

obligatory for the Chief Judicial Magistrate to record reasons for tendering pardon to Darshan Lal. The Chief Judicial Magistrate did not record any reason in terms of section 306 (3), Criminal Procedure Code, in the impugned order P. 1 and the same is, therefore, liable to be set aside. This contention is also without force. The Chief Judicial Magistrate has given reasons in terms of section 306(3), Criminal Procedure Code, in the impugned order P. 1, and the same, therefore, cannot be held bad on this ground.

(8) The learned counsel for the State has urged that the present petition is not maintainable for the reason that the impugned order P. 1 being interlocutory in nature cannot be interfered with by the High Court in revision as provided in section 397, Criminal Procedure Code. The contention of the learned counsel for the petitioner is that irrespective that the impugned order P. 1 may be interlocutory and not revisable under section 397(2), Criminal Procedure Code, it can be interfered with by this Court in exercise of power under Section 482, thereof to prevent abuse of the process of the Court and to secure the ends of justice.

(9) As discussed above the impugned order P. 1 has been held to be valid. It is difficult to hold that the tender of pardon to Darshan Lal under Section 306, Criminal Procedure Code, is an abuse of the process of the Court. It can, therefore, be not quashed in exercise of the powers under section 482, Criminal Procedure Code.

In the result, the petition fails and is dismissed.

H.S.B.

Before P. C. Jain, A.C.J., & J. M. Tandon, J.

BANWARI LAL,—Appellant.

versus

FINANCIAL COMMISSIONER (TAXATION), PUNJAB AND

October 23, 1984.

Letters Patent Appeal No. 899 of 1980.

October 23, 1984.

Displaced Persons (Compensation and Rehabilitation) Rules, 1955—Rule 117—Notice under Rule 117(1) issued to auction purchaser on specified address—Said notice received back undelivered as the whereabouts of auction purchaser not known—No notice under Rule

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117(7) issued—Sale in favour of auction purchaser cancelled—Such cancellation—Whether valid—Compliance with Rule 117(7) after compliance with sub-rule (1)—Whether still mandatory—Non-compliance with Rule 117(7)—Whether makes subsequent proceedings void ab initio.

Held, that an analysis of Rule 117 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 shows that under sub-rule (1) every order or notice made or issued under the Act or the Rules shall be served by registered post acknowledgement due. Sub-rule (7) provides the modes of effecting substituted service where an order or notice sent by post under sub-rule (1) is returned undelivered or where the Settlement Officer or the other authority is satisfied that there are reasons to believe that the order or notice cannot be delivered in the ordinary course. Now adverting to sub-Rule (7), it is clear that the Settlement Officer or the other authority has been given the power to resort to the procedure laid down therein for effecting substituted service, but it cannot be said that after having complied with the provision of sub-rule (1) it is still obligatory on the Settlement Officer or the other authority to comply with the provisions of sub-rule (7). A look at rule 117 shows that the issuance of notice under sub-rule (1) through registered post acknowledgement due is mandatory in nature that the issuance of notice under sub-rule (1) through registered post acknowledgement due on the address supplied by the person on his address given on the application for compensation, unless an intimation of a change of address has been given, is a must. Where the notice has been sent under sub-rule (1) on the address given in the application then by virtue of the provisions of sub-rules (3) and (4) of rule 117, it would be deemed that that service had been effected on the applicant. The rule when reads as a whole clearly indicates that the provisions of sub-rule (1) are mandatory while the provisions of sub-rule (7) may be resorted to if the Settlement Officer or the other authority finds it necessary to do so, and as such sub-rule (7) is directory in nature and its non-compliance would not make the order *void ab initio*.

(Paras 8 and 9)

Behari Lal vs. The Managing Officer (Sales), Jullundur and others, 1977, P.L.J. 35.

OVER RULED.

Letters Patent Appeal under Clause X of the Letters Patent against the order passed by Hon'ble Mr. Justice J. V. Gupta, in Civil Writ Petition No. 2871 of 1972, on 9th September, 1980.

