

(1950) 04 PAT CK 0006
In the Patna High Court
Case No : Criminal Revision No. 311 of 1950

J.W. Broucke and Others

APPELLANT

Vs

Kamleshwari Narain Singh and Others

RESPONDENT

Date of Decision : 25-04-1950

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 148

Citation : AIR 1950 Patna 472

Hon'ble Judges : Shearer, J

Bench : Single Bench

Advocate : S.N. Basu and S. Mustafi, for the Appellant; Lalnarayan Sinha and Sreenath Singh, for the Respondent

Judgement

Shearer, J.—This application in revision is directed against an order made u/s 145, Criminal P. C., in which the petitioners were the first party. On 30th May 1947, two of the petitioner executed a sale deed conveying to the second party to the proceeding an area of 526 bighas 6 kathas 6 dhurs of land and also certain buildings situated in village Chowtarwa. This land was land in which the executants of the sale deed had rights of occupancy under the landlord Chowterwa which is the Bettian Raj. It is apparently the practice of the Bettian Raj to have the holdings of occupancy raiyats measured from time to time in order to ascertain whether they have encroached on waste land. If it is found that waste land has been encroched on and amalgamated with an occupancy holding, the occupancy raiyat is required to (sic) formal settlement of it on payment of a salami. During or before the negotiations between the parries to the proceeding, a measurement had been made, and it had been discovered that the petitioners had made a number of encroachments the aggregate extent of the encroachments amounting to more or less 11 bighas. The second party in the first instance declined to take a conveyance of this 11 bighas, but agreed eventually to do so. In the meantime, however, a second measurement had been made as a result of which it appeared that further encoachments to the extent of somewhat more than 40 bighas had been made by the petitioners. The second

party declined to have his area included in their sale deed, as they considered that the petitioners had then no title to it. They stipulated, however, that, if and when the petitioners were in a position to convey a good title to this land also, they should be given the option of purchasing it. The subject-matter of the proceeding was this area of more or less 40 bighas. The sale deed, as I have said, was executed on 30th May 1947, and on 27th June 1947 that is within four weeks of the execution of the sale deed, one of the first party wrote to the second party suggesting that, as they had not purchased this land and as it was contiguous to land which they had purchased, the boundary between this land and the land conveyed by the sale deed should be demarcated. On the following day a reply was sent to this letter by the second party stating that they had sent for an amin to have the demarcation made, as desired by the first party. The petitioners eventually succeeded in persuading the manager of the Bettiah Raj to settle this 40 bighas with them and paid the requisite salami. It is said, however, that the Board of Revenue declined to ratify what the manager has done and that the land was later formally settled with the second party who also paid salami. The second party apparently contend that, as a result of this, they succeeded in evicting the first party and obtained possession of the land. This, it is quite clear is the vital question for decision, and the importance of it has not been fully realised by the Court below.

2. It is obvious that the first party were in possession of the land in dispute in the middle of 1947, and the onus was therefore, on the second party to show conclusively that they had succeeded in dispossessing them within more than two months prior to the institution of the proceeding which was on 4th January 1949. This is clear on general principle. If authority is needed, I may refer to the decision cited by Mr. S. N. Basu for the petitioners, in the course of his argument *S. M. Yaqub v. T. N. Basu* A. I. R. (36) 1949 Pat. 146 : 50 Cr L J. 299 S. B). The trial is also vitiated by another irregularity of a serious kind.

3. When the first party had closed their case, an application was made for a pleader commissioner to be appointed. The learned trying Magistrate appointed a pleader commissioner to make a local enquiry and directed him to report on certain specific points. The pleader Commissioner in due course, submitted his report, and objections were taken to it by the first party which asked to be allowed to adduce rebutting evidence. The learned trying Magistrate declined to accede to this request. The pleader commissioner was called to give evidence by the second party but was not examined at any length, the reason, no doubt being that the pleader for the second party considered that his report could be read as evidence. The learned trying Magistrate was of the same opinion and the report was read as evidence, and the learned trying Magistrate greatly relied on it in his judgment. If a local enquiry was necessary, and I do not say that it was not entirely justified, the enquiry ought, u/s 148 Criminal P. C., to have been held by a Subordinate Magistrate. I do not regard it as a very serious error that it was not held by a Subordinate Magistrate but by a pleader commissioner. The really serious matter is that the first party were not allowed to adduce rebutting

evidence. The local enquiry having been held after the first party had closed their case, they were, quite clearly, entitled to adduce rebutting evidence and show that the report was erroneous or ought not to be relied on. In these circumstances the order of the Court below must, in my opinion, be set aside, and the proceeding must be ordered to be retried from the point at which the irregularity occurred. A local enquiry ought to be made either by a Subordinate Magistrate or by the trying Magistrate himself, and in either case the first party ought to be given an opportunity of seeing the report or the memorandum of inspection and an opportunity, if they so desire, of adducing rebutting evidence. The second party will of course, be entitled to examine the pleader commissioner, and the pleader commissioner will be entitled to refer to his report in order to refresh his memory but the report itself cannot be read as evidence. In conclusion, I would point out that Mr. S.N. Basu, for the petitioners conceded that a mistake had been made in drawing up the proceeding in that a number of plots comprising no very considerable area was land which had been conveyed by the sale deed. Mr. Lalnarayan Sinha for the opposite party, similarly concedes that a small area, on which there were some buildings, was in the possession of the first party. The learned trying Magistrate will, no doubt, deal with these minor points in his final order.