
(1938) 05 PAT CK 0005
In the Patna High Court

Deb Narain Kundu

APPELLANT

Vs

Amrita Lal Sil

RESPONDENT

Date of Decision : 05-05-1938

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 58

Citation : AIR 1938 Patna 421

Hon'ble Judges : Chatterji, J;Agarwala, J

Bench : Full Bench

Judgement

Chatterji, J.—The subject-matter of the dispute which has given rise to this appeal is a strip of land lying within the Madhupur Municipality. The land adjoins the plaintiff's house and is claimed by him to be a part of his holding. In December 1932 he applied to the Chairman of the Municipality for permission to erect a building on the land. The Municipality rejected his petition, denying his title to the land and claiming it as a public road. Hence the plaintiff brought the present suit for a declaration of his title and confirmation of possession over the disputed land. The suit was contested substantially on the ground that the land in suit is not the property of the plaintiff but a public municipal road. The learned Subordinate Judge who tried the suit dismissed it, holding that the plaintiff failed to prove his title and that the disputed land was being used as a public road. On appeal to the learned Deputy Commissioner, Santal Parganas, he confirmed the decision. Hence this second appeal by the plaintiff.

2. The plaintiff claims title to the disputed land on the basis of (1) a sale deed Ex. 2 executed on 20th April 1920 by one Mr. Monnier and (2) a mourasi mokarrari deed Ex. 4 executed on 23rd January 1891 by the then proprietor of mouza Sheikhpura, both in favour of the plaintiff's predecessor. Both these deeds Ex. 2 and Ex. 4 comprise practically the same area, about 41 bighas. The later deed Ex. 4 had the effect of converting what was mulrai-yati interest acquired from Mr. Monnier by the earlier deed Ex. 2 into a mourasi mokarrari tenure. The disputed land lies on the boundary between two mouzas Madhupur

and Sheikhpura, both of which are within the Madhupur Municipality, mouza Madhupur being to the west of Sheikhpura. In both the deeds Exs. 2 and 4, boundaries of the lands are given and the plaintiff claims that the disputed land falls within the area comprised within these boundaries. To ascertain the identity of the disputed land the plaintiff prayed for a local investigation by a survey knowing commissioner. The learned Subordinate Judge allowed.

3. This prayer by his order dated 28th November 1933 which runs thus:

Parties represented. Plaintiff applies for the. deputation of an Amin Commissioner to survey the land in suit and prepare a map showing the position of the disputed land in relation to the lands covered by the patta granted by the Ghatwal of Pathrole and the deeds of relinquishment of the previous holders of the land, also whether the land falls within the road of the present survey map. Babu Hem Chander Ghosh, Retired Kanungo, is appointed commissioner to do this. He will in addition compare the location of the land in suit in the map of the 1905 settlement and after consulting the records of that settlement prepare a map showing how the land was then recorded. He will also by actual measurement on the spot locate the exact position of the land in suit in the municipal town map prepared at the time. Mr. Eaves was the Chairman of the Madhupur Municipality. Fix 21-12-83 for his report. Plaintiff to deposit Bs. 25 as the cost of the commissioner.

4. The commissioner appointed made a local investigation and submitted his map and report from which it is pretty clear that the disputed land falls within the boundaries mentioned in the plaintiff's title deed Ex. 4. He appears to have followed the directions of the Court as given in the order quoted above. To fix the identity of the disputed land the northern and western boundaries are particularly important. On the north there is Railway B Class land about which there can be no uncertainty. On the west there are at present the Wes-lyan Church and Priya Villa. The commissioner ascertained that these were formerly Bishun Dayal Sah's land which tallies with the western boundary mentioned in Ex. 4. No objection was taken by either side to the correctness of the commissioner's map and report. The learned Subordinate Judge declined to act on his map and report on the ground that he located Bishun Dayal Sah's land on the western boundary, relying on enquiries on the spot. Having discarded the map and report the learned Subordinate Judge proceeded to discuss the evidence in the case and came to the finding that the plaintiff failed to connect the disputed land with his title deeds Exs. 2 and 4. This finding has been confirmed by the learned Deputy Commissioner in appeal. To my mind the learned Subordinate Judge, committed an error of procedure. Under Order 26, Rule 16, Civil P.C. a commissioner, unless otherwise directed by the Court, may examine the parties or witnesses.

5. Under Order 26, Rule 10 the evidence taken by him is to be reduced to writing and the evidence so recorded shall be submitted with the report and shall form part of the record. The commissioner if he examined witnesses on the spot

should have reduced their evidence to writing. When the Court found that his report was not in accordance with law it should have ordered a fresh investigation. It is true that a Court when it rejects a commissioner's report is not bound to issue a fresh commission if the other evidence on the record is sufficient for the disposal of the case. In the present case a local investigation was essentially necessary in order to determine the identity of the land. The commissioner's map was an important piece of evidence in support of the plaintiff's case and the learned Subordinate Judge when he rejected the map and report should have in the exercise of his judicial discretion, issued a fresh commission. The learned Deputy Commissioner in appeal also did not at all consider the map and report, and in deciding the question of the plaintiff's title proceeded on the same grounds as the learned Subordinate Judge did.

6. The learned Subordinate Judge upon consideration of the oral and documentary evidence came to the conclusion that the disputed land was being used as a public road for a long time. Even assuming that the plaintiff proved his title to the disputed land, yes if it is found as a fact that the disputed land is being used by the public as a road for a long time openly and as a matter of right, it may be inferred that there was an implied dedication of the land for the use of the public.

7. In that case the land would become a public road and, as is provided in Section 58, Bihar and Orissa Municipal Act, would vest in the municipality. The plaintiff's suit must then fail. The learned Deputy Commissioner in his judgment does not at all deal with this aspect of the case. If he had done so and had come to a clear finding on the point the appeal might have been concluded by this finding of fact.

8. Under the circumstances the proper order, in my opinion, would be to set aside the decree passed by the Courts below and remand the suit to the trial Court for disposal according to law after issuing a fresh commission for local investigation. Costs will abide the result.

Agarwala, J.

I agree.