

GAHC010182392012



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

Case No. : RSA/83/2012

SMTI RESHMI DEVI GOLCHA and 3 ORS
W/O LATE PANNALAL OSWAL PROPRIETOR OF DHUBRI MEDICAL HALL

2: HARIRAM AGARWALLA

3: HAZARILAL AGARWALLA
BOTH ARE SON OF RAMESWRLAL AGARWALA.

4: SMT. SESKI DEVI

W/O LATE JOY CHANDLAL AGARWALA
ALL ARE PROPRIETORS OF MUKIM DRESS
ALL ARE RESIDENTS OF DHUBRI N.S. ROAD
DHUBRI TOWN
P.S. and DIST. DHUBRI
ASSA

VERSUS

SMTI SANTANA DEY and ORS
W/O SRI TAPAN KUMAR DAS

2:TAPAN KUMAR DEY
S/O MONIGOPAL DEY
BOTH ARE RESIDENT OF WARD NO. 7 OF DHUBRI TOWN

3:LALBHCHAND SURANA

4:GOLAPCHAND SURAN

5:SIKARCHAND SURANA

6:GAUTAMCHAND SURANA
ALL ARE SONS OF BHANWARILAL SURANA
PROPRIETORS OF M/S BHAWARILA LABHCHAND SURANA. PRESENTLY
RESIDING NEAR TARA PATH BHAWAN
JAIPAIMORE
SHILIGURI
DIST. DARJEELING
WEST BENGAL

Advocate for the Petitioner : MR.U DUTTA

Advocate for the Respondent : MS.L SARMA

Advocate for the Appellants : Mr. G. N. Sahewalla, Sr. Advocate
Ms. S. Todi, Advocate

Advocate for the Respondents : Mr. K. K. Dey, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 14.06.2023

Date of Judgment : 14.06.2023

JUDGMENT AND ORDER (ORAL)

Heard Mr. G. N. Sahewalla, the learned senior counsel assisted by Ms. S. Todi, the learned counsel for the appellants and Mr. K. K. Dey, the learned counsel appearing on behalf of the respondent Nos. 1 & 2. None appears on behalf of the respondent No.3 on call.

2. The instant second appeal was admitted by this Court by formulating the following substantial questions of law vide the order dated 22.05.2012

which are reproduced herein under:-

1. *Whether the findings of the courts below that there is no evidence that defendant No.1 (a) was representing defendant No.1 (b) to 1 (d) is correct in view of Exhibit-7, i.e. Sale Deed, where defendant No.1 (a) executed the sale deed as constituted attorney of defendant No.1 (b) to 1 (d)?*
 2. *Whether an agreement for sale executed by a co-sharer is not enforceable in respect of his share of land?*
 3. *Whether the rent deposited in the joint names of defendant Nos.1 to 3 is not valid in the facts and circumstances of the case?*
3. For deciding as to whether the three substantial questions of law so formulated by this Court arises in the instant second appeal, this Court deems it proper to deal briefly with the facts involved.
4. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.
5. It appears from the amended plaint as enclosed to the instant Memo of Appeal that the plaintiff Nos.1 & 2 were tenants of the original owner of the Schedule-A land as described in the plaint. In the year 1977, the said land was purchased by the defendant Nos.1 (a) to 1 (d) and the plaintiff Nos.1 & 2 continued their tenancy under the defendant No.1 as alleged. It further reveals from a perusal of paragraph No.4 of the plaint that M/s Bhanwarilal Labhchabd Surana, a firm wherein the defendant Nos.1 (a) to 1 (d) were partners entered into an agreement for sale with one Narendra Oswal, the plaintiff No.2 (a) and the plaintiff No.3 for sale of a plot of land measuring 2 kathas 16 lechas under Dag No.391 and 987 of Periodic Patta No.35 at Ward No.4 at Dhubri Town for a consideration of Rs.4,50,000/-. Clause 3 of the said agreement dated 06.02.1999 stipulated that the

