
(2018) 07 GAU CK 0021
In the Gauhati High Court
Case No : Regular Second Appeal 125 of 2018

Shri Nitai Mudok	Vs	APPELLANT
Shri Suren Saikia, Surendra Saikia And Ors		RESPONDENT

Date of Decision : 11-07-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100
Specific Relief Act, 1963 — Section 16(c)

Citation : (2018) 07 GAU CK 0021

Hon'ble Judges : KALYAN RAI SURANA, J

Bench : Single Bench

Advocate : S. K. Sarkar, P. Das, S. Das, A. Ahmed, A. Ahmed, M. Kalita, J. Islam

Final Decision : Dismissed

Judgement

1. Heard Mr. S. K. Sarkar, learned counsel appearing for the appellant as well as Mr. A.

Ahmed, learned counsel appearing for the respondents No. 1, 3, 4 and 5.

2. This appeal under Section 100 CPC, is directed against the judgment and decree dated 26.02.2016 passed by the learned District Judge, Nagaon in

Title Appeal No. 20/2014, thereby dismissing the said appeal, and affirming the judgment and decree dated 03.05.2014, passed by the learned Civil

Judge, Nagaon in Title Suit No. 8/2008.

3. The appellant is the plaintiff in Title suit No. 8/2008 which was filed on 04.04.2008. The case projected by the appellant in the plaint is that he had

entered into an agreement for sale with the respondents No. 1, 2 and 3 on 04.02.2006 (Ext. 1), thereby agreeing to purchase two plots of land

one measuring 3K- 6L(3 katha-6 lecha) and the other plot measuring 1B-2K-16L (1 bigha-2 katha-16 lecha) from the said respondents at a sale

consideration of Rs.3,30,000/-. It is projected that by payments made on various dates, a sum of Rs.3,00,000/- was paid by the appellant to the

respondents No. 1, 2 and 3 against the agreed sale consideration of Rs.3,30,000/-, further projecting that the balance amount of Rs.30,000/- was

required to be paid at the time of registration of the Sale Deed. It was projected that on 10.01.2008, the said respondents did not turn up to execute the

sale deed in respect of the land measuring 3K-6L and later on, the appellant had come to know that the respondent No. 1 had sold 1K land to the

respondent No. 4 at a sale consideration of Rs.60,000/- and that the respondent No. 3 had sold 1K land to the respondent No. 5 at a sale

consideration of Rs.70,000/-. Hence, the suit was filed for specific purpose of contract. From the documents annexed to the memo of appeal, it

appears that as per order dated

20.04.2010, the original schedule of the plaint was amended and first plot of land measuring 3K-16L was deleted and the suit had been contested in

respect of the second plot of land measuring 1B-2K-16L out of 2B-2K-17L land covered by Dag No. 831/832.

4. The learned trial Court, on the perusal of evidence and materials available on record had recorded a specific finding on the fact that in the cross-

examination, the appellant (PW1) had admitted that he alone could not purchase the suit land and therefore, he along with six others were desirous of

purchasing the suit land along with the additional land and therefore, the learned trial Court had arrived at a finding of fact that the appellant was not

ready and willing to purchase the suit land alone.

5. Therefore, out of the seven issues framed for trial, in respect of issue No.5, the learned trial Court held that the appellant was unable to purchase the

land covered by the agreement (Ext.1) on his own and that he had also admitted that he along with other persons would jointly purchase 3K-6L land

mentioned in Ext.1. Therefore, it was held that the suit was not maintainable and the said agreement was not enforceable. In view of the provisions of

Section 16(c) of the Specific Relief Act, the issues 2 and 5 were decided against the appellant. In respect of issue No. 5, as to whether the appellant

was ready and willing to perform his part of the contract, the learned trial Court had held that the witnesses of the appellant could not say when the

appellant had subsequently paid money to the respondents No. 1 and 3 and, as

such, it was held that the appellant could not prove the contents and due execution of the money receipts (Exts. 6 and 7), holding the same to be not proved. Moreover, in respect of issue No. 3, regarding whether the suit was barred by principles of waiver, acquiescence and estoppel, it was held that as the appellant could not purchase 3K-6L of land and he was bringing other persons with him to purchase the suit land jointly, he is estopped from claiming specific performance of the contract and therefore, the issue No. 1 regarding cause of action was decided against the appellant and the suit was dismissed.

