
(1938) 09 PAT CK 0010
In the Patna High Court

Ramanandan Marwari and Others

APPELLANT

Vs

Ramjiban Marwari and Others

RESPONDENT

Date of Decision : 28-09-1938

Acts Referred:

Transfer of Property Act, 1882 — Section 8

Citation : AIR 1939 Patna 164

Hon'ble Judges : Dhavle, J

Bench : Division Bench

Judgement

Dhavle, J.—This is an appeal by the plaintiffs in a suit for declaration of title to portions of land marked "ga" and "gha" lying on the east and south, respectively, of a block marked "kha" on the map in suit. In 1915, plaintiffs first bought the block of land marked "ka", which lies immediately ? to the south of the Bankura Road in the town of Purulia. In 1924 the plaintiffs bought land immediately to the south of "ka" from another vendor Indumati Dasya; and the claim in the suit was that this sale deed covered not only "kha" but also "ga" and "gha". The lower Courts have concurrently held that under their purchase of 1924, the plaintiffs acquired no more than the portion marked "kha" and dismissed the suit.

2. The sale deed of 1924 is vague in several respects. As the lower Appellate Court has pointed out, it leaves it open to controversy what the starting point for the measurement of 25 feet 6 inches from west to east was intended to be. The sale deed gives the western boundary of the land conveyed as Amaro aponar paikhana, jataater rasta dui foot bade Paran Hal. darer palca prachir."

The appellants" would translate this as:

Paran Haldar"s pucca wall excluding the two-feet wide passage which is used for coming and going to our or your privies,

while the respondents" construction is:

Paran Haldar's pucca wall, beyond the two feet wide passage for going and coming to our privy and yours.

3. What, little I know of Bengali does not enable me to say that either construction is impossible, though I must add that the construction adopted by the lower Appellate Court, rejecting the construction contended for by the appellants, seems on the very wording to be rather more reasonable than the other. The sale deed gave the length of the land conveyed from north to south as 23 feet and the area as "about one katha," The maximum area that could be contained in a quadrilateral measuring 25 feet 6 inches from east to west and 23 feet from north to south falls considerably short of one katha, viz. by between 1.5 and 1-6.

4. It is also practically impossible to take the directions east to west and north to south with any precision, in view of the fact that the land conveyed is bounded on the north by a wall of the plaintiffs which does not appear to run due east to west and is bounded on the west by a passage or lane 2 feet wide to the east of a pucca wall which does not run in a straight line but shows changes of direction at several points. A Pleader Commissioner was taken out to the spot to plot out the land covered by the sale deed and was face to face with the difficulties already indicated. He also found a straight wall at the eastern end of the block "kha" and another straight wall on the south of the same block, running in a slanting direction from the end of the wall in the east. Both these walls were admittedly built by the plaintiffs. The Pleader Commissioner expressed his difficulty in the following terms:

So there would be a question as to how to measure this 25 feet 6 inches or 23 feet. Whether 25 feet 6 inches is to be measured along the altitudes on Paran Haldar's wall or along those on the eastern wall which is the straightest parallel to the southern limit of schedule "ka" or along the slant of the now existing southern wall. Similarly there is the question as to how to measure the 23 feet, i.e. at right angles to which of the above lines. There will be different results in shewing the schedules "ga" and "gha" according as one or the other method is selected. I thought the eastern wall which is the straightest should be selected as the basis and I have drawn schedules "ga" and "gha" accordingly. It will be seen that it differed with the plaintiff's map a little, as evidenced from map number 2.

5. The Commissioner noted that the extent and existence of "ga" and "gha" depended on the interpretation of the kebala, which was beyond his jurisdiction, but that as he had been directed by the writ to determine "ga" and "gha" he had to take One view or the other:

If the language is taken as a general description of an irregular figure and is taken in the loose sense that 2 feet should be left from the lane along Paran Haldar's wall and then the measurement of the longest portions of the schedule kha should be 25 feet 6 inches and 28 feet, then probably there will be no

existence of the schedules "gha" and "ga". On the other hand, if it is to be interpreted that every inch of the eastern side and southern side of schedule "kha" should be 25 feet 6 inches and 23 feet from Paran Haldar's wall and the southern limit of schedule "ka", respectively, then the schedule "ga" and "gha" should be as I have shown in the map. But in that case also it would be seen from map No. 1 that a small portion on the south, eastern corner of schedule "kha" the plaintiff is not entitled to, of course if the measurement is taken in the way that I have done and if it is the correct way.

6. The Pleader Commissioner does not use the familiar language of ordinary geometry, but his meaning is perfectly clear. It is common ground before me that "kha" as bounded by plaintiffs' new walls on the east and south of the disputed purchase measures 23 feet along the eastern wall and 25 feet 6 inches along the southern wall. The learned Munsif has given a variety of reasons for holding that it was land thus bounded on the east and south that was conveyed by the kebala. He refers to the evidence of plaintiffs' third witness that the plaintiffs had walled the land purchased from Indumati and that the land on the south of the wall (the southern wall) that is to say "gha", so far as the dispute before us is concerned, belongs to Indumati. Plaintiffs' story that they had deliberately left land to the south of this wall for later constructions has been disbelieved as a question of fact by both the lower Courts for very strong reasons, to which must be added the circumstance brought out from the report, of the Pleader Commissioner that if the length from west to east of the land purchased by the plaintiffs from Indumati is to be measured in the way desired by the plaintiffs, they will be found to have trespassed upon the balance of their vendor's land near the south-eastern corner.

