

**(2008) 01 GAU CK 0039**

**Gauhati High Court**

**Case No:** Regular First Appeal No. 87 of 2003

Abdul Kuddus Borbhuiya & Ors.,  
Legal Heirs of Late Samsul  
Haque Borbhuiya

APPELLANT

Vs

Ibrahim Ali Borbhuiya & Ors.

RESPONDENT

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**Date of Decision:** Jan. 8, 2008

**Acts Referred:**

- Civil Procedure Code, 1908 - Order 41 Rule 33, Order 41 Rule 4
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33, Order 41 Rule 4

**Citation:** (2008) 3 GLT 170

**Hon'ble Judges:** B.P.Katakey, J

**Bench:** Single Bench

**Advocate:** B.K.Goswami, A.Y.Choudhury, D.R.Choudhury, N.Dhar, P.Dutta, T.Goswami,  
Advocates appearing for Parties

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### **Judgement**

B. P. Katakey, J.

The legal heirs of defendant No. 1 and the defendant Nos. 2, 5, 6, 8, 10, 11, 13 to 18, 21 to 34, 34(a), 34(g), 35 to 38 and 19 other proforma defendants in Title Suit No. 13/1997 have preferred the present appeal challenging the judgment and preliminary decree both dated 07.04.2003 passed by the learned Civil Judge (Sr. Division), Hailakandi in the aforementioned suit declaring the joint title of the plaintiffs (the original respondent Nos. 1 to 6 in the appeal) over the land measuring 32 Bigha 7 Katha 14 Chatak 9 Gonda 12 Kora 1 Kranti, described in Schedule 1 by partition of the said land by maintaining possession of the plaintiffs over the land described in Schedules 2 to 5 and drawing a preliminary decree for allotment of a separate share of the said land without reference to the Revenue Department and, thereafter, for preparation of the separate share.

2. The present respondent Nos. 1 to 3,5, 6 and Mustt. Rukia Begum (whose name has been struck off from the list of respondents on the prayer of the appellants vide order dated 06.05.2005 as she died on 20.07.2003) instituted Title Suit No. 13/1997 against the predecessorininterest of the present appellant Nos. 1 (a) to 1 (d) and also the appellant Nos. 2 to 32 and two others namely, Md. Fazle Haque Barbhuiya and Md. Nurul Islam Barbhuiya, as principal defendants as well as against the present appellant Nos. 33 to 51 along with 23 7 others as proforma defendants, praying for a decree for declaring the joint title of the plaintiffs over the land measuring 32 Bigha 7 Katha 14 Chatak 9 Gonda 12 Kora 1 Kranti, described in Schedule1 to the plaint by partition of the said land by maintaining possession of the plaintiff over the land described in Schedules 2 to 5 of the plaint and for a preliminary decree for allotment of a separate share of the said land without reference to the Revenue Department and, thereafter, for preparation of a separate share and accordingly, to pass final decree of recovery of actual possession of the said land through the assistance of the Court, claiming title on the basis of inheritance over the land in question. The said suit was contested by the principal defendant Nos. 1,2,4 to 19,21 to 40 as well as the proforma defendant Nos. 41, 54,187 and 189 by filing written statement denying the claim of the plaintiffs. The other principal defendants, namely the defendant Nos. 3 and 20 (Md. Lilumia Barbhuiya and Md. Abdul Hamid Barbhuiya), did not contest the suit by filing any written statement, so also by the other proforma defendants except proforma defendant Nos. 41, 54, 187 and 189 as noticed above. The learned Trial Court on the basis of the pleadings framed the following issues:

"1. Whether there is a cause of action for the plaintiff suit?

2. Whether the suit is barred by the law of adverse possession?

3. Whether the suit is bad for mis joinder and non joinder of necessary parties?

4. Whether the suit is barred by the law of resjudicate in view of "the Judgment passed by the Learned Sub Judge, Cachar, Silchar in T. S. 6/42 relating to the suit land?

