



GAHC010101852007

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

Case No. : RSA/122/2007

ON THE DEATH OF PURNAKANTA KONWAR, HIS LEGAL HEIRS, MRS. UMA
KONWAR AND ORS.
S/O LATE KANAKESWAR KONWAR, R/O SEUJPUR, PO/PS/DIST.
DIBRUGARH, ASSAM.

1.1: UMA KONWAR
SEUJPUR
PALTAN BAZAAR ROAD
DIBRUGARH
ASSAM

1.2: SIDDARTH SHANKAR KONWAR
SEUJPUR
PALTAN BAZAAR ROAD
DIBRUGARH
ASSAM

1.3: DEBAJANI BORPATROGOHAIN
ASSAM FINANCIAL CORPORATION
LAKHIMPUR

1.4: MITALI KONWAR
EAST MILANNAGAR
DIBRUGARH

1.5: KANIKA K. BARUAH
PANJABARI
GUWAHAT

VERSUS

ON THE DEATH OF BISHWANATH AGARWALLA, HIS LEGAL HEIRS, SMTI.
GEETA DEVI AGARWALLA and ORS.
S/O LATE BHAGESWAR DAS AGARWALA.



1.1:GEETA DEVI AGARWALLA
G.S. MODI ROAD
JYOTINAGAR
P.O.
P.S. AND DIST. DIBRUGARH

1.2:KAUSHIK KR. AGARWALLA
G.S. MODI ROAD
JYOTINAGAR
P.O.
P.S. AND DIST. DIBRUGARH

2:KAMAL KR. MODI AGARWALLA
S/O LATE GAURI SHANKAR MODI
BOTH ARE RESIDENTS OF THE G.S.MODI ROAD
JYOTINAGAR
PO/PS/DIST. DIBRUGARH
ASSAM

Advocate for the Petitioner : M BORAH

Advocate for the Respondent : D BARUA

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER

Date : 22.06.2022

Heard Mr. N.C. Das, learned senior counsel assisted by Mr. M Borah, learned counsel for the petitioner and Mr. S Dutta, learned senior counsel assisted by Mr. S Dutta, learned counsel for the respondent.

2. The instant Appeal under Section 100 of the Code of Civil Procedure 1908 is directed against the judgment and decree dated 18.08.2007 passed by the Court of the District Judge, Dibrugarh in Title Appeal No.1/2007, whereby the Appeal was dismissed thereby upholding the

judgment and decree dated 12.12.2006 passed by the Court of the learned Civil Judge, Dibrugarh in Title Suit No.27/1997.

3. The instant Appeal was admitted on 17.12.2007 by formulating the following substantial question of law in terms with Section 100 (4) of the Code.

“Whether the suit filed by the present respondents are maintainable in view of the provision contained under Section 69(2) of the Partnership Act, 1932, the respondents being the partners of an unregistered partnership firm?”

4. For the purpose of deciding the said question of law, it is relevant to take note of the brief facts of the case. For the sake of convenience, the parties here are referred to in the same status as they stood before the trial Court.

5. The respondents herein as plaintiffs filed a suit being Title Suit No.27/1997 seeking declaration of right title and interest of the plaintiffs in the suit land described in the Schedule to the plaint and for recovery of khas possession of the land by evicting the defendants, agents, employees and representatives and demolishing the structure, if any raised by the defendant No.1; for cancellation of the registered sale deed No.2878/1987 dated 09.02.1987; for perpetual injunction restraining the defendant No.1 for selling or dispossessing the land in any manner; for declaration that the mutation in the name of the defendant No.1 in respect to the suit land as per the order dated 06.06.1988 passed by the Sub-Deputy Collector in Mutation Case No.799/1987-88, as illegal and void and setting aside the same and to restore the name of the plaintiffs firm i.e., “M/S Borbari Land

Development Corporation” and for issuance of a precept accordingly to the concerned authority.

6. The case of the plaintiff in brief is that both the plaintiffs were carrying on partnership business of acquiring land and building of any tenor or description by purchase, lease, exchange or otherwise and any estate or interest therein and selling the same after making improvement, construction, reconstruction and division etc under the name and style of “Borbari Land Development Corporation” with its Head Office at Jyotinagar, Dibrugarh.

