(1984) 01 CAL CK 0013

Calcutta High Court

Case No: Civil Revision Case No. 3499 of 1980

Sahabali Mondal		APPELLANT
	Vs	
Morion Bibi and Others		RESPONDENT

Date of Decision: Jan. 31, 1984

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- WEST BENGAL LAND REFORMS ACT, 1955 - Section 5, 8

Hon'ble Judges: Ashamukul Pal, J

Bench: Single Bench

Advocate: Bimal Kumar Chatterjee and Miss P.P. Chowdhury, for the Appellant;Anil Kumar Seth and Miss Hiranya Chowdhury for Opposite Party Nos. 1 to 7, for the Respondent

Judgement

Ashamukul Pal, J.

This is an application u/s 115 of the CPC made by Sahabali Mondal the petitioner herein for revision of an Order No. 13 made by Additional District Judge, Alipore in Appeal No. 242 of 1980 dated 15.9.80 dismissing the Miscellaneous Appeal No. 242 filed by the petitioner herein against the order (No. L 58) made by the learned Munsif of Bongaon on 11.4.80.

2. The facts of the case shortly are Sahabali was the purchaser of the land (rayati interest of the land in question). The case of the original petitioner Morion Bibi before the learned Munsif was that Sahabali Mondal who was a stranger, purchased the land from other co-sharers on 3.6.72. The original petitioner''s case before the learned Munsif was that she came to know of the transfer from local men and no notice u/s 5(5) of the West Bengal Land Reforms Act was served upon her. Morion Bibi''s case (the original petitioner seeking pre-emption) is that the consideration money was deposited in Court after she come to know of the said transfer from the local men together with further sum of 10% of the amount and made the application for pre-emption before the learned Munsif.

3. The said application was contested denying the fact that land was purchased from the co-sharers as alleged it was further contended (which is of more importance for decision of the present case) that notice of such transfer was served upon the said original petitioner as far back as on 9.6.73 and so the original petitioner''s right to pre-empt was lost being barred by limitation as she did not file the application in time. The purchaser''s positive case before the learned Munsif is that notice of such transfer was served on 9.6.73 upon the original petitioner seeking pre-emption and as the application was made beyond time as provided u/s 8(1) of the West Bengal Land Reforms Act the application was barred by limitation.

4. The learned Munsif mainly based his finding on the question of notice that is to say, whether the notice of transfer was served upon the original petitioner and whether the pre-emptor''s claim was barred by limitation or not.

5. Before the learned Munsif deposit of consideration money together with a sum of 10% interest was admitted but the learned Munsif held that the notice should be served upon the co-sharer who was not party to such transfer under registered post and as the purchaser should cause service of notice on the holding in question in the Court house or in the office of the Revenue Officer or of the registering office as the case may be and as these formalities were not complied with the point of limitation could not be sustained and he held in favour of the original petitioner.

6. Learned Munsif observed "that it is apparent on the fact on the record that no notice u/s 5(5) of the West Bengal Land Reforms Act was served upon the petitioner Morion Bibi although the service under registered post is mandatory consequently I am to hold that Morion Bibi had no knowledge of such transfer. It is settled principle of law that in case of service of notice the limitation for filing such application is for three years from the date of transfer" and as the application was made within that period of three years he allowed the application for pre-emption.

7. The learned Additional District Judge also observed in the concluding portion of his judgment "in this case admittedly no notice was served by registered post and there is no evidence to show that the same was served by affixation on the holding and in the Court house or in the office of Revenue Officer or of the registering authority. So I am constrained to hold that Opposite Party No. 1 (purchaser) has not complied with the provision of section 5(5) of the Act. So the period of limitation would be three years" and ultimately he held that the application for pre-emption having been filed within the period of 3 years the application would be maintainable and the order of pre-emption on the ground be made. He has allowed the application for pre-emption on the ground of strict non-observance of the provisions of section 5(5) of the West Bengal Land Reforms Act and so extending the period of limitation to three years and not restricting it to four months. It appears from both the judgments that the learned Courts below allowed the application for pre-emption because provisions of section 5(5) of the West Bengal Land Reforms Act were not complied with.

8. Mr. Mukherjee, Counsel for the petitioner who challenges the said orders of Courts below referred to the provisions of Order 5, Rule 20, of the CPC and argued that if the said provisions were not strictly complied with but however if the Courts came to a finding that actually the persons sought to be served were served and though not strictly in accordance with the said provisions Court will not set aside that service.

9. But if I found that the learned Courts below on the evidence did not believe at all that the service was in fact effected by actual service and that Morion Bibi had not the knowledge of such transfer by any service in the way it was done I would not accept the contention of Mr. Mukherjee. In this case however I find that both the learned Courts allowed the application of pre-emption solely on the ground that the service was not effected in accordance with the mode laid down u/s 5(5) of the West Bengal Land Reforms Act. Though the learned Additional District Judge expressed contain doubts about the knowledge of Morion Bibi of transfer of land through such service but ultimately he held in favour of the pre-emptors on the ground that the provisions of section 5(5) of the Land Reforms Act were not complied with. The learned Additional District Judge has stated in course of discussion that the process server deposed that Morion Bibi refused to accept the notice but ultimately, learned Additional District Judge held in favour of the petitioners because provisions of section 5(5) were not compelled with without coming to any finding whether in fact she was served with the notice or that the said notice was delivered to her. Therefore, I am to see whether only because the provisions of section 5(5) were not rigidly complied with the period of limitation can be extended to three years even if thee is evidence that the persons praying for pre-emption had the knowledge even though the service was defective.

