

(2001) 10 CAL CK 0036
Calcutta High Court
Case No: S.A. No. 323 of 1983

Kiriti Bhusan Shau

APPELLANT

Vs

Jugal Chandra Shau

RESPONDENT

Date of Decision: Oct. 11, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10, Order 26 Rule 9, 100, 115

Citation: (2001) 2 ILR (Cal) 388

Hon'ble Judges: Subhro Kamal Mukherjee, J

Bench: Single Bench

Advocate: Sudhir Dasgupta, Amar Nath Shaw and Nabaroon Karak, for the Appellant; Shyam Prasanna Roy Chowdhury, R. Pushpendu Bikash Shau and Sudhakar Biswas, for the Respondent

Final Decision: Allowed

Judgement

Subhro Kamal Mukherjee, J.

This is an appeal by the Defendant No. 2 against a judgment of affirmance in a suit for declaration of title and for removal of encroachment.

2. Title Suit No. 166 of 1968 was instituted in the court of the learned Munsif, First Court at Midnapore by the Plaintiffs/Respondents for declaration of their title in respect of 13 decimals of land in plot Nos. 700 and 703 appertaining to R.S. Khatian No. 6863 of Mouza: Patna Bazar and for recovery of possession of 1 decimal encroached land. It is alleged that originally the suit properties belonged to Panchu Shau and on his death the said properties devolved upon his three sons, namely, Priyanath, Satish and Jaytindra. In the district settlement, the suit properties were correctly recorded in their names. On the death of Priyanath, his 1/3 share in the suit properties devolved upon his son, namely, Sudhir, Satish, Jaytindra and Sudhir executed a registered deed of partition on March 28, 1941 and the suit properties were allotted to Sudhir. The Plaintiffs purchased the said share of Sudhir from his

widow. The Defendants were the owners of plot Nos. 701 and 702 which were situated to the contiguous south of plot No. 703. Initially, there was a kuncha structure of the predecessors of the Plaintiffs over the plot No. 703 and, subsequently, the Plaintiffs have built a pucca house over the said plot of land. On plot Nos. 701 and 702, there was a kuncha house of the predecessors of the Defendants and, subsequently, they raised a pucca house and opened a window in the northern side of plot Nos. 701 and 702. Since the said opening of the window interfered with the privacy of the predecessors of the Plaintiffs, a dispute cropped up. Ultimately, however, the dispute was settled and as a part of settlement the predecessors of the Plaintiffs raised a boundary wall on the extreme southern part of their land. Subsequently, the predecessors of the Defendants left plot Nos. 701 and 702 and the kuncha house was collapsed. The mother of the Defendant No. 2 purchased the vacant land in plot Nos. 701 and 702 and constructed a kuncha house on the western side of her land. The Defendants have demolished the said kuncha house and constructed a pucca house on the northern side of plot Nos. 701 and 702 and in the process encroached a small portion of plot No. 703. The Defendants have made further encroachment by constructing a C^{af}9I[^] (a raised terrace of a building) on the further north of their pucca house. Initially, the Defendants agreed to remove the encroachment and the Plaintiffs got the respective plots surveyed, which revealed encroachment of plot No. 703 by the construction of the Defendants. The Defendants tried further construction by raising wall over the C3Ht[^] compelling the Plaintiffs to lodge complaints at the local police station. Ultimately, the present suit has been instituted for declaration of their title and for removal of the encroachment, shown by the red colour in the map attached to the plaint.

3. The Defendant No. 2 contested the suit and he alleged that he never encroached any portion of plot No. 703 and that the Defendants have constructed over the old existing plinth within plot Nos. 701 and 702. It was, also, contended that the Defendants have possessed the suit land for more than 46 years adversely against the Plaintiffs.

4. By judgment and decree dated June 24, 1981 the learned Munsif, First Court at Midnapore decreed the suit on contest with cost. The Plaintiff's title over the suit property was declared and the Defendants were directed to remove the "C3TS1V and the wall over the "C3T*Jt[◆] constructed to the north of their house and to deliver vacant possession thereof to the Plaintiffs. It was directed that the report of the Advocate Commissioner including his field book and the map should form a part of the decree.

5. The Defendant No. 2 preferred Title Appeal No. 383 of 1981 in the court of the learned District Judge, Midnapore, which was eventually transferred to the court of the learned Additional District Judge, Third Court at Midnapore.

