

(1961) 01 PAT CK 0012
In the Patna High Court
Case No : A.F.A.D. No. 1016 of 1959

Ramautar Gope and Others

APPELLANT

Vs

Sheonandan Mistri and Others

RESPONDENT

Date of Decision : 30-01-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10(2), Order 41 Rule 33, Order 41 Rule 4, 100
Easements Act, 1882 — Section 35
Evidence Act, 1872 — Section 13, 32
Patna Municipal Corporation Act, 1951 — Section 508

Citation : AIR 1962 Patna 273

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : R.S. Chatterji, for the Appellant; S.N. Dutta, S. Mustafi, S.K. Ghosh, Kanhaiyaji and Tarni Prasad, for the Respondent

Final Decision : Dismissed

Judgement

K. Ahmad, J.—The suit by the plaintiffs, who are main respondents in this Court, was for declaration of title and recovery of possession in respect of a lane bearing municipal Khasra No. 334 and for mandatory injunction directing the defendants to close their door and windows facing that lane. In defence, the main pleas raised were (i) that no encroachment had been made by the defendants over the lane, and (ii) that the suit, as framed, was bad for want of notice u/s 508 of the Patna Municipal Corporation Act, 1951. It is not denied that on the east of the lane in dispute is the house of the defendants which, during the cadastral survey was measured as plot No. 83 and in the municipal survey in plot Nos. 713 and 714. And that on its west is the house of the plaintiffs, which, during the cadastral survey was measured as plot No. 76 and during the municipal survey as plot No. 333. Both the Courts have concurrently found that the land in dispute forms part of the plaintiffs' plot on the west, namely, that of cadastral survey plot No. 76 and municipal survey plot No. 333. The trial Court,

however, dismissed the suit, on the ground that the suit, as constituted, was hit by the mischief of Section 508 of the Patna Municipal Corporation Act, 1951. The lower appellate Court, has taken a different view on that question. In the opinion of the lower appellate Court, this suit is not hit by the aforesaid Section 508 of the Patna Municipal Corporation Act, even though Patna Municipal Corporation has been impleaded as a party defendant to the present action. Accordingly, the lower appellate Court has decreed the suit.

2. Now as against that judgment and decree, only the principal defendants have come up in second appeal to this Court. That means, there is no appeal filed on behalf of the Patna Municipal Corporation. Mr. R.S. Chatterji appearing for the appellants in support of this appeal, raised four points (i) that the lower appellate court erred in law in discarding the two exhibits of the appellants, namely, Exts. C and C(1), (ii) that the lower appellate court in law was wrong in taking into consideration the report of the pleader commissioner, in view of the fact that the commissioner was not examined as a witness at the trial, (iii) that the suit, as framed in the present case, is hit by Section 508 of the aforesaid Patna Municipal Corporation Act, and as such it should have been dismissed, and (iv) in any view of the matter, the lower appellate Court was not right in passing the order that "the defendants 1st party shall close the door and the windows in the western wall of their house within a month of the date of the decree, failing which they shall be dosed at their cost through the processes of the Court." I take up these points one by one in the order in which they have been stated above.

3. As to the first point, it will suffice to say that Exts. C and C(1) have been relied upon by the appellants to show that therein the boundaries given of the properties covered thereunder give support of their case. In other words, those documents have been relied upon by the appellant only prove that the boundaries given therein show that the land in dispute is not the exclusive property of the plaintiffs. The lower appellate Court has elaborately discussed this point. In my opinion, he has rightly relied upon the rule of law as laid down to Soney Lall Jha and another Vs. Darbdeo Narain Singh and others , in rejecting the same. It cannot be denied that Exts. C and C(1) are documents of the vendors of the present appellants, and, as such, the statements of a third, party. There is no evidence on the record that they are dead, nor they have been examined in this case. As such, the statements made about the boundaries in those documents cannot be held in law as admissible against the plaintiffs of the present case.