registration shall be made within six months and the payment shall have to be cleared at the time of registration, failing which the agreement shall be deemed to be cancelled. It is, however, the case of the plaintiffs that during the pendency of the said agreement for sale dated 06.02.1999, the defendant Nos.1 (a) to 1 (d) fraudulently executed the deed of sale bearing No.877 dated 06.05.1999 in favour of the defendant Nos.2 & 3 and the defendant Nos.2 & 3 had due knowledge of the agreement for sale dated 06.02.1999. It is under such circumstances, the suit was filed seeking specific performance of the agreement dated 06.02.1999 as well as for declaration and cancellation of the sale deed No.887 dated 06.05.1999. It reveals from the records that initially at the time of filing the suit, the plaintiff No.3 was the proforma defendant No.2, but pursuant to the filing of the suit, the proforma defendant No.2 was transposed as the plaintiff No.3.

6. It further reveals from the records that the defendant Nos.1 (a) to 1 (d) filed their written statement wherein various preliminary objections were taken. In paragraph No.17 of the said written statement it was mentioned that the land in question was purchased by the defendant Nos.1 (a) to 1 (d) jointly. It was further denied in paragraph No.19 of the written statement that the defendant No.1 (a) entered into an agreement or took any advance from the plaintiffs.

7. It further reveals that the defendant Nos.2 & 3 had filed separately a written statement wherein also various preliminary objections were taken as regards the maintainability of the suit. In addition to that, it was also mentioned that the defendant No.3 was bonafide purchaser for valuable consideration without prior notice to the agreement dated 06.05.1999. In

paragraph No.18, it was mentioned that the plaintiffs were duly intimated by the defendant Nos.1 (a) to 1 (d) about the purchase of the suit land by the defendant No.3. However, the plaintiff No.1 (a) to 1 (d) instead of attorning to the defendant No.3 on their own started depositing the rent in the Court in the name of the defendant No.3.

8. It further appears from the record that a counterclaim was also filed by the defendant Nos.2 & 3 whereby the defendant Nos.2 & 3 sought for declaration of their right, title and interest over the Schedule-A land; for declaration that the plaintiffs were tenants under the defendant Nos.2 & 3 for the properties as described in Schedule-E & F of the counterclaim and that they are defaulters and liable to be evicted under the law etc.

9. The Records further show that the plaintiffs filed a cross-objection to the said counterclaim. Relevant herein to take note of paragraph No.12 of the said cross-objection wherein it has been categorically mentioned that the house rent was regularly deposited in the Court, and as such, the question of defaulting in payment of house rent does not arise. Furthermore, it was averred that as the ownership remained suspended, the counterclaimant cannot claim their house rent from the original tenants.

10. On the basis of the above, as many as 7 issues were framed by the learned Trial Court which are reproduced herein under:-

1. Whether the suit is maintainable?

2. Whether the suit is bad for non-joinder of necessary parties?

3. Whether the agreement to sell the suit property executed by the defendant No.1(a) to (d) Luv Chand Surana is enforceable?

4. Whether the counter-claim is maintainable?

5. Whether the plaintiff No. 1 and 2 are tenants under the counterclaimants/defendant No. 2 and 3 and they are defaulters and liable to be evicted from the suit property?

6. Whether the plaintiffs are entitled to the decree as prayed for?

7. Whether the counter-claimants are entitled to the decree as prayed for?

11. It further appears from the records that on behalf of the plaintiffs, there were various witnesses who adduced evidence and the plaintiffs also exhibited various documents. On behalf of the defendants also there were various witnesses who adduced evidence and various documents were also exhibited. At this stage, this Court finds it relevant to take note of that Exhibit-3 which is the agreement for sale dated 06.02.1999 and Exhibit-7 is the deed of sale dated 06.05.1999.

