

(1898) 08 CAL CK 0002
In the Calcutta High Court
Case No : Rule No. 961 of 1897

Kali Narain Roy Chaudhuri, Plaintiff No. 2	APPELLANT
Vs	
Shaikh Bajoo and Others	RESPONDENT

Date of Decision : 09-08-1898

Acts Referred:

Citation : (1898) 08 CAL CK 0002

Judgement

Maclean, C.J.—This is a rule to show cause why an order made by the Munsif and confirmed on appeal by the District Judge inflicting a fine of 500 rupees on the Applicant, should not be set aside. The fine, the maximum allowed, was imposed under sec. 174 of the Code. Sec. 174 of the CPC is a section of a highly penal nature, and in my judgment its provisions, in order to give validity to anything purporting to be done under them, must be strictly complied with. Sec. 174 is as follows :--

If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned and attending departs in contravention of sec. 173, the Court may order him to be arrested and brought before the Court.

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may sentence him to a fine not exceeding five hundred rupees.

If any person so apprehended and brought before the Court cannot, owing to the absence of the parties or any of them give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place, as it thinks fit, and, on such bail or security being given, may release him.

We have to ascertain whether the conditions which enabled the Court to act under that section, existed in the present case.

2. In this case the Applicant, a zemindar of position, was the Plaintiff in a rent-suit. The Defendant desired to call him as a witness. It is suggested, and it is not improbable that the Defendant took that course, not because he believed that the Plaintiff could give any evidence which would assist his case, but with the view of harassing and worrying him. But be that as it may, he took out a summons against him, and the first, the paramount question is, was the summons duly served upon the present Applicant? In my opinion it was not, and, if so, the power of sec. 174 did not become exercisable.

3. Sec. 166 of the CPC says that " every summons to a person to give evidence shall be served in the manner hereinbefore prescribed for service of summons on the Defendant, and the rules contained in Chapter VI as to proof of service shall apply in the case of all summonses served under this section." That takes us back to that portion of Chapter VI, which relates to service of summonses. Sec. 75 says, " whenever it may be practicable, service shall be made on the Defendant in person, unless he have an agent empowered to accept the service, in which case service on such agent shall be sufficient.

4. It is clear in this case that there was no personal service of this summons upon the Applicant. I gather from the return made by the peon that the service was intended to be effected under sec. 80 of the Code. Sec. 80 of the Code says :-- " If the Defendant or other person refuses to sign the acknowledgment--I need not deal with that for the suggestion has not been made--or if the serving officer cannot find the Defendant, and there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom the service can be made, the serving officer shall affix a copy of the summons on the outer door of the house in which the Defendant ordinarily resides, and then return the original to the Court.

5. The return of the peon is in these terms--I need not deal with the earlier portion which relates to the service on the other witnesses, I need only deal with that portion which deals with the Applicant under this application, which is as follows :--

The remaining witness No. 1 being in Calcutta, the copy of summons in his name has been hung up on the mat wall of the kutchery house of the Defendant's residence." The question is whether this constituted good service of the summons. The only condition under which the peon is entitled to do what he did, is if the serving officer cannot find the Defendant, and there is no agent empowered to accept service of summons on his behalf, nor any other person on whom the service can be made. It cannot be said that the peon could not find the Defendant, because he states in his return that ho knew where he was, that he was in Calcutta. He does not say there was no agent empowered to accept service on his behalf nor that there was no other person on whom the service

could be made. His only reason for so affixing the notice was that the Defendant was in Calcutta. Then can it be said that under these circumstances the affixing a copy of the summons in the manner stated by the peon was good service on the Defendant? I think not. The circumstance that he could not find the Defendant, though he says he knew where he was, is not sufficient per se to warrant the peon in affixing a copy of the summons to the Defendant's house, so as to constitute good substituted service under sec. 80.

6. There is again another point which raises a doubt as to the validity of this service. The copy summons was affixed not to the outer door of the house in which the defendant ordinarily resides, but "on the mat wall of the kutchery house of the Defendant's residence." I am very doubtful whether this was a compliance with the section : but as I have not the materials before me to say how far the kutchery house of the Defendant was attached to or connected with the Defendant's residence (though it has been suggested that the Defendant had no residence there at all), I need not go further into this point. I think it is extremely important that in cases in which reliance is placed on substituted, as opposed to personal, service in judicial proceedings, the conditions under which such substituted service may be effected should be most strictly complied with. In my opinion there was no good service of the summons upon the Applicant in this case, and consequently the penal powers of sec. 174 did not become exercisable.

7. With respect to the suggestion that the Applicant appeared subsequently by his pleader before the Munsif and must, therefore, be treated as if he had been duly served, although by this course of proceeding which not improbably was adopted both for his own protection and out of respect to the Court, he might be precluded from saying as between him-self and the opposing parties in the suit, that he had not waived due service of the summons, that would not preclude him from saying that there had been no such service of the summons as could warrant sec. 174 being put into force against him.

8. Again, there appears to have been no arrest of the Applicant within the meaning of sec. 174. He can only be fined when he has been arrested and brought before the Court after the arrest. I regret that we have not had the advantage of hearing the Respondent on this application : they have not thought fit to appear. I think that the Judges in the Mofussil should be extremely careful in ascertaining that before exercising any penal powers given them under the Code all conditions precedent to the exercise of such powers have been strictly complied with. I cannot help noticing that the Munsif fined the Applicant under secs. 170 and 175 whilst the District Judge fined him under sec. 174. But these several sections apply to absolutely different cases : and the powers of each section are exercisable under extremely different circumstances. So we have this result. The District Judge finds that the Munsif was wrong in fining the Applicant under secs. 170 and 175. If so, he ought to have allowed the appeal. But on the contrary he takes it upon himself to fine the Applicant under sec. 174, which the

Munsif had not done. What right had the District Judge to do this? The order complained of is intrinsically wrong from beginning to end. The rule must be made absolute to set aside the order imposing the fine, and the fine, if paid, must be refunded.

Banerjee, J.

I agree with the learned Chief Justice in thinking that this rule ought to be made absolute, and the order made by the Court below set aside, on the ground that the requirements of sec. 174 of the CPC under which the order imposing the fine was made and which is of a highly penal character have not been strictly fulfilled, because the service of summons, which is the foundation for an order under sec. 174, has not been duly made. It might be said that the Petitioner waived the service of summons by taking time to appear; but though he might have done so, he did it for the purpose of appearing, and not for the purpose of bringing himself within the penal provisions of sec. 174. I only wish to add one word with reference to the mode in which the cause shown by the Petitioner has been dealt with by the Court below, though I am bound to say that if that had been the only ground for our interference, it might not have been a sufficient ground under sec. 622 of the Code. The observation I wish to make is this, that when a Medical certificate of the kind that was filed in this case in support of the cause shown was before the Court, it ought not to have summarily rejected it in the manner it has done.