
(1922) 08 PAT CK 0009
In the Patna High Court
Case No : S.A. No. 808 of 1920

Sita Ram Tewari and others

APPELLANT

Vs

Gya Prashad and others

RESPONDENT

Date of Decision : 03-08-1922

Acts Referred:

Citation : (1922) 08 PAT CK 0009

Final Decision : Dismissed

Judgement

Jwala Prasad, J.—This appeal arises out of a suit, as stated in the judgment of the lower appellate Court, for the establishment of the plaintiffs' title and for confirmation of possession in, or in the alternative for recovery of possession of, survey plots Nos. 694, 690 and the northern portion of plot No. 698; for a declaration that these areas and the other plots specified in the plaint belong to the plaintiffs in Mafi Mokadami right and that the entries in the record-of-rights of the village to the contrary are incorrect, and finally for closing the door at Z and removal of the eaves along the line H, H 1 and GG 1 and of the Posta (wall support) along GG 1 of the plaint map. The cause of action is alleged to have arisen on the 23rd of November, 1911, the date of the final publication of the record-of-rights, on the 15th Jaith, 1324 Fasli, the date when the "wall and the Olti" at HH 1 and GG 1, the Posta at GG 1 and the door at Z were constructed, as well as on various dates not specified in the plaint when the plaintiffs' possession over the disputed land was interfered with. The suit was instituted on the 17th of September, 1917.

2. The defendant No. 3 is the present proprietress of the Touzi in which the lands in dispute are situate. Defendants Nos. 1 and 2 are related to defendant No. 3. Defendants Nos. 4 to 7 are certain deities represented by defendant No. 3 as Mutwalli.

3. The defendants resisted the plaintiffs' suit and disputed their right to the reliefs claimed in the plaint. They asserted that the record-of-rights was correct.

4. The Munsif by his judgment, dated the 16th April, 1919, dismissed the plaintiffs' suit. On appeal, the learned Subordinate Judge reversing the decision of the Munsif decreed the plaintiffs' suit in part. He has declared that the plots Nos. 623, 625, 697, 746, 699 and 696 belong to the plaintiffs in Mafi Mokadami, and not in be lagan right. Nearly half the judgment of the learned Subordinate Judge is devoted to this question. The defendants do not dispute this portion of the decree and therefore we are no longer concerned with it.

5. The learned Subordinate Judge has declared that plot No. 690 with pucca well therein and the portion A B C D E F being the northern part of plot No. 694 and G 1, H 1 as being the northern part of plot No. 698 belong to the plaintiffs as their Mafi Mokadami, and has confirmed their possession therein. The learned Subordinate Judge has further directed that the eaves along the wall GH 1, H1H and the Posta along the wall GG 1 be removed and that the defendants will have no right to pass through their door at Z on the plaintiffs' land to the north thereof. The defendants have appealed against the aforesaid decree of the learned Subordinate Judge.

6. As regards the southern portion of plot No. 694, namely, the portion to the south of line FG and also the southern portion of G1, H1, PM of the portion M N O P in the plaint-map, the plaintiffs' claim has been dismissed. The plaintiffs have filed a cross objection against this part of the decree whereby a portion of their claim has been dismissed.

7. The finding of the learned Subordinate Judge that plot No. 690 with the pucca well therein belongs to the plaintiffs has been challenged on the ground that the learned Subordinate Judge has based his judgment largely upon Exhibit 10, which was an inadmissible and irrelevant piece of evidence. This document is a deed of exchange of the year 1891 executed by one Pershad Narain as Mukhtear Aam of the defendant's husband and the plaintiffs' father with a view to compromise a suit then pending between the plaintiffs' father and the defendant's husband. In that case (vide plaint, Exhibit 27) plot No. 690 was not the plot in dispute; but the first plot in the deed of exchange, which is the house of Sohan Kandu, is said to have been described as being bounded on the east by the house of Harcharan Kahar and on the west by the Indara (well) of the defendant in that suit, that is, the plaintiffs' father, Parti, Samadh, and after that makan (house) of Jai Parkash Lal, the plaintiff in that case, who is the husband of defendant No. 3 in the present case. The learned Subordinate Judge has, for the reasons given by him, come to the conclusion that the indara referred to therein is the indara in question in plot No. 690. The reasons given by him for this inference have been disputed by the learned Vakil on behalf of the defendants-appellants in the present case. We are not concerned with those reasons for the document in question was obviously inadmissible, inasmuch as it was not given effect to and the object for which it was executed, namely, the proposed compromise in that suit, fell through. Therefore the document in question has not the force of a decree. The boundary in question mentioned