5. Whether the plaintiff have acquired any right, title and interest on the land of suit pattas with the sale deed No. 2162 dated 14.5.2006 and 3683 dated 3.4.52.

6. Whether the plaintiffs have got right, title and interest over 32 Bigha 7 Kathas 14 Lechas 9 Gondas 3 Kora 2 Krantis of land?

7. Whether the plaintiffs are entitled to get a preliminary decree for partition of the suit and as prayed?

8. To what other relief if any, the plaintiffs are entitle under the law and equity?"

3. The learned Court below, thereafter, upon appreciation of the evidences on record, passed the decree as aforesaid, which resulted in filing of the present appeal

by all the contesting main defendants except the contesting defendant No. 4 (Md. Jalal Uddin Barbhuiya), No. 7 (Mustt. Rakiba Bibi), No. 9 (Mustt. Nazma Begum), No. 12 Md. Muhibbur Rahman Barbhuiya), No. 19 (Md. Abdul Karim Barbhuiya), No. 39 (Md. Fazle Haque Barbhuiya) and No. 40 (Md. Nurul Islam Barbhuiya) as well as by the contesting proforma defendant Nos. 187 and 189 (other contesting proforma defendants being No. 41 and 54 have not filed the present appeal).

4. At the beginning of the hearing of the appeal, preliminary objections relating to the maintainability of the present appeal have been raised by the learned Sr. counsel appearing on behalf of the respondent Nos. 1, 2, 3, 5 and 6 and accordingly; Mr. Dhar, learned counsel appearing on behalf of the appellants and Mr. Goswami, learned Sr. counsel appearing on behalf of the aforementioned respondents were heard on the preliminary objection as both the learned counsel have insisted for hearing on the preliminary objections before proceeding to hear the appeal on merit.

5. Mr. Goswami in support of his preliminary objections relating to the maintainability has submitted that the present appeal is not maintainable as all the principal defendants and other contesting proforma defendants are not made parties in the present appeal and the appeal filed by the defendant No. 4, namely Md. Jalal Uddin Barbhuiya, who was one of the contesting principal defendant, has already been dismissed. It has further submitted by Mr. Goswami that the suit being for declaration that the plaintiffs (respondents herein) are joint title holder in respect of the land in question and also for partition, the principal defendants as well as the other contesting proforma defendants ought to have been made party to the appeal, which having not been done, the present appeal is not maintainable. It has been submitted that out of the contesting principal defendants, the defendant No. 4 (Md. Jalal Uddin Barbhuiya), No. 7 (Mustt. Rakiba Bibi), No. 9 (Mustt. Nazma Begum), No. 12 (Md. Muhibbur Rahman), No. 19 (Md. Abdul Karim Barbhuiya), No. 39 (Md. Fazle Haque Barbhuiya) and No. 40 (Md. Nurul Islam Barbhuiya) as well as two of the contesting proforma defendants being No. 41 (Md. Matibur Rahman Mazumdar) and No.54 (Md. Faizur Rahman) have not been made party. That apart, the contesting defendant No. 4 (Md. Jalal Uddin Barbhuiya) preferred an appeal being RFA No. 111/2003 before this Court together with an application being Misc. Case No. 2175/05 together with an application being Misc. Case No. 1003/03 praying for condoning the delay in filing the said appeal and the said application for condonation of delay was dismissed vide order dated 06.05.2005 and consequently, the appeal being RFA No. 111703 was also dismissed. Mr. Goswami, therefore, submits that the judgment and decree passed by the learned Court below, which has been challenged in the present appeal, has already been affirmed and upheld by dismissing RFA No. 111703 preferred by one of the principal contesting defendant being defendant No. 4, Md. Jalal Uddin Barbhuiya, and, therefore, the present appeal is not maintainable. Referring to the decision of the Apex Court in Shyam Sunder Sarma Vs. Pannalal Jaiswal & Ors. [AIR 2005 SC 226], it has been

