
(1917) 06 CAL CK 0009
In the Calcutta High Court

Nemai Charan De

APPELLANT

Vs

Secretary of State for India

RESPONDENT

Date of Decision : 12-06-1917

Acts Referred:

Bengal Public Demands Recovery Act, 1895 — Section 10, 31

Citation : 46 Ind. Cas. 741

Hon'ble Judges : Richardson, J; N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. The plaintiff-appellant brought the suit, out of which this appeal arises, for a declaration that the sale held on the 19th June 1912 under the Public Demands Recovery Act was null and void and did not affect the plaintiff's title to the lands in suit. The plaintiff also prayed for confirmation of possession and for other reliefs.

2. The suit has been valued at Rs. 998 and the property was sold for 3 pies.

3. The sale has been attacked on the ground that no notice u/s 10 of Bengal Act I of 1895 was served.

4. The learned District Judge says: "It is true that the peon's report of service of the notice u/s 10, Act I of 1895, does not show that there was no adult male member of the family present on whom he could have served the notice as he was bound to do. The person is unfortunately dead, so that he could not be questioned on this point. Had it been alleged that an adult member of the family was there at the alleged date of service, the witnesses might have been questioned on the point or witnesses might have been examined on the subject, but when no such question was raised, I think the defendants are entitled to the presumption that the peon did what he was legally bound to do. Undoubtedly he went to the village and there seems to be no reason why he should not have made a regular service, since it is clear that the appellant knew of the sale."

5. We think that the learned Judge has taken an erroneous view as to the onus

of proof in such cases. He seems to have been of opinion that it was for the plaintiff to show that there were male members of the family on whom the notice could be served. But as is pointed out in *Rakhal Chandra Rai Chowdhuri v. Secretary of State* 12 C. 603 at p. 605 : 6 Ind. Dec. (N.S.) 409, "it is sufficient for him to deny any such service so as to put upon the defendant the burden of proving that proper service has been made."

6. The manner in which the notice u/s 10 is to be served is laid down in Section 31 of the Act; and it has been held in several cases that the service of notice u/s 10 must be effected in strict conformity with that section. If no attempt is made to effect the service as contemplated by that section, it cannot be said that there was strict conformity with the provisions of the section. That section provides in the first place that there must be an attempt at personal service. It then provides that "when such judgment-debtor cannot be found, the service may be made on any adult male member of his family residing with him." The section then goes on to say: "If no such adult male member can be found, the notice may be served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the Certificate Officer issuing the same and also in some conspicuous part of the land, if any, affected by the service of the notice."

7. As pointed out in *Jogeswar Sahu v. Debi Prasad* 5 C.L.J. 555 at p. 657, "the service, therefore, in this manner, that is, by fixing the notice on the outer door of the judgment debtor's house is not sufficient compliance with the law unless it is shown that an attempt was made to effect service on the adult male members of the family of the judgment-debtors." The onus, therefore, was clearly upon the defendant to show that there was proper service of the notice, as required by law.

8. The peon who made the service is, no doubt, dead; but his return is in evidence and that return does not show that there was no adult male member of the family on whom he could serve the notice as he was bound to do. The learned District Judge was of opinion that there was a presumption depending upon a rule of evidence, namely, that it was for the plaintiff to show that there were male members of the family upon whom service could be made.

9. As we have said, the onus does not lie upon the plaintiff. The presumption relied upon by the learned Judge, therefore, does not arise. The defendant must prove proper service of the notice and, as part of that, he has to show that no adult male member of the family could be found upon whom notice could be served.

10. We are informed by the learned Government Pleader that there is some evidence, or admission on the point, to be considered. Under the circumstances, we think that there ought to be a decision on the point.

11. We accordingly set aside the decree of the lower Appellate Court and send

the case back to that Court in order that the question may be considered and the case decided in accordance with the finding arrived at on the point.

12. Costs will abide the result.