6. By judgment and decree dated August 26, 1982 the learned Additional District Judge dismissed the appeal and affirmed the judgment and decree passed by the

trial court. In affirming the decree passed by the learned trial judge, the lower appellate court observed that the disputed strip of land formed part and parcel of plot No. 703 of the Plaintiffs and the report of the local Investigation Commissioner was quite scientific and fully reliable in the light of the other evidences produced before him.

7. Being aggrieved the Defendant No. 2 has come up with this appeal.

8. I have heard Mr. Sudhis Dasgupta, learned-Senior Advocate, appearing in support of the appeal and Mr. Syama Prasanna Roychoudhury, learned Senior Advocate, appearing on behalf of the Plaintiffs/ Respondents.

9. In my view, this appeal involves the following substantial question of law.

10. Whether the courts below substantially erred in law in decreeing the suit in favour of the Plaintiffs without properly considering the deed of partition dated March 28, 1941 (exhibit 3) in which the vendor of the Plaintiffs was a party when the said document clearly showed that the area of the disputed properties was 12 decimals of land in total and as such the courts below substantially erred in law in placing undue reliance upon the report of the Investigation Commissioner and the settlement map in granting a decree in favour of the Plaintiffs in respect of properties which they did not have ?

11. Undisputedly, the suit properties originally belonged to Panchu and on his death the properties devolved upon his three sons including Priyanath. On the death of Priyanath, the properties devolved upon Sudhir, that is, son of Priyanath. The said co-owners partitioned the properties amongst themselves and they executed a registered instrument on March 28, 1941. The said document has been exhibited as exhibit 3 in the suit. The suit properties have been allotted in favour of Sudhir by virtue of the said deed of partition. The said Sudhir died leaving his widow, Sulachana Dasi, as his only heir and. these Plaintiffs purchased the suit properties from the said Sulachana Dasi by a registered deed dated Jaistha 3, 1363 B.S. Therefore, the deed of partition is the fountain of the title of the Plaintiffs. The area of plot No. 703 has been mentioned as 11 decimals in the map annexed to the said partition deed. Initially, the Plaintiffs, also, in their plaint alleged that the total area of land covered by plot Nos. 700 and 703 was 12 decimals- 1 decimal in plot No. 700 and 11 decimals in plot No. 703. Subsequently, however, the plaint was amended and it is alleged that the total area was 13 decimals. It was categorically asserted by the Defendants that the predecessors of the Plaintiffs had their properties partitioned in 1941 by a registered deed of partition and the area of plot No. 703 has been mentioned as 11 decimals in that partition deed. Even the Plaintiff's witness No. 1 in his deposition categorically admitted "we accept the measurements given in our partition deed as correct."

12. The Supreme Court of India in the case of K.S. Nanji and Company v. Jatashankar Dossa and Ors. A.1.R. 1961 S.C. 1474 observed that a map referred to in a lease

should be treated as incorporated in the lease and as forming part of the said document. Where the map is drawn to scale and the boundary is clearly demarcated the courts are right in accepting the boundaries drawn in the plan without embarking upon an attempt to correct them with reference to the revenue records.

13. Accordingly, in my view, the courts below substantially erred in law in ignoring the plan annexed to the deed of partition dated March 28, 1941 and in placing unnecessary reliance upon the report of the learned Investigation Commissioner and the settlement map. In the present case local investigation commission was held and the learned Commissioner submitted his report. The trial court accepted the report on February 14, 1978. The Defendant No. 2 preferred a revisional application u/s 115 of the CPC before this Court being Civil Rule No. 1487 of 1978. The revisional application was dismissed and, consequently, the Rule stood discharged on February 19, 1979. The learned judge in the lower appellate court observed that the learned Commissioner duly took into consideration the C.S. and R.S. plots vide this Court's order in Civil Rule No. 1487 of 1978. It is true that the Commissioner's report was in favour of the Plaintiffs, but the report of the Commissioner was only a piece of evidence and was to be considered along with other evidence on record. Merely because the trial court has accepted the report and that the order accepting the report has been affirmed by the High Court, the report was not sacrosanct.

