

Assam Schedule VII, Form No. 132

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT OF APPEAL / CASE

DISTRICT: DHUBRI

IN THE COURT OF THE CIVIL JUDGE DHUBRI

Present: **V.K. Singh, A.J.S**

Title Appeal No. 69/2015

Tuesday, the 24th October, 2017

Mostt. Jabun Nehar Hoque,

W/O Samsul Hoque,

R/O Ward No.7 (Thana bye late),

Dhubri Town, Dhubri..... Appellant.

-Versus-

Begum Suraiya Parvin,

W/O Enamul Islam,

Ward No.10, Dhubri Town, Dhubri..... Respondent

Proforma Respondents:-

1. Nasima Begum,

W/O Abdul Sabir,

R/O Ward No.7, Dhubri Town, Dhubri

2. The State of Assam,

Represented by the Collector, Dhubri.

This appeal coming on this day (or having been heard on) 22-09-2017. In

the presence of:

Sri A. B. Akand Ld. Advocate for Plaintiff.

Sri M. Rahma Ld. Advocate for Respondent

And having stood for consideration to this day, the court delivered the following judgment:-

J U D G M E N T

1. This first appeal has been preferred by appellant /plaintiff on being dissatisfied with the judgment and decree dated 10-08-2015 passed in connection with T.S. No. 301/14 by learned Munsiff No. 2, Dhubri, whereby learned trial court dismissed the suit against the plaintiff / appellant.
2. Upon admission of the appeal for hearing, notices were issued to the respondents and original case record T.S. No. 304/14 was called for and received. In this case the defendants / respondents contested the appeal.
3. Now in order to decide this appeal, I find it necessary to give brief descriptions of the facts leading to this appeal.
4. Plaintiff/appellant instituted original T.S. No. 301/14 against the present defendants. In that suit, plaintiff / appellant stated that the Khatiandar Md. Eyasin Ali Khandakar and 5 others were the owner and possessor of land measuring 2B-1K-18L covered by patta No .742 (O), 450(N) under 7 numbers of dag, Dag No. 873. The Khatiandar out of his land sold 2K-10L to the plaintiff, defendant and proforma defendant on receiving consideration amount of Rs. 80,000/- and executed 3 Registered sale deeds in favour of them. That, at the time of execution of the sale deed he left 72 feet (east west) and 8 feet (south north) from the northern side of A land. Hence, the land owner sold C land to the plaintiff vide registered sale deed number 1274 of 1995. He also sold D land to the proforma defendant by a registered sale deed number 1273 of 1995. That, Schedule-E land is situated adjacent to the western side of Schedule-C and D land. That, Schedule-D land is situated in between the land of Schedule-B and C. That, proforma defendant being owner of D-Schedule land have also capacity to ingress and egress over the passage of the Schedule-B land. That, plaintiffs purchased land is Schedule-C which is in southern side of D-Schedule land. The defendant and proforma defendant can enjoy ingress and egress the passage left about the vendor but the plaintiff was debarred

from enjoying the passage, as such plaintiff, defendant and proforma defendant mutually agreed to create a common path measuring 10 feet starting from B land up to southern boundary of A land and 5 feet wide for ingress and egress of the parties. Accordingly on 05-07-96 plaintiff, defendant and proforma defendant entered into an agreement whereby the plaintiff and proforma defendant jointly left 2 ½ feet land from C and D land from western side and the defendant also left 2 ½ feet land from eastern side of E land and created 104 feet *5 feet common passage for ingress and egress of plaintiff which is shown as Schedule-F. That, the agreement dated 05-07-96 was authenticated on 18-12-97 before the J.M.F.C., Dhubri in presence of plaintiff, defendant and proforma defendant and duly identified by an Advocate. That the defendant by violating the agreement dated 05-07-96 which was authenticated on 18-12-97 in the month of March 2005 constructed Northern southern boundary walls with RCC post covering entire land of defendant and also grided Gate at the eastern joining point of F land as a result of which the plaintiff was unable to ingress and egress to the main road. That, on 27-07-05 the plaintiff served an notice on the defendant and requested her to solve the matter of otherwise the plaintiff will suffer irreparable loss but she did nothing. Then finding no alternative, the plaintiff instituted T.S. No. 383/05 but mistakenly did not insert the authentication date on 18-12-97 of the agreement but mention only the date of execution of said agreement dated 5-07-96. The suit was dismissed in the court of Munsiff No.1, Dhubri. That, thereafter the plaintiff preferred first and 2nd appeal which were also dismissed. That the plaintiff, defendant and proforma defendant jointly acquired easementary right over the F schedule land by executing a mutual agreement. As such the defendant has got no right to prevent the plaintiff from enjoying her easementary right. In the last, plaintiff prayed for decree- i) declaring that the plaintiff has acquired joint easement right as per agreement among the parties to use/enjoy the common F schedule