12. The Trial Court dismissed the suit vide the judgment and decree dated 31.08.2009. In doing so, the learned Trial Court came to a finding that Exhibit-3 was not enforceable for which the Issue No.3 was decided against the plaintiffs. As regards Issue Nos.4 & 5, the learned Trial Court came to a finding that the plaintiffs were defaulters in payment of rent, and therefore, are liable to be evicted.

13. Being aggrieved and dissatisfied, an appeal was preferred before the Court of the District Judge, Dhubri which was registered and numbered as Title Appeal No.5/2009.

14. At this stage this Court also finds it relevant to take note of that as the suit was dismissed and the counterclaim was decreed, the plaintiffs ought to have preferred two appeals. However, only one appeal was

preferred before the Court of the District Judge, Dhubri which was registered and numbered as Title Appeal No.5/209. It appears from the records that the First Appellate Court vide the judgment and decree dated 06.09.2011 dismissed the appeal thereby affirming the judgment and decree passed by the learned Trial Court dated 31.08.2009 passed in Title Suit No.11/2008. It is against the judgment and decree passed by the First Appellate Court dated 06.09.2011 in Title Appeal No.5/2009, the instant second appeal has been filed.

15. As noted above, vide the order dated 22.05.2012, this Court had admitted the instant appeal by formulating the three substantial questions of law. The first substantial question of law pertains to as to whether the findings of the Courts below that there was no evidence that the defendant No.1 (a) was representing the defendant Nos.1 (b) to 1 (d) is correct in view of the Exhibit-7, i.e. the sale deed where the defendant No.1 (a) executed the sale deed as constituted attorney to the defendant Nos.1 (b) to 1 (d).

16. From a perusal of the said question so formulated it appears that it is primarily a question of facts. Be that as it may, a perusal of the Exhibit-7 clearly shows that the said Exhibit-7 was executed on the basis of the Power of Attorney dated 23.04.1999 meaning thereby that the said Power of Attorney was executed after the deed of agreement for sale dated 06.02.1999, (Exhibit-3) and therefore, the said question of law so framed in the opinion of this Court cannot be termed to be a substantial question of law arising in the instant appeal.

17. As regards the second substantial question of law so formulated as to whether the agreement for sale executed by a co-sharer is enforceable

in respect of his share of land, in the opinion of this Court is not a substantial question of law arising in the instant appeal in as much as the agreement for sale dated 06.02.1999 (Exhibit-3) was executed by a firm and not by the defendant Nos.1 (a) to 1 (d) in their personal capacity. There is no document which is a part of the record that the firm M/s Bhanwarilal Labhchabd Surana was the owner of the suit land. Under such circumstances, the said substantial question of law so formulated, in the opinion of this Court, does not arise in the instant appeal.

18. The third substantial question of law so formulated as to whether the rent deposited in the joint names of defendant Nos.1 to 3 is not valid in the facts and circumstances of the case, in the opinion of this Court also cannot be taken into account as a substantial question of law involved in the instant appeal in view of the fact that for the purpose of getting the benefit under Section 5 (4) of the Assam Urban Area Rent Control Act, 1972, so that the plaintiffs do not come within the mischief of provision (e) to Section 5 (1) of the Act of 1972, the plaintiffs are required to offer the rent to the defendant Nos. 1 (a) to 1 (d) or even to the defendant No.3, under protest and it is upon the refusal of the rent, the lawful rent could be deposited in the Court. There was no mention whatsoever in the pleadings that there was offering of the rent to the defendants pursuant to the letter of attornment issued to the defendant Nos.1 (a) to 1 (d). Under such circumstances, the learned Trial Court as well as the learned First Appellate Court have, therefore, come to a finding of fact that the plaintiffs were defaulters in payment of rent. These findings of facts therefore cannot be disturbed in a proceeding under Section 100 of the Code. Under such circumstances, the third substantial question of law so

formulated does not arise in the instant appeal.

19. Accordingly, as the instant appeal is devoid of any merit, the appeal, therefore, stands dismissed.

20. The Registry is directed to prepare the decree accordingly.

21. Return the LCR.

JUDGE

Comparing Assistant