

GAHC010199622010



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

Case No. : RSA/262/2010

SMTI. PARBATI DEVI and 6 ORS,
W/O LT. RUDRESWAR SARMA

2: SHRI KAILASH CHANDRA SARMA

3: SRI DEEPANKAR SARMA

4: SMT. DEEPALI DEVI

5: SMT. JAYASHREE GOSWAMI

6: SMT. ANJALI DEVI

7: SMT. BIGHA GOSWAMI
NO. 2 TIO7 ARE THE SON AND DAUGHTERS OF LT. RUDRESWAR SARMA
RESIDENT OF JYOTINAGAR
GUWAHATI-21
P.S. CHANDMARI
DIST. KAMRUPMETRO
ASSAM

VERSUS

MANOJ KALITA,
S/O LT. RUDRESWAR KALITA, R/O SANTINAGAR, DIST. KAMRUP, ASSAM.

Advocate for the Appellants : Mr. D. Mazumdar, Sr. Advocate
Mr. S. Biswas, Advocate

Advocate for the Respondent : Mr. S. J. Sarma, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing :14.05.2024

Date of Judgment : 14.05.2024

JUDGMENT AND ORDER (ORAL)

This is an Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'the Code') challenging the judgment and decree dated 14.07.2010 passed by the learned Civil Judge No. 2, Kamrup (M) at Guwahati in Title Appeal No. 13/2009 thereby affirming the judgment and decree dated 15.12.2008 passed in Title Suit No.671/2006 by the learned Munsiff No. 1, Kamrup (M) at Guwahati.

2. This Court vide the order dated 07.01.2011 admitted the instant Appeal by formulating two substantial questions of law which reads as under:-

1. Whether in view of the finding that after the date of the agreement on 27.01.1994, the plaintiff approached the defendant only on 01.12.2000 offering balance amount for execution of the sale deed, the learned court below was justified in holding that the plaintiff was always ready and willing to perform his

part of the contract in terms of section 16(c) of the Specific Relief Act ?

2. Whether, the learned Trial Court having come to a finding that the Defendant No. 2 has a title to the suit property in Issue No. 9, the appellate court was justified in reversing the same and dismissing the counter claim in a suit for Specific Performance of Contract?

3. At the outset Mr. D. Mazumdar, the learned senior counsel appearing on behalf of the appellants submitted that the second substantial question of law does not arise in the instant Appeal taking into account that there was no Appeal filed against the dismissal of the counterclaim by the learned Trial Court, and as such, the dismissal of the counterclaim having attained finality, the second substantial question of law does not arise.

4. This Court is of the opinion that once substantial questions of law are formulated in exercise of the powers under Section 100 (4) of the Code and sans any or some of the substantial question of law, so formulated, do not become insignificant or redundant in view of the decision rendered in the other substantial questions of law, this Court would be obligated in view of the legislative mandate contained in Section 100 (5) of the Code to answer to all the substantial questions of law so formulated as to whether the

same is/are involved in the Second Appeal. In that view of the matter, let this Court decide the first substantial question of law so formulated as to whether the same is involved in the instant appeal and on the basis of the said decision, the significance or redundancy of the second substantial question of law would be taken up.

5. To ascertain whether the first substantial question of law which had been formulated, is a substantial question of law involved in the instant appeal, let this Court take note of the facts involved which led to the filing of the instant appeal. Before delving into the facts, this court finds it relevant to take note of that the first substantial question of law primarily revolves around the issue as to whether the suit filed for specific performance was within the period of limitation as prescribed in Article 54 of the schedule to the Indian limitation act, 1963 (for short 'the Act of 1963').