path. ii) Declaring that the defendant is legally bound to obey, follow the agreement agreed among the plaintiff, proforma defendant No.1, defendant as regards creation of F schedule, common path, and the defendant is legally bound to vacate western half of F schedule common path for them.

5. That, suit was contested by defendants who filed written statement. In the written statement defendants stated that suit is not maintainable, as it is barred by res-judicata as per section 11 of the CPC. It is stated that in respect of the same subject matter the plaintiff, earlier to this suit filed T.S. 383/05 against the same parties which was dismissed on contest on 26-04-11. Thereafter, the plaintiff preferred first and 2nd appeal which were also dismissed. The suit is also barred by the Limitation Act. That, the suit is based on the agreement dated 05-07-96 and authenticated on 18-12-97 and praying for its specific performance. Thereafter, on 27-07-05 the plaintiff served a pleader notice up on the defendant for performing her part as per the agreement dated 05-07-96.
6. In this case, after filing written statement, defendant prayed for framing of preliminary issues on the point of res-judicata and limitation. As per record, learned Trial court framed the preliminary issues and decided the suit by deciding those issues which are as follows:
 - 1) Whether the suit is barred by Res-judicata?
 - 2) Whether the suit is barred by limitation?
7. Then, after hearing learned Munsiff No. 2, Dhubri found that the suit is barred by res-judicata and also barred by limitation, hence, dismissed the suit of the plaintiff, then, being aggrieved and dissatisfied by judgment / decree dated 10-08-15 passed by learned Munsiff No. 2, Dhubri, plaintiff/ appellants preferred this appeal on the following ground:
 - 1) For that the learned Munsiff No.2, Dhubri has been erred in law and facts in passing the impugned judgment and decree.
 - 2) For that the learned Lower Court has committed gross mistake and

irregularities in passing the impugned judgment and decree.

- 3) For that the learned Lower court has misconceived the provision of law and as such arrived into wrong decision.
- 4) For that the learned lower court ought to have held that the suit is not barred by res-judicata.
- 5) For that the learned lower court ought to have held that the limitation start from the date of construction of wall boundary on 25.06.14 and the suit was in the year of 2014 with in time and the suit cannot be barred by limitation.
- 6) For that the learned lower court did not comply the provision of Order X Rule 2 CPC and as such illegally dismissed the suit in preliminary hearing.
- 7) For that the learned lower court ought to have oral examination of the party with a view to elucidating matters in controversy in the suit before disposing the petition filed U/O Rule 1 CPC.

POINT FOR DETERMINATION

Point for determination in this case are as follows:

1. Whether learned trial court rightly decided issue no. 1 that the suit is barred by res-judicata?
2. Whether learned trial court rightly decided issue no. 2 that the suit is barred by limitation?
- 8.** In this case, as it is clear from the LCR, that learned trial court after framing the preliminary issues called for the records of T.S. no. 383/05 and after perusal of the same decided both issues.

POINT FOR DETERMINATION NO. 1

This point is in respect of preliminary issue no. 1 framed and decided in the original suit. As defendant vehemently raised this point in his

written statement that on the same subject matter plaintiff earlier instituted T.S. no. 383/05 in the court of learned Munsiff No. 1, Dhubri which was dismissed and against that plaintiff had preferred appeal before the court of The Civil Judge, Dhubri, which was also dismissed and then plaintiff had preferred second appeal before Hon'ble Gauhati High Court which was also dismissed. As on the same matter plaintiff again brought the present suit so it is barred by the principles of res-judicata.

