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**(1920) 07 CAL CK 0053**

**Calcutta High Court**

**Case No:** None

Dharam Chand Gain

APPELLANT

Vs

Kanaksarkar

RESPONDENT

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**Date of Decision:** July 22, 1920

**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 46
- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 15

**Citation:** AIR 1921 Cal 638 : 68 Ind. Cas. 991

**Hon'ble Judges:** Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

**Bench:** Division Bench

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**Judgement**

Mookkejes, Act. C.J.

1. This is an appeal by the tenant defendant in a suit instituted u/s 46 of the Bengal Tenancy Act. Sub Section (1) of that Section provides that " A suit for adjustment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy raiyat unless the landlord has tendered to the raiyat an agreement to pay the enhanced rent, and the raiyat has within three months before the institution of the suit refused to execute the agreement." Sub-section (2) then provides as follows: " A landlord desiring to tender an agreement to a raiyat under this section may file it in the office of such Court or Officer as the Local Government appoints in this behalf for Service on the raiyat. The Court or Officer shall forthwith cause it to be served on the raiyat in the prescribed manner, and when it has been so served, it shall for the purposes of this Been on be deemed to have been tendered. "... Rule 30 of the statutory rules made by the Government of Bengal provides as follows: "The agreement under sub-section (2) of Section 46 hall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served on the raiyat in the manner prescribed for the service of summons on defendant under the CPC on payment of the fee prescribed by the

High Court."

2. In the case before us the plaintiff alleges that the agreement was duly served in accordance with Order V, r. 15 of the CPC which provides as follows:

"Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him." The First Court found in favour of the plaintiff that the summons had been duly served. The District Judge has affirmed that conclusion. But the facts found by him are not sufficient to show that the requirements of C. V, r. 15 have been fulfilled. The District Judge has held that what is required is that the agreement should be properly brought to the notice of the defendant, and that as the agreement was served upon the son, one can have little doubt but that it was duly brought to the notice of the defendant by his son who lives in the same house with him, This clearly is a consideration which cannot be permitted to weigh with the Court when the question is whether or not the requirements of the Statute have been carried out. It is not definitely found whether the first condition mentioned in r. 15 existed, namely, whether the defendant could not be found. The District Judge says " that it is very unlikely that the defendant's son or any one connected with the defendant would give any real information as to the defendant's whereabouts": and, further that ""the evidence would go to show that enquiries were made from the defendant's son as to the whereabouts of the defendant to which apparently only vague replies were given." The Statute does not require that the enquiry should be confined to the son of the defendant or to a person related to him. An attempt could easily have been made to find out the defendant by an enquiry from his neighbors or other persons. The District Judge has not also found whether the son was an adult male member of the family residing with him. The facts are thus insufficient to justify the decree, for it is essential that the requirements of the Statute in these matters should be strictly carried out.

3. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for re-consideration.

4. It is stated that there are other points involved in the appeal. We do not deal with them, because if the point mentioned be decided against the plaintiff, no other question will arise. But if the point is decided in favour of the plaintiff and against the defendant, the other questions which arise in the case will be re-considered by the lower Appellate Court.

5. Costs will abide the result.

Fletcher, J.

6. I agree.