7. The plaintiffs purchased in the name of the said partnership firm a land measuring 34 bighas, 2 kathas, 16 lessas situated at Gabharupather Ward, under Dibrugarh Town Mouza in the name of their partnership firm from one M/S Assam Auto Agency vide a registered sale deed dated 27.04.1983 and obtained possession of the said land. The land was mutated in the name of their firm M/S Barbari Land Development Corporation in the year 1987-1988. The Defendant No.1 requested the plaintiff No.1 to sell some part of the land. Accordingly the plaintiff agreed to sell 3 kathas of land to the defendant No.1 for a valuable consideration. The Defendant No.1 paid Rs.24,000/- as an advance against the said proposal. The plaintiff No.1 gave possession of the land measuring 1 katha, 19¼ lecahs to the Defendant No.1 and the land was shown to the Defendant. It was agreed that the sale deed would be executed and registered on receipt of the entire consideration. The plaintiff No.1 gave possession of the land measuring 1 katha, 19 ¼ lessas to the Defendant No.1, but the Defendant No.1 insisted the plaintiffs to show the land measuring 3 kathas approximately, which the

plaintiff No.1 was compelled to do under the circumstances. The plaintiffs thereafter repeatedly requested to the defendant to pay the remaining balance consideration which the defendant No.1 failed to pay. While on one hand, the Defendant No.1 did neither take any steps to get the registration of the sale deed nor made the payment of the balance amount in spite of his verbal assurance from time to time to pay the balance amount and get the sale deed registered in his favour, to the utter surprise of the plaintiffs, the defendant No.1 got the land measuring 3 kathas, 5 lessas of periodic patta No.66 covered by Dag No.494 and 495 of Gabharupathar Ward, Dibrugarh Town Mouza mutated in his name vide Mutation Case No.799/1987/88 dated 06.06.1988 passed by the Sub-Deputy Collector, East Circle Dibrugarh. The plaintiff No.1 thereafter made enquiry and could come to learn that the said mutation was granted on the basis of a registered sale deed No.2878/1997 alleged to have executed by one Smti. Chandra Devi, a stranger to the plaintiffs. The plaintiff No.1 immediately applied for a certified copy of the Jamabandi and the sale deed alleged to be executed by Smti. Chandra Devi, which the plaintiff obtained on 11.04.1997 and 21.04.1997 respectively. Further to that, the plaintiff also came to learned that the Defendant No.1 was trying to dispose of the land which was purportedly purchased on the basis of fraudulent deed of sale. The said plot of land which the Defendant had purchased has been most specifically described in the Schedule to the plaint. It is on the basis of that the suit was filed claiming various reliefs as already stated herein above.

8. The Defendant No.1 filed his written statement and the suit

proceeded ex-parte against the Defendant No.2. In the written statement various preliminary objections were taken that the suit was not maintainable on the ground of non-joinder of necessary parties and barred by limitation. The plaintiffs did not have the *locus standi* to institute the suit and to proceed with the same in absence of and without impleading the Firm "M/S Barbari Land Development Corporation" and all its partners. On merits it was averred that in spite of the Defendant No.1's repeated request, the plaintiff No.1 neither delivered the physical and vacant possession of the suit land purchased which the Defendant No.1 was to purchase nor executed any sale deed though the entire amount was received by the plaintiff No.1. It was also stated that while the defendant No.1 went to take the symbolic possession of the suit land from the plaintiff No.1, he came to know that one Chandra Devi had been in possession over the suit and she had right title over the same by way of adverse possession since the days of her predecessor and the plaintiff No.1 had also knowledge about the said adverse possession of the defendant No.2 at the time of the sale of the suit land to him. But the plaintiff suppressed the said matter. Under such circumstances, the Defendant No.1 purchased the possessory right of the suit land from the Defendant No.2 in consideration of total sum of Rs.15,000/- by the Registered sale deed No.2878/1987 and acquired the actual vacant physical possession of the suit land.