submitted by Mr. Goswami, learned Sr. counsel that the dismissal of the application for condonation of delay and consequent dismissal of the appeal on refusal to condone the delay being a decision in appeal, the dismissal of RFA No. 111/03 preferred by one of the contesting defendant against the judgment and decree under challenged in the present appeal, amounts to upholding the said judgment and decree and as such, another appeal by some other contesting principal and pro forma defendants is not maintainable, more so, when the decree is not severable as the decree passed by the learned Trial Court has been merged with the order passed by the learned Appellate Court in the said appeal being RFA No. 111/03.

6. Mr. Dhar, learned counsel for the appellants referring to the provision of Order 41, Rule 4 of the CPC has submitted that some of the contesting principal and proforma defendants without making the other contesting principal and pro forma defendants as party can maintain an appeal as Order 41, Rule 4 CPC provides for filing an appeal by any one or more plaintiffs or defendants against the whole decree on any ground common to all such plaintiffs or defendants, where there are more plaintiffs or more defendants in the suit and the Appellate Court is empowered to reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be. Mr. Dhar, therefore, submits that as in the instant appeal, the grounds taken is common to all the contesting defendants the appeal by some of the contesting defendants is maintainable, even if, the other contesting defendants are not made party. It has further been submitted by Mr. Dhar, learned counsel for the appellants, that in view of the provision contained in Order 41, Rule 33 CPC the Appellate Court has the power to pass any decree and make any order, which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and such power can be exercised by the Appellate Court notwithstanding that the appeal is as to part only of the decree and such power can be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been passed against such decrees, therefore, according to Mr. Dhar, the present appeal, at the instance of some of the contesting defendants, is also maintainable. Relating to the argument put forward by the learned counsel for the respondents regarding the nonmaintainability of the appeal in view of the dismissal of RFA No. 111/03 preferred by one of the contesting defendants namely, Md. Jalal Uddin Barbhuiya, it has been urged by Mr. Dhar that the said appeal was not dismissed on contest as the application for condonation of delay was rejected having not been pressed and consequently the appeal. Therefore, according to the learned Sr. counsel, the dismissal of the said appeal, where the present appellants were not made party, will not render the present appeal is nonmaintainable. Mr. Dhar, in support of his contention has placed reliance on the decision of the Apex Court in *Chaya & Ors. Vs. Bapusaheb & Ors.* (1994) 2 SCC 41.

7. I have considered the submissions of the learned counsel for the parties and also perused the materials available on record including the judgment and decree under challenged as well as the records of RFA No. 111/03.
8. In view of the aforesaid factual situation and the submissions of the learned counsel for the parties, the question, which requires consideration is (i) whether the appeal filed by some of the defendants against the plaintiffs without making the other contesting principal and proforma defendants party to the appeal is maintainable and (ii) whether in view of the dismissal of the appeal being RFA No. 111/03 filed by one of the contesting defendants namely, Md. Jalal Uddin Barbhuiya, where the other contesting principal and proforma defendants were not made parties, in view of the rejection of the prayer for condonation of delay on the ground of nonprosecution, the present appeal by some of the contesting principal and proforma defendants is maintainable.
9. Order 41, Rule 4 of the CPC provides that where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary from the decree in favour of all the plaintiffs or defendants, as the case may be. Rule 33 of Order 41 empowers the Appellate Court to pass any decree and make any order, which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. It further provides that the power vested on the Appellate Court under the said provision can be exercised notwithstanding that the appeal is as to part only of the decree and maybe exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The power conferred on the Appellate Court under Rule 33 of Order 41 can also be exercised in respect of all or any of the decrees, where there have been decrees in cross suits or where two or more decrees are passed in one suit although an appeal may not have been filed against such decrees. Proviso to Rule 33, however, stipulates that the Appellate Court shall not make any order under Section 35(A), in pursuance of any objection on which the Court from whose decree the appeal is preferred, has omitted or refused to make such order.
10. The object of Rule 4 of Order 41, therefore, is to enable any one of the parties to a suit to obtain relief in an appeal when the decree appealed from proceeded on a ground common to him and others. It is not necessary that to come within the purview of Rule 4, the decree appealed from must be on every ground common to the parties and it would be sufficient if any one common ground exist to all the plaintiffs or defendants as the case may be, as Rule 4 of Order 41 provides for filing an appeal by one of several plaintiffs or defendants against the whole decree on any ground common to all the plaintiffs or to all the defendants, as the case maybe.