6. From a perusal of the plaint, it reveals that the predecessor-in-interest of the Appellant herein, one Rudreswar Sarma (since deceased) was the owner of plot of land measuring 3 Kathas in Dag No.331 covered by K.P No. 112 of Village - Odalbakra, Mouza- Beltola under P.S.-Dispur in the district of Kamrup. The said land is herein after referred to as the suit land. Late

Rudreswar Sarma entered into an Agreement dated 27.01.1994 with the Respondent herein who is the plaintiff in the suit. This agreement dated 27.01.1994 had been exhibited in the suit as Exhibit 1.

7. In view of the contentions so forwarded at the hearing by the counsels of the parties, this Court finds it very necessary to take note of the contents of the said agreement– Exhibit 1. A perusal of Exhibit 1 shows that it was agreed that the total consideration for the sale of the suit land was Rs.80,000/- and of which Rs.40,000/- was paid. It was further mentioned that due to some unavoidable circumstances, it was not possible for both the parties to draw up the Sale Deed for which the parties have entered into the agreement for sale. From the said Agreement and more particularly the Clauses therein nothing can be discernible as to when the Deed of Sale would be executed, but there are two very pertinent aspects which are apposite to be taken note of. First, that Late Rudreswar Sarma agreed to sale the suit land only to the plaintiff and that too at the same price as agreed to. The second is the possession of the suit land was handed over to the Plaintiff thereby permitting the Plaintiff to erect fencing, shed or temporary house and to make improvement of the land at the cost of the plaintiff and in the circumstances, the Plaintiff declines to purchased the suit

land then the Plaintiff had agreed to remove the constructions made within a month from the date of expressing his unwillingness to purchase the land and also to compensate for the damage done of the pond before removing their constructions.

8. It is also seen from a perusal of the plaint that a proceeding under Section 145 Cr.P.C. was initiated during the lifetime of Late Rudreswar Sarma in the year 1995 which was registered and numbered as Case No.148_m/1995. This happened after the agreement was entered into. It is on account of the said proceedings, the suit land was attached. Thereupon, during the pendency of the said proceedings, Rudreswar Sarma expired on 29.07.1996. In paragraph No.5 of the plaint, which is of vital significance in view of the arguments forwarded, it was categorically mentioned "after the death of Late Rudreswar Sarma, his son Kailash Sarma was not willing to sale the suit land to the plaintiff and he had initiated false criminal case against the plaintiff about which the plaintiff would come to know in the year 1999 when the police came to him and granted him bail". On the basis of the said statement, it was contended on behalf of the Appellants herein that the Plaintiff had due notice immediately on the death of Late Rudreswar Sarma that the Defendant No.2 had refused to execute the Deed

of Sale and the suit having been filed in the year 2001, it was barred by limitation.

9. Be that as it may, it was mentioned in the plaint that on account of intervention of some mutual friends and well wishers, the principal defendants agreed to sale the land as per the agreement to the plaintiff after disposal of the same case being No.148_m/1995. The said case being 148_m/1995 was decided in favour of the legal representatives of Late Rudreswar Sarma by an order dated 25.08.2000. It was alleged in the Plaint that the plaintiff approached the principal defendant No.2 in the month of September, 2000 and requested to register the Sale Deed in respect to the suit land in terms with the agreement, but the latter refused to execute the Sale Deed. Subsequent thereto, on 01.12.2000, the plaintiff again went to the residence of the principal defendants with the balance amount of consideration and requested to execute the Sale Deed in terms with the agreement dated 24.01.1994 entered into with Late Rudreswar Sarma, but the principal defendants not only refused to execute the Sale Deed but also misbehaved with the plaintiff. It is under such circumstances, the suit was filed seeking specific performance of the agreement for sale dated

27.01.1994 directing the principal defendants to execute the Sale Deed in favour of the plaintiff for the suit land by accepting the balance amount of Rs.40,000/- from the plaintiff. It has also been mentioned that in the circumstance the principal defendants failed to execute the Deed of Sale, the Court ought to execute the Deed of Sale in accordance with the provisions of law. It is also pertinent to mention that the Plaintiff had also sought for an alternate prayer to the effect that in the circumstance the decree for specific performance is not granted, the amount of Rs.72,000/- invested by the plaintiff with compensation at the rate of 24% per annum be decreed against the principal defendants.