9. It was further stated that in a proceedings under Section 145 Cr.P.C the possession of the defendant No.2 in respect to the suit land was declared. In revision also the decision of the Lower Court was confirmed by the Additional District Judge, Dibrugarh in Criminal

Revision No.17(1)/1988. Accordingly the Defendant No.1's mutation over the suit land was granted legally and after mutation he made improvements of the suit land and hence now the plaintiff cannot question about the legality of the mutation. On the basis of the said pleadings, as many as six issues were framed, which were:-

(I) Whether there is any cause of action for the suit?

(II) Whether the suit is barred by limitation?

(III) Whether the plaintiff had any right title and interest over the suit land?

(IV) Whether the sale deed No.2878/1987 executed by the defendant No.2 in favour of the defendant No.1 in respect of the suit land is void and tenable in law?

(V) Whether the plaintiff is entitled to get a decree as prayed for?

(VI) To what other relief or reliefs if any, the parties are entitled to?

10. Apart from the said six issues an additional issue was framed by the learned trial Court "*As to whether the plaintiff had any right to suit?*"

11. In the said suit both the parties adduced evidence. The plaintiff examined two witnesses including himself and the Defendant also examined two witnesses including himself. One court witness was also examined. Both the parties submitted various documents in support of their case.

12. The Trial Court vide a judgment and decree dated 12.13.2006 decreed the suit in favour of the plaintiff thereby declaring that the plaintiffs had right title and interest over the suit land; the plaintiffs were entitled to get a decree for recovery of khas possession and permanent injunction in respect to the suit land thereby evicting the

defendant therefrom in accordance with law. The trial Court further held that the plaintiff was entitled to a decree for cancellation of the registered sale deed No.2878/1987 and the mutation order in favour of the defendant No.1 was declared to be void and tenable.

13. While passing the said judgment and decree in favour of the plaintiffs, the learned trial court decided the Issue No.1 as to whether there was any cause of action in the suit in favour of the plaintiff. The issue No.2 which was as regards as to whether the suit was barred by limitation, it was held that the said suit was within limitation. The additional issue which was issue No.7 as to whether the plaintiff had a right to suit, the trial Court held that the plaintiff had right to suit. As regards the issue No.4 which pertains to the legality and validity of the sale deed No.,2878/1987 the trial Court after taking into consideration the evidence on record came to a find that the sale deed No.2878/1987 executed by the Defendant No.2 in favour of the Defendant No.1 in respect of the suit land is void and not tenable and accordingly the said issue was decided in the affirmative and in favour of the plaintiff. The issue No.5 and 6 which relates to as what decree the plaintiff is entitled to as well as what other reliefs the parties were entitled to, the trial Court decreed the suit in the manner as above mentioned.

14. Feeling aggrieved and dissatisfied the Defendant No.1 as appellant preferred an Appeal before the Court of the District Judge, Dibrugarh which was registered and numbered as Title Appeal No.1/2007. A perusal of the Memo of Appeal which would show that various grounds of objection were taken.

15. The First Appellate Court on the basis of the various grounds of

objection framed six points for determination which were:

(1) Whether the suit is maintainable?

(2) Whether the suit was barred by limitation?

(3) Whether the plaintiffs have right title and interest over the suit land?

(4) Whether the summon to the Defendant No.2 was properly served?

(5) Whether the Defendant No.2 acquired any right title and interest by way of adverse possession and whether she had any right to transfer the land to the Defendant No.5?

(6) Whether the mutation of the land in favour of the defendant No.1 was legal?

16. In deciding the first point for determination i.e., as to whether the suit was maintainable, the first Appellate Court after taking into consideration the provisions of Section 69(2) of the Indian Partnership Act 1932, the provisions of Order XXX Rule 1 of the Code and the evidence on record came to a finding that both the partners of the unregistered firm have instituted the suit in their individual capacity and as such, the suit was maintainable.

17. The First Appellate Court had also taken into account the Exhibit 4 which was the Deed of Partnership wherein the plaintiffs were the only two partners of the unregistered firm in question. While deciding upon the point of determination No.2, as to whether the suit was barred by limitation, the First Appellate Court came to a finding that the suit was filed for recovery of immovable property based on title and as such the period of limitation would be as per Article 65 which is 12 years

when the possession of the defendant becomes adverse. In the instant case, the plaintiffs came to learn about the mutation when they received a copy of the sale deed and jamabandi on 11.04.1997 and 21.04.1997 respectively and the suit was filed immediately on 30.04.1997. Consequently, therefore, it was held that the suit was within time.

