

(2011) 05 GAU CK 0026

In the Gauhati High Court

Case No : Regular Second Appeal No's. 74 and 99 of 2011

Badan Medhi and Others

APPELLANT

Vs

Pramila Kalita (Smt.) and Others

RESPONDENT

Date of Decision : 13-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100
Limitation Act, 1963 — Section 5

Citation : (2011) 3 GLT 740

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : M.H. Choudhury, Ms. L.N. Choudhury and Mr. R. Goswami and Mr. R. Bhattachariya, for the Appellant; A.C. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—Both these appeals carry a challenge against the determinations separately made by the learned lower Appellate Court negating the denunciation of the judgment and decree-dated 11.02.2009 passed in Title Suit No. 8/2008 instituted by the respondent herein.

2. I have heard Mr. M.H. Choudhury, learned counsel for the appellants in RS A 74/2011 and Mr. R. Goswami, learned counsel for the appellants in RSA 99/2011. Mr. A.C. Sarma, learned counsel for the respondent is also heard.

3. For the order proposed to be passed it is considered inessential to issue formal notice in the appeals.

4. The respondent herein instituted the aforementioned suit against the appellants in RSA 99/2011 (defendant Nos. 1, 2, 3 and 4) in RSA 74/2011 (defendant Nos. 5, 6 and 7) along with other proforma defendants in the Court of Munsiff No. 1, Morigaon praying for a decree inter alia for declaration of her right, title and interest in the suit land described in Schedule-A to the plaint and also for recovery of khas possession by removing the structures of the defendant

Nos. 1, 2, 3 and 4 thereon. The suit land measured 1B-4K-6Ls covered by Dag No. 53 in Periodic Patta No. 281 located at Village Morigaon (Assam). The pleaded case of the respondent was that the same was her paternal property and that during his life time her father, Kan Kalita, the owner in possession thereof granted it to her. He in the process conveyed his other lands to his three other daughters (proforma defendant Nos. 1, 2 and 3). The respondent averred that though she as such was the rightful owner of the suit land, the same having transited to her from her father Late Kan Kalita, the defendant Nos. 5, 6 and 7 clandestinely in order to grab the same filed Mutation Case No. 201/2006 before the Circle Officer, Morigaon Revenue Circle and obtained an order dated 13.06.2006 recording their names in respect thereof. The respondent/plaintiff having come to learn of this misdeed on 08.08.2007 from the defendant Nos. 1, 2, 3 and 4 when they attempted to erect bamboo fencing on the boundaries of the land, she made necessary enquiries and could confirm the veracity of the information. It transpired that the defendant Nos. 5, 6 and 7 after obtaining mutation in the aforesaid manner executed four sale deeds in favour of the defendant Nos. 1, 2, 3 and 4 in respect of the suit land transferring the same in their favour. Situated thus, the respondent on 20.08.2007 filed a petition before the Deputy Commissioner, Morigaon for cancellation of the mutation of defendant Nos. 5, 6 and 7. This petition was forwarded to the Officer-in-Charge, Morigaon Police Station for enquiry and report. Further enquiries revealed that the defendant Nos. 5, 6 and 7 had filed mutation case only against Kan Kalita who was men dead, however, without impleading the respondent and her sisters who were his existing legal heirs. As the defendant Nos. 1, 2, 3 and 4 on the I strength of the aforementioned sale deeds dispossessed the respondent/plaintiff of the suit land, the suit was filed for the aforementioned reliefs.

5. The defendant Nos. 1, 2, 3, 4, 5, 6 and 7 contested the suit by filing joint written statement wherein they denied the title of the respondent/plaintiff. According to them, at the time of the settlement operation in the year 1930-31 the suit patta was numbered 96 with the suit Dag as No. 402 containing 1B-4K-6Ls. They averred that Periodic Patta No. 96 as it stood then was comprised of seven dags enfolding 11B-3K-19Ls of land in all. They stated that one Bholou Kalita was the original pattadar and after him Tatak Kalita, Fosou Kalita, Gerai Kalita and Kala Kalita @ Kan Kalita were the recorded pattadars. They claimed that the Patta No. was altered to 281 and Dag No. 402 similarly got changed to 53, however, containing 1B-4K-6Ls of land. The defendants denied the respondent/plaintiff's right, title and interest in the land and claimed the same in them. The defendant Nos. 1, 2, 3 and 4, in particular, did so on the basis of the sale deeds.

