

## Smt. Shakuntala Murmu Vs Sri Kishore Prasad Bhagat

**Court:** Calcutta High Court

**Date of Decision:** July 13, 2012

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 26 Rule 10(2), Order 26 Rule 9

**Hon'ble Judges:** Prasenjit Mandal, J

**Bench:** Single Bench

**Advocate:** Buddhadeb Ghoshal, Mr. Tapas Mukherjee and Mr. Dipanjan Sinha Roy, for the Appellant;

**Final Decision:** Dismissed

### Judgement

Prasenjit Mandal, J.

This application is at the instance of the plaintiff and is directed against the Order No. 183 dated August 26, 2003

passed by the learned Civil Judge (Junior Division), 6th Court, Howrah in Title Suit No. 163 of 1991 thereby rejecting the objection filed by the

plaintiff against the report of the learned Commissioner under Order 26 Rule 9 of the CPC. The plaintiff/opposite party herein instituted the suit

being Title Suit No. 163 of 1991 for recovery of possession, permanent injunction and other reliefs against the defendant/opposite party herein.

2. The defendant/opposite party herein is contesting the said suit by filing a written statement denying the material allegations raised in the plaint. In

that suit, the plaintiff filed an application for local investigation and that application was allowed. Accordingly, the investigation was held in presence

of both the parties and the learned Commissioner submitted his report holding, inter alia, that there was no encroachment by the defendant on the

"B" schedule property of the plaintiff as described in the schedule to the plaint. Being aggrieved by such findings, this application has been

preferred by the plaintiff.

3. The question is whether the learned Trial Judge is justified in rejecting the objection raised by the plaintiff/petitioner herein against the report of

the Commissioner.

4. Upon hearing the learned Advocates for the parties and on going through the materials-on-record, I find that the suit property has been

described in schedule "A" and schedule "B" to the plaint and the plaintiff has prayed for recovery of "B" schedule land by eviction of the defendant

therefrom. This "B" schedule land is a strip of land measuring 55'-0" x 8'-00" and this strip of land according to the plaintiff case is a part of the "A"

schedule land as described in the schedule to the plaint. The plaintiff has also prayed for mandatory injunction directing the defendant to dismantle

and remove the part or portion of the "Kutchra Hut" standing on a part of "B" schedule land and also permanent prohibitory injunction restraining

the defendant from raising any structure on any part of "B" schedule land and from making further encroachment on any part of "A" schedule land.

5. The local investigation was sought for on the following two points:-

(i) For relayment of the partible two plots described in the Schedule "A" to the plaint on the Partition Deed together with the plan dated April 25,

1983; and

(ii) To prepare a case map depicting the boundaries of "A" schedule plot and area or portion encroached upon by the defendant as described in

schedule "B" to the plaint.

6. It may be mentioned herein that a registered Deed of Partition dated April 25, 1983 was executed between the plaintiff and the defendant and

according to this Partition Deed, the plaintiff was allotted 5 cottahs 4 chittaks and 12 sq.ft. on the northern side and the defendant was allotted 2

cottahs of land on the southern side as shown in the plan annexed to the said Deed of Partition dated April 25, 1983.

7. It may be noted herein that both the plaintiff and the defendant are the transferees of their respective lands by the respective Deeds of Sale.

8. Mr. Buddhadeb Ghoshal, learned Advocate for the petitioner, has assailed the impugned order as well as the report of the learned

Commissioner on the following grounds:

(a) That the relayment of the land in suit had not been done by following the procedure of investigation as to the fixed points;

(b) That the learned Commissioner had not followed the principles to be followed for determining the fixed points;

(c) That the learned Commissioner had not followed the directions of the learned Trial Judge and as such, the report of the learned Commissioner

was not in conformity with the directions of the learned Trial Judge; and

(d) That the learned Commissioner did not make survey of the entire plot in case.

9. So, the report should have been rejected by the learned Trial Judge by the impugned order. The learned Advocate submits that the impugned

order should be set aside. So far as the procedure for investigation is concerned, I find that the learned Commissioner had done investigation in

presence of both the parties and in doing so, he took the fixed points on the north-east corner and also the south-west corner of the land of the

plaintiff as shown by the parties and there is no dispute that they identified and agreed that these two points should be taken as fixed points

towards the northern side of the plot in suit. On verifying the Deed of Sale of the plaintiff with the Deed of Partition it was found that those two

fixed points had tallied with the fixed points as noted on the north-east corner and also the north-west corner of the plaintiff's land. The

measurement of the lands had commenced on the basis of such admitted position.