18. The First Appellate Court while deciding the Appeal took up the points for determination Nos.3, 5 and 6 together. The First Appellate Court came to a finding that the plaintiff had right title and interest over the suit land and the Defendant No.1 could not prove adverse possession over the suit land.

19. Consequently, the First Appellate Court on the basis of the findings in respect to points for determination Nos.3, 5 and 6 decided the same in favour of the plaintiffs. The First Appellate Court in respect to the point for determination No.4, as to whether the summons upon the defendant No.2 was properly served, held that in the suit proceedings that the summons was issued to the Defendant No.2 through the process server as well as by Registered Post with A/D. The Registered Post with A/D was served. After service upon the defendant No.2, the said defendant No.2 did not appear and as such the suit proceeded ex-parte. In the Appeal also notice was send to the Defendant No.2 by way of Registered Post with A/D which returned with the endorsement of the postal authority as "not known". But in respect to the notice through the process server, the process server in his report stated that the nephew of the addressee reported that Chandra Devi

had expired 12 years ago but when he was asked to write the same he refused to do so. The learned First Appellate Court then relying on the provisions of Order XXII Rule 1 came to a finding that the even if the defendants case is to be believed, it is clear that the Defendant No.2 had no right title and interest over the suit land. It was further observed that the Defendant No.1 had nowhere stated that the Defendant No.2 acquired the status of land holder as per the provision of the Assam Land and Revenue Regulations. It was also observed that the Defendant No.2 had also acknowledge the title of the plaintiffs in the proceedings under Section 145 CPC and she never declared herself to be in possession of the land adversely.

20. On the basis of the said points of determination being decided, the learned First Appellate Court had upheld the judgment and decree passed by the trial Court vide the impugned judgment and decree dated 18.08.2007.

21. Feeling aggrieved and dissatisfied, the present Appeal has been filed under Section 100 of the Code and this Court vide the order dated 17.12.2007 had formulated the substantial question of law as already quoted herein above.

22. In the backdrop of the above, this Court therefore is required to look as to whether the said substantial question of law is involved in the instant Appeal and thereby would affect the litigation between the parties.

23. From a perusal of the said substantial question of law as formulated, it would show the question which arose for consideration as

to whether the suit was maintainable in view of the provisions contained under Section 69 (2) of the Partnership Act 1932 and the respondents/plaintiffs being the partners of an unregistered partnership firm.

24. For the purpose of convenience, it would be relevant to quote the Sub-Section (1) and (2) of Section 69 of the Indian Partnership Act, 1932 herein:

69. Effect of non-registration.—

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

25. A conjoint reading of the above two quoted Sub-Sections of the Section 69 would show that no suit to enforce a right arising from a contract or conferred by the Indian Partnership Act 1932 shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. Sub-Section (2) of Section 69 bars a suit to enforce a right arising from a contract from being instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons

suing are or have been shown in the Register of Firms as partners in the firm.

26. Thus a reading of the said Sub-Sections of Section 69 of the Indian Partnership Act, 1932 (for short the Act of 1932) would show that the ban imposed under Section 69 (1) of the Act of 1932 is on any person in his capacity as a partner of an unregistered firm against the said firm or any of its partners, in the matter of filing a suit to enforce a right arising from a contract or conferred by the provisions of the Act of 1932. In effect, the ban is in respect of filing a suit against that unregistered firm itself or any of its partners by way of a suit under a contract or under the Act of 1932. Under Sub-Section (2) the very same ban is imposed on an unregistered firm or on its behalf by any of a partners against any third party by way of a suit to enforce a right arising from a contract in any court. A close reading of Sub-Section (1) & (2) of Section 69 therefore shows that while the Sub-Section (1) the ban is against filing of a suit in a court by any person as a partner of an unregistered firm against the firm itself or any of its partners, under Sub-Section (2), such a ban is in the same form of a suit in the Court will also operate against any third party by way of a suit to enforce a right arising from a contract in any court. The common feature in both the Sub-Sections are filing of a suit, in the Court for enforcement of right arising from a contract or conferred by the Act of 1932 either on behalf of an unregistered firm or by the firm itself or by any one representing as partners of such an unregistered firm.