11. The general Rule is that on an appeal by one of the several plaintiffs or defendants the Appellate Court can reverse or vary the decree by the Trial Court only in favour of the party filed the appeal. But Rule 4 and Rule 33 of Order 41 provide exception to the general Rule. Under the said provisions of law the Appellate Court is empowered to reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be, even though the appeal has been preferred by only one or some of the defendants or plaintiffs but, however, such appeal must proceed on a ground common to all the defendants or plaintiffs, as the case may be. In such a case, the appeal by one of the plaintiff or the defendant is virtually treated an appeal on behalf of all, though they may not be parties to the appeal. However, when one or some of the plaintiffs or the defendants filed the appeal only against the portion of the decree, which affects him or them alone, Rule 4 and Rule 33 of Order 41 shall have no application. The policy of the Rule is to enable the Appellate Court to do justice to all the parties whether before it or not.

12. The Apex Court in Harihar Prasad Singh Vs. Balmiki Prasad Singh (AIR 1975 SC 733) has approved the principle of law laid down by the High Court of Madras in its decision in Venukuri Krishna Reddi & Anr. Vs. Kota Ramireddi & Ors. (AIR 1954 Madras 848), wherein it has been observed that Rule 33 of Order 41 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party, who has not preferred any appeal. It has further been observed that normally a party, who is aggrieved by a decree should prefer appeal against it within the time allowed, after compliance of the requirement of law and where he fails to do so, no relief should originally be granted to him under Rule 33, but there are well recognize exception to this rule namely, (i) where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties; (ii) where the question is one of settling mutual rights and obligations between the same parties; (iii) when the relief prayed for is single and individual but it claims against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is possibility that there might come into operation at that time and with reference to the same subject matter two decrees, which are inconsistent and contradictory. It has further been observed that those are not the class of cases alone in which the Courts could interfere under Order 41, Rule 33 as, such enumeration would neither be possible nor even be desirable.

13. Rule 33 of Order 41, is to be read with Rule 4 of Order 41. It gives the Appellate Court the power to do complete justice between the parties, though the appeal does not extend to the whole of the decrees and though some of the parties have filed appeal and others had not. The Court has ample power to pass such order as may be necessary for ends of justice and when so doing a party who has not appealed may be benefited by the order. Even the power does not depend at all to any extent on the fate of the appeal, which was actually preferred as, such power can be exercised by the Appellate Court even in cases while dismissing the appeal filed, if

the interest of justice demands the variation of decree in any particular manner.

14. The majority view in *Nirmala Bala Ghose & Anr. Vs. Baled Chanel Chose* (AIR 1965 SC 1874) is that Rule 33 of Order 41 is undoubtedly expressed in terms, which are wide, but it has to be applied with discretion and to cases whether interference in favour of the appellants necessitates interference also with a decree, which as by acceptance or acquiescence become final, so as to enable the Court to adjust the right of the parties. It has further been observed that where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person, who has not appealed, the power conferred by Order 41, Rule 33 may properly be invoked, however, the Rule does not confer an unrestricted right to reopen decrees, which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from.

