
(2006) 12 GAU CK 0039
In the Gauhati High Court

Bipin Chandra Kalita

APPELLANT

Vs

Sarama Kalita and Others

RESPONDENT

Date of Decision : 19-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146
Evidence Act, 1872 — Section 114, 30, 4, 90
Registration Act, 1908 — Section 60, 69

Citation : (2007) 2 GLT 399

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Judgement

Amitava Roy, J.—The appellant-plaintiff being aggrieved by the judgment and order dated 23.11.2000, passed by the Civil Judge (Sr. Division) No. 2 Guwahati, in Title Appeal No. 24 of 1991, affirming the verdict of the learned Trial Court dismissing his Title Suit No. 68 of 1986, is in appeal.

2. I have heard Mr. B.K. Goswami, Senior Advocate assisted by Mr. P.K. Kalita, Advocate for the appellant-plaintiff and Mr. S. Medhi, Advocate assisted by Mr. S. Baruah, Advocate for the respondent No. 1 to 4-defendants. The name of the proforma respondent No. 5 had been struck off in terms of the order of this Court.

3. The pleaded version of the appellant-plaintiff in short, is that Ratan Kalita and Jurai Kalita (both deceased) were brothers owning and possessing separately in equal shares land measuring 1 Bigha 1 Katha 8 Lechas covered by Dag No. 711 (new)/463 (old) of K.P Patta No. 178 (new)/103 (old) in village Sualkuchi under Pub Bongsor Mauza in the district of Kamrup described in Schedule-B to the plaint. In or about the year 1956 half portion of the said land owned and possessed by Ratan Kalita, was acquired by the Electricity Department for which compensation was also granted. Following this, Jurai Kalita, the father of the respondent-defendant No. 1 & 2 and husband of respondent-defendant No. 3 became the absolute owner of the remaining half portion of the land in Schedule-B, measuring 3 Kathas 4 Lechas. In the year 1956, he sold 1 Katha thereof,

described in Schedule A-1 and A-2 to the plaint in favour of Ratan Kalita, who then resided there with his wife Champa Kalita. On the death of Ratan Kalita, his wife widow Champa Kalita survived as his only heir. On 26.04.1965 Champa Kalita sold 1 Katha of land described in Schedule A-1 and A-2 to Golapi Kalita by executing a registered deed of sale. Thereafter on 01.11.1985, Golapi Kalita sold the said land with a thatched house thereon, to the appellant-plaintiff by a registered deed of sale and also delivered possession thereof to him. At or about the same time, the respondent-defendant No. 1, instituted a proceeding u/s 145/146 Cr.P.C. registered as Misc. Case No. 191m of 1985, in which the learned Executive Magistrate declared the possession of the aforementioned land in his favour. The appellant-plaintiff, having unsuccessfully challenged the said order before the revisional Court, instituted the aforementioned suit, praying for a decree inter alia for declaration of his right, title and interest over the suit land and confirmation of possession. He, in the alternative also prayed that in case his possession was determined to be uncertain, a decree for delivery of khas possession be also granted.

4. The suit was contested by the respondent-defendant Nos. 1,2 & 3. While categorically denying each and every averment made in the plaint, they claimed that the thatched house on the suit land had been constructed by them and that they were in absolute possession of the suit property. They specifically denied that Jurai Kalita during his lifetime had sold 1 Katha of land from his share to his brother Ratan Kalita by executing a registered deed of sale. They asserted that the suit land had never been in possession of Ratan Kalita in his lifetime.

On the basis of the pleadings of the parties, the learned Trial Court framed several issues of which issue No. 5 & 6 being of vital relevance are set out hereinbelow:

Issue No. 5, Whether the title and possession of the suit land ever passed to the hands of the predecessor-in-interest of the plaintiff and subsequently to the plaintiff?

Issue No. 6, Whether the defendants have been in undisputed and continuous possession of the suit land ?

