

GAHC010169722006



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/89/2006

MD. MUSTAFA and ORS
S/O MD. ABDUL JALIL, R/O NO. 1 MULLAPATTY, MOUZA-KACHOMARI, PS-
NAGAON SADAR, DIST-NAGAON, ASSAM.

2: 2. MUSSTT. FATEMA KHATOON

W/O MD. MUSTAFA
R/O NO.1 MULLAPATTY
PS-NAGAON SADAR
PS-NMAGAON SADAR
DIST
NAGAON
ASSAM

VERSUS

MD. ABDUL KHALEQUE CHOUDHURY
S/O LATE AMIR HUSSAIN, R/O NO.1 MULLAPATTY NAGAON, PS-SADAR,
DSIT-NAGAON, ASSAM.

2:MUSSTT. SAFIDA CHOUDHURY

W/O MD. ABDUL KHALEQUE CHOUDHURY
A RESIDENT OF NO. 1 MULLAPATTY
PS-NAGAON
SADAR
DIST-NAGAON
ASSAM.

3:3. ABDUL JALIL

S/O ABDUL JABBAR
R/O NO. 1 MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON

DIST-NAGAON
ASSAM.

4:4. MD. ABDUL KHALIL

S/O ABDUL JABBAR
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

5:5. JALOK UAPADHYAY

S/O ASHOK UPADHYAY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

6:6. MUSSTT. PILPILI

W/O NOOR MOHAMMAD
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

7:7. MUSSTT. SUKURI KHATOON

W/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

8:8. MD. ABDUL KADIR

S/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

9:9. MD. ABDUL RASID
S/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON

ASSAM.

10:10. MD. MAKSAD ALI
S/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

11:11. MD. ABDUL KASIM
S/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM.

12:12. MUSSTT. RANGILLA BEGUM
D/O LATE SABDUL DAPTORY
MULLAPATTY KACHOMARI MOUZA
P.O. NAGAON
DIST-NAGAON
ASSAM

Advocate for the appellants : Ms. S. Kemprai, Advocate
Advocate for the Respondents : Mr. S. Gautam, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 19.01.2023

Date of Judgment : 19.01.2023

JUDGMENT AND ORDER (ORAL)

Heard Ms. S. Kemprai, the learned counsel for the appellants and Mr. S. Gautam, the learned counsel appearing on behalf of the respondent No.2.

2. At the outset, the learned counsel appearing on behalf of the respondent No.2 has submitted that the respondent No.1, who is the husband of the

respondent No.2, had expired. He further submitted that the respondent No.2, being a legal representative of the respondent No.1, the estate of the respondent No.1 is well represented and as such there is no requirement for further substitution. Taking into account the said submission and as such admittedly the respondent No.2 is the wife of the respondent No.1 and the estate of the respondent No.1 also devolves upon the respondent No.2, this Court is of the opinion that there is no necessity for further substitution of the respondent No.1 pursuant to his death as his estate is duly represented by the respondent No.2.

3. This Court vide an order dated 26.07.2006 formulated three substantial questions of law while admitting the appeal, which for the sake of convenience, are reproduced herein under:

“1. Whether the counter claim of the defendants can be entertained in the Title Suit preferred by the appellants after expiry of the period of limitation without considering the question relating to limitation?”

2. Whether the court below is justified in allowing the counter claim of the respondent for specific performance of contract without discussing the provisions of Sections 12, 17 & 20 of the Specific Relief Act?

3. Whether the lower appellate court is justified in affirming the decree of counter claim directing to perform the specific performance of contract when the lower appellate court found that the plaintiffs have no title over the land?”

4. For the purpose of ascertaining as to whether the said substantial questions of law so formulated are involved in the instant appeal, this Court deems it proper to briefly take note of the facts involved in the instant case.

5. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

6. The appellants herein as plaintiffs had instituted the suit being Title Suit No.110/1996 wherein the respondent Nos.1 & 2 were impleaded as the principal defendants and the proforma respondent Nos.3 to 12 were arrayed as proforma defendants.

7. The case of the plaintiffs in brief is that vide the registered Deed of Sale bearing Deed No.5226/1983, the proforma defendant No.8 transferred 17 lechas of land covered by Dag No.126, PP No.4 of Town Hoiborgaon Kissam under Town Mouza in the district of Nagaon, Assam to the plaintiffs. It is the case of the plaintiffs that as the principal defendant Nos. 1 & 2 who were the brother-in-law and the sister of the plaintiff No.1 having no other place to take shelter requested the plaintiffs to allow them to reside in the said suit land. However, at a later stage, when the plaintiffs requested the principal defendants to vacate the suit land, the principal defendants did not vacate the land. Under such circumstances, the plaintiffs had entered into a registered Deed of Sale bearing Deed No.813/1995 dated 07.02.1995 whereby the plaintiffs agreed to sale the land to the principal defendants. It is pertinent herein to take note of that in terms with the said agreement for sale dated 07.02.1995 that the Deed of Sale would be executed in favour of the principal defendants after obtaining necessary permission from the Government and on receipt of the balance amount. It further appears from the perusal of the plaint that in 18.05.1996, pleader's notice was issued on behalf of the principal defendants to the effect that if the plaintiffs did not execute the Deed of Sale on receipt of balance amount of Rs.3,000/- from the principal defendants, they would file a suit for specific performance of the contract. It is the case of the plaintiffs that the plaintiffs never denied or disagreed not to sell the land but on account of the objection raised by the co-pattadars, the plaintiffs by the pleader's notice dated