10. Mr. Mukherjee limited his argument mainly to the point of service of notice. Although he drew my attention to one factual error which is apparent on the face of the document: Mr. Mukherjee pointed to me that Morion Bibi''s name had in fact been mentioned in the said original deed although the learned Additional District Judge observed in his judgment that Morion Bibi''s name had not been mentioned.

11. However in support of his argument that Courts below should not have treated the service as altogether void. Mr. Mukherjee referred to me a judgment in the case of (1) K. Narasimhiah Vs. H.C. Singri Gowda, . From the facts of the case it would appear that there was a provision of notice given within a specified period, which had to be complied with for holding special General Meeting. Supreme Court held after considering the facts and circumstances of the case that such provision was only directory and not mandatory. In another judgment in the case of (2) Commissioner of Income Tax Punjab Jammu and Kashmir and Himahcal Pradesh Vs. Daulat Ram Khanna, . the Supreme Court noticed that although there were Specified modes provided under Order 5 Rule 20 of the CPC for service of notice yet in the concluding portion the self-same rule a discretionary power is given to the Court for

such service of notice by the words "or in such other manner as the Court thinks fit" and on that basis Supreme Court held that the last portion of Order 5, Rule 20 confers discretion on the Court to adopt any other manner of service. It may be noted here that in section 5(5) of the West Bengal Land Reforms Act such words do not occur.

12. Mr. Mukherjee also cited to me a judgment in the case of (3) In re: Poyeer and Mills'' Arbitration, 1963 (1) AER 612 in that judgment Justice Megaw at page 617 of the said report after quoting relevant portion of section 92(1) of the Agriculture Holdings Act which is as follows: -

Any notice..... under this Act shall be duly given to or served on the person to or on whom it is to be given or served if it is delivered to him, or left at his proper address, or sent to him by post in registered letter.

13. Held that due service had been effected on the person meant to be served by due delivery although it was not done in accordance with the provisions of this Act by sending it by a registered letter. It was contended that in such a case if a notice is to be sent by post at all it must be sent by registered post as enjoined by the Act and if it is not so sent, it must not in the slightest whether the other party can move that in fact it duly reached the person for whom it was meant. The other argument was that if the notice was sent by post not as a registered letter, and if the parties sending it could prove that it had in fact been delivered to the person to whom it was addressed that was sufficient and that was due service u/s 92(1) of the Agricultural Holdings Act, 1948. Justice Megaw accepted the latter argument and held that if the notice was in fact delivered "it matters not in the slightest" whether it was personally handed over to the person meant to be served. According to him, it would satisfy the condition that notice was delivered to the person to whom it was meant to be served and such service was due delivery of notice within the meaning of the Act although it was not in fact sent by registered post, if the person sending it could prove that notice was actually received by the person to whom it was sent or who was meant to be served.

14. In this connection, I am also shown by Mr. Mukherjee Maxwell on The Interpretation of Statutes, 12th Edition, page 99, Maxwell also referring to the said judgment of the Queen''s Bench Division cited above supported the view that there was good and sufficient service within the section if thee was proof that the letter was actually delivered to the person to whom it was addressed. Mr. Mukherjee argued that such a provision may be treated as directory and not mandatory. He argued that a clause is direction and nothing more but not so where it has been expressly provided that if that mode is not followed it will be null and void to all intents and in support of the contention referred to me Crajes on Statute Law (6th Edition) page 267.

15. After hearing the respective arguments I am inclined to accept in the facts and circumstances of this case the argument of Mr. Mukherjee in this regard. I agree with the view that in the absence of the provision that if the mode is not followed, the service would be null and void to all intents, such a mode provision would be directory and not mandatory: also if there is no express provision that the statute must be strictly followed then in those cases the manner that is laid down in the provision of the statute would be treated to be directory and not mandatory. In the present case there is no such provision that unless the service is effected in the manner provided u/s 5(5) of the West Bengal Land Reforms Act such service would be null and void and as such Court can go into the question of fact whether such a service was in fact effected, whether such a notice was in fact delivered or whether in fact the persons sought to be affected had knowledge of the fact through such service or notice and still they did not take any action within the period prescribed after such service or notice. In a case such as this, if the Court comes to a finding on the facts that in fact the service was effected by actual delivery of the service and the pre-emptor knew about the fact of such transfer through such service then it will be a travesty of justice if the Courts hold otherwise. A provision of law specially procedural provision should be given a reasonable and liberal construction. True, Court must see that a bona fide applicant for pre-emption should be protected but if one wants to take shelter under the rigidity of the procedural provision to gain an advantage by his own inaction it would be a sort of contrivance for which law would not come to his aid because such a plea is tainted with mala fide. The essence of the whole thing, to my mind, is that Court is to see whether service has in fact been effected by delivery and mere irregularity in the mode of service will not make it absolutely void.

Under the circumstances, I set aside the impugned order and remand the matter to the learned Munsif to reconsider the entire matter in the light of the observation made herein. The learned Munsif would hear and dispose of the matter within one month from the date of the receipt of the records which be sent down within ten days from today. With this direction I make the rule absolute. No order as to costs.