5. Both sides adduced evidence both oral and documentary. Whereas, the appellant-plaintiff examined himself and amongst others Smt. Golapi Kalita, the respondents-defendants examined the respondent-defendant No. 1 and one Sri Nivarsa Kalita. The learned Trial Court on a consideration of the pleadings of the parties and the evidence on record, dismissed the suit. Being aggrieved the appellant-plaintiff approached the learned Assistant District Judge No. 2, Guwahati, with Title Appeal No. 24 of 1991, which also met with the same fate on 04.08.1993. Second Appeal No. 121 of 1993 was thereafter preferred before this Court by the appellant-plaintiff, which was disposed of on 30.11.1999, remanding the case to the learned Lower Appellate Court for fresh disposal. By the judgment and order, impugned in this appeal, the dismissal of the suit

recorded by the learned Trial Court has been sustained.

6. At the time of the admission of the appeal, the following two substantial questions of law had been framed.

i) Whether the learned Appellate Court committed error in not applying Section 90 of the Evidence Act regarding the execution of Ext. 7.

ii) Whether the learned Appellate Court committed error in substantial questions of law by making a finding contrary to the findings made by this Court in S.A. No. 121 of 1993.

7. Before adverting to the rival submissions, it would be appropriate to briefly outline the conclusions of the learned Lower Appellate Court. The decision is principally based on the determinations pertaining to issue No. 5 & 6 as above. The learned Lower Appellate Court discarded the sale deed Ext. 7 claimed to have been executed by Jurai Kalita in favour of Ratan Kalita on 13.09.1956, inspite of the same being 30 years old and the availability of presumption ordained in Section 90 of the Indian Evidence Act 1872 (hereinafter also referred to as the "Act") on the following considerations:

a) The respondents-defendants had denied the execution of the said document by their predecessor in interest Jurai Kalita contending that he was illiterate and, therefore, could not read or write.

b) The document had not been produced from the proper custody.

c) Neither the scribe of the document nor the contesting witnesses had been examined.

d) One of the boundaries in the land described in the said document did not tally with that of the same land in subsequent title deeds.

e) The respondent-plaintiff and his witnesses had contradicted each other with regard to the possession of the suit land after the sale.

f) Ratan Kalita and his wife Champa Kalita had left for Bongsor after the acquisition of their land by the ASEB and did not return to Sualkuchi thereafter.

The learned Lower Appellate Court also appraised the evidence of the respondents-defendants with regard to the possession of the suit land vis-a-vis the testimony of the respondent-plaintiff and his witnesses in that regard. On the above estimate, the learned Lower Appellate Court concluded that the presumption u/s 90 of the Act was not available to the document Exhibit 7 and that as the respondent-plaintiff had failed to prove that a valid title had been passed on to him by the series of transactions referred to in the plaint, he was not entitled to any declaration as prayed for.

8. Mr. Goswami, has emphatically urged that the conditions precedent legislatively prescribed for the applicability of Section 90 of the Act being present in the instant case, the learned Courts below grossly erred in law in rejecting Ext.