The said suit was registered and numbered as Title Suit No. 91/01 and was filed on 09.04.2001.

10. The defendants filed their written statement wherein various preliminary objections were taken including the preliminary objections to the effect that the suit is barred by the limitation on the ground that the alleged agreement dated 27.01.1994 was executed by the predecessor of the defendant Nos.1,2 & 3 and the suit ought to have been filed within 3 years but was done only in the year 2001. This plea however is completely

different from the question of law urged by the appellants herein as already stated paragraph 8 herein above. In addition to the preliminary objections to the maintainability of the Suit, the defendants denied the entire case set up by the Plaintiff. It was pleaded in the written statement that the Plaintiff had possession of the Suit land. It was also denied that the Plaintiff took steps in the 145/146 Cr. P.C. In Paragraph No.10 of the written statement, which was the paragraph dealing with Paragraph No. 5 of the Plaint, the defendants stated that after the death of Late Rudreswar Sarma on 29.07.1996, the plaintiff never approached the answering defendants in connection with the alleged deed of agreement as was stated in the paragraph No.5 of the plaint. It was alleged that the plaintiff manufactured a forged Power of Attorney showing to have been executed by the Defendant No.2 in his favour and the defendant No.2 having come to know about the forgery lodged an FIR with the Pan Bazar Police Station, being Pan Bazar P.S. Case No.280/97 which was under investigation and the plaintiff was arrested and was released on bail by police. It was denied that after the intervention from mutual friends as well as well-wishers, the principal defendants agreed to sale the land as per the agreement to the plaintiff after disposal of the said proceedings under Section 145 Cr.P.C. The statements made in paragraph No.6 of the plaint was also denied which was to the effect that the plaintiff

approached the principal defendant No.2 in the month of September 2000 and thereafter again to the principal defendants on 01.12.2000 for execution of deed of sale. It was also mentioned that the question of forceful dispossession of the plaintiff over the suit land does not arise in as much as the defendant No.2 was in occupation of the suit land. These statements made in the written statement has great significance in respect to the adjudication of the substantial question of law formulated which would be seen at a later stage of the instant judgement.

11. The Defendant Nos.4, 5 and 6 submitted a separate written statement. In the said written statement it was stated that the Section 145 Cr.P.C proceedings was initiated by Late Rudreswar Sarma and not by the plaintiff and upon the death of Late Rudreswar Sarma, the Defendant No.2 was substituted in place of the father of Late Rudreswar Sarma in the said proceedings. The defendant Nos. 4, 5 and 6 supported the case of the defendant No 2. There was a denial that the legal heirs of Late Rudreswar Sarma were bound to execute the sale deed in favour of the plaintiff.

12. The records further show that the defendant No.2 submitted an additional written statement along with the counterclaim on 17th of April,

2002. It is very pertinent to mention that the said additional written statement was filed pursuant to the order passed by the learned Trial Court on 25.01.2002. The paragraph Nos.12 & 13 of the additional written statement are replicas of paragraph Nos.10 & 11 of the original written statement. In the counterclaim, the defendant No.2 sought for declaration of his right, title and interest in suit property with the decree of the ejectment of the plaintiff from the suit land and house and delivery of the khas possession of the suit land to the defendant No. 2 along with cost.

13. The plaintiff filed a written statement to the counterclaim of the defendant No.2. In paragraph No.9 of the said written statement filed by the Plaintiff, the statements made in Paragraph Nos. 11 & 12 of the counterclaim were denied and the plaintiff categorically stated that the plaintiff had approached the defendants for execution of the sale deed in his favour and the plaintiff never manufactured any Power of Attorney as alleged by the defendant No 2. It was also mentioned that the Pan Bazar P.S Case No. 280/1997 which was initiated against the defendant No.2 had no merit, and as such, no progress has been made in the said case.