4. Then comes the criticism against the report of the Commissioner. It appears that at the trial the Court had appointed a commissioner for measuring the land in dispute, and, in pursuance of that order, the commissioner had submitted a report. That report in law is obviously admissible, and, in fact, forms part of the case, as provided in Rule 10(2) of Order XXVI of the Code of Civil Procedure, It is, however, stated by Mr. Chatterji that though an application has been filed on behalf of the appellants to examine that commissioner as a witness in the case in

support of the objections raised on their behalf, he was ultimately not examined as by the time the case was taken up for trial, he was dead. In my opinion, the fact that the commissioner was not examined at the trial cannot, in law, make his report inadmissible in evidence. Secondly, no such objection was raised against the report of the commissioner either at the trial or in the lower appellate Court. On the contrary, it appears, as stated by the lower appellate Court, that on the 10th July, 1958, the lawyers of both the parties prayed before the trial Court that the report of the commissioner should be considered at the time of the hearing of the suit along with other evidence on the record. Therefore, in my opinion, it is too belated on the part of the appellants to submit now that simply because the commissioner could not be examined at the trial due to his death, his report should not have been admitted in evidence. Thus the second point also fails.

5. The third point relates to the non-maintainability of the suit for want of notice u/s 508 of the Patna Municipal Corporation Act, 1951. It is not denied, as already stated above, that the Patna Municipal Corporation has been impleaded in the present action as a party defendant, and, that on their behalf an objection had been taken at the trial that the suit was hit by the mischief of the aforesaid Section 508. The main part of that section provides:

"508(1) No suit shall be instituted against the Corporation, the Standing Committee or any Corporation, officer or servant, or any person acting under the direction of the Corporation, the Standing Committee or any municipal officer or servant, in respect of any act done in pursuance of execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act or any rule or bye-law made thereunder until the expiration of one month next after notice in writing has been delivered or left at the Corporation office or at the residence of such officer, servant or person stating with reasonable particularity....."

This section, therefore, clearly applies in a case where the allegation against the Corporation is "in respect of any act done in pursuance of execution or intended execution of this Act. or in respect of any alleged neglect or default in the execution of. this Act or any rule or bye-law made thereunder". Applying this test, the trial Court came to the conclusion that the entry got made in the records of the municipal survey was an act done by the Corporation, or, at least, by the predecessor-in-interest of the Corporation, and as such the present case was covered within the terms of that section. The lower appellate Court, as against that, has taken a contrary view. In the opinion of the lower appellate Court, all that has been sought against the Corporation is a declaration of title and no relief has been sought for in regard to any act done in pursuance of execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act or any rule or bye-law made thereunder. Mr. Chatterjee appearing on behalf of the appellants has strongly challenged this view taken by the lower appellate Court, and in support of his contention has

placed reliance on the law laid down in *Nathubhai Dhulaji and Others Vs. The Municipal Corporation, Bombay and Others*, and *Jageshar Thakur Vs. Mahabharath Thakur*, .

In my opinion, none of these two authorities has got any bearing on the facts of the present case. The former dealt with a question where the notice given under a similar provision of law as provided in Section 527 of the Bombay Municipal Corporation Act (3 of 1888) was a valid notice as contemplated under that section. The notice as given there was against the Municipal Corporation. In those circumstances, the learned Judges who heard that case, held that any notice given to the Municipal Commissioner could not be accepted as a valid notice against the Corporation. There is no discussion made therein as to whether it applies even to cases where the subject-matter of controversy is confined to declaration of title against the Corporation.