therein is at best a statement of the Mukhtear Aam of the plaintiff in that case and the defendant's husband in the present case. It has not been shown, and no Mukhtearnama has been filed, that the Mukhtear Aam had a right to make such a statement on behalf of his principal, the husband of defendant No. 3, and therefore the defendant No. 3, is not bound by the statement or admission made by the Mukhtear Aam, unless it is shown to have been made within the scope of the authority conferred by the Mukhtearnama. The document in question was therefore inadmissible in evidence. It is also no proof of the admission of the husband of defendant No. 3 and is not binding upon defendant No. 3. But the inadmissibility of this document does not in itself vitiate the finding of the learned Subordinate Judge inasmuch as he has referred to the other evidence in the case, such as the deposition of the plaintiffs' witnesses, to the effect that the well in question with the land belongs to the plaintiffs. He has disbelieved the defendant's evidence and has accepted that of the plaintiffs. Upon the evidence in the case he has recorded a finding of fact in favour of the plaintiffs, holding that the presumption of correctness of the survey record-of-rights with respect to plot No. 690 has been rebutted. His finding on this point therefore is not liable to be set aside in second appeal.

8. Now, as to the portion of survey plot No. 698 marked M.N.O.P. in the plaintiff map, the learned Subordinate Judge holds that "the space covered by G 1, H 1, P M only is a part of a rasta running east and west and towards south on the spot". As regards the portion north of this, that is, G 1, H 1, the learned Subordinate Judge holds that "it is not a rasta but forms a part and parcel of plots Nos. 696 and 699 belonging to the plaintiffs" and accordingly he has decreed the same in favour of the plaintiffs. Now, the reason given by the learned Subordinate Judge is that inasmuch as plots Nos. 696 and 699 to the east and west of that portion and plots Nos. 623 and 697 to the north and north-east of that portion belong to the plaintiffs, therefore "there could never have arisen any necessity for any persons other than the plaintiffs of having any rasta there". This is only a surmise. The rasta No. 698 on the survey map could very well exist in spite of the plaintiffs having lands on the north, east and west of it.

9. Then the learned Subordinate Judge refers to the Batwara map (Exhibit 4) of 1864 and irrigation survey map (Exhibit 2) of 1874-1875 and Exhibit 11, a map filed in the suit of 1890 brought by the husband of the defendant No. 3 against the plaintiffs' father, and says that in those maps the rasta in question has not been shown. But those maps are too ancient to rebut the existence of the rasta in question in the year 1910-11 as shown in the cadastral survey. As regards the map (Exhibit 11) of the suit of 1890, the two Courts have differed. The Munsif says that in that map "a rasta is shown on the same side as M.N.O.P.". The learned Subordinate Judge says that the said map does not show "the existence of any rasta along the eastern side of the said plot No. 699." Again, the map referred to in Exhibit 11 was filed by the plaintiffs' father in the suit of 1890 and is therefore no evidence against the defendants in the present case.