31.05.1996, intimated the principal defendant Nos.1 & 2 that they are not in a position to execute the Deed of Sale, and accordingly, rescinded the contract and asked the principal defendants to receive back the earnest money of Rs.3,000/- within 15 (fifteen) days of the receipt of the notice which however admittedly the principal defendants did not accept. The plaintiffs thereupon requested the principal defendants to vacate the suit land to which the principal defendants did not do so in spite of rescission of the contract for which the plaintiffs filed the suit seeking a decree for declaring his right, title and interest over the land described in Schedule-A to the plaint; a decree for khas possession by evicting the principal defendants by removing all such constructions from the Schedule-A land and put the plaintiffs into the vacant possession of Schedule-A land; a decree for declaration of the Sale Agreement Deed as specified in Schedule-B to the plaint is not binding on the plaintiffs as the contract of sale has been rescinded; cost of the suit as well as any other reliefs.

8. It appears from the record that the defendants filed their written statement on 30.01.1999 whereupon various preliminary objections were taken as regards the maintainability of the suit. In paragraph No.27 of the said written statement, the principal defendants took the stand that one Jalfu Paida was the original owner of the land measuring 1 katha 17 lechas of PP No.14 Dag No.126 of Town Hoiborgaon Kissam under Town Mouza in the district of Nagaon, Assam. The said owner sold the land measuring 14 lechas to Mohabbat Ali by a registered Sale Deed No.67/58 on 03.12.1957 and the rest of the 14 lechas to Hazarat Ali vide registered Sale Deed No.67/59 dated 03.12.1957. But Hasen Ali and Kajimuddin, both sons of Kismat Ali, took the possession of the land on that day by force and as such the aforesaid purchasers never could take possession

of their land. It is the further case stated in the written statement that the aforesaid Hasen Ali and Kajimuddin were possessing the land upto 1980. The land which was purchased by Hazarat Ali was occupied by Kajimuddin and with the permission of Kajimuddin, the defendant No.1 constructed a house in the year 1978 on the portion of the suit land and was living thereon. It has been mentioned that in the year 1980, Kajimuddin left the place by handing over the possession of the entire suit land to the defendants. It has been mentioned that though the plaintiffs had purchased the suit land from the proforma defendant No.8, but could not take into possession of the suit land and as such the plaintiffs offered to sell the suit land to the defendants fixing the price of the suit land at Rs.6,000/- and accepted Rs.3,000/- from the defendants and an agreement for sale bearing Sale Deed No.813 dated 07.02.1995 was registered wherein it was stipulated to execute a Sale Deed after obtaining permission from the authority concerned. It was further mentioned that thereupon the plaintiffs started to avoid the execution of the Deed of Sale for which an Advocate's notice was issued on 18.05.1996 whereby there was a demand made for execution of the registered Deed of Sale. It was further mentioned that instead of the plaintiffs acquiescing to the demand made in the pleader's notice dated 18.05.1996, filed the suit which was false and vexatious for which the suit ought to be dismissed.

9. It further appears from the records that the principal defendant Nos.1 & 2 on 26.05.1995, filed the counter claim on the same sets of fact as stated in the written statements. The defendants sought for a decree for specific performance of contract thereby directing the plaintiffs to execute and register the Deed of Sale described in Schedule-A in favour of the principal defendant Nos.1 & 2 by accepting the balance amount of Rs.3,000/- from them and if the plaintiffs

failed to execute the Sale Deed within the time fixed by the Court, then the Court may, by accepting the money from defendants, execute the Sale Deed in favour of the defendants.

10. To the said counter claim, the plaintiffs had filed their written statement.

11. It appears from the records that on 07.04.2000, issues were framed by the Trial Court which are reproduced herein below:-

(1) Whether there is cause of action to file the suit?

(2) Whether the suit is maintainable in the present form?

(3) Whether the suit is bad for non-joinder of necessary parties?

(4) Whether the principal defendants are licensee under the plaintiffs?

(5) Whether the plaintiffs executed a registered sale deed dated 08.03.1995 in favour of the principal defendants and it was rescinded due to exercise of the right of preemption by co-pattadars?

(6) Whether the plaintiffs has right, title and interest over the suit land?

(7) Whether the plaintiffs is entitled to a decree as prayed for?