On this point, I find that even in the plaint plaintiff clearly stated in para no. 12, 13 and 14 that earlier also plaintiff instituted T.S. no. 383/05 for declaration for permanent injunction but plaintiff at the time of preparation of plaint mistakenly did not insert the authentication date on 18-12-1997 of the agreement but mentioned only the date of execution of said agreement dated 05-07-96. As a result of which learned Munsiff no. 1, Dhubri dismissed the T.S. no. 383/05. That, plaintiff preferred first appeal before The Civil Judge, Dhubri in T.A. no. 61/11 which was also dismissed. That, plaintiff preferred second appeal before Hon'ble Gauhati High court in RSA no. 18/14 which was dismissed on technical ground.

So, it is clear that even in her own pleading plaintiff admitted that in respect of the same subject matter, basing upon the same right, she had instituted a suit against the same parties which was finally heard and decided on merit. On this point, I find it important to note that in the plaint plaintiff in para no. 20 stated that cause of action of the suit arose on 05-07-96, 18-12-97, 27-07-05 and lastly on 25-06-2014. In this regard, in para 15 of the plaint plaintiff has story that again on 25-06-2014 the defendant constructed full walls boundary on the eastern side of the land by encroaching the land of passage 2.5 x 72 feet left by the defendant and violated the condition of agreement executed amongst the plaintiff, defendant and proforma defendant. But, as discussed earlier it is clear that the foundation of the claim of the plaintiff in this suit and in the earlier suit is the said agreement alleged to be entered by plaintiff, defendant and

proforma defendant. So, once it has been finally heard and decided that plaintiff is not entitled to any relief on the basis of said agreement, hence merely by alleging the new date of alleged cause of action, plaintiff cannot raise the same issue which has been finally decided earlier. Hence, at this stage of my discussion, I find that even considering the averment of the plaintiff, it is clear that the matter directly and substantially in issue of this case has already been finally heard and decided in earlier suit which was challenged up to the Hon'ble Gauhati High Court by the plaintiff. So, it is clear that the present suit is barred by the principles of res-judicata. Hence, learned trial court rightly decided this preliminary issue. This point is decided accordingly.

POINT FOR DETERMINATION NO. 2

This point is in respect of preliminary issue no. 2 framed and decided in the original suit. In this case, another objection of the defendant is that, the suit is barred by the law of limitation. On this point, I find that in the plaint plaintiff stated that on 27-07-05 plaintiff served an Advocate notice upon the defendant and requested her to solve the matter, but defendant did not pay any heed to the said notice. Plaintiff has shown this date of notice also as the date of cause of action. In the suit claim of the plaintiff is based upon the alleged agreement entered into by the parties of the suit, which certainly means as having nature of specific performance. As per the record, this suit was instituted on 21-07-14 which is clearly after the long gap of expiry of period of limitation for the same. Now, if the date shown by the plaintiff which is as 25-06-2014 is taken into consideration which is the date of further alleged construction by the defendant, then also stand of the plaintiff remains the same. As claim of the plaintiff is based on the alleged agreement which was allegedly violated much earlier by the defendant and for that plaintiff was compelled to file earlier suit. Hence,

period of limitation in this case had started running since then and by placing subsequent story as done by the plaintiff, the same cannot be stopped. So, from all aspects, I find that this suit was not filed within specific period of limitation. Hence, this suit is barred by the law of limitation. So, learned Munsiff no. 2, Dhubri has rightly decided this issue also. This point for determination is decided accordingly.

8. So considering all aforementioned discussions and decisions of points for determination, I find that learned lower court rightly dismissed the suit of the plaintiff / appellant and she is not entitled to any relief in this appeal also.

ORDER

9. In view of the above discussions, this appeal is dismissed on contest with cost and the impugned judgment and decree dated 10-08-2015 passed by the learned Munsiff no. 2, Dhubri in T.S. No. 301/14 is affirmed and it is held that appellant / defendant is not entitled to any relief.
10. Prepare decree accordingly.
11. This appeal is dismissed on contest with cost.
12. Send back the LCR along with a copy of this judgment to the learned Trial court.

Given under my hand and the seal of this court on this 24th day of October 2017.

V. K. Singh
Civil Judge, Dhubri