

Assam Schedule VII, Form No. 133

FORM NO. (J) 3

HEADING OF JUDGMENT ON APPEAL.

District :- Bongaigaon.

IN THE COURT OF CIVIL JUDGE, BONGAIGAON.

**Present :- Smti M.C. Bordoloi.
Civil Judge,
Bongaigaon.**

Wednesday, the 7th day of January, 2015.

Title Appeal No. 15 of 2011.

1. Smt Jyotsna Das.
W/O Sri Kamal Das. R/O.Near Leela Gas Agency (Godown)
Salbari, North Bongaigaon, P.O. & Dist : Bongaigaon. Appellants.

V E R S U S

1. Smti Roma Mitra
W/O Sri Sushil Kr Mitra.R/O.Near Leela Gas Agency (Godown)
Salbari, North Bongaigaon, P.O. & Dist : Bongaigaon. Respondent

The appeal coming for final hearing on (Give date or dates) 17.11.2014 and 18.12 .2014 in the presence of :-

Mr. D. J. Mukherjee, Advocate for Appellant

Mr S. Kr Sarkar, Advocate for Respondent

And having stood for consideration on this 7th day of January, 2015 the Court delivered the following Judgment :-

Contd----P/2

::: J U D G M E N T :::

1. The judgment and decree dated 25.2.2011 passed by the learned Munsiff, Bongaigaon in Title Suit no. 48/2006 is impugned in the instant appeal.

2. Upon receipt of the memo of appeal, the records of Title Suit No.48/2006 was requisitioned from the Court of learned Munsiff, Bongaigaon and notices were issued upon the respondents. The respondents entered appearance and contested the appeal.

3. Brief facts leading to the judgment in appeal is stated hereinunder :

That the plaintiff Roma Mitra wife of Sushil Kr Mitra of Bongaigaon district filed Title Suit bearing no. 30/2002 before the Court of the Civil Judge (Senior Division), Bongaigaon on 26.11.2002 praying for a declaration and permanent injunction. Plaintiff's case was that she was the owner and possessor of a plot of land which was more specifically described in the Scheduled A to the plaint and that the defendant is her adjacent neighbour and that the plaintiff had been living peacefully over a period of 12 years in the scheduled land. It is the further case of the plaintiff that after the purchase of the plot of land which fell on her southern boundary, the defendant constructed a sewerage tank on 17.11.2002 thereon without keeping sufficient gap from the boundary wall demarcating her land with that of the plaintiff thereby violating the rules and regulations of the

Contd....

(3)

Bongaigaon Development Authority, which requires that a gap of five feet be kept from any structure to be erected from any boundary wall. It is also the case of the plaintiff that she had constructed her kitchen and dining area on the southern side of her land and the sewerage tank constructed by the defendant on the scheduled B land was likely to cause nuisance due to emission of foul water and obnoxious smell from the alleged sewerage tank. The plaintiff also averred that defendant failed to concede to the objection raised by the plaintiff and to shift the sewerage tank to some other places in his purchased land whereupon the plaintiff submitted the written complaint before the proforma defendant, to take steps for stalling the construction work of the sewerage tank. As no steps had been taken, the instant suit was filed with the prayer for declaration that the construction of the sewerage tank on the suit land was illegal and that the same is to be demolished and a permanent injunction restraining the defendant from construction the sewerage tank on the suit land alongwith mandatory injunction and cost of the suit.

Defendant's case in brief

4. The defendant entered appearance and contested the suit by filing written statement. In her written statement the defendant besides raising the plea that the suit was devoid of cause of action, averred that the suit was bad for the fact that the plaint is not supported by an affidavit ; that the suit was only filed to harass the defendant. The defendant stated that she had constructed her residential house in her own purchased land having obtained the 'No objection certificate' from the Bongaigaon Development

Contd....

(4)

Authority and on the basis of approved site plan. The defendant stated that she had constructed the septic tank for sanitary latrine according to the approved site plan of the Bongaigaon Development Authority and that there was no scope of creating any problem to the plaintiff through the emission of foul water and obnoxious smell therefrom. Further it is the defendant case that the soak-pit is more than 30 feet away from the alleged boundary wall of the plaintiff and the question of the plaintiff suffering loss therefrom does not arise. Hence, in the above circumstances the defendant prayed for dismissal of the suit with exemplary cost.

5. Upon perusal of the pleading the learned Trial Court framed as many as six issues for adjudication which are given below :

- 1. Is there any cause of action for the suit ?*
- 2. Whether the defendant has violated the rules and regulation while constructing the sewerage septic tank?*
- 3. Whether the plaintiff is likely to face serious nuisance while using the septic tank by the defendants ?*
- 4. Whether the plaintiff is entitled to a decree for declaration as prayed for ?*
5. Whether the plaintiff is entitled to a decree of mandatory injunction ?
6. To what relief parties are entitled ?

