

Lakhi Baruah and others

Vs

Sri Padma Kanta Kalita and others

Civil Appeal No. 3866 of 1996

(G. N. Ray, B. L. Hansaria JJ)

26.02.1996

JUDGEMENT

G. N. RAY J.

1. Leave granted. Heard learned counsel for the parties.

2. This appeal is directed against judgment dated December 17, 1993 passed by the High Court of Guwahati in Second Appeal No. 46 of 1993. By the aforesaid judgment, the High Court dismissed the appeal preferred against judgment and decree dated March 29, 1993 passed by the learned Assistant District Judge. Sonitpur in Title Appeal No. 7 of 1992 reversing the judgment and decree dated February 28, 1992 passed by the learned Munsif. IInd Court, Tezpur passed in Title Suit No. 55 of 1981.

3. Shri Pusmoa Kanta Kalita and Shri Padma Kanta Kalita, namely plaintiff Nos. 1 and 2, instituted title suit No. 55 of 1981 in the Court of learned Munsif at Tezpur against defendants Smt. Aikon Baruah, Shri Dakshi Baruah, Shri Basu Baruah, Shri Bikash Baruah, Shri Babui Baruah, Shri Jitan Baruah and Smt. Sonmal Baruah for a declaration that the plaintiff No. 1 was the sole and lawful owner of the lands in Schedule A to the plaint and for further declaration that the registered Sale Deed of 1950 of Tezpur was forged, null and void and was inoperative so far as the plaintiff No. 1 was concerned and also for a declaration that plaintiff No. 2 had right title and interest in the lands as described in Schedule B to the plaint by virtue of his purchase of the said lands from plaintiff No. 1. The prayer for consequential relief by way of delivery of the possession of the suit property to the plaintiff No. 2 after evicting the defendants from the said lands was also made.

4. The case of the plaintiff, inter alia was that one Sumitra Kalitani was the sole and absolute owner of lands measuring about 7 bighas 3 Katras 12 lachas comprised under Old Dag Nos. 624, 790, 780, 796, 788, 816, 818 and 986 appertaining to Old Periodic Patta No. 239 of village Dekasunder, Mouza Borbhagia in the District Darrang, Assam with an ancestral house on a portion of the said lands. Plaintiff Nos. 1 Shri Pushoa Kanta Kalita was born to Sumitra on March 14, 1979 in the said village Dekasunder but the said Sumitra Kalitani died within about two-three months from the date of birth of Pushpa Kanta. Father of Pushpa Kanta, Thalluk, also died after about four years and the plaintiff No. 1 Pushpa Kanta was thereafter brought to and maintained by his grandmother (mother's mother), late Jaoari Kalitani, in the said ancestral house up to the age of 8 and 9 years of the plaintiff No. 1. Thereafter, the said Jaoari Kalitani also died and plaintiff No. 1 became an orphan and there was no one to look after him and his aforesaid properties of which he became owner by succeeding the interest of his mother Sumitra Kalitani. Taking advantage of the helpless condition of plaintiff No. 1 Pushpa Kanta, one Holiram Baruah, since deceased and husband of respondent

No. 1, started torturing the plaintiff No. 1 with mala fide intention of wrongfully grabbing the properties of plaintiff No. 1, As a matter of facts on one occasion the plaintiff No. 1 was mercilessly beaten by the said Holiram Baruah causing fracture and dislocation of back and wrist bone for which the plaintiff No. 1 became partially disabled. Coming to know of such torture meted out to the plaintiff No. 1, his paternal uncle Shri Kaminath Bora had brought the plaintiff No. 1 to the residence of Kaminath at village Madhab, Borhampur, in order to ensure security of plaintiff No. 1. The plaintiff No. 1 remained there till he had attained majority and also for some more years. Thereafter, he acquired some lands at village Hatinga Rampur and had been living in the said village Hatinga Rampur with the members of his family by constructing a house. The lands and house of the plaintiff No. 1 at village Dekasunder were used to be looked after by Smt. Jaoari Kalitani his maternal grandmother till her death and thereafter by the uncle of plaintiff No. 1, Kaminath Bora till plaintiff attained majority; The plaintiff No. 1 after attaining majority had been managing and enjoying the entire property at Dekasunder by exercising actual physical control and the name of plaintiff No. 1 had also been mutated in respect of the said lands.