27. The Supreme Court in the case of ***Haldi Ram Bhujawala & Anr. Vs. Anant Kumar Deepak Kumar*** reported in **(2000) 3 SCC 250** at

paragraph No.9 took up for consideration as to whether the bar under Section 69(2) of the Act of 1932 would operate if a statutory right or common law right is being enforced. Paragraphs 9 to 12 of the said Judgment is quoted herein below:

9. *The question whether Section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a common law right is being enforced came up directly for consideration in this Court in Raptakas Brett Co. Ltd. v. Ganesh Property. In that case, Majmudar, J. speaking for the Bench clearly expressed the view that Section 69(2) cannot bar the enforcement by way of a suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right "arising from a contract" but was a common law right or a statutory right under the Transfer of Property Act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference. Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.*

10. *The next question is as to the nature of the right that is being enforced in this suit. It is well settled that a passing-off action is a common law action based on tort (vide Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co. Therefore, in our opinion, a suit for perpetual injunction to restrain the defendants not to pass off the defendants' goods as those of the plaintiffs by using the plaintiffs' trademark and for damages is an action at common law and is not barred by Section 69(2). The decision in Virendra Dresses v. Varinder Garments and the decision of the Division Bench of the Delhi High Court in Bestochem Formulations v. Dinesh Ayurvedic Agencies state that Section 69(2) does not apply to a passing-off action as the suit is based on tort and not on contract. In our*

opinion, the above decisions were correctly decided. (Special Leave Petition No. 18418 of 1999 against the latter was in fact dismissed by this Court on 28-1-2000.) The learned Senior Counsel for the appellants no doubt relied upon Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar. That was an arbitration case in which the words "arising out of a contract" were widely interpreted but that decision, in our view, has no relevance in interpreting the words "arising from a contract" in Section 69(2) of the Partnership Act.

11. *Likewise, if the reliefs of permanent injunction or damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is, in our view, not barred by Section 69(2).*

12. *For the aforesaid reasons, in both these situations, the unregistered partnership in the case before us cannot be said to be enforcing any right "arising from a contract". Point 1 is therefore decided in favour of the respondent-plaintiffs.*

28. It is also relevant here to take note as to what would be the scope of the words, "to enforce a right arising from a contract" as mentioned in Sub-Section (2) of Section 69 of the Act of 1932.

29. The Supreme Court in the said case of Haldi Ram Bhujawala & Anr. (supra) at paragraph 21 observed that the purpose behind Section 69 (2) of the Act of 1932 was to impose a disability on an unregistered firm or its partners to enforce rights arising out of contracts entered into by the unregistered firm with the third party in course of the firms' business transaction. It was further held that the real crux of the question is that the legislature when it used the words "arising out of a contract" in Section 69(2), it was referring to a contract entered into in

course of business transaction by the unregistered firm with the third party and the idea is to protect those in commerce who deals with such a partnership firm in business. Such third party who deals in partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business. Paragraph 25 of the said judgment being relevant is quoted herein below:

25. Further, Section 69(2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could only be as a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a motor car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, — it is clear that the relief for possession against the defendant in the suit does not arise from any contract which the defendant entered into in the course of the plaintiff firm's business with the defendant but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a suit would be maintainable and Section 69(2) would not be a bar, even if the firm is unregistered on the date of suit. The position in the present case is not different.

30. From a perusal of the above quoted paragraph it would show that Section 69 (2) of the Act of 1932 is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. In the backdrop of the above, if this Court takes into account the facts of the instant case, it would be seen that the suit in

question was filed seeking declaration of right title and interest over the Schedule land; for recovery of khas possession of the Schedule land by evicting the defendant; for cancellation of the registered sale deed No.2878/1987-88; for perpetual injunction as well as for declaration that the mutation of the name of the defendant No.1 in the suit land as per the order dated 06.06.1988 passed by the Sub-Deputy Collector for Mutation Case No.799/1987-88 is illegal and void. The reliefs therefore sought for having nothing to do with any contract arising between the plaintiffs or their firm namely, "Barbari Land Development Corporation" and the defendant No.1. The said reliefs also have nothing to do as regards any business relationship between the plaintiffs and the defendant No.1 in course of the business relationship of the partnership firm.