7. This document being 30 years old and produced from the proper custody i.e., the respondent-plaintiff, the learned Courts below clearly fell in error in denying it the benefit of presumption available u/s 90 of the Act. The learned Senior Counsel, in order to controversy the factors taken note of by the learned Lower Appellate Court to dismiss the Ext. 7, drew the attention of this Court to the written statement of the respondents-defendants to contend that the plea of illiteracy of Jurai Kalita and his inability to read and write had not been taken therein. Referring to the evidence of the respondent-plaintiff and his witness Golapi Kalita, PW1, Mr. Goswami has urged that it is apparent therefrom that after the execution of the sale deed Ext. 1 & 2, the sale deed (Ext. 7) had been handed over to the respondent-plaintiff by his vendor and, therefore, the production of the said document from his custody was by all means in accord with the requirements of Section 90 of the Act. All the sale deeds having been proved in accordance with law, Mr. Goswami argued that a valid title in the suit land had passed on to the respondent-plaintiff and, therefore, the absence of possession thereof by the respondent-plaintiff was of no consequence, there being no plea of adverse possession by the respondents-defendants. The learned Counsel in other words sought to contend that the respondent-plaintiff having acquired a valid title in the suit land, even if the adverse findings with regard to his possession, are sustained the same would not have any annulling effect thereon. According to him, in the facts and circumstances of the case Ext. 3, the Jamabandi was a formidable supportive document demonstrating the title of the respondent-plaintiff and the learned Lower Appellate Court erred in dismissing the suit holding that the same was not relevant to uphold the respondent's-plaintiff's title in the suit land. On the said analogy or reasoning, the considerations acted upon by the learned Lower Appellate Court to exclude Ext. 7 from the benefit of Section 90 of the Act are fully irrelevant, he urged. The learned Senior Counsel exhaustively referred to the judgment and order dated 30.11.1995, of this Court in Second Appeal No. 121 of 1993 to buttress his above submissions. According to him, the underlying objective of the above legal provision being to relieve a party relying on the related document of the rigour of proving the same in accordance with law in view of the time lag and the possibility of nonavailability of the witnesses, the learned Appellate Court misconstrued the essence thereof, rendering the impugned judgment and order legally invalid. The learned Senior Advocate relying on Section 60 of the Registration Act 1998 (hereinafter also referred to as the "Registration Act") argued that Ext. 7 being a registered document a presumption of the valid execution and registration thereof, was available and, therefore, the learned Courts below erred on a substantial question of law in holding otherwise. In support on his submissions, Mr. Goswami, placed reliance on the decision of the Privy Council in AIR 1947 Indira Vs. Arumugam and Another, K.V. Garasiya Vs. Babubhai N. Gavit and Others, , was also pressed into service.

9. Per contra Mr. Medhi, has emphatically argued that the learned Courts below, having on a proper assessment of the facts and interpretation of law held that

the presumption comprehended in Section 90 of the Act, was not extendable to Ext. 7, this Court sitting in Second Appeal, would not endeavour to reassess the materials on record and substitute the said conclusion on the basis thereof. According to the learned Counsel, the facts taken note of and acted upon by the learned Courts below, were relevant and cogent and, therefore, in absence of any material to evince erroneous exercise of discretion, no interference therewith, is called for. The deductions vis-a-vis Ext. 7 being based on the recorded facts, the same cannot be, in any view of the matter, be condemned as capricious, arbitrary or perverse, he urged. To reinforce his arguments, Mr. Medhi, has placed reliance on the decisions in *Swarnamoyi and Another Vs. Sourindra Nath Mitra and Others*, (*Rangu Vithoba and Others Vs. Rambha Dina and Another*, (*N. Ramaswamy Padayachi Vs. C. Ramaswami Padayachi and Others*, (*Haradhan Mahatha and Others Vs. Dukhu Mahatha* (*Baradhan Mahatha and Ors. v. Dukhu Mahatha*) and (1986) 1 GLR 98 (*Buidrom Achou Singh v. T.N.O. Ibempishak Devi*).

10. The rival submissions have been closely appreciated. It would be expedient in view of the background of an earlier round of litigations to initiate the adjudicative exercise from the decision in S.A. No. 121/1993. As alluded hereinabove, the appellant-plaintiff was in appeal, his suit having been dismissed by the Lower Appellate Court. This Court while noticing the observation of the learned Appellate Court that the execution of the deed Ext. 7, did not require formal proof for the reason for the applicability of Section 90 of the Act, held that the absence of Smt. Champa Kalita's possession of the suit land and her migration with Ratan Kalita to another village could not be said to have any adverse impact on their right, interest and title thereon. The reliance of the learned Lower Appellate Court on the findings of possession in the proceedings u/s 145 Cr.P.C. involving the suit land, was also held to be faulty. This Court further recorded that the conclusion of the learned Lower Appellate Court that the suit land happened to be a part of the Courtyard of the respondents-defendants, was without any substantial reason. This Court held the view that once the transfer of suit land by Jurai Kalita in favour of Ratan Kalita, was established, the rest of the appellant-plaintiff's story was bound to be accepted because the respondents-defendants then could succeed in the suit only by establishing that Jurai Kalita had not sold 1 Katha of land from his land of 3 Katha 4 Lechas to Ratan Kalita and that Ratan Kalita did not get possession thereof. On the aspect of the significance of mutation to establish title or possession, this Court held, that though, registration of the name of a person in the revenue records, per se, may not prove his title or possession, it is a strong circumstance in support thereof, if the mutation is preceded by and is based on a deed of title. The finding of the learned Lower Appellate Court dismissing the sale deed Ext. 1 & 2, was also held to be unsustainable. This Court was of the view that the author of the said documents, namely, Smt. Golapi Kalita having testified about the execution thereof by her, no other witness was required to prove the said fact. While remanding the matter, the learned Lower Appellate Court was directed to decide

the appeal afresh in accordance with and in the light of the observations made in the judgment and order.