5. Plaintiff No. 1 thereafter sold and transferred lands measuring 1 bigha 19 lessas described in Schedule B to the plaint to Shri Padma Kanta Kalita, plaintiff No. 2 by registered Deed of Sale No. 1553 of 1980 for a sum of Rs. 3,000/- and delivered possession of such lands to plaintiff No. 2 who had been possessing and occupying the same since after purchase. The said Padma Kanta Kalita got his name mutated in respect of the lands purchased by him. It was averred in the plaint that the defendants being heirs of Holiram Baruah, since deceased, had their houses near the suit lands and the said defendants were the persons of desperate nature. Taking advantage of living near the disputed lands, the said defendants with the help of their men illegally and forefully trespassed into B Schedule lands on February 15, 1981 with an ulterior motive to great the said properties and started to prepare kuchha bheti of a temporary house. For such alleged illegal activities, the plaintiff No. 2 made a complaint out of which proceeding under Section 145 Criminal Procedure Code was initiated. It is the further case of the plaintiffs that in the said proceeding under Section 143 Criminal Procedure Code, it was disclosed that the defendant No. 4 had filed an application in February, 1981 before the Settlement Officer. Darrang at Tezpur for cancellation of mutation of the name of plaintiff No. 2 in respect of Schedule B lands and the said defendant No. 4 had also made a braver in his petition dated February 11, 1981 before the Settlement Officer for mutation of his name by alleging that his father Holiram Baruah had purchased the said lands by registered Sale Deed No. 78 of 1950 from the plaintiff No. 1. The plaintiff thereafter caused search and obtained the certified copy of the said alleged registered deed of sale from the Sub-Registry Office at Tezpur on March 13, 1981 and it transpired from the said certified copy that a purported sale deed was executed by the plaintiff No. 1 in favour of Holiram Baruah thereby conveying 2 bighas 2 kathas 6 lesses of lands described in the Schedule A to the plaint in favour of Holiram Baruah. The plaintiff stated that on the date of the said alleged sale by the plaintiff No. 1, namely, on January 1, 1950 in favour of Holiram Baruah, the plaintiff No. 1 was a minor and he did not execute the above Sale Deed of any document in favour of Holiram Baruah. The plaintiffs therefore contended that the registered Sale Deed No. 78 of 1950 was a forged, null and void document by which no title had passed to Holiram Baruah or any successor in interest of Holiram Baruah. As the title to the suit lands was disputed by the defendants, the aforesaid suit for declaration of title and recovery of possession by evicting one defendant had been instituted by the said plaintiffs.

6. The defendants contested the said suit by filing the written statements inter alia, contending that the plaintiffs had no cause of action. The defendants contended that the plaintiff No. 1 executed the said registered Sale Deed in favour of Holiram and delivered possession of the lands sold by him to the said Holiram and on the date of the execution of the Sale Deed, the plaintiff No. 1 was not a

minor but was aged about 25 years. The defendants also contended that the sale deed in favour of plaintiff No. 2 was invalid and the plaintiff No. 1 having no title to the disputed lands on the date of transfer could not transfer the B Schedule lands to the plaintiff No. 2. The defendants also contended that ever since the aforesaid purchase by Holiram Baruah in 1950, he had exercised possession of the lands and thereafter the defendants had been possessing the said lands. The defendants also denied that the plaintiff became an orphan at a tender age and Holiram Baruah had ever committed any act of torture on plaintiff No. 1.