6. It is seen that the learned first appellate Court, having independently assessed the evidence and pleadings on record, had arrived at a similar finding and therefore, the factual position is cemented by concurrent finding of fact by both the learned Court below.

7. Having heard the submissions made by the learned counsel for the appellant as well as the learned counsel for the respondents, it is seen that

although as per the agreement for sale (Ext. 1), the subject matter of the sale agreement (Ext. 1) was two plots of land. However, by amending the

plaint, specific performance is being sought for in respect of land measuring 1B-2K-16L, which is only one part of the schedule contained in the

agreement between the parties, i.e. the appellant as well as the respondents No. 1, 2 and 3. It is further seen that it is the admitted case of the

appellant in the plaint that respondent No. 1 had sold 1K land to respondent No. 4 and that the respondent No. 3 had sold 1K land to respondent No. 5.

However, a perusal of the amended plaint shows that although the plaint was amended on 20th April, 2010, the said two sale deeds favouring

respondents No. 4 and 5 were not put to challenge and therefore, the said two sale deeds have attained finality during the pendency of the suit.

Moreover, it is further seen that by an order dated 05.11.2008, the learned trial Court had struck out the name of the respondents No. 5, 6 and 7.

Admittedly, the respondent No. 5 had purchased 1k land from the respondent No. 3 and therefore, there is no way that the contract/agreement

dated 04.02.2006 can be performed without cancelling the said two sale deeds favouring the respondents No. 4 and 5, which are not under challenge.

8. Three more adverse situation are found operating against the appellant. Firstly, during the pendency of the suit, the appellant had entered into a

compromise with the respondent No. 2 by petition No. 3595/09, whereby the respondents No. 2 had agreed to sell the plot of land measuring 2 kathas

out of 1B-2K-16L land described in Schedule 'B' in the said compromise petition. However, the agreement was to the effect that the

respondent No 2 was to execute the sale deed within one month from the date of receiving the said consideration. But, there is no averment in the

memo appeal to the effect that the said compromise dated 05.11.2009 had fructified in the execution of a formal sale deed in respect of the said

Schedule-B land of the compromise petition in favour of the appellant. Therefore, by entering into a compromise in respect of 2 katha land without

identifying whether the said respondent No. 2 suit was the owner in respect of the said specified area of land, and by the conduct of the appellant in

not challenging the two sale deeds executed by the respondents No. 1 and 3, this Court is of the view that the agreement for sale dated 04.03.2000

has been frustrated. Secondly, when the names of the respondents No. 5, 6 and 7 were struck out in the suit, there was no decree against them.

Hence, the said respondents No. 5, 6 and 7 could not have been arrayed as respondents in this appeal. Therefore, in view of order dated 05.11.2008

passed by the learned trial Court in T.S. 8/2008, the names of the respondents No. 5, 6 and 7 are ordered to be struck out in this appeal as no leave

was taken to file appeal against parties who were not the defendants in the suit. Thirdly, there is no prayer in the suit for rectification of the agreement

(Ext. 1). Therefore, there is no way that a contract can be decreed only for one part.

9. Therefore, by holding that the concurrent finding of the fact recorded by the learned Courts below is borne out of the evidence of the

appellant 'A' (i.e. PW-1) in his cross-examination as well as from the facts borne out of the amended plaint. Hence, there is no way that the suit

can be decreed for specific performance of contract in respect of agreement dated 04.02.2006 (Ext. 1).

10. Therefore, in view of the discussions above, this Court is of the opinion that there is no substantial question of law to be decided in this appeal on

the basis of the facts and evidence as narrated above, as such, this appeal fails and the same stands dismissed.

11. Parties are left to bear their own cost for this appeal.