10. Be that as it may, these documents are not sufficient to rebut the existence of the rasta found and recorded in the survey record-of-rights of 1910-11; yet in consideration of these documents the learned Subordinate Judge says:-"I am inclined to rely upon the evidence of the plaintiffs" witnesses that the portion G 1, H 1, O N of the plaint map is not a rasta to form a part and parcel of plots Nos. 696 and 699 belonging to the plaintiffs". The learned Subordinate Judge does not say that the presumption as to the correctness of the record-of-rights has been rebutted. He does not, while discussing the question of the rasta, refer in any way to the entry in the record-of-rights which is in favour of the defendants. It does not appear that he had in his mind, while dealing with this question, the presumptive evidence of the record-of-rights in favour of the defendants. He has relied upon the evidence of the plaintiffs" witnesses because it is supported by the ancient maps of the Batwara, the irrigation map and the suit of 1890. The Batwara map, to say the least, is only nazri, and not to a scale as the learned Subordinate Judge himself observes in another part of the judgment. The irrigation map was prepared to show blocks for irrigation purposes and need not necessarily have shown the details, such as the rasta, etc. Therefore the finding of the Subordinate Judge in the plaintiffs" favour with respect to the rasta in question being a part of their survey plot No. 699 is not sufficient to rebut the record-of-rights; nor, as stated above, has he expressly said that the record-of-rights has been rebutted. His decision is, therefore, illegal.

10. The learned Subordinate Judge has also not met another reason given by the Munsiff in his judgment on the point, namely, the situation of the grave of the Sadhu as shown in Exhibit 11 and on a portion of the plaintiffs" garden in the present case. Therefore the decision of the learned Subordinate Judge is liable to be set aside as being conjectural, and not based upon valid evidence and not having displaced the presumption of the record-of-rights which must stand unless so rebutted. There is yet another presumption in favour of the defendants. They being proprietors of the village, the gair majruha lands and rastas prima facie belong to them unless the plaintiffs prove positively that they are part and parcel of their tenure.

11. Therefore the decision of the Munsiff on the point must stand, according to which the Portion G 1, H 1, O N of the plaint-map is a part of the rasta which extends to the south of it; in other words, the entire plot No. 698 is a gair majruha rasta as shown in the survey map.

12. Now, as to plot No. 694 in dispute, the learned Subordinate Judge has arbitrarily fixed the northern boundary of this plot. In doing so, he has not accepted the report of the Civil Court Commissioner. He has tacitly held that the Amin has correctly shown in the cadastral survey map the boundary of the plot, when he says-the Amin "only followed the natural zigzag boundary as he found on the spot." This was exactly what the Amin was required to do and this is exactly the object why the present cadastral survey took place. It had to show the existing boundary in the map as found on the spot. On account of the ditch

or gaddha in plot No. 694 the existing boundary was as the Amin "found on the spot." He has simply tried to make the boundary of plot No. 694 run in straight line with the rasta west of the line G 1 G. He has prolonged G 1 G which is the northern boundary line of plot No. 695 towards the east up to eastern boundary line of plot No. 694 and thus he has located an imaginary line G F as the northern boundary line of plot No. 694, thereby dividing the plot as shown in the survey into two halves, giving the northern half to the plaintiffs and the southern half to the defendants. Perhaps the learned Subordinate Judge did not like the zigzag boundary as shown by the survey or the configuration of plot No. 694 and he says that the course adopted by him is most equitable inasmuch as it follows the configuration of the southern boundary on the spot as shown in the Batwara and in the irrigation. As to the ancient maps of irrigation, survey and Batwara, I have already shown that it is not a safe and certain guide in a case of this kind. One might perhaps yield to a consideration of symmetry in a partition suit, but not in a suit for a declaration of title; nor can such a consideration, which is more or less conjectural, overrule the presumption of the survey record-of-rights in favour of the defendants. In fixing the boundary of plot No. 694, the learned Subordinate Judge has not given effect to the presumption in favour of the defendants, nor has directly or indirectly referred to it.

13. Now, the learned Munsiff has relied upon the plaintiffs' witnesses for holding that A B C D E F, that is, the northern portion of survey plot No. 694 has been a gaddha (ditch) from the hosh of the plaintiffs. The learned Subordinate Judge does not dispose of the reference by the Munsiff to the aforesaid evidence. Here also the defendants as zemindars have prima facie title to the entire plot No. 694 as shown in the survey inasmuch as it is a gaddha (ditch), and the learned Subordinate Judge does not refer to this presumption. Therefore the finding of the learned Subordinate Judge with respect to plot No. 694 is liable to be set aside and is accordingly set aside, and that of the Munsiff is restored.