31. Under such circumstance, this Court is of the opinion that the bar under Section 69(2) has no application to the facts of the instant case. Consequently, therefore this Court is of the opinion that the substantial question of law so formulated is not a substantial question of law involved in the instant case.

32. Before parting with the records it will also be relevant herein to mention that the learned counsel for the appellant had submitted that apart from the question of law so framed on 17.12.2007 by this Court, there are other substantial questions of law which arises in the instant Appeal.

33. The learned senior counsel submits that a substantial question of law arises in the instant Appeal as to whether the defendant No.1 had acquired title in respect to the suit land by the right of adverse

possession. A perusal of the written statement filed by the defendant No.1 nowhere claims adverse possession of the defendant No.1. It further appears from the judgment of both the trial Court as well as the First Appellate Court that a concurrent finding of fact has been arrived at that the defendant No.2 admitted that she was lessee of the plaintiffs in the 145 proceedings. The defendant No.1 had purchased only the possessory rights in respect to the Schedule land from the defendant No.2. When the defendant No.2 have not claimed adverse possession and have duly acknowledged the right of the plaintiffs over the suit land, the question of the defendant No.1 claiming adverse possession does not arise in the facts and circumstances of the case.

34. The learned counsel for the appellant further submitted that substantial question of law arises as to whether the suit was barred under Section 154(1)(c) of the Assam Land and Revenue Regulation 1886. In the opinion of this Court the same also is not a substantial question of law involved in the instant case as there is no foundation laid in the pleadings as regards the bar contained under Section 154(1) (c) of the Assam Land and Revenue Regulation 1886. Be that as it may, it is also relevant to mention that the instant suit was filed for declaration of right title and interest of the plaintiff over the suit land; for recovery of khas possession; for cancellation of the deed of sale bearing deed No.2878/1987-88; for perpetual injunction and also for consequential relief of setting aside the order dated 06.06.1988 passed by the Sub-Deputy Collector in Mutation case No.799/1987-88. The relief of declaration of right title and interest over the suit land; for cancellation of the registered sale deed No.2878/1987-88; for recovery

of khas possession; as well as for perpetual injunction cannot be given by the revenue court and it is only civil Court which has the jurisdiction to do so. As the sale deed was sought to be cancelled by filing the suit, the consequential relief of setting aside the mutation order which was passed on the basis of the registered sale deed No.2878/1987-88, can very well be claimed in the suit. Under such circumstances, Section 154 (1)c) of the Assam Land and Revenue Regulation cannot act as a bar as regards the maintainability of the suit for which the said cannot also be a substantial question of law involved in the instant Appeal.

35. The learned senior counsel for the appellant further submits that the judgment and decree passed in Title Suit No.27/1997 was a nullity inasmuch as the defendant No.2 was admittedly found dead prior the filing of suit as such the same is a substantial question of law involved in the instant Appeal. There is nothing in the pleadings stating that the defendant No.2 had expired and on the basis of which the defendant No.1 has raised the issue in the Appeal. However, a perusal of the First Appellate Court judgment shows that the process server has submitted a report stating that the nephew of the defendant No.2 had expired 12 years ago but when he was asked to write the same he refused to do so. Under such circumstances, there is nothing on record to show that the defendant No.2 had expired that too prior to the institution of the suit.

36. Be that as it may, it is also pertinent to mention that the appellant/defendant No.1 had claimed that he had purchased the suit land from the defendant No.2 and as such, by virtue of order XXII Rule 10 of the CPC, the appellant had stepped into the shoes of the



defendant No.2 and the relief so sought for is against the defendant No.1 and not the defendant No.2 in the suit. Consequently, this aspect of the matter has been duly taken into consideration by the First Appellate Court while deciding the point of determination No.4, the findings of which this Court duly affirms.

37. Consequently, in view of the above, this Court dismisses the instant Appeal thereby affirming the judgment and decree passed by the First Appellate Court dated 18.08.2007 in Title Appeal No.1/2007.

38. Send down the LCR.

39. In the facts of the instant case the respondent herein shall be entitled to the cost of the proceedings.

JUDGE

Comparing Assistant