7. After considering the case of the parties and the evidence adduced, the learned Munsif by judgment dated April 4, 1992, inter alia, came to the finding that the Sale Deed dated January 1, 1950, executed by plaintiff No. 1 in favour of Holiram Baruah was a genuine document and plaintiff No. 1 was major at the time of the execution of the Sale Deed, in view of such finding, the learned Munsif held that there was no necessity to examine the question of limitation for the maintainability of the suit. The learned Munsif also declined to accept certain documents which were sought to be filed by the plaintiffs to prove the date of birth of the said plaintiff No. 1. The learned Munsif dismissed the said suit.

8. The plaintiff No. 2 predecessor-in-interest of the present respondents, thereafter preferred Title Appeal No. 7 of 1992 in the Court of the Assistant District Judge, Sonitpur. The learned Assistant District Judge considered the School Certificate issued on March 31, 1946 in favour of the plaintiff No. 1 and came to the finding that the plaintiff must have been born in 1934 and at the date of execution of the said sale deed in favour of Holiram Baruah in 1950, the plaintiff No. 1 was minor. The learned Judge also came to the finding that the document of sale stated to have been executed by plaintiff No. 1 in favour of Holiram Baruah was forged, null and void. The judgment and decree of the learned Munsif were set aside and the suit filed by the plaintiffs was decreed by the learned Assistant District Judge. The appellants thereafter preferred a Second Appeal No. 46 of 1993 before the High Court of Guwahati and by the impugned judgment dated December 17, 1993, the High Court dismissed the appeal.

9. Mr. Goswami, learned Senior counsel appearing for the appellant, has submitted that plaintiff No. 1 Puspa Kanta was major on the date of execution of the sale deed in favour of Holiram. Even if the findings of the learned Assistant District Judge that Pushpa Kanta plaintiff No. 1 was born in 1934 and at the time of execution of the deed of sale by him in favour of Holiram he was minor are accepted to be correct, the said Pushpa Kanta had attained majority within a few years after the sale. The title suit was filed by the plaintiffs in 1981. Hence, such suit was barred by limitation. Question of limitation strikes at the root of maintainability of the suit. Hence, the Courts had imperative duty to go into the question of maintenance of the suit on the score of its being barred by limitation.

10. Mr. Goswami has submitted that when the suit was filed in 1981 the document of sale executed by plaintiff No. 1 in favour of Holiram in 1950, was more than 30 years old. Presumption of valid execution of such old document arising under Section 90 of the Evidence Act was in favour of the defendants. Hence, the contention of the plaintiffs that no such deed had been executed by the plaintiff No. 1 could be accepted. The trial Court had rightly held that it must be presumed that the deed of sale had been executed by the plaintiff No. 1. Once such execution by the plaintiff No. 1 is accepted, it must be held that plaintiff No. 1 was required to get such deed executed by him to be avoided by filing a suit within the period of limitation. Mr Goswami has submitted that the said deed of sale was a registered document and certified copy of the same was filed in the suit. He has submitted that the High Court has erred in not giving the presumption flowing from Section 90 of the Evidence Act only because certified copy was filed. He has, therefore, submitted that gross

injustice has been meted out to the appellants and the appeal should therefore be allowed by setting aside the impugned judgment and decree and dismissing the suit filed by the plaintiffs.

11. Mr. Ganguly, learned Senior counsel appearing for the respondents, has however disputed the contentions of Mr. Goswami. Mr. Ganguly has submitted that the plea of limitation has no basis because execution of the sale deed by the plaintiff No. 1 in favour of Holiram has not been established. Mr. Ganguly has submitted that the custody of disputed sale deed must be with the defendants. Presumptions as to document being thirty years old is not available in respect of the certified copy of the document. In this case, execution by plaintiff No. 1 was denied. The plaintiffs could have established the case of fabrication and forgery of the said deed of sale if the original documents would have been produced. In order to evade the risk of being detected about commission of forgery in respect of the signature of the plaintiff No. 1, the defendants deliberately did not produce the original sale deed. Mr. Ganguly has therefore submitted that no interference is called for in this appeal and the same should be dismissed with cost.