11. This Court in substance in the aforesaid appeal, therefore, disapproved the approach of the learned Lower Appellate Court in relying on the factum of possession of the suit land by Champa Kalita and her emigration along with her husband Ratan Kalita to another village, as wholly irrelevant for the purpose of the applicability of Section 90 to Ext. 7. This Court, on the otherhand, countenanced the learned Lower Appellate Court's conclusion that the execution of document Ext. 7, did not require any formal proof in view of the above provision of the Act. The relevance of mutation, if preceded by the execution of a deed on title, was also underlined. Noticeably, the learned Lower Appellate Court was required to adhere to the observations made by this Court, while deciding the appeal afresh on remand.

12. The debate having centered around Section 90 of the Act, it is time now to deal therewith. The above provision permits drawal of a presumption, if the document concerned is thirty years old. Thereunder, where any document, purporting or proved to be thirty years old, is produced from any custody, which the Court in a particular case considers proper, it may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's hand, and, in the case of a document executed or attested that it was duly executed and attested by the person (s) by whom it purports to be executed or attested. In the explanation following the text of the provision, its elucidated that the documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody would be improper if it is proved to have had a legitimate origin, or if the circumstance(s) of a particular case are such as to render such an origin probable.

13. The above provision of the Act, thus, curves out an exception in respect of documents 30 years old or more from the usual mode of proof in law. It permits a presumption in respect of such documents, if the same are produced from any custody, which the Court in a particular case may consider to be proper. In such an eventuality, the Court may presume that the signature and every other part of the document, which appears to be in the handwriting of a particular person, is his and if the document is executed or attested then it was so done by the persons by whom it purports to be. The underlying object of Section 90 of the Act appears to be to obviate the necessity of proving a document by observing the legally prescribed essentialities appertaining thereto. This, logically, is in view of a possible eventuality that the proof of execution or attestation of such document after 30 years of its creation might not be practically feasible. Emphasis, therefore, has been laid on the custody from which such a document is produced to be tendered in evidence. If the Court is satisfied that such custody is proper and reliable, it is permitted to elicit a presumption that the signature and any other part of the document is in the handwriting of the person

represented to be so and that the document had been executed and attested by him or them, as the case may. The expression "may presume", appearing in the said provision in terms of Section 4 of the Act denotes that a Court may either accept the signature or every other part of the document to be in the handwriting of the person concerned or construe that the document had been executed or attested as purported to be unless and until it is disproved. In a given case depending on the fact situation, the Court may also call for the corroboration in respect thereof. The above notwithstanding, having regard to the end purpose of the said legal provision, it would, in my opinion, require potent, convincing and persuasive grounds to dislodge the presumption, otherwise available in respect of the documents contemplated thereby.

14. The Privy Council in *Munnalal and Ors.* (supra), while dwelling on the import of Section 90 of the Act qua a will, affirmed the determination of the Courts below presuming execution and attestation of the said testamentary instrument. By drawing a presumption u/s 90 of the Act, it was held that though a party setting up a will, was required to prove that the testator was of sound disposing mind when he had made the disposition, in the absence of any evidence as to the state of his mind, the proof that he had executed a will rational in character in the presence of witnesses must lead to the presumption that he was of sound mind, and understood what he was about. It held the view that this presumption could be justified under the express provision of Section 90 and that it stood fortified u/s 114 as well. Their Lordships of Privy Council, therefore, not only sustained the presumption with regard to the execution or attestation of the will on the basis of Section 90 of the Act, it was declared to demonstrate a sound disposing state of mind of the testator as well. This decision therefore is an authority on the proposition that a document if admissible u/s 90, the presumption would envisage due compliance of the mandatory legal procedure prescribed to be followed for the execution and registration (if any) thereof, and proof of all relevant facts and circumstances having a bearing thereon.