H. S. Wasu, Sr. Advocate with Major Manmohan Singh, Advocate and K. C. Khanna, Advocate, for the Appellant.

H. L. Sibal, Sr. Advocate with H. L. Mittal, Advocate, for the Respondent.

JUDGMENT

Prem Chand Jain, A.C.J.

(1) Subedar Major Banwari Lal has filed this appeal against the judgment of a learned single Judge of this Court dated September, 9, 1980, by which C.W.P. No. 2871 of 1972 filed by him was dismissed. In order to appreciate the controversy, certain salient features of the case may be noticed.

(2) An Urban agricultural plot No. 1008 near Masjid Bhra Kharr in Jullundur was purchased by the appellant in auction held in July, 1961. The bid was accepted,—vide letter dated August 19, 1961 (Copy Annexure 'A' to the writ petition). The appellant did not pay the earnest money and instead executed an indemnity bond. Later on, only a sum of Rs. 743-56 was adjusted against his verified claim, and for recovery of the balance amount of Rs. 981.44, a registered notice was issued to him by the Managing Officer on May 21, 1965. The said notice was, however, received back undelivered with the report that the whereabouts of the addressee were not known. The Managing Officer ultimately vide his order dated June 17, 1965 (copy Annexure 'B' to the writ petition) cancelled the sale in favour of the appellant and the property was again disposed of by auction on November 8, 1966, and was purchased by Mehar Singh (Respondent No. 5.) on May 16, 1967.

(3) Feeling aggrieved from the action of the Settlement Authorities, the appellant preferred an appeal before the Authorised Settlement Commissioner, which was rejected,—vide order dated April 12, 1969 (copy Annexure 'C' to the writ petition) on the ground that the property had gone out of the compensation pool. The revision petition filed by the appellant against the order of the Authorised Settlement Commissioner was also dismissed by the Chief Settlement Commissioner,—vide his order dated June 29, 1971, (copy Annexure 'D' to the writ petition) on the ground that the appellant was unable to explain the delay caused by him in filing the appeal when the sale in his favour had been set aside by the Managing Officer on June 17, 1965. A further revision under Section 33 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as the Act) was also dismissed by the Central Government,—vide order dated March 24, 1972 (Copy annexure 'E' to the writ petition). The grounds on which the

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revision was dismissed are:

- (i) that the provisions of the Indian Soldiers (Litigation) Act had not been applied to the Tribunals functioning under the provisions of the Act ;
- (ii) that the auction was held in July, 1961, and the appellant was duty-bound to make enquiries from the settlement authorities as to the balance amount payable by him;
- (iii) that the notice to him on the last known address was received back undelivered, because he did not make adequate arrangements for the delivery of post to him before leaving for Poona; and
- (iv) that the property had already been disposed of in auction and had been purchased by Mehar Singh (Respondent No. 5)

(4) Feeling aggrieved from the impugned orders, the appellant preferred C.W.P. No. 2871 of 1972. The Learned Single Judge, on consideration of the entire matter, recorded the following findings:—

- (1) That the provisions of sub-rule (7) of Rule 117 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 (hereinafter referred to as the Rules) are directory in nature and are not mandatory with the result that the order of the Managing Officer is not void *ab initio*;
- (2) That the appellant did not intimate the change of address with the result that the compliance of the provisions of sub-rule (7) of Rule 117 would have been a mere formality and would not have made any difference;
- (3) That the property was auctioned and respondent No. 5 had purchased it in public auction and his right cannot be interfered with unless it could be held that he was a party to the irregularity, if any, committed by the Rehabilitation authorities; and
- (4) That in the absence of any such allegation and the property having gone out of the compensation pool after the

sale in favour of Mehar Singh (respondent No. 5), this Court would not interfere in the matter in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

(5) As a result of the aforesaid findings, the learned Single Judge dismissed the writ petition with costs. Hence the present appeal.