Similarly, the latter decision, namely *Jageshar Thakur Vs. Mahabharath Thakur*, , is mainly on the question as to how far a notice given u/s 80 of the CPC is mandatory. Nobody asserts that a notice contemplated u/s 508 of the aforesaid Patna Municipal Corporation Act is not mandatory. What is in controversy here is whether it is at all applicable to a case of the present type. In my opinion, on the facts of tills case, it cannot be successfully asserted that the allegations as made in the plaint are in respect of any act done in pursuance of execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act or any rule or bye-law made thereunder. On the contrary, at least so far as the main defendants are concerned, it is a suit for injunction restraining them, from in any way interfering with the possession o? the plaintiffs. In other words, if it relates to any acts at all, it is in regard to those which arc threatened to be done in future, and, not those already committed in the past. Therefore, the case which is more closer to the facts of the present case is that as given in *The State of Bihar Vs. Raghunandan Singh and Another*, . Lastly, it cannot be ignored that though the lower appellate Court held against the Corporation on this point, the Corporation has not come up in appeal against the judgment and decree given by the lower appellate Court. It is true that they have been impleaded here as a respondent, but on that ground alone, they cannot, as a matter of right, claim all that, which they could have asserted, had they come as appellant in this Court. It was, however, argued that though- the Corporation have not come as an appellant here, still this Court can give relief to them in exercise of its inherent powers as provided in Order 41, Rule 4 and Order 41, Rule 33, Code of Civil Procedure. I think that when in a case where there was a clear remedy available to the Corporation and when they have chosen not to prefer any appeal against decision, there is no justification for me to exercise any inherent powers in their favour, specially when there is no cause shown as to why the Corporation have not chosen to prefer an appeal against the judgment and decree under appeal. And so far as the main defendants are concerned, they cannot take any advantage of the provisions of law as laid down in Section 508 of the Patna Municipal Corporation Act, if the Corporation are

satisfied with the view taken by the lower appellate Court. For these reasons, I think, this point has also to be decided against the appellants.

6. That leaves us with the last contention which is on the point whether, in a case like this, the lower appellate Court was right in issuing a direction against the appellants that they should close the door and the windows in the western wall of their house within a month of the date of the decree failing which they shall be closed at their cost through the processes of the Court. Mr. Chatterji has placed reliance on the rule or law as laid down in *Sarojini Debi and Another Vs. Krishna Lal Halidar and others* and has contended that the appellants being the absolute owners of the western wall of their house cannot be restrained from enjoying all the rights of the property therein, and, therefore, even if it be held that the ownership of the land in dispute is in the plaintiffs, then all the plaintiffs can claim in a case like this is that they should be allowed to have a wall erected at the extremity of their own land on the eastern side, notwithstanding, whether that wall would result in closing the door and windows of the defendants in their western wall. In my opinion, this part of the contention has sufficient force, and, even Mr. S.N. Dutta, appearing for the other side, has conceded that to that extent the order passed by the lower appellate Court should be modified. In the aforesaid decision in *Sarojini Debi and Another Vs. Krishna Lal Halidar and others*, their Lordships, while dealing with this aspect of the matter has observed that:

"The principle applicable to cases of this character is well-known and was explained recently in the case of *Tustu Mondal and Others Vs. Kenaram Mondal*, . But before we deal with the question, it may be useful to point out, as was done by Lord Westhury in *Tapling v. Jones* (1865) 11 HLC 290 (305), that the expression "right to obstruct" has a tendency to mislead. "If my adjoining neighbour builds upon his land and opens numerous windows, which look over my gardens or pleasure grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been, by some antecedent matter, either lost or impaired, and I gain no new or enlarged right by the act of my neighbour." The erection of a wall or other obstacle is, Indeed, the only remedy available to a land-owner, if he is annoyed by the opening of new windows overlooking his ground; he can maintain no action nor can he obtain other relief at law or in equity; in building to obstruct new windows, however, he must be careful to avoid obstructing ancient lights : *Re Penny and S.E. Ry. Co.* (1857) 7 EL BL 660 ; 110 RR 773; *Turner v. Spooner* (1861) 1 Dr. Sm. 467; 127 RR 192; *Chandler v. Thompson* (1811) 3 Campbell 80: 13 RR 756. To put the matter briefly, every one may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect, does not, by itself give the latter a

cause of action, in the absence of other circumstances. If windows are so opened, the neighbour may, by building on his own land, obstruct the light which would otherwise reach them."

7. Accordingly, the order given by the lower appellate Court directing that the defendants 1st party shall close the door and the windows in the western wall of their house within a month of the date of the decree, failing which they shall be closed at their cost through the processes of the Court is set aside and it is ordered that it shall be open to the plaintiffs to erect their own walls or such other structures as they may choose on their own land on that side, notwithstanding the fact that as a result thereof the door and the windows of the defendants 1st party in their western wall may get permanently blocked and closed.

8. In the result, subject however to the modification as stated above, the decree of the Court below shall stand confirmed and the appeal dismissed, but in the circumstances of the case there will be no order as to cost.