12. After hearing the learned counsel for the parties and considering the judgments of the Courts below and materials on record. It appears to us that there is no dispute that Pushpa Kanta succeeded to the title to the properties in suit by way of intestate succession of his mother's interest. The defendants admitted such position but the case of the defendants is that Pushpa Kanta had conveyed his right, title and interest in the disputed property in favour of Holiram, the predecessor-in-interest of the defendants by executing a Sale Deed in 1950. Such claim of title by Holiram and his successors-in-interest is disputed on the ground that plaintiff No. 1 Pushpa Kanta was minor on the date of alleged sale deed and he had not executed any such sale deed in favour of Holiram and such deed is a product of forgery and fabrication.

13. In the aforesaid facts, defendants were required to establish that Pushpa Kanta had in fact conveyed title by executing the sale deed as alleged. The deed of sale was not sought to be proved by leading evidence about valid execution of the same or payment of consideration by Pushpa Kanta in favour of Holiram by examine proper witnesses. But an attempt was made to prove the execution of the said deed of sale with the aid of Section 90 of the Evidence Act. Since the alleged sale deed was more than thirty years old on the relevant date, presumption of the execution of same flowing from Section 90 was relied upon. The trial Court accepted the case of execution of a sale deed by Pushpa Kanta in favour of Holiram on the basis of presumption arising from Section 90 of the Evidence Act; but the learned Assistant District Judge and the High Court did not allow the claim of presumption in favour of valid execution of the said deed of sale by indicating that presumption flowing from Section 90 was not available because the original Sale Deed was not placed before the Court. If the Sale Deed on which the defendants base their title is not proved, there is no occasion for interference with the impugned judgment. It is, therefore, necessary to consider whether presumption flowing from Section 90 was available to the defendants.

14. It will be appropriate to refer to Section 90 of the Evidence Act which is set out hereunder :

Section 90. Presumption as to documents thirty years old - where any document purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court 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 persons handwriting, and, in the case of a document executing or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested.

15. Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document. Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the Court to accept the presumption flowing from Section 90. There is, however, no manner of Court that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

16. So far as applicability for presumption arising from Section 90 of the Evidence Act in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in *Khetter v. Khetter Paul*, ILR 5 Calcutta 886. Later on, in the decisions of various High Courts the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however, did not accept the decision rendered in *Khetter* and other decisions of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in view of the clear language of Section 90 the production of the particular document would be necessary for applying the statutory presumption under Section 90. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine : but production of the copy was not sufficient to justify the presumption of due execution of the original under Section 90. In this connection, reference may be made to the decisions in *Seetnayya v. Subramanya*, 56 Ind APP 146 : AIR 1929 PC 115 and *Basant v. Brijraj*, AIR 1933 PC 132. In view of these Privy Council decision, disapproving the applicability of presumption under Section 90 to the copy or the certified copy of an old document. In the subsequent decisions of the High Courts. It has been consistently held by different High Courts that production of a copy or a certified copy does not raise the presumption under Section 90.

17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old : but if a foundation is laid for the admission of secondary evidence under Section 65 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine.

18. In the facts of this case, the presumption under Section 90 was not available on the certified copy produced by the defendants and, in our view, the High Court is justified in refusing to give such presumption in favour of the defendants. We may also indicate that it is the discretion of the Court to refuse to give such presumption in favour of a party, if otherwise there is occasion to doubt due execution of the document in question. The plaintiff's definite case was that the deed of sale in favour of *Holiram* was a forged and fabricated document. In the aforesaid facts, there was a requirement to produce the original copy so that the question of due execution by plaintiff No. 1 could have been contested by the parties.

19. In the aforesaid facts, no interference is called for in this appeal and the appeal is dismissed with cost. Appeal dismissed.