6. On the basis of the pleadings the learned Trial Court framed issues. Whereas the respondent/plaintiff adduced oral and documentary evidence, the defendants abstained from doing so. The suit was eventually decreed by the judgment and decree as aforementioned.

7. The defendant Nos. 5, 6 and 7 (appellants in RSA 74/2011) preferred an appeal against the same being Title Appeal No. 9/2009. By the judgment and order dated 05.04.2010 the appeal was dismissed. The defendant Nos. 1, 2, 3 and 4 also followed suit but belatedly for which in the process a delay of 514 days occurred. Situated thus, they along with the memorandum of appeal submitted an application u/s 5 of the Limitation Act, 1963 (for short, hereinafter referred to as "the Act") seeking condonation thereof. This application was registered as M. J. Case No. 38/2010. Their appeal was incidentally numbered as Title Appeal No. 9/2010. The respondent/plaintiff submitted her written objection to the prayer for condonation of delay. Finally, by the order dated 15.12.2010 this application was rejected. Consequently, by a separate order of the same date the appeal also stood dismissed.

8. Mr. Choudhury has argued that as the omission on the part of his appellants to adduce evidence in the suit had been due to lack of proper advice and initiatives on the part of their learned Advocate, the impugned judgment and order ought to be interfered with in the interest of justice. He further urged that even otherwise on merits the decision of the learned lower Appellate Court is unsustainable in law and on facts.

9. Mr. Goswami insisted that though his appellants are comparatively more disadvantageously placed, they could not prefer the appeal in time due to wrong advice on the part of the common Advocate for which the unwarranted delay had occurred. According to the learned counsel, the appellants in RSA 99/2011 though had approached their Advocate in time they were advised against preferring a separate appeal in view of the one filed by the defendant Nos. 5, 6 and 7. Contending that a client ought not to be made to suffer for the fault of his Advocate, Mr. Goswami has urged upon this Court to interfere with the order of the learned lower Appellate Court rejecting his appellants' prayer for condonation of delay. As the delay had occurred not for any deliberate lapse or inaction on the part of his appellants, it is a fit case for such interference, more particularly when their appeal had been dismissed without any consideration of merit of the contentions raised therein, he urged.

10. Mr. Sarma, learned counsel for the respondent, in reply, has submitted with reference to the statements made in the memorandum of appeal filed by the appellants in RSA 74/2011 (defendant Nos. 5, 6 and 7) that it would appear therefrom that the cavil and imputation against their learned counsel is wholly unfounded and that, therefore, the plea based thereon is rejectable in limine. Without prejudice to this, the learned counsel has maintained that in case the appellants were keen to adduce evidence, they even at the belated stage could have prayed therefor under Order 41, Rule 27 of the CPC (for short, hereinafter referred to as "the Code"). While pointing out that the findings of both the Courts below are concurrent in nature and are not lightly interferable by this Court in exercise of its power u/s 100 of the Code, Mr. Sarma has urged that it being unimpeachably evident from the pleadings and evidence on record that the

respondent/plaintiff was the daughter of the pattadar and that on his death her name was mutated in the revenue records as his heir in respect of the suit land, no interference even otherwise with the impugned judgment and order is warranted. To buttress his plea Mr. Sarma has relied upon a decision of this Court rendered in *Amiya Bala Dutta Vs. Mukut Adhikari*, (1991) 1 GLR 229.

11. A bare perusal of the impugned judgment and order dated 05.04.2010 rendered by the learned lower Appellate Court reveals an exhaustive and analytical discussion of the pleadings and evidence on record. On the basis of the documentary evidence, more particularly, the zamabandis (Exhibits-1 and 2) it came to the conclusion that the name of the respondent/plaintiff was recorded in place of her father Kan Kalita in respect of the suit land. It noticed the omission on the part of the defendants (the appellants herein) to adduce evidence in refutation of this and also their failure to dispute that the respondent/plaintiff was not the daughter of Kan Kalita. The impugned judgment and order also reveals that in course of the arguments a copy of the order of the Addl. Deputy Commissioner, Morigaon cancelling the mutation of the defendant Nos. 5, 6 and 7 had been produced. The learned Court below thus concluded on the basis of the pleadings and evidence on record that the respondent/plaintiff was the daughter of the pattadar Kan Kalita and, as such, she had stepped into his shoes on his demise. The decision of the learned Trial Court was, thus, affirmed. In the opinion of this Court, the findings recorded in the impugned judgment and order with the reasons in support thereof do not justify this Court's interference for annulling the same in exercise of its power u/s 100 of the Code. No substantial question of law is discernible to invalidate the decision assailed in the instant appeals.