14. The record reveals that the learned Trial Court, on basis of the above

pleadings had frame as many as 10 Issues. Taking into account the substantial question of law so formulated, the relevant issue is Issue No.2 which was as to whether the suit was barred by the limitation. The issue No 9 was better the defendant No 2 had right, title and interest over the suit land. The Issue No 10 was whether the defendant No.2 was entitled to get Khas possession by ejecting the plaintiff from the suit land.

15. On behalf of both the plaintiff and the defendants witnesses were examined and documents exhibited. The learned Trial Court vide the judgment and decree dated 15th of December, 2008, decided the said suit in favour of the plaintiff. The counterclaim however was dismissed. Pertinent herein is that Issue No.2 was decided in favour of the plaintiff holding that the suit was not barred by limitation. The learned Trial Court observed that the First Information Report was lodged before the Officer In-Charge of the Pan Bazar Police Station on 27.08.1997 and on the same date, the case was registered under Section 420 of the IPC. It was opined by the learned Trial Court that mere lodging of an FIR may not amount to notice of the intention of the fact that the Agreement i.e. Ext.1 was sought to be dishonoured. It was also mentioned that the plaintiff was arrested on 30.01.1999 and he was released on bail on the same date. It was opined that the filing of an

FIR would not amount to a notice and the plaintiff only came to learn about the refusal on 30.01.1999 and taking into account that the suit was filed on 09.04.2001, it was held that the suit was within the period of limitation. It is also relevant to take note of that the learned Trial Court while deciding the Issue No.9 observed that the defendant No.2 had title to the suit property as the same was an admitted position. Before further proceeding, this court finds it relevant to observe that T. S. No. 91 /2001 was renumbered as T. S. No. 671 of 2006 upon being transferred to the Court of the learned Munsiff No 1, Kamrup in view of the change in the pecuniary jurisdiction of the Courts vide the amendment made to the Bengal, Agra, Assam Civil Courts Act, 1887.

16. Being aggrieved, the defendants jointly filed an appeal before the Court of the Civil Judge No. 2, Kamrup (M) at Guwahati which was registered and numbered as Title Appeal No. 13/2009. In the grounds of objection, more particularly Objection No.4 (b), the appellants raised the ground that the learned Trial Court did not consider the averment made in the plaint and more particularly at paragraph No.5 wherein it was categorically mentioned that after the death of Rudreswar Sarma, his son was not willing to sell the suit land to the plaintiff. It was further mentioned in the said ground of

objection that Rudreswar Sarma expired on 27.09.1996 and the plaintiff as per his own statements made in the plaint itself, knew of the refusal so made by the Defendant No 2 in the year 1996 itself. Therefore, the suit which was filed in the year 2001 was barred by the limitation.

17. It is very interesting to note that there was no appeal separately filed against the dismissal of the Counter Claim. Further to that the Plaintiff had also not filed any appeal or cross objection as regards the decision rendered by the Learned Trial Court in respect to the Issue No 9, to which this Court had referred to in the foregoing paragraph No 15 herein above.

18. The learned First Appellate Court by the judgment and decree dated 14.07.2010 dismissed the Appeal. The Issue No.2 was taken up in Paragraph Nos.18 to 20 of the said judgment of the First Appellate Court. From a perusal of the said paragraphs, it is not seen that the learned First Appellate Court took note of the ground of objection No.4(b) which was specifically taken. Rather the learned First Appellate Court observed that it was proved that on 1/12/2000, the defendants refused to perform their part of the contract and as the suit was filed on 9/4/2001, the suit was not barred by limitation.

This Court also finds it relevant to observe that the Learned First Appellate Court further went ahead to decide the Issue Nos.9 & 10 though there was no separate Appeal filed by the Defendants or any cross objection filed by the Plaintiff. The Learned First appellate Court held that the Counter Claim was filed by the Defendant No.2 and not by the other defendants. It was observed that the legal heirs of Late Rudreswar Sarma still have the title over the suit land and the Defendant No 2 alone was not entitled to the said decree for declaration of his right over the suit land alone.

