'ble Judges : Greaves, J;Graham, J

Bench : Full Bench

Judgement

Greaves, J.—We think that this appeal must succeed as there has not been a proper service of notice of the appeal on the appellants before us. the suit was commenced by the plaintiffs against their tenants for the recovery of rent. The first Court decreed the suit. Against this decree the defendants preferred an appeal. In the plaint the plaintiffs, have described themselves as residing at a village called Samsara. Accordingly, the notice of the appeal was sent for service to Samsara. The peon on arriving at Samsara did not find the plaintiffs there or any male member of their family upon whom the service could be effected. He found there a servant of the plaintiffs and the peon was told the plaintiffs were at that time living at their own bari at village Janki, some two or three miles distant from Samsara. the peon thereupon purported to effect service by affixing the notice at the entrance of the house at Samsara. This is shown by the receipt which is the first document in the paper book and also by the peon's return. The appeal was heard ex parte and was decreed in favour of the defendants in the suit. The plaintiff thereupon applied for the rehearing of the appeal which was refused and against this refusal the present appeal has been preferred to this Court. As I have already stated, in my opinion, the service was not good service under the provisions of the Code. When the peon was told that the plaintiffs, whom he was seeking to serve, were not living at the time at Samsara but at their own bari in village J anki in my opinion, it was" his duty, to endeavour to effect personal service upon them either by proceeding to Janki or returning to the Court from which he came and stating the facts in order that fresh notice should issue for service on the plaintiff at Janki. It seems to me idle to say that

the provisions of Order 5, Rule 17 have been complied with by the peon in doing what he did in this case. In my opinion, he did not use due and reasonable diligence. The service, if possible, should be personal unless there is an agent empowered to accept service, and is only, if you cannot effect personal service, that you are justified in proceeding in accordance with the other provisions of Order 5, Rule 17, In the present case in my opinion, there was nothing to prevent personal service which could have easily been effected had due and reasonable diligence been observed.

2. The result is that the appeal succeeds and the appeal will be reheard by the lower Court in the presence of the present appellants before us.

3. There will be no order as to costs in this appeal.

4. Costs in the lower Court will abide the result.

Graham, J.

5. I agree.