15. In *Ratan Lal Shah Vs. Firm Lalman Das Chhadamma Lal & Am*: (AIR 1970 SC 108) the Apex Court, in view of the provision of Order 41, Rule 4 CPC, has held the appeal filed by one of the defendants challenging a joint decree passed in favour of the plaintiffs maintainable, where no steps for issuance of notice of appeal was taken against the other defendants, who was impleaded as party respondent to the appeal and consequently no notice was served on him. In *Mahabir Prasad Vs. Jage Ram & Ors.* (AIR 1971 SC 742), in which case one of the respondents in the appeal had died and his heirs have not been brought on record, the Apex Court has observed that the competence of the Appellate Court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made, on a ground which is common to him and others, is not lost merely because of the person who was jointly interested in the claim has been made a party respondent and on his death his heirs have not been brought on the record. It has further been observed that the power of the Appellate Court under Order 41, Rule 4 to vary or modify a decree of a subordinate court arises when one of the persons out of many against whom a decree or an order has been made on a ground which was common to him and others has appealed and that power may be exercised when other persons, who were parties to the proceeding before the Subordinate Court and against whom a decree proceeded on a ground, which was common to the appellant and to those other persons, are either not impleaded as parties to the appeal or are impleaded as respondents.

16. The Apex Court in *Chaya & Ors.* (supra) has observed that the provision of Order 41, Rule 33 of the CPC is based on a solitary principle that the Appellate Court should have the power to do complete justice between the parties. The object of the rule is also to avoid contradictory and inconsistent decisions on the same questions in the same suits and the Rule confers a wide discretionary power on the Appellate Court to pass such decree or order which ought to have been passed or as the nature of the case may require, notwithstanding the fact that the appeal is only with

regard to a part of the decree. The Apex Court in the said case has, however, observed that since the power is derogative of the general principle that a party cannot avoid the effect of a decree against him without filing an appeal or crossobjection, therefore, the power has to be exercised with care and caution. It has further been observed that in an appropriate case, the appellate Court should not hesitate to exercise the discretion conferred by the said Rule.

17. In the present appeal admittedly only some of the contesting principal and proforma defendants preferred the appeal against the joint decree passed in favour of the plaintiffs without making the other contesting principal as well as the proforma defendants party, which appeal, however, in view of the aforesaid discussion, is maintainable in view of Order 41, Rule 4 of the CPC.

18. Admittedly, one of the several principal defendants namely, defendant No. 4, Md. Jalal Uddin Barbhuiya, preferred RFA No. 111 /03 along with an application for condonation of delay in preferring the appeal. The said condonation application was dismissed for nonprosecution and consequently the appeal being RFA No. 111/03 preferred by the said defendant was dismissed, meaning thereby, the decree passed against him has been upheld, as the dismissal of the application for condonation of delay and the consequent dismissal of the appeal on refusal to condone the delay as observed by the Apex Court in Shyam Sunder Sarma (supra). This would, however, in view of the provision contained in Order 41, Rule 33 of the CPC and also in view of the aforesaid discussion, would not preclude the Appellate Court to pass a decree appropriate to the nature of dispute in an appeal filed by one of the several persons against whom a decree was made on a ground which is common to him and others, as observed by the Apex Court in Mahabir Prasad (supra). That apart the earlier appeal being RFA No. 111/03 having not been decided on merit, it will not operate as resjudicata. The Appellate Court still, even though the RFA No. 111/03 has consequently been dismissed, upon rejection of the application for condonation of delay on the ground of nonprosecution, has the power to pass any decree and make any order, which ought to have been passed by the learned Trial Court, reversing a joint decree appealed from on any common ground, if the Appellate Court reaches a conclusion, which is inconsistent with that of the Court appealed from and in adjusting the rights claimed by the appellant, it is found necessary to grant a relief to the appellant in RFA No. 111/03. Hence, it cannot be said that the present appeal is not maintainable.

19. The preliminary objections raised by the respondents/plaintiffs are, therefore, rejected. The appeal would now be heard on merit.