19. Being aggrieved by the Judgement and decree dated 14/07/2010, the present appeal was filed by the Appellants herein who were the defendants in the suit and the same had been admitted by framing the two substantial questions of law as already mentioned in the previous segments of the instant judgement.

20. Now, in the above backdrop, the question therefore arises as to whether the substantial questions of law which have been formulated by this Court or for that matter, the manner of deciding the Issue No.2 and 9 by the learned Courts below requires any interference on the basis of a substantial question of law being involved in the present appeal.

21. In the above light, the first question that this Court needs to consider pertains to the aspect of limitation. The First Schedule to the Limitation Act, 1963 provides for the period of limitation in the following manner:

Description of suit	Period of limitation	Time from which period begins to run
54. For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

The said Article prescribes the period of limitation for filing a suit for specific performance of the contract which is three years and the same has to be calculated based on either of the two contingencies, i.e the date fixed for performance of the contract or if no date is fixed, the date on which the plaintiff had noticed about the refusal of the performance by the defendants. The expression "date fixed for performance" is hence a crystallised notion. The Supreme Court had the occasion of dealing with the said aspect of the matter upon a reference being made to a three judges bench of the Supreme Court in the case of **Ahmadsahab Abdul Mulla v. Bibijan** reported in **(2009) 5 SCC 462**. Paragraph Nos.11 & 12 being relevant is reproduced herein below.

11. *The inevitable conclusion is that the expression "date fixed for the performance" is a crystallised notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a*

particular act. Even in the second part the stress is on "when the plaintiff has notice that performance is refused". Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. *Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression "date" used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.*

22. A question also arises as to how can the Court come to the conclusion as to when the Plaintiff had notice that the performance had been refused. The same has to be discerned from the materials on record. This Court also finds it relevant to observe that Section 3 of the Act of 1963 categorically stipulates that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. The said provision is however subject to Section 4 to 24 (inclusive) of the Act of 1963. It is also no longer res integra that the provisions of Section 3 of the Act of 1963 are to be strictly and mandatorily enforced. Now coming to Section 101 of the Indian Evidence Act, 1872, it would be seen that whoever desires that any Court has to give a judgement as to a legal right or liability dependent on the existence of facts which he asserts, must prove those facts.

23. In view of the above, the inevitable conclusion one would reach is that the person who wishes that the suit should be dismissed on account of the delay in filing the suit has to prove the existence of the fact that the Plaintiff had notice that the performance had been refused. The said aspect can be proved either by oral or documentary evidence or for that matter if there is any admission made by plaintiff in the Plaint.

24. In the backdrop of above, let this Court therefore recapitulate the relevant facts already delineated in the previous segments of the instant judgment. The plaintiff averred in the Plaint and more particularly at Paragraph No.5 that after the death of Late Rudreswar Sarma, the Defendant No 2 was not willing to sale the suit land to the plaintiff and he had initiated false criminal case against the plaintiff about which the plaintiff would come to know in the year 1999 when the police came to him and granted him bail. It was further stated that on account of intervention of some mutual friends and well wishers, the principal defendants agreed to sale the land as per the agreement to the plaintiff after disposal of the case being No.148_m/1995. The said case being 148_m/1995 was decided in favour of the legal representatives of Late Rudreswar Sarma by an order dated 25.08.2000. It was alleged in the Plaint that the plaintiff approached the

principal defendant No.2 in the month of September, 2000 and requested to register the Sale Deed in respect to the suit land in terms with the agreement, but the latter refused to execute the Sale Deed. Subsequent thereto, on 01.12.2000, the plaintiff again went to the residence of the principal defendants with the balance amount of consideration and requested to execute the Sale Deed in terms with the agreement dated 24.01.1994 entered into with Late Rudreswar Sarma, but the principal defendants not only refused to execute the Sale Deed but also misbehaved with the plaintiff.

