APPELLATE CIVIL.

Before M. C. Ghose and McNair JJ.

1934

April 11.

MOKAM HALDAR

v.

NAIMADDI SHAIKH.*

Appellate Court—Local investigation by commissioner—Disagreement with commissioner's conclusion—Pâttâ—Construction—Procedure.

The lower appellate court is entitled to set aside the decree of the trial court based on the conclusions of the commissioner for local investigation who prepared a map and made a report, if it accepted that map and the facts stated by the commissioner but only disagreed with the conclusions of the commissioner.

Tirthabasi Singha Roy v. *Bepin Krishna Roy* (1) referred to.

If according to a *pâttâ* the lessee undertook to pay rent at a certain rate *per bighâ* for land demised within defined boundaries, which land was stated by guess to be three *bighâs*, the lessee is not entitled to 26½ *bighâs* of land on the strength of such a *pâttâ*.

Durga Prasad Singh v. *Rajendra Narayan Bagchi* (2) distinguished.

SECOND APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Risheendranath Sarkar and *Farhat Ali* for the appellant.

Atulchandra Gupta and *Nirodebandhu Ray* for the respondent.

M. C. GHOSE J. This is an appeal by the plaintiff in a suit for declaration of title to certain lands and recovery of possession. The lands in suit comprised three cadastral survey plots Nos. 1049, 1116 and 1117.

*Appeal from Appellate Decree, No. 657 of 1932, against the decree of Phaneendranath Mitra, Additional Subordinate Judge of Khulna, dated July 23, 1931, modifying the decree of Adityachandra Datta, Second Munsif of Bagerhat, dated Nov. 29, 1929.

(1) (1916) 23 C.L.J. 600.

(2) (1913) I. L. R. 41 Calc. 493; L.R. 40 I.A. 223.

These three plots together make up an area of 26½ *bighâs*. The plaintiff claimed these lands on the strength of a *pâttâ* obtained from the *patnidâr*, Annadaprasad Mukherji, in 1326. In that *pâttâ* the area of the land demised to the plaintiff was stated as measuring by guess three *bighâs*. A local investigation was made by a commissioner and he submitted a map and a report. The commissioner reported that in his view the land in dispute was comprised within the boundaries of the plaintiff's *pâttâ*. The trial court accepted that view and decreed the suit. In appeal by the defendants the learned Subordinate Judge did not accept the conclusion of the commissioner that the lands in suit are identical with the lands demised to the plaintiff by the *pâttâ* of 1326. On going through the report of the commissioner, the learned Subordinate Judge came to the conclusion that the boundaries on the north and west coincided with the boundaries in the plaintiff's *pâttâ*, but that the boundaries on the south and the east were not identical. In this view, the learned Subordinate Judge held that the plaintiff would be entitled to an area of land measuring three *bighâs* beginning with the boundaries on the north and west.

In appeal, it is urged that the procedure adopted by the learned Subordinate Judge was wrong, that he had no authority to set aside the finding of the commissioner and to adopt only a part of his report. The learned advocate has quoted the case in *Tirthabasi Singha Roy* v. *Bepin Krishna Roy* (1), decided in 1916 by Sir Lancelet Sanderson and Sir Asutosh Mookerjee. In that case the first court accepted the commissioner's report and decreed the suit. The court of appeal found the report to be unsatisfactory and unreliable and dismissed the suit. The High Court, in the circumstances of that case, considered that the case should go back to the first court for a fresh local investigation. We are of opinion that in this case the learned Subordinate Judge did not exceed the

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proper limits in criticising the work of the commissioner. He accepted the map prepared by the commissioner as correct. He accepted facts stated by the commissioner. He only disagreed with the conclusion of the commissioner. This, in our opinion, he was entitled to do.

It has been strenuously urged that the learned Subordinate Judge misdirected himself in holding the view that the plaintiff was entitled to only three *bighâs* of land as stated in his *pâttâ*. It is urged that the plaintiff obtained settlement by his *pâttâ* of 1326 of *jungli* lands and that the area was put by guess and not by measurement and that, in the circumstances, the plaintiff was entitled to all the lands, which were found within the boundaries as stated in his *pâttâ*. In support of this view, the case of *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (1), decided by their Lordships of the Judicial Committee in 1913, has been quoted. In that case, the landlord sued for rent on the basis of a *pâttâ* when the rent was calculated on the basis of an area of 400 *bighâs* of land. The defendants pleaded that the area was less than 400 *bighâs* and claimed a proportionate abatement of rent. It was found that the defendants in a previous suit had got reduction on the basis of inferior quality of coal but not on any representation or complaint that there were not 400 *bighâs* of land within the boundaries specified in the schedule to the *kabuliyat*. In that case, the first court found that the area in the possession of the defendants was 346 *bighâs*. In appeal, the High Court found that the area found in the defendant's possession was 275 *bighâs*. Their Lordships of the Judicial Committee held that the defendants were bound to pay rent for the whole of the land within the boundaries, although it had been arrived at on the basis of 400 *bighâs* in area. In the present case, the area obtained by the plaintiff by his *pâttâ* was three *bighâs* of land at a rent of Re. 1

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per *bighâ*. In our view, the learned Subordinate Judge was not wrong in holding that, on the strength of this *pâttâ*, the plaintiff was not entitled to dispossess the defendants from $26\frac{1}{2}$ *bighâs* of land. In our opinion, the decree of the court of appeal below is correct.

This appeal is dismissed with costs.

McNair J. I agree.

Appeal dismissed.

G. S.