The fact that Ext. 7, in the instant case, was a registered document, is significant by itself. Section 60 of the Registration Act, deals with certificate of registration of a document presented there for. It enjoins that on the compliance of the necessary legally prescribed formalities, if a document is presented for registration, the registering officer would endorse thereon a certificate, containing the word "registered" together with the number and page of the book in which the document had been copied. Such a certificate is required to be signed sealed and dated by the registering officer, whereupon the same would be admissible for the purpose of proving that the document had been duly registered in the manner provided by the said statute and that the facts mentioned in the endorsement have occurred as referred to therein. This provision of the Registration Act in substance raises a presumption of the validity of the process leading to the registration of a document presupposing that the necessary legal imperatives have been duly observed. This presumption in law, is also demonstrative of the validity of Ext. 7.

15. A careful reading of the decision of this Court in Second Appeal No. 121 of 1993, suggests that the matter was remanded to the learned Lower Appellate Court, as it, while deciding the appeal had erroneously relied on irrelevant facts bearing on the presumption, vis-a-vis, Ext. 7. Noticeably, this Court had noted with approval the determination of the learned Lower Appellate Court that the execution of the said document was not required to be proved in the face of Section 30 of the Act. In other words, while disposing of the appeal after remand, in view of the operative directions of this Court, the learned Lower Appellate Court was obliged to bear in mind that in face of the above provision of the Act formal proof of the execution of the document was not called for. In other words, this Court had endorsed the presumption comprehended in Section 90 of the Act, vis-a-vis, the said document.

16. The facts taken note of by the learned Lower Appellate Court to spurn Ext. 7, have been enumerated hereinabove. A brief reference at this stage of the authorities relied upon on behalf of the respondents would be appropriate. In *Swarnamoyi and Anr. (supra)*, their Lordships of the Calcutta High Court with reference to the above legal provision, held that a mere production of an ancient document unless substantiated by some corroborative evidence of acting under it, is not entitled to any weight.

17. To the same effect is the rendering in *Ram Baran Dube and Ors. (supra)*. The decision in *Rangu Vithoba and Ors. (supra)*, has been pressed into service to emphasise that the presumption available u/s 90 would arise only with respect to a case set up by the plaintiff and not with reference to one not pleaded by him.

18. Their Lordships of the Madras High Court in *N. Ramaswamy Padayachi (supra)*, ruled that the presumption contemplated in Section 90 of the Act, is not an absolute one and that even in cases, where the document is produced from a proper custody, the Court has a discretion to draw the presumption or require the proof of its execution. It held that the Court must have regard to the surrounding circumstances and apply its mind as to whether the presumption should be drawn or not.

19. While, dwelling on the expression "may presume", it was held in *Haradhan Mahatha and Ors. (supra)*, that a discretion has been vested in the Court to presume or not a fact. In that case a will more than 30 years old had been tendered. Noticing that the attesting witnesses were not alive and that therefore, the proof of the document in terms of Section 69 was not possible, presumption u/s 90 of the Act, was drawn in absence of any suspicion as to the unnaturalness in the bequest or interpolation in the said document.

20. This Court in *Huidrom Achou Singh (supra)*, held that u/s 90 of the Act, the presumption is limited of the handwriting of the person or persons appearing on the document and that for proving the contents thereof, evidence is necessary. The view that the drawal of presumption by a Court under the above legal provision, is a matter of judicial discretion and rebuttable was reiterated. This

decision has also been relied upon in support of the contention that the discretion exercised by a Court in the matter of such presumption ought not to be lightly interfered with by the High Court.