10. The learned Commissioner had also observed in his report that the north-east corner point had also tallied with the village road electric pillar

and that there was no dispute about the fixation of such points at the time of holding investigation over the said plot. Relayment of the lands of the

parties had been done taking these two fixed points towards the northern side of the plot in suit.

11. It may be noted herein that according to the Deed of Sale, the plaintiff had purchased 5 cottahs 4 chittaks and 12 sq.ft. on the northern side

and the defendant had purchased 2 cottahs of land on the southern side as shown in the Deed of Partition dated April 25, 1983. On survey of the

lands possessed by the parties, it was found that total partible land available present possession of the parties as per Deed of Partition is to the

extent of 5098 sq. ft. out of which the plaintiff was in possession of 3658 sq. ft and the defendant was found in possession of 1440 sq. ft. But, the

Deed of Partition lays down the area of the total land in respect of the plaintiff and the defendant to the extent of 5232 sq. ft. as described in

schedule "Ka" to the Deed of Partition out of which the plaintiff was allotted land measuring 5 Cottahs 4 Chittaks and 12 sq.ft., that is, 3792 sq. ft.

and the defendant was allotted 2 cottahs, that is, 1440 sq. ft.

12. So, the possession of the land by the defendant tallies with the Deed of Partition but the actual possession of the plaintiff falls short to the extent

of (3792-3658), that is, 136 sq. ft. Under the circumstances, the learned Commissioner has opined that there was no encroachment by the

defendant at all. As regards, short fall of the area of the land of the plaintiff, the learned Commissioner had expressed his opinion to which side

such land of the plaintiff was to be extended to get 136 sq. ft. of the land.

13. Anyway, I find that when the corner plots on the northern side were taken as fixed points as pointed out by both the parties and investigation

was done accordingly and such fixed points got support from the village road, electric posts, etc. as admitted by the parties, I am of the view that

the entire plot in suit need not be surveyed for the purpose of investigation on the points noted earlier.

14. Thus, I find that the learned Commissioner had followed the rules of survey in presence of both the parties and that there is no indication that

the parties had shown any other better fixed points for taking into consideration in the matter of submission of report on the points to be surveyed.

15. Upon making the survey, the learned Commissioner had arrived at a conclusion that there was no encroachment at all as alleged against the

defendant by the plaintiff. The learned Commissioner was not directed to relay the R.S. map of the plot in suit and parties also did not submit such

R.S. map to the Commissioner to come to a different findings other than he had arrived at. The learned Commissioner had performed his task as

per writ and both the parties cooperated in the matter.

16. Under the above circumstances, the objection raised by the plaintiff against the report of the Commissioner, I hold, cannot sustain. The learned

Judge has rightly rejected the objection filed by the plaintiff.

17. The local investigation under Order 26 Rule 9 of the CPC was held for the purpose of elucidating the matter in dispute, that is, for

determination of encroachment as alleged by the plaintiff. The learned Commissioner proceeded for investigation from the admitted stage with

respect to the northern boundaries of the land of the plaintiff. He submitted his report following the procedure for the purpose of investigation. The

report cannot be said to be "not satisfactory". The learned Commissioner had answered both the points for investigation in his report. So, the

report is not incomplete at all.

18. The plaintiff has described the "B" schedule property in the plaint mentioning the length, breadth, specific direction of length and breadth,

sketch map with proper identification of the "B" schedule property vis-à-vis the position of the lands of the parties and the surrounding features.

This is, I hold, enough for identification of the "B" schedule property. If the encroachment is proved, the decree as prayed for in respect of the "B"

schedule property could well be passed.

19. Above all, according to the provisions of Order 26 Rule 10(2) of the CPC, the report shall be evidence in the suit and shall form part of the

record. So, the report of the learned Commissioner is a piece of evidence and "not conclusive" and it shall be taken into consideration along with

other evidence to be adduced by the parties in support of their respective contentions. Thereafter, the learned Trial Judge is to arrive at his own

conclusion independently.

20. In that view of the matter, I am of the opinion that the impugned order does not call for any interference. This application is, therefore,

dismissed. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.