2. It is not difficult to see how the southern wall came to be built where we find it, with a length of 25 feet 6 inches up to the eastern wall which is 23 feet long. Plaintiffs spoke of Indumati building a privy immediately to the south of this southern wall 7 or 8 years ago, but this was given away by their own fourth witness who placed the privy in 1305 or 1306 B.S.

8. The southern wall was thus rightly taken by the learned Munsif (having regard to the vendor's right under the sale deed to place "rafters but not any beam" on the southern wall, the filled-up gaps seen on his local inspection and the evidence of P.W.s Nos. 3 and 4, etc.) to mark the southern limit of what was conveyed to the plaintiffs by Indumati. The eastern limit is even clearer, if the southern one is thus fixed; for the southern wall slants in the east towards the north and makes it impossible to say that what the plaintiffs bought was a block of land bounded by parallel straight lines on the north and south and by parallel zigzags on the west and east. Nor does it appear that land to the east of the eastern wall was ever before shown by the plaintiffs as theirs (e. g. when they applied to the Municipality) parallel in its varying directions to Paran Haldar's pucca wall on the west.

9. Their story that they deliberately left some land on the east of their eastern

wall in order to widen the lane to the north is opposed, as the learned Munsif points out to the evidence of their third witness who says that the lane on the east is now of the same dimensions as before. He has also pointed out that Indumati would not have parted with her land here in such a way that if plaintiffs had so chosen, they could have narrowed her passage to her house. There also appears to be no reason why plaintiffs should have been anxious to widen the lane on the east of their house when the lane is of a narrower breadth towards the north.

10. The lower Courts have both held that the kebala gave the plaintiffs no more than a temporary interest in this lane on the east. The appellants have assailed this and invoked Section 8, T.P. Act, before me. I will deal with their plea of an easement of necessity along this lane later on. It is sufficient in the meanwhile to point out that the provision in the kebala entitling the purchaser, so long as his second storey is not constructed, to use the lane as a passage for himself and his cattle goes much against the contention that the plaintiffs had more than a temporary interest in the lane so as to lead one to believe that they could have had any reason to wish to widen the lane by setting apart land for which they had paid as much as Rupees 1,100 a (Bengal) cottah. The learned Subordinate Judge applied some tests into which I do not consider it necessary to go, partly because they are expressed in language which is so far from clear that the learned advocates may well be excused for not being able to follow it, and partly because the reasons given by the learned Munsif and already referred to by me have not been shaken by the appellants and seem conclusive.

11. We need not therefore inquire how far the lower Courts (the Subordinate Judge especially) were right in referring to the boundaries given in later deeds of Indumati that evidence may be excluded altogether without affecting the claim of the plaintiffs to "ga" and "gha". In view of the large price paid, plaintiffs cannot well be believed to have left land on the east and the south without any reason; and the reasons they have given fail on the evidence of their own witnesses. The inference is strong that what they walled in on the east and the south the only directions in which there was any possibility of dispute was no less than what they had purchased, especially as the lengths of these new walls are 25 feet 6 inches and 23 feet.

12. The construction of the kebala in the present case is not a matter of the interpretation of the words of the kebala by themselves, but has to be decided in the light of the oral evidence and the local circumstances. Regarding the matter in this way, my conclusion is that the appellants have failed to show that there is any material error in the way the lower Courts have read the kebala and the evidence and circumstances bearing on the interpretation of it.

15. The only other point that has been raised before me relates to the plaintiffs' right to use the lane Una to the east of the eastern wall. There was no separate issue framed about it in the trial, but the trial Court discussed it under Issue 4 and pronounced against the plaintiffs' claim that they were entitled to use this

lane for ever for going to the Bankura Boad from the block marked "kha". The lower Appellate Court concurred in that view. It has been contended for the appellants that their interest in this lane is in the nature of an easement of necessity. It is true that before the plaintiffs' purchase of 1924 their vendor, who also owned the lands to the east of the lane and to the south of their southern wall bounding "kha", had to use this lane for access to her property. Appellants' contention is that in that way there was an easement of necessity along this lane in respect of block "kha". But in the first place it is significant that their kebalah of 1924 expressly provides that so long as their pucca second storey is not constructed, they with their cattle will be entitled to pass along this lane. Secondly, it is well-settled that

an easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property: *Gale on Easements*, Edn. 11, p. 183:

14. This principle was followed in First Appeal No. 76 of 1931, decided by the late Chief Justice and Varma J., on 22nd October 1935, a decision to which the learned advocate for the respondents has referred me. The learned advocate for the appellants has, as against this cited *Proctor v. Hodgson* (1855) 10 Ex 824. But the actual decision in *Proctor v. Hodgson* (1855) 10 Ex 824 was that no question of an easement of necessity arises without an allegation that the plaintiff had no other way. This it is impossible for the appellants to do in the present case, for, as in First Appeal No. 76 of 1931, block "kha" is bounded on the north by the plaintiffs' own land and there is in addition on the west the lane in front of Paran Haldar's wall which gives access to this block. It is true that in the discussion in *Proctor v. Hodgson* (1855) 10 Ex 824 Parke, B. and Alderson, B. were inclined to "doubt *Holmes v. Goring* (1824) 2 Bin 76 a but this was only as regards whether that decision was to be considered to refer to a grant of such a right of way as from time to time may be necessary a consideration which does not at all arise in the present case in view of the lane in front of Paran Haldar's wall and of block "ka", which plaintiffs purchased years before their purchaser of "kha." Both the points urged before me fail. The appeal is dismissed with costs.