APPELLATE CIVIL.

Before Jwala Prasad, A.C.J. and Kulwant Sahay J.

MAHADEO SINGH

v.

BASGIT SINGH.*

1924.

August, 6

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section 49—Notice to quit, method of service of—irregularity in service, effect of—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order V, rule* 17—*Under*-raiyat, *ejectment of—notice, validity of.*

The rules contained in order V of the Code of Civil Procedure, 1908, relating to the service of summons, apply to the service of notice through the court under section 49 of the Bengal Tenancy Act, 1885.

Therefore, where the person to whom such a notice is directed, accepts the notice but refuses to grant a receipt for it, Order V, rule 17, applies, and its provisions must be strictly complied with.

A notice under section 49 of the Bengal Tenancy Act calling upon an under-*raiyat* to quit the land of which he is in possession at the end of the agricultural year is not a valid notice unless it is served in accordance with law, and, where the service was not in accordance with law, the mere fact that the under-*raiyat* received the notice and was apprised of its contents does not entitle the landlord to institute a suit for ejectment under section 49.

Appeal by the plaintiffs.

These appeals arose out of suits in ejectment. The defendants were under-*raiyats* and the plaintiffs were occupancy *raiyats*. The plaintiffs sought to eject the defendants upon the ground that notice was served on them under section 49 of the Bengal Tenancy Act.

* Second Appeals nos. 1112 to 1124 of 1922, from a decision of M. Sayed Hasan, Subordinate Judge of Arrah, dated the 29th August, 1922, reversing a decision of B. Ramanugrah Narain, Officiating Munsif of Buxar, dated the 11th January, 1922.

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The defendants raised various pleas and the following issues were framed in the trial Court:

1. Whether the plaintiffs have any valid cause of action?
2. Is the suit barred by time?
3. Was notice duly served on the defendants?
4. Are the defendants *shikmidars* of the plaintiffs? Is there any custom that *shikmidars* obtain occupancy rights in the land they hold as such?
5. Whether the plaintiffs are entitled to recover possession of the disputed land?
6. Whether the plaintiffs are entitled to *wasilat*?

The Munsif found all the issues in favour of the plaintiffs and decreed the suits.

On appeal the Subordinate Judge dismissed the suits upon the preliminary ground that there was no proper service of notice as required by section 49 of the Bengal Tenancy Act.

H. Prasad, for the appellants.

Sambhu Saran, for the respondents.

JWALA PRASAD, A.C.J. (after stating the facts set out above, continued as follows): The plaintiffs contend that the view taken by the Subordinate Judge is wrong and that he ought to have held that there was proper service of notice under section 49. The report of the peon showed that the defendants took notice but refused to grant receipts therefor. The learned Subordinate Judge says that under Order V, rule 17, the peon ought to have affixed a copy of the notice on the outer door or some other conspicuous part of the house in which the defendants generally resided. There is no special rule for the service of notice to quit under clause (*b*) of section 49 of the Bengal Tenancy Act. There is, however, a rule framed by the Government under section 189 of the Act, that is rule 3, Part I, of the Government rules in Appendix I of the Bengal Tenancy Act. That rule says that:

"Notice required to be served under this Act shall be served in the manner provided in the Civil Procedure Code for the service of summons."

Therefore the rules laid down in Order V of the Code of Civil Procedure relating to the service of summons

will apply to notices served under section 49 of the Bengal Tenancy Act. Rule 16 of Order V provides that:

"Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons."

Rule 17 provides that:

"Where the defendant or his agent or such other person, as aforesaid, refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant..... the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

The serving officer is then required to submit his report and to file a report verifying the correctness of the same either by an affidavit or by examination on oath in Court. The Court then is required, under rule 19, to declare that the summons has been duly served or to pass such order under rule 20 for substituted service if it finds that the defendant is avoiding the service of summons upon him. The order-sheet in the present case, regarding the service of notice, does not record any order of the Court that the notice was duly served upon the defendants under rule 19 of the Order. Perhaps that rule does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the Civil Procedure Code. Rule 19 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. There is no doubt as held by the Court below that rule 17, relating to the mode of service, was not complied with. In the case of *Nageshwar Bux Rai* v. *Biseswar Dayal Singh* (1) it was

(1) (1924) I. L. R. 3 Pat. 236.

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held, where the defendant refused to acknowledge service of summons, that the non-compliance with rule 17 regarding the affixing of a copy of the summons on the outer door or a conspicuous part of the house in which the defendant resides, does not vitiate the service of summons. In that case, however, the evidence was that the defendant, when served with notice and a copy of the plaint, retained the same and thus made it impossible for the peon to affix a copy upon the door of his house. There was in that case a further judicial declaration of the Court under rule 19 of Order V that the summons was duly served. In the circumstances of that case, therefore, it was held that the defendant was not entitled to have the *ex parte* decree set aside under Order IX, rule 13, of the Code upon the ground that the summons "was not duly served." It was regarded that at the utmost non-compliance with rule 17 was an irregularity and did not necessarily vitiate the service of summons when there was, upon the affidavit of the peon and the circumstances of the case such as the withholding of the copy delivered to the defendant, a finding of the Court under rule 19 that the summons was duly served. The words "duly served" occur in rule 13 under which the application of the defendant was to set aside the *ex parte* decree. These circumstances are not present in the present case and therefore the decision is distinguishable. In the present case, which is a suit for ejecting the defendants, the Court below is right in holding that the provisions relating to the service of notice laid down in Order V, rule 17, should be strictly complied with. It has been argued that there is some doubt as to whether notice was required to be served through the Court upon the defendants and a private notice would have been sufficient which would not have necessitated a compliance with the requirements of the rules in Order V. This may be, but when the plaintiffs choose to have the notice served through the Court the service must be in accordance with rules prescribed for the service of notice.

It was then argued that the defendants took the notice and, therefore, were apprised of the contents thereof that they were required to vacate the land at the end of the agricultural year next following that in which the notice to quit was served. But knowledge of the defendants is not sufficient to entitle the plaintiffs to bring suits for ejectment under section 49. If that was so then it would have been permissible to the plaintiffs to prove that there was verbal notice served upon the defendants in a suit for ejectment. The law requires a written notice to be served and that is in the interests of the *raiyat* concerned and when a notice is required to be served it must be served in accordance with the rules prescribed for service. Therefore I agree with the view taken by the learned Subordinate Judge in these cases and dismiss these appeals with costs.

Let it be noted that inasmuch as the Subordinate Judge disposed of the defendants' appeals upon the preliminary issue he did not decide the other issues in the case raised and determined by the Munsif. These issues are, therefore, undetermined in the case.

KULWANT SAHAY, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Jwala Prasad, A.C.J. and Macpherson, J.

RAM RACHHYA SINGH

v.

KUMAR KAMAKHYA NARAYAN SINGH.*

1924.

August, 6

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I*, *Article* 144—*grant* of istamrari mukarrari—*Sale by lessees*

* Appeal from Original Decree no. 238 of 1921, from a decision of B. Promotha Nath Bhattacharji, Subordinate Judge of Hazaribagh, dated the 10th June, 1921.