
(1918) 03 CAL CK 0039
In the Calcutta High Court

Hon"ble Sir Maharaja Manindra Chandra Nandi Bahadur	APPELLANT
Vs	
Kumar Sarabindu Ray and Others	RESPONDENT

Date of Decision : 19-03-1918

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Limitation Act, 1963 — Article 47

Citation : AIR 1919 Cal 672 : 45 Ind. Cas. 408

Hon'ble Judges : Walmsley, J;Richardson, J

Bench : Division Bench

Judgement

Richardson, J.—The plaintiff in the an is the appellant in this appeal. The dispute between the parties relates to the boundary between two estates, that on the west belonging to the plaintiff and that on the east belonging to the defendants. In the trial Court, the learned Subordinate Judge on a consideration of the evidence came to the conclusion that the bulk of the lands belonged to the plaintiff's estate. The Subordinate Judge made a decree in accordance with that finding. On appeal the learned District Judge took a different view and dismissed the suit.

2. The principal contention urged before us by Sir Rash Behary Ghose on behalf of the plaintiff, and the only contention with which we are called upon to deal, is that the learned District Judge erred in respect of the mode in which he dealt with the burden of proof. It appears that on behalf of the plaintiff the District Judge was referred to the principle laid down by the Privy Council in the case of *Lukhi Narain Jagadeb v. Jodu Nath Deo* 21 Order 604 21 I.A. 39 : 6 Sar. P.C.J. 408 : 10 Ind. Dec. (N.S.) 966 (P.C.). The principle, as it is stated by their Lordships, appears to be that in those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule in a suit regarding the onus coming on the plaintiff has no application. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant, as much as of the plaintiff, to aid

the Court in ascertaining the true boundary. Referring to that case the learned District Judge says that the principle is only laid down in respect of boundaries in large areas of waste lands, and that in the present case the plaintiff has to shoulder the ordinary burden of proving his case. It is not, in my opinion, necessary to consider for the present purpose what, if any, limitation should be placed upon the principle as their Lordships stated it, a principle which when the evidence as to possession is equally balanced or unreliable is of great utility in those parts of the country where expert surveyors are not easily obtainable, and where boundaries may depend on the identification by evidence of injunction points and so forth. Even if the learned District Judge be wrong in supposing that the principle applies only in regard to large areas of waste lands, his conclusion, though it may rest on a wrong ground, nevertheless seems to be right. It is clear that he had before him on the record the fact that the defendants against whom the suit was brought had been in possession for some years under an order of the Criminal Court made in accordance with the provisions of Section 145, Criminal Procedure Code. The learned Pleader for the defendants has gone so far as to argue, though the point was not apparently taken before the learned District Judge, that the present suit was brought beyond the period of limitation prescribed by Article 47 of the Schedule of the Limitation Act. Whether that is so or not may perhaps be doubtful and may depend on further questions of fact as to who were the parties who appeared or were represented in the proceedings before the Magistrate. That question not having been considered by the District Judge it would not be argued for us in second appeal to deal with it. It still remains, however, that the defendants were in possession under this order which was made in the year 1904, and they remained in possession till the date when the suit was brought in January 1910. Regarding the decision of the Privy Council in *Dinomoni Chowdhury v. Brojo Mohni Chowdharani* 29 C. 187 : 29 I.A. 24 : 6 C.W.N. 386 : 12 M.L.T. 83 : 4 Bom. L.R. 167 : 8 Sar. P.C.J. 224 (P.C.) it seems clear that the principle stated in *Lukhi Narain Jagadeb v. Jodu Nath Deo* 21 C. 504 : 21 I.A. 39 : 6 Sar.P.C.J. 408 : 10 Ind. Dec. (N.S.) 966 (P.C.) must yield to the circumstances of the present case and that the burden of proof was on the plaintiff to show that the person in possession under the order of the Magistrate had no right to possession. *Dinomoni Chowdharani's* case suggests that when the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries clearly shown, is found to have been in actual possession of the disputed area, the burden will in that case come on the plaintiff to establish his title. Though, therefore, the learned District Judge may have given a wronger reason for his view that the burden of proof was on the plaintiff, that view seems to be correct in the circumstances of the present case. If the burden of proof is on the plaintiff, no ground exists in second appeal for disturbing the findings of fact at which the learned District Judge has arrived. He was entitled to deal with the report of the Amin appointed to make a local investigation. He was entitled to come to a conclusion on the evidence that the map prepared by the Amin did not represent the true boundary.

3. A complaint is made that if the District Judge was dissatisfied with the map and report of the Amin, he did not, as it is said he should have done, direct a fresh investigation. As to that, in the first place, it was not compulsory on the learned Judge to direct a fresh investigation and in the words used by the Privy Council in *Jaga-dindra Nath Roy v. Secretary of State* 30 I.A. 41 : 30 C. 291 : 7 C.W.N. 193 : 5 Bom. L.R. 1; 8 Sar. P.C.J. 412.(P.C.), while it was no doubt open to the District Judge to take that course of sending back the case for further enquiry, he committed no error of law in deciding, as he did, on the evidence before him Whether he was right or wrong in the decision to which he came is not a question into which we can enter in second appeal. Moreover, from an observation to be found in the District Judge's judgment it appears that the plaintiff had an opportunity for further enquiry but he did not take advantage of it. The learned Judge says that the appellants before him, i.e., the defendants, were perfectly willing to abide by the revenue survey line if it were relaid by a competent surveyor but the respondent, that is, the plaintiff, would not accept this offer.

4. In the circumstances, in my opinion, this appeal fails and should be dismissed with costs.

5. Walmsley, J.--I agree.