

(2012) 03 KL CK 0090

In the High Court Of Kerala

Case No : Regular Second Appeal . No. 1212 of 2011

Naigo

APPELLANT

Vs

State of Kerala and Forest Range Officer

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11

Citation : (2012) 03 KL CK 0090

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : T.I. Abdul Salam, for the Appellant; James Mathew Kadavan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Heard. Admit.

2. Following substantial questions of law are framed:

i. Is the first appellate court justified in rejecting the appeal on the ground of delay without considering merit of the case where the evidence both oral and documentary point to a valid right guaranteed to the plaintiff by a statute?

ii. Whether the first appellate court is justified in rejecting the appeal on the ground of delay ignoring the evidence and circumstances proving inability of appellant to file the appeal within time?

3. In the nature of questions raised for a decision and as agreed by learned counsel for appellant and the learned Government Pleader for respondents, it is not necessary to call for records of the case. I have perused the copy of I.A.No.621 of 2010 (in A.S.No.14 of 2010)

4. Plaintiff in O.S.No.81 of 1996 of the court of learned Munsiff, Idukki and the appellant in A.S. No.14 of 2010 of the court of learned Sub Judge, Kattappana is the appellant before me, challenging dismissal of the appeal as barred by

limitation consequent to the dismissal of I.A.No.621 of 2010 for condonation of the delay.

5. Short facts necessary to answer the questions raised are:

Appellant/plaintiff claimed that his father had encroached into the forest land in the year, 1965 and since then, has been in possession and enjoyment of 1.95 acres. In the year, 1993, the Government framed Rules for regularisation of occupied forest land by the holders. The said 1.95 acres came into the possession of appellant as per a family settlement. He applied for patta and an order of assignment was passed on 30.11.1993. But patta has not so far been issued. One acre of land on the east of the said 1.95 acres was assigned to one Uthaman Pallithara. The said Uthaman Pallithara had constructed a building in the said one acre. Appellant got possession of the said one acre and building from the said Uthaman Pallithara. The 1.95 acres which appellant claims to have got by family settlement and the one acre he claims to have obtained from Uthaman Pallithara, it is said, lie as a compact plot and is described as the 2.95 acres in the plaint schedule. It is the version of appellant that the building is numbered as IX/180 of Arakkulam Panchayat. While so, the Forest Department set up two jundas towards east of the suit property in the year, 1976. Appellant apprehends that forest officials might trespassed into the suit property and hence the suit.

6. 2nd respondent filed written statement on behalf of himself and on behalf of 1st respondent contending that the revenue/forest officials conducted a joint verification and prepared list of encroachers prior to 01.01.1977. Appellant and Uthaman Pallithara do not figure in that list (indicating that they had no possession of forest land prior to 01.01.1977). Appellant's father, Padmanabhan was in possession of one acre prior to 01.01.1977. That one acre is not part of the suit property. Documents concerning the suit property produced by the appellant are fabricated. Suit property was not in the possession of appellant or his predecessors-in-interest before 01.01.1977 and hence there was no assignment of any portion of the suit property to the appellant. It is contended that the No.IX/180 does not concern the building situated in the suit property.

7. Trial court decreed the suit in part granting injunction with respect to 1.95.200 acres (plot No.1 in Ext.X1, survey plan). Aggrieved by the refusal of the trial court to grant decree with respect to the remaining portion of the suit property, appellant filed A.S.No.14 of 2010 with a delay of 493 days and filed I.A.No.621 of 2010 to condone that delay.

8. Respondents resisted the application for condonation of delay contending that there is no sufficient reason. RSA No.1212/2011 4

9. Appellant gave evidence as PW1 on I.A.No.621 of 2010 and explained the delay. First appellate court was of the view that delay is not explained, dismissed I.A.No.621 of 2010 and consequently, the appeal as well.

10. Learned counsel for appellant contends that finding of the first appellate court regarding sufficient cause for the delay is not correct and that first appellate court should have given a liberal approach in the matter of condonation of delay particularly as the trial court has granted a decree in favour of appellant with respect to 1.95.200 acres and was not inclined to disbelieve the case of appellant in toto. Learned Government Pleader contended that there is no reason to interfere with the impugned order.

11. In the affidavit in support of I.A.No.621 of 2010, appellant claimed that trial court disposed of the suit on 25.09.2008 and that he was looking after the case with all diligence. His counsel had informed him that the case was decided in his favour. On that belief, he did not take steps to prefer any appeal. On learning that the Government is taking steps to issue patta, he approached his counsel to get a copy of the judgment. He obtained a copy of the judgment on 05.04.2010 when alone he learnt that the suit was dismissed against him in part. Hence there happened to be a delay of 493 days.

12. When examined as PW1, (as seen from the order of the first appellate court) appellant stated in cross examination that his Advocate had informed him result of the case on the next day the court pronounced judgment. RSA No.1212/2011 5 PW1 was questioned whether he had made any arrangement to get copy of the judgment. In answer to that question PW1 replied that he does not know about it. The first appellate court thought from the above stand of the appellant that his version cannot be accepted.

13. It is the consistent case of appellant that information his counsel had given him was that the suit was decided in his favour and hence, he did not take steps to file the appeal. I must bear in mind that the suit was decreed in part in favour of the appellant. There is no reason to think that suit having been dismissed against appellant in part, he willfully caused the delay in filing the appeal, for, by such conduct appellant did not stand to gain. I must also notice that in considering whether there is sufficient cause, court must adopt a liberal approach.

14. Having regard to the circumstances stated I am inclined to think that appellant has shown sufficient cause for the delay. The substantial questions of law framed are answered accordingly.

Resultantly this Second Appeal is allowed as under:

i. Order dismissing I.A.No.621 of 2010 in A.S.No.14 of 2010 and the consequent dismissal of that appeal by learned Sub Judge, Kattappana are set aside. RSA No.1212/2011 6

ii. I.A.No.621 of 2010 in A.S.No.14 of 2010 is allowed.

iii. A.S.No.14 of 2010 is remitted to the learned Sub Judge, Kattappana for hearing under Order XLI, Rule 11 of the CPC and to pass appropriate orders in that regard.

iv. Appellant shall appear in the court of learned Sub Judge, Kattappana on 12.04.2012 for hearing under Order XLI, Rule 11 of the Code of Civil Procedure.

v. To avoid delay in issue of notice in case the appeal is admitted, respondent shall also present "in court on that day

All pending interlocutory applications will stand dismissed.