12. This Court in *Amiya Bala Dutta* (supra) had held in the context of the Assam Land and Revenue Regulation, 1886 - Section 17 that a patta holder is deemed to be a land holder and has a permanent, heritable and transferable right of use and occupancy in his land and that the records of rights prepared thereunder ought always to be deemed to be correct unless the contrary is proved. It was further observed that if a person in order to establish his title produces a patta the same must be given due weightage inasmuch as the same is issued in accordance with the provisions of Section 17 of the Assam Land and Revenue Regulation and the Rules framed thereunder and must be considered to be a document of title.

13. In view of the disclosures from the Zamabandis taken note of by the learned Court below where in the respondent/plaintiff is shown to be a recorded pattadar in respect of the suit land following the death of her father, Kan Kalita, this decision in the opinion of this Court, clinches the issue of title in her favour.

14. So far as the plea of negligence and inaction against the Advocate representing the appellants is concerned, it appears from the memorandum of appeal of the defendant Nos. 5, 6 and 7 (appellants in RSA 74/2011) that they had averred therein that from the inception of the suit steps were regularly taken

on behalf of the contesting defendants by their engaged Advocate. According to them, the appellants in RSA 99/2011 took up on themselves the responsibility of taking necessary steps at a certain stage of the proceeding but thereafter they failed to instruct their learned Advocate to cross-examine the witnesses of the respondent/plaintiff and take other necessary initiatives in the suit. The defendant Nos. 5, 6 and 7 further stated that inspite of these failings their Advocate of his own cross-examined PW 1 and eventually in view of the persistent defaults on their behalf declined to cross-examine PW 2. These defendants also alleged of an amicable settlement between the appellants in RSA 99/2011 and the respondent/plaintiff and abstained from contesting the suit in that premises.

15. A perusal of the application of the appellants in RSA 99/2011 u/s 5 of the Limitation Act, however, unfolds a different story. According to them, they were not informed about the fact that the suit had proceeded ex-parte for want of steps. They were also not communicated with the information of the judgment and decree dated 11.02.2009 passed by the learned Trial Court and it was only when they received the notice of T. A. No. 9/2009 filed by the defendant Nos. 5, 6 and 7 that they became aware of these developments. According to them, their learned counsel when contacted advised against filing a separate appeal by them in the face of the one already lodged by the defendant Nos. 5, 6 and 7. Acting on the said advice they entered appearance in this appeal. On the dismissal of T. A. No. 2/2009 by the judgment and order dated 10.05.2010 when all the defendants in a group decided to prefer a joint appeal, the defendant Nos. 1, 2, 3 and 4 were advised to approach the learned lower Appellate Court at the first instance. According to the appellants in RSA 99/2011, as a result of the wrong legal advice accorded to them, a delay of 514 days occurred.

16. In her written objection the respondent/plaintiff in substance pleaded that all the contesting defendants were being represented from the stage of their appearance by a common Advocate who had been taking steps on their behalf in the suit. According to her, they could not produce any witness or introduce any document in support of their case as none was available. She, therefore, repudiated the plea of wrong legal advice as a ruse to somehow shift the blame on their learned counsel so as to take a chance under the cover thereof to prefer an appeal against the otherwise unassailable decision of the learned Trial Court.

17. The learned Court below by its order dated 15.12.2010, as referred to hereinabove, refused to condone the delay on the ground that the cause stated was not sufficient within the meaning of Section 5 of the Act. Though this order does not in details elaborate the reasons in support of this finding, having regard to the statements made by the defendant Nos. 5, 6 and 7 in their memorandum of appeal and the rival pleadings on the aspect of condonation of delay alluded hereinabove, this Court is of the view that this order dated 15.12.2010 also does not suffer from any gross illegality warranting interference at this end. The dismissal of the time barred appeal of the appellants in RSA 99/2011, thus,

cannot be faulted with.

18. In view of the determination made hereinabove, in the comprehension of this Court, the appeals lack in merit and are thus dismissed.

No costs.