14. P.B. Mukherjee, J. (as the Hon"ble Chief Justice then was) in *Balai Chandra Ghosh v. Tarapada Ghosh and Ors.* 70 C.W.N. 266 observed as under:

It is essential to emphasize that the whole purpose and procedure of commissions for local investigation as laid down in the CPC is "for the purpose of elucidating any matter in dispute" under Order 26, Rule 9 of the CPC Code. A closure scrutiny of the provision of Rule 10, Order 26 as a whole makes it abundantly clear that the Commissioner after local inspection and after reducing to writing the evidence taken by him, has to return such evidence together with his report in writing signed by him to the Court. That report of the Commissioner and the evidence taken by him, but not the evidence without the report shall be evidence in the suit and shall form part of the record. The Court may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report or as to his report, or as to the manner in which he has made the investigation. Therefore, the report of the Commissioner for local investigation is nothing more than a piece of evidence for the purpose of elucidating any matter in dispute. It has no other sanctity but as a piece of evidence. It cannot in that sense be said to bind a court of law if the court of law finds that the report even though formally accepted, for reasons adduced at the trial through witnesses and other circumstances is not acceptable. No doubt as a matter of ordinary practice and procedure before the Commissioner's report is accepted notice is given to the other side, and then the Court hears such a petition and finally makes an order either accepting or rejecting

the report of the Commissioner. Such an order of acceptance or rejection should not of course as a matter of fact as a normal procedure be lightly set aside. But that does not mean that it is sacrosanct and in new circumstances during the trial and especially at the trial even an accepted report cannot be questioned and if so found wanting the court is free to reject such accepted report.

15. Moreover, the settlement map is not a document of title. The Supreme Court in the cases of [Smt. Sawarni Vs. Smt. Inder Kaur and Others](#), and [Sankalchan Jaychandbhai Patel and Others Vs. Vithalbhai Jaychandbhai Patel and Others](#), held that the revenue entries are only to enable the State to collect revenues from the persons in possession and enjoyment of the property and the right, title and interest as to the property should be established de hors the entries. Entries are only one of the modes of the proof of the enjoyment of the property. Mutation entries do not create any title or interest therein.

16. Even in the report submitted by the learned Advocate Commissioner, on October 22, 1971, pursuant to the Order No. 62 dated April 23, 1970, in respect of item No. 5 the learned Commissioner reported as under:

5. I have been directed to state whether the plinth on which the Rowak stands is an old one.

17. The upper layer of the Rowak was removed at one place and found some broken "chati" bricks. Some "chati" bricks contain lime plaster on the upper layer. Some part of Rowak above the ground level contains "Chati" bricks as well as thick bricks. The Defendants refused to show "Chati" bricks on the disputed wall as they apprehended that the wall would collapse. The height of the disputed wall is about 8" feet. The location of the plinth could not be ascertained in the locality and as such it is not possible for me to say if the plinth is an old one or not.

18. The aforesaid observations of the learned Commissioner goes long way to show that the Defendant No. 2 was correct in his saying that on the old plinth new construction was raised by the Defendants.

19. Therefore, even though apparently the conclusion of the lower appellate court can be held to be findings of fact and as such not liable to be interfered with in second appeal in view of the provisions of Section 100 of the Code of Civil Procedure, a closer scrutiny of the reasons given by the lower appellate court in support of such findings makes it abundantly clear that the judgment of the lower appellate court can never be sustained in law. The trial court as also the lower appellate court applied a wrong legal test and they proceeded on a wrong footing as to the evidentiary value of the report of the learned Commissioner for investigation and the settle-merit map in relation to the registered deed of partition dated March 28, 1941, that is, the document of title ; the basis on which the Plaintiffs claimed absolute title and sued the Defendants for declaration of their title and for recovery of possession upon removal of the alleged encroachment. The recital in the

old registered deed of partition executed between the predecessors-in-title of the Plaintiffs and his co-owners relating to the area of the land is definitely admissible in evidence and the learned judges in the courts below ought to have given preference to the said document than the Commissioner's report and the settlement map. Moreover, even the Plaintiffs proceeded on the basis that the measurement given in the said registered deed of partition was correct.

20. In the present case the courts below ignored a material and relevant evidence on regard which, if considered, would have led to an opposite conclusion.

21. In the aforementioned situations, a substantial question of law has arisen in this second appeal requiring interference by the court as I am of considered opinion that the Plaintiffs have failed to prove that the Defendants have encroached upon their land in plot No. 703.

22. Before I part with, I must record that the claim of the Plaintiffs over plot Nos. 700 and 703 has not been disputed in this suit, but the contesting Defendant has successfully proved that construction of the Defendants was not over the Plaintiffs' land nor the Defendants have encroached any portion of the said plot Nos. 700 and 703.

23. Accordingly, the appeal is allowed. The judgments and decrees passed by the courts below are set aside. Title suit No. 166 of 1968 filed by the Plaintiffs is dismissed.

24. The parties are directed to bear their respective costs throughout.

25. Let photocopy of the judgment and decree, if applied for, be supplied to the parties expeditiously.