14. Here it may be pertinent to dispose of the cross-objection of the plaintiffs with respect to the southern portion of plot No. 694. The learned Subordinate Judge has disbelieved the plaintiffs' evidence on the point. After disposing of that evidence, the learned Subordinate Judge says "accordingly I am constrained to say that the plaintiffs' father hopelessly failed to make out the truth of their claim in respect of the gaddha to the south of the line F G in the plaint-map and thus that portion of their claim must fail." The learned Vakil on behalf of the plaintiffs has not been able to successfully attack the aforesaid finding of the learned Subordinate Judge. The finding is supported by the record-of-rights and accordingly it is confirmed, and the cross-objection of the plaintiffs is dismissed.

15. Now, as regards the olti (eaves) and the posta (wall support), north of the defendants' wall H H 1 and G G 1 the learned Subordinate Judge holds that the walls are on the defendants' land and that the eaves of the wall H H 1 G G 1, and the posta of the wall G G 1 are outside the defendants' land and within the plaintiffs' land to the north. He also holds that the said eaves and the posta have

come into existence recently during or since the survey proceedings.

16. Now, a portion of G G 1, namely, E G has been held to be within the boundary of plot No. 694 belonging to the defendants. Therefore the eaves and the posta (support) of the wall north of E G will be on the defendants' land and cannot, according to our finding in the present case, be removed: but the finding of the learned Subordinate Judge with respect to portion of E G 1 remains, and the eaves and the posta to the north of it (E G 1) if it happens to be on the defendants' land, must be removed. The eaves on the wall H H 1, if any, projecting beyond the survey boundary to the plaintiffs' land must also be removed. This can easily be done by deputing a commissioner to find out whether and how far the encroachment, as stated above, in the shape of eaves and posta on the wall H H 1 and G 1 E exists in accordance with the survey boundary. That much the plaintiffs are bound to remove.

17. Now, as to the door at point Z, the learned Subordinate Judge has held that it is in the defendants' wall and therefore cannot be closed, but that the "defendants cannot have any right to use the same so as to enter there through upon the plaintiffs' land adjoining to the north". The learned Subordinate Judge has given no reason for this order. Apparently it is based upon the fact that plots Nos. 696 and 699 to the north of the door are the plaintiffs' garden. These plots have been shown in the survey as Khalihans where grain is stored. The Munsiff has referred to the evidence on behalf of the plaintiffs as showing that 15 to 20 tenants of the village stored their grains on these plots and used the same as their Khalihans. "This finding of the Munsiff has not been displaced by the learned Subordinate Judge. Therefore there is no reason why the door at point Z should not be used for that purpose. The defendants, however, have no right to use the door for any other purpose. The direction of the learned Subordinate Judge with respect to the door at point Z is accordingly modified.

18. In conclusion, the appeal is partially decreed. The suit of the plaintiffs with regard to the portions A B C D E F being the northern part of plot No. 694 and G1, H1, O N being the northern part of plot No. 698 is dismissed. The cross appeal of the plaintiffs with respect to the southern portion of plot No. 694 is also dismissed.

19. The result is that the entries in the survey record-of-rights with respect to the entire plots Nos. 698 and 694 are confirmed, and the northern boundaries of those plots will be those as shown in the survey record-of-rights. The defendants' appeal with respect to plot No. 690 and the well therein is dismissed, and the entry in the survey record-of-rights with respect thereto is set aside as being incorrect. The claim of the plaintiffs with respect to the posta and the olti on the wall E G is dismissed; so also with regard to H1, G1 as the posta and the eaves to the north of the plaintiffs' wall H1, G1 and E G happens to be on the plaintiffs' land in plots Nos. 698 and 694. As regards the posta and eaves on the portion of the plaintiffs' wall G1 E, as well as the eaves on the portion of the Wall H1 H, a commissioner will be deputed to find out how far the eaves and

the pesta have encroached upon the plaintiffs' land and so much as is found by the Commissioner will be removed. The cost of the commission will be borne by the defendants.

20. The decree of the Court below is modified in accordance with the aforesaid findings and the appeal is partially decreed. The cross-objection is dismissed.

21. There will be no order as to costs in the circumstances of the case and each party will bear its own costs throughout.

Adami, J.

22. I agree.