

(1924) 04 CAL CK 0044
In the Calcutta High Court

Raj Chandra Banik and Others

APPELLANT

Vs

Iswar Chandra Banik and Others

RESPONDENT

Date of Decision : 04-04-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : AIR 1925 Cal 170

Hon'ble Judges : Suhrawardy, J;Graham, J

Bench : Full Bench

Judgement

Suhrawardy, J.—This is an appeal from an order of the Subordinate Judge of Tipperah remanding the case to the Court of the Munsif for re-trial. The suit was brought by the plaintiff for declaration of his right over a pathway. The learned Munsiff held a local investigation and after recording the evidence dismissed the plaintiff's suit. There was an appeal and the learned Subordinate Judge, without going into the evidence or merits of the case, remanded it for re-trial by the first Court on the ground that the Munsif had made use of his knowledge of what he saw in the locality, without making any note of the result of his inspection. Reliance has been placed by the Court below on the case of Rai Kishori Ghose v. Kumudini Kanta Ghose [1912] 15 C.L.J. 138. That case was decided u/s 392 of the repealed Code of 1882. In the new Code there has been some alteration in that section as well as in the rule regarding the inspection of the locality " by the Court. Section 392 of Act XIV of 1882 has been enacted word per word in Order 26, Rule 9 with the exception of the words- "and the same cannot be conveniently conducted by the Judge in person." These words have been left out in view of the new provisions introduced in the present Code by Order 18, Rule 18 which invests the Court with power to inspect a property at any stage of the suit. Although there has been this alteration in the law the law as it stood before has not been materially changed. Though the present Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the foundation of its judgment which must be based

upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence. The Judge is to hold such inspection for the purpose of better following and understanding the evidence adduced before him or to test its accuracy.

2. In the present case what the learned Munsif did is this. It was a part of the plaintiffs' case that the pathway extended beyond the house of the defendants up to the District Board road. The learned Munsif found on inspection of the locality that the broad pathway extended up to the house of defendants Nos. 5 and 9 and beyond that there were merely footpaths in several directions. He further observes in one portion of his judgment " I had been to the locality being accompanied by parties and am convinced that the disputed pathway which is broad enough for use for all purposes is a passage common to the members of the house of defendants and though a single foot pathway can be traced from house to house beyond the house of defendants Nos. 5-9 or beyond the eastern bank of the tank up to the Municipal road mentioned above as in any other direction it can in no case be said that the disputed pathway has extended further east beyond the houses of the defendants." The learned Vakil for the respondent has argued that the learned Munsif has correctly stated the facts as they appeared at the time of the inspection but not the facts when the obstruction occurred i.e., more than a year ago. That may be so and it is a matter of evidence. The learned Munsif accepted all the evidence the parties chose to adduce. He did not shut out any evidence. It is, however, argued that as the learned Munsif left no note on the record of the result of his inspection, it was not possible for the plaintiff to foresee the points that struck the Munsif most and to adduce evidence to explain it. I do not desire to be a party to lay down any such proposition as has been done in some of the cases, that it is the duty of the Court when holding a local inspection to leave a note of the same. There is nothing in the statute to make it obligatory on the Court and no such provision should be read into it. The only limitation that has been placed on the right of the Court to make such local inspection is that the Judge should not make it the basis of his judgment irrespective of the evidence adduced by the parties. In this particular case the learned Munsif has not made his observation of the locality the foundation of his judgment. He has considered the plaintiff's case as placed before him and attempted to be proved before him by evidence. He observed that the plaintiff has based his claim on prescription and finds that the plaintiff came into the occupation of the alleged dominant tenement within 20 years and that before his occupation the whole locality was jungle. From these facts he has come to the conclusion that the plaintiff has not acquired any right of prescription by user. He has further examined the evidence and came to the conclusion that the plaintiff did not acquire any right of way over the disputed property either by prescription or as a way of necessity. The evidence on this point has been dealt with fully in a lengthy judgment. In my opinion the view taken by the Subordinate Judge that as the Munsif did not keep a note of the result of his inspection his judgment is to be set aside and the case has to be

retried is not correct.

3. The result is that the order of the Court of appeal below is set aside and the case remitted to it for hearing of the appeal on merits and according to law. Costs will abide the result. The hearing-fee is assessed at one gold mohur.

Graham, J.

4. I agree. The trial Court clearly had power under Order 8, Rule 18 of the CPC to make the local inspection. The provision appears to have been overlooked by the first appellate Court. Two main points have been urged on behalf of the appellants: firstly-and this is the main contention- that the learned Munsif was not entitled to base his judgment on what he found at the time of local inspection; and secondly that if he made such local inspection he ought to have placed on record a note of what he observed at the time so as to make the parties explain any matter that might arise therefrom and cross-examine if necessary. With regard to the first point it is to be seen whether the Munsif has in fact based his decision on what he observed at the time of the local inspection: on a careful consideration of the matter it appears to me that the Munsif cannot be said to have based his judgment on the result of his local inspection., On the contrary, he has dealt with the evidence at some length and it cannot, I think be said that his judgment is based entirely on what he observed when he went to the locality.

5. We have been referred to the case of Ahmed Sahib Shuhar v. The Magnesite Syndicate Ltd. [1916] 39 Mad. 501, but that case is clearly distinguishable as the decision there was found to be based solely on the result of the local inspection. As regards the second contention, it is to be observed that the CPC nowhere lays down that the result of a local enquiry must be placed on record and I do not think that we ought to read into the rule something which has not been stated therein. If it had been the intention of the Legislature that this should be done it could easily have said so in plain language.

6. For the reasons given I agree that the appeal must be allowed and the case sent back to the Court below to be disposed of in accordance with law.