25. The Defendant No 1 & 2 had in the written statement as well as in the additional written statement denied these statements. The specific case as regards limitation set out in the written statement is that the agreement was made in the year 1994 and the suit being filed in the year 2001 , the suit was barred by limitation. The written statement as well as the additional written statement are absolutely silent as to when the plaintiff had notice that the defendants refused as regards the performance of the agreement. It was the requirement of law to make such statement more so when the agreement is absolutely silent on the aspect when the Deed of Sale was required to be executed. The plea taken as regards the admission made in

Paragraph 5 of the Plaint seems to be for the first time taken in the First Appellate stage in the Ground of Objection No.4(b).

26. The senior counsel for the Appellants submitted that a perusal of Exhibit-G would show that on 03/08/1997, the plaintiff approached the defendants for sale of the land and the plaintiff had also asked the defendant No.2 that the Deed of Sale be executed in his favour else he would get the Deed of Sale executed in his name by other means. On the said basis the learned senior counsel submitted that the defendant No.2 had refused on 03/08/1997 and as such the suit so filed was barred by limitation.

27. The counsel appearing for the Plaintiff on the other hand submitted that the said submission was totally misconceived in as much as in the cross-examination of the Defendant witness No.1 who was the Defendant No 2 ,he categorically stated that the plaintiff did not come to his house on 13.08.1997 which was the date mentioned in the FIR.

28. This Court further delved into the evidence in view of the submissions made by the respective counsels. It is seen from the Evidence led by the parties that the Defendant No.2 stated that he came to know about the agreement dated 27.01.1994 in the year 2004 to be false. On the other

hand, if this Court takes note of the cross-examination of the plaintiff, it is seen that the Plaintiff stated that Rudreswar Sarma expired in the year 1996. He further stated that after filing of the FIR, the defendant No.2 did not inform him that he would not sell the land. The plaintiff further stated in his cross-examination that he did not remember when he went to meet the defendant No.2 after the death of Late Rudreswar Sarma.

29. From the evidence so adduced also, it cannot be said that the defendants had proved that the plaintiff had notice of the refusal of the performance by the Defendant(s) to the Agreement – Exhibit 1 on such other date than the date stated and proved by the Plaintiff, to bar the suit on the ground of limitation.

30. Under such circumstances, this Court is of the opinion that the Issue No.2 was rightly decided by the learned Courts below by holding that the suit was filed within the period of limitation. The above therefore answers the first substantial question of law.

31. Now the question arises as to whether the second substantial question of law has become redundant and or insignificant in view of the first substantial question of law decided. The Learned First Appellate Court came

to an opinion that all the defendants had right, title and interest over the suit Land and not only the defendant No.2. The First Appellate Court rightly arrived at the opinion. The counterclaim was only filed by the defendant No.2 whereas the other defendants who also had right, title and interest did not join the defendant No.2 in filing the counterclaim. In the opinion of this Court, the first Appellate Court was justified in not decreeing the counterclaim only in favour of the defendant No.2. In that view of the matter, the second substantial question of law is not involved in the instant appeal.

32. In that view of the matter, this Court finds no ground to interfere with the judgment and decree passed by the learned First Appellate Court dated 14.07.2010 passed by the learned Civil Judge No. 2, Kamrup (M) at Guwahati in Title Appeal No.13/2009 for which the instant Appeal stands dismissed thereby affirming the judgment and decree dated 15.12.2008 passed in Title Suit No.671/2006 by the learned Munsiff No. 1, Kamrup (M) at Guwahati.

33. This Court further quantifies the cost of the instant proceedings at Rs 5,150/- which the Plaintiff shall be entitled to. In addition to that the Plaintiff

shall be entitled to costs throughout.

34. LCR be returned.

J U D G E

Comparing Assistant