21. The gravamen of the authorities referred to above, is that the presumption comprehended in Section 90 of the Act, is relatable to the writings, execution and the attestation of the document, the contents thereof, being subject to proof in accordance with law. Unerringly, the approach of a Court in the matter of presumption u/s 90 of the Act has to be essentially to effectuate the purpose thereof and not to render it nugatory. Though, a Court is endowed with a discretion to draw a presumption as enumerated in the section, the exercise thereof, has to be informed with objectivity to further the legislative intendment. Unless, the attending facts and circumstances on the face of the document renders its existence, execution and attestation impossible, a rebuttable presumption is raised in favour of the genuineness and authenticity thereof, casting a burden on the other side to establish the contrary.

22. A plain reading of the written statement of the respondents-defendants reveals that no plea has been taken, asserting that Jurai Kalita was illiterate and, therefore, was unable to read or write. In that view of the matter, the evidence of DW1 Shri Sarama Kalita, to that effect cannot be taken note of as a factor to deny the presumption for Ext. 7. PW2 Shri Bipin Chandra Kalita (appellant-plaintiff), proved Ext. 4, whereby Champa Kalita had sold the suit land in favour of Golapi Kalita. In cross-examination, this witness clarified that Smt. Golapi Kalita had handed over the sale deed Ext. 7 to him. He, however, deposed that the scribe and the witnesses of the said sale deed had expired in the meantime. The said witness confirmed to have purchased the suit land from the Golapi Kalita by sale deed, Ext. 1 & 2. PW Golapi Kalita corroborated the sale of the suit land in favour of the appellant-plaintiff, Bipin Kalita.

23. Having regard to the background of the transactions, and the above evidence, the appellant-plaintiff's custody of the sale deed Ext. 7, is unmistakably proper and has to be accepted. The reservation expressed by the learned Lower Appellate Court on the production of the said document from the custody of the appellant-plaintiff, is therefore, unfounded. In view of the clear and categorical testimony of PW 2, that neither the scribe nor the witnesses of the said document were alive, the failure to examine them, could not have weighed against the presumption u/s 90 of the Act. The exception taken by the learned Lower Appellate Court regarding the custody of the said document with the appellant-plaintiff, in absence of any statement of PW 1 Smt. Golapi Kalita to the said effect, in my opinion, is also of no avail. The difference in one of the boundaries of the land involved, considering the time lag between the two transactions is also not of any significance.

24. Noticeably, the respondents-defendants had not raised any plea of adverse possession. In that view of the matter, even assuming that they had been in possession of the suit land, mere length thereof, without any open assertion of

their right thereto, challenging the superior title of the appellant-plaintiff therein, per se would not divest him, of his title therein, if otherwise legally acquired. The Apex Court in *Indira v. Arumugam and Anr.* (supra), held that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence, unless the defendant proves the adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Declaration of possession in favour of the respondents-defendants in the 145 Cr.P.C. proceeding therefore, cannot be of any definitive relevance. The evidence that Champa Kalita and Ratan Kalita had left the village, where the suit land is situated and did not return, ipso facto, is not mutilative of the appellant-plaintiff's claim of title on the basis of the aforementioned sale deeds. The determinations of this Court in Second Appeal No. 121 of 1993, as dealt with in details hereinabove, were binding on the learned Lower Appellate Court, while deciding the appeal on remand.

25. A cumulative consideration of the above leads to the irresistible conclusion that the learned Lower Appellate Court had proceeded on an erroneous legal and factual premise in deciding the issue Nos. 5 & 6 against the appellant-plaintiff. Mutation by itself though not an absolute proof of title, as recorded by this Court in SA No. 121 of 1993, is a corroborative evidence thereof, if preceded by and based on a deed of title. The learned Court below misconstrued the law in this regard and arrived at its findings by overlooking the relevant evidence on record. Ext. 3, Jamabandi and revenue paying receipts could not have been excluded in the manner so done.

26. In view of the findings recorded as above, the conclusions of the learned Lower Appellate Court, are thus held to be legally unsustainable being against the weight of the evidence on record and vitiated by perversity and fatal illegalities. In the result, the appeal succeeds and is thus allowed. The substantial questions of law are answered accordingly. The judgment and order dated 23.11.2000 is hereby set aside. The suit is decreed in full.

27. Let a decree be prepared on the basis of this judgment and order. No costs.