(1981) 06 CAL CK 0002

Calcutta High Court

Case No: C.R. No. 2718 of 1979

Lachmi alias Luxmi Kumar Somani		APPELLANT
	Vs	
Sheo Krishna Nathani and Another		RESPONDENT

Date of Decision: June 11, 1981

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 19, Order 5 Rule 19A, 115
- West Bengal Premises Tenancy Act, 1956 - Section 17, 17(2), 17(2A)(b)

Citation: 85 CWN 1001

Hon'ble Judges: S.M. Guha, J

Bench: Single Bench

Advocate: Pradip Kr. Ghose and Tapandeb Nandy, for the Appellant; Tarun Chatterjee, for the Respondent

Final Decision: Allowed

Judgement

S.M. Guha, J.

The instant application for revision is directed against the order dated 10th July, 1979 passed by Shri M. Roy, Judge, 5th Bench of the City Civil Court at Calcutta, rejecting the application u/s 17(2) and 17(2A) (B) of the West Bengal premises Tenancy Act, 1956, on the ground that those were barred by time. The moot question in this case is pointed out by the learned Judge was what was, the date of service of summons on the tenant defendant. According to the plaintiff opposite party there had been a personal service effected on 19th July, 1978, whereas the tenant defendant alleged that such summons had never been served on him and that one through registered post was served on 2nd of December, 1978. In order to find the actual date of service the learned Court below considered the evidence adduced on behalf of the plaintiff landlord, P. W. 1, Tarak Banerjee, the bailiff of the Court deposed that he had effected the personal service of the summons on the

defendant on 19.7.78. P. W. 2, Mirza N. H. Beg who was the Naib Nazir of the Court had no personal knowledge. But the learned Court below considered the diary of the Court bailiff and his endorsement in the peon book and the relevant entries in the book of the nazarat, vide, exhibits 1, 2, 3 and 3a. On the evidence both oral and documentary the learned Judge held that there had been personal service on the defendant on 19.7.78. In the face of these materials the learned Judge was not prepared to accept the interested testimony of the defendant.

2. Mr. Tapandeb Nandi, learned Advocate for the petitioner points out at the out set that the service of summons in this case cannot be accepted as there was no simultaneous issue of summons under Order 5 rule 19 and Order 5 rule 19A. He relies on the decision in the case of Tamluk Workers Transport Pvt. Ltd, v. Milan Kumar Maity, reported in 1980 (11) CHN In this case, the service by affixation was effected on April 3, 1978 and summons by registered post were ordered to be issued on April 24, 1978. Accordingly, it was held that the provision of Order 5 rule 19A was not complied with. But in the instant case the facts were otherwise. In this case there was an order by the Court for simultaneous issue of summons both under order 5 rule 19 and order 5 rule 19A. It appears that though there was such an order there was some delay on the part of the plaintiff landlord to issue summons by registered post. In this view of the matter, it cannot be said that the Court failed to make necessary order as contemplated under the law.

3. Next it is argued by Mr. Nandy that the Court failed to appreciate the evidence adduced by the parties and there was an error in exercise of the jurisdiction by the Court. Mr. Tarun Chatterjee, learned Advocate for the opposite parties beseeched the Court not to interfere with an order though it might be erroneous or illegal. He makes reliance on the decision of the Supreme Court in the case of Shri M.L. Sethi Vs. Shri R.P. Kapur, . It is held therein that an erroneous decision of a question of law reached by the subordinate Court which has no relation to question of jurisdiction of that court cannot be corrected by the High Court u/s 115 C. P. C.

4. True the jurisdiction of the High Court under suction 115 of the C. P. C. is no doubt a limited one but the court would be entitled to look into the fact if there be any error in appreciation of evidence or if there is any illegal exercise of jurisdiction.

5. Mr. Chatterjee also points out that inspite of the administrative order on the point the court found it necessary that the matter be thrashed out judicially as to whether there was a personal service on 19th July, 1978. The defendant tenant pledged his oath to deny the personal service on the alleged date, that is, on 19.7.78. It was incumbent on the landlord opposite party to prove otherwise; unfortunately the best evidence on the point that is the summons could not be traced. As such the landlord relied on the secondary evidence that is the register and the diary maintained by the bailiff of the Nazarat. The learned judge over looked the admission of the bailiff, P. W. 1 whereby he admitted that the defendant in the case was not known to him nor there was any evidence to show that the defendant had

been identified by any one before him. In this view of the matter the register and the diary cannot be ''sine qua non'' in the matter of proving a personal service. In my opinion, the learned Judge committed an error and as such failed in exercise of proper jurisdiction in finding that there was proper service by the bailiff. There was certainly a miscarriage of justice in the matter. In this facts and circumstances this court surely would make interference u/s 115 of the C. P. C. In the result, the application is allowed. The Rule is made absolute. The impugned order is set aside. The court shall proceed with the application u/s 17 and 17(2) and 17(2A) (b) of the West Bengal Premises Tenancy Act, in accordance with law.

There will be no order as to costs.

Let the records be sent down forthwith.