(6) Though various points had been urged before the learned Single Judge as is evident from the findings reproduced above. yet before us, Shri H. S. Wasu, learned Senior Advocate, urged only one point, that the provisions of sub-rule (7) of rule 117 of the Rules are mandatory in nature and as the procedure laid down in that sub-rule was not followed, the order of cancellation of the sale passed against the appellant was *non est* and void *ab initio*. In support of his contention, the learned counsel placed reliance on a judgement of this Court in *Behari Lal v. The Managing Officer (Sales), Jullundur and others* (1). On the other hand, Shri H. L. Sibal, learned Senior Advocate, contended that the appropriate authority had followed the procedure prescribed under sub-rule (1) by sending notice through registered post acknowledgement due; that the notice could not be served on the appellant as he was not found at the given address; that no change of address was given by the appellant; that after complying with the provisions of sub-rule (1), it would be deemed that service had been effected on the appellant and that the provisions of sub-rule (7) are merely directory, and non-compliance of those provisions would not make the impugned order *non est* or void *ab initio* especially when the mandatory provision of sub-rule (1) of rule 117 of the Rules had been followed.

(7) After giving my thoughtful consideration to the entire matter, I find considerable force in the contention of the learned counsel for the respondents. Relevant provisions of rule 117; with which we are concerned, read as under:—

“117. Service of orders and notices—(1) Every order or notice made or issued under the Act or these rules shall be served by registered post acknowledgement due.

(2) Ordinarily a notice of at least fifteen days shall be given.

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- (3) The service of an order or notice under sub-rule (1) shall be deemed to have been effected if the order or notice has been properly addressed and despatched by registered post.
- (4) The service of an order or notice shall, unless the contrary is proved, be deemed to have been effected on the date on which the order or notice; as the case may be, would ordinary have been delivered through the registered post.
- (5) When an order or notice has to be served on a person who has made an application for payment of compensation, it shall be despatched to him at the address supplied by him in the application for compensation unless an intimation of a change of address has been given.
- (6) When by due diligence the address of the person concerned cannot be known, the order or notice may be despatched to him at his last known address.
- (7) Where an order or notice sent by post is returned undelivered, or where the Settlement Officer or other authority is satisfied that there are reasons to believe that the order or notice cannot be delivered in the ordinary course, the Settlement Officer or other authority may direct that the order or notice may be served either;—
- (a) by publication in one issue of a newspaper having circulation in the area in which the person concerned is known to have last resided or to have carried on business; or
- (b) (i) by affixture of a copy of the same on a conspicuous part of the property in relation to which the order or notice has been made or issued; and
- (ii) by beat of drum at some place on or adjacent to such property.

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(8) An analysis of rule 117 show that under sub-rule (1) every order or notice made or issued under the Act or the Rules shall be served by registered post acknowledgement due. Under sub-rule (2), ordinarily a notice of at least 15 days shall be given. Sub-rule (3) provides that if an order or notice has been properly addressed and despatched by registered post then the service of such an order or notice shall be deemed to have been effected and under sub-rule (4) service of such a notice or order would be deemed to have been effected on the date on which the order or notice, as the case may be, would ordinarily have been delivered through the registered post. Sub-rule (5) provides that notice or order has to be despatched at the address supplied by the person, on the application of compensation filed by him, unless an intimation of a change of address has been given. Under sub-rule (6), it is provided that if after exercise of due diligence the address of the person concerned cannot be known, then the order or notice may be despatched to him at his last known address. Sub-rule (7) provides the modes of effecting substituted service where an order or notice sent by post is returned undelivered or where the Settlement Officer or the other authority is satisfied that there are reasons to believe that the order or notice cannot be delivered in the ordinary course.