(8) To what other relief/reliefs of the parties are entitled to?

12. Subsequent thereto, an additional issue was framed which is also reproduced herein below:-

Whether the defendant Nos.1 & 2 are entitled to get a decree for specific performance of agreement for sale of land as claimed in the counter claim?

13. On behalf of the plaintiffs there were two witnesses who were examined and the plaintiffs produced five numbers of documents. The principal defendant Nos.1 & 2 adduced evidence of three witnesses.

14. The Trial Court vide the judgment and decree dated 23.05.2003 dismissed the suit of the plaintiffs, but decreed the counter claim of the defendants

thereby directing the plaintiffs to perform his part of the contract as specifically stipulated in Exhibit-Ka within a period of 3 (three) months from the date of the said judgment by receiving the balance amount of Rs.3,000/- from the defendant Nos.1 & 2 failing which the defendants would be entitled to get the sale executed by resort to the law.

15. Being aggrieved by the said judgment and decree dated 23.05.2003, passed by the Trial Court in Title Suit No.110/1996, the plaintiffs as appellants preferred an appeal before the Court of the Civil Judge, (Senior Division), Nagaon which was registered and numbered as Title Appeal No.35/2003. The First Appellate Court, after taking note of the various grounds of objection taken in the Memo of Appeal, decided the said appeal issue-wise on the basis of the grounds of objection so taken and upheld the judgment and decree passed by the Trial Court and thereby dismissed the appeal.

16. In the backdrop of the above facts, let this Court therefore take into consideration as to whether the substantial questions of law which were formulated by this Court vide the order dated 26.07.2006 are substantial questions of law involved in the instant appeal.

17. The first substantial question of law so formulated is as to whether the counter claim of the defendants can be entertained in the Title Suit preferred by the appellants after expiry of the period of limitation without considering the question relating to limitation. It would transpire from what has been stated above that on 18.05.1996, the pleader's notice was issued on behalf of the principal defendants and vide the pleader's notice dated 31.05.1996, the plaintiffs informed the defendants that he has rescinded the contract. Taking into account that there was no fixed date fixed for performance of the contract as per Article 54 of the Limitation Act, 1963 the period of limitation would be

three years from the date the defendants/counter claimants herein has noticed about refusal to perform the contract. Therefore, it is only on 31.05.1996 that the plaintiffs intimated the counter claimant vide the pleader's notice that he had rescinded the contract.

18. As already observed that the counter claim was filed on 26.05.1999 which is within 3 years in terms with Article 54 of the Schedule-I to the Limitation Act, 1963. Further to that, it would also be seen that the said counter claim was filed prior to framing of the issues in as much as the issues were framed on 07.04.2000. Under such circumstances, the counter claim is within the period of limitation. It would further appear from a perusal of the appellate judgment and decree dated 03.05.2005 that the First Appellate Court had duly taken note of the question of limitation and had held at paragraph No.16 of the said judgment and decree that the claim of the defendants were well within the period of limitation. Consequently, this Court is of the opinion that the first substantial question of law so formulated is not a substantial question of law involved in the instant appeal.

19. The second substantial question of law so formulated pertains to as to whether the court below was justified in allowing the counter claim of the respondent for specific performance of contract without discussing the provisions of Sections 12, 17 & 20 of the Specific Relief Act, 1963. On a specific query being made as regards the said substantial question of law upon the learned counsel for the appellants, nothing was forthcoming as to why the Court is required to discuss the provisions of Sections 12, 17 & 20 of the Specific Relief Act in allowing the counter claim. Be that as it may, even assuming that Sections 12, 17 & 20 of the Specific Relief Act, 1963 is not discussed, the same cannot be said to be a substantial question of law involved in the instant appeal.

in as much as it would at best be an erroneous order which does not equate to be a substantial question of law.

20. The third substantial question of law so formulated by this Court pertains to as to whether the lower appellate court is justified in affirming the decree of counter claim directing to perform the specific performance of contract when the lower appellate court found that the plaintiffs have no title over the land. In the opinion of this Court, the said substantial question of law does not arise at all in as much as the Issue No.6 pertains to as to whether the plaintiffs have right, title and interest over the suit land which was found in the affirmative in favour of the plaintiffs by the Trial Court holding inter-alia that as there was no dispute regarding the title of the plaintiffs over the suit land for which the plaintiffs have right, title and interest over the suit land. If this Court peruses paragraph No.9 of the impugned judgment and order of the First Appellate Court it is apparent that the said Issue No.6 was affirmed by the First Appellate Court thereby upholding the findings of the Trial Court to the effect that the plaintiffs have right, title and interest over the suit land. Therefore, the third substantial question of law so formulates is not a substantial question of law involved in the instant appeal.

21. Accordingly, as there arises no substantial question of law involved in the instant appeal, the appeal stands dismissed. Return the LCR.

JUDGE

Comparing Assistant