(9) As is evident from the contention of the learned counsel for the appellant, the only point urged before us is that as the provisions of sub-rule (7) have not been followed, the order of cancellation of the sale passed was non est and void ab initio. Now adverting to sub-rule (7), I find that the Settlement officer or the other authority has been given the power to resort to the procedure laid down therein for effecting substituted service, but can it be said that after having complied with the provision of sub-rule (1) it is still obligatory on the Settlement Officer or the other authority to comply with the provisions of sub-rule (7). In my view, the answer has to be in the negative. A look at the analysis of rule 117 shows that the issuance of notice under sub-rule (1) through registered post acknowledgement due is mandatory in nature, that is, that issuance of notice under sub-rule (1) through registered post acknowledgement due on the address supplied by the person on his address given on the application for compensation, unless an intimation of a change of address has been given, is a must. In the instant case, admittedly, this specific provision has been complied with. The notice, which was sent to the appellant for the deposit of the balance amount on the address supplied by him in the application for compensation,

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was returned undelivered with the report that the whereabouts of the appellant were not known. There is no dispute that the appellant never intimated the change of address to any of the authorities concerned. In this situation, the notice under sub-rule (1) could be sent only on the address given in the application and by virtue of the provision of sub-rules (3) and (4), it would be deemed that the service had been effected on the appellant on the date on which ordinarily such a notice would have been delivered through the registered post. Having complied with the provision of sub-rule (1), the notice would be deemed to have been served on the appellant. Once this conclusion is arrived at, there does not seem to be any sound basis for holding that the provisions of sub-rule (7) are mandatory in nature. The intention of the Legislature in enacting this sub-rule is only to vest the authority with a power to exercise its discretion in an appropriate case to resort to the mode of effecting service, prescribed therein. The rules when read as a whole clearly indicates that the provisions of sub-rule (1) are mandatory while the provisions of sub-rule (7) may be resorted to if the Settlement Officer or the other authority finds it necessary to do so. The fact that it has been left to the discretion of the authority makes the intention of the rule-making authority clear that the provision is merely directory, and not mandatory and its compliance would not make the order void *ab initio* or *non est*. In this view of the matter, with respect, I am unable to agree with the contrary view enunciated on this aspect of the matter in *Behari Lal's case* (supra) and, accordingly, overrule the same. The view of the learned Single Judge that the impugned order does not suffer from any infirmity is upheld.

(10) Further, the learned Single Judge has also found as under:—
“Apart from that, after the property was reauctioned and respondent No. 5 had purchased it in public auction, his right cannot be interfered with unless it could be held that he was a party to this irregularity, if any, on the part of the rehabilitation authorities. In the absence of any such allegations and the property having gone out of the compensation pool after the sale in favour of Mehar Singh respondent, this court would not interfere in the matter in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.”

I am in respectful agreement with the aforesaid observations also.

(11) Thus viewed from any angle, we find no merit in this appeal and consequently, dismiss the same but without any order as to costs.

J. M. Tandon, J.—I agree.

H.S.B.

Before M. M. Punchhi, J.

COURT ON ITS OWN MOTION,—*Petitioner.*

versus

RAM LUBHAYA AND ANOTHER,—*Respondents*

Criminal Revision No. 1488 of 1984.

October 30, 1984.

Indian Penal Code (XLV of 1860)—Sections 361 and 363—Probation of Offenders Act (XX of 1958)—Section 4—Natural father attempting to kidnap minor daughter from lawful custody of adoptive father—Such attempt—Whether makes the natural father culpable under Section 361—Appellate Court releasing accused on probation under section 4 but maintaining imposition of fine—Maintenance of fine—Whether legal—Note appended to the judgment after its finalisation and signing that the conviction shall not effect the service of accused—Such direction—Whether permissible.

Held, that Section 361 of the Indian Penal Code, 1860 envisages the taking or enticing away of any minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. The explanation added thereto expands the words 'lawful guardian' to include any person lawfully entrusted with the care or custody of such minor or other person. The explanation to Section 361 of the Penal Code envisages more than one lawful guardian of a minor at one and the same time. In this view of the matter, the natural father of the minor child was also lawful guardian along with the adoptive father. As such the natural father of the minor cannot be said to have committed the offence under Section 361 so as to be punishable under Section 363 of the Code.

(Paras 3 and 4)