6. The plaintiff side adduced evidence of two witnesses and also exhibited some documents. The defendant side, on the other hand, adduced evidence of one witness and also exhibited certain documents.

Contd.....

(5)

7. The learned Trial Court after going through the case record in its entirety passed the judgment dated 25th February, 2011 in the said suit which is impugned in the instant appeal. The appellant assailing the judgment of the learned Trial Court filed in the memo of appeal taking as many as 24 grounds.

8. Learned counsel for the appellant side submitted that the judgment of the learned Trial Court is erroneous, mis-conceived and is liable to be set aside. Learned counsel for the appellant also submitted that the learned Munsiff, Bongaigaon failed to appreciate the evidence in proper perspective and hence the judgment needs to be interfered with. Learned counsel for the respondent submitted that the learned Court below had acted as per the law and has rightly appreciated the evidence taking into account the memo of local inspection to arrive at a just decision in the instant case.

9. Heard both sides. I refrain from reproducing the grounds taken up in the appeal by the appellant in the memo of appeal and rather propose to take up the same when the need arises while discussing the judgment passed by the learned trial Court issue-wise.

10. Issue No.1

Learned Munsiff, Bongaigaon while discussing the issue no.1 -- Whether there is cause of action in the instant suit noted that the cause of action means every act which if traversed would be necessary for the plaintiff to prove in order to support the right to judgment in his favour and decided that there is cause of action for filing the instant suit. Perusal of

Contd....

(6)

the plaint disclosed that the plaintiff had failed the instant suit against the defendant alleging inter-alia that she had constructed the sewerage tank in her house violating the required norms of the Bongaigaon Development Authority without keeping sufficient space between the boundary wall and the septic tank causing great trouble due to the emission of obnoxious smell and other materials from the septic tank and the defendant, on the other hand, disputing the plaintiff's contention averred that the alleged septic tank was constructed without violating the norms of Bongaigaon Development Authority and the same was constructed after obtaining the no objection certificate from the proforma defendant. The rival contention of both the parties discloses that there is a matter which needed adjudication and constitutes a bundle of facts which would be necessary for the plaintiff to prove in order to support the right to a judgment in her favour. The learned trial Court was right in deciding that there was a cause of action in filing of the suit. I concur with the findings of issue no.1 of the learned trial Court.

11. Issue no.2

Issue no.2 relates to the question whether the defendant has violated the rules and regulations while constructing the sewerage tank. The learned trial Court had decided the issue in the affirmative and in favour of the plaintiff. To find out whether the decision of the learned trial Court could be sustained, let me revisit the evidence available on record.

PW 1, Sushil Kr Mitra in his evidence stated that the defendant has purchased a plot of land which is contiguous to his land on

Contd.....

(7)

the southern side and that the defendant had constructed her dwelling house without leaving a gap of five feet from the boundary while violating the rules and regulations of the Bongaigaon Development Authority and that the defendant had constructed the septic tank leaving only a gap of 1.5 inches from his boundary wall. PW 1 further stated that he has his kitchen and dinning area and pucca wall on the southern side of his land and in the event of the construction of the septic tank PW 1 apprehends that it would be difficult to use the dinning and kitchen room for it would emit foul water and obnoxious smell.

In his cross-examination PW 1 revealed that there is a pucca boundary wall between his land and that of the plaintiff and that his bath room and septic tank is at a distance of 1 ½ feet from the said boundary wall. PW 1 further discloses that near his bath room and septic tank his latrine is also situated. PW 1 further discloses that at a distance of 3.2 inches from the boundary wall there is a well which is a concerned of water for the inmates of his house and from a distance of 5 feet there is a tube well from the boundary wall. PW 1 discloses that the Bongaigaon Development Authority had allowed to construct the septic tank leaving a space of 1.60 meters and that she had objected to the Bongaigaon Development Authority vide Ext B (1) that the defendant had constructed a septic tank leaving only a space of 1.28 meter. PW 1 admits that his well is situated at a distance of 5.9 inches and that the defendant has been using the septic tank since 3 years prior to his deposing in the Court in March, 2006.

Contd....

(8)

PW 2 is Kunja Mohan Sarma who is a Junior Engineer at the Bongaigaon Development Authority deposed on oath that the defendant had taken permission from the Bongaigaon Development Authority vide Ext 9 and on 24.5.2002, the then Chairman accorded permission by issuing the no objection certificate. PW 2 discloses that the plaintiff filed an objection to the construction of the defendant on 3.1.2003 and the same was pending at the time of deposing of his deposing in the Court. PW 2 discloses that as per approved plan there is a requirement of leaving a gap of 2 feet as rear set back.

PW 2 further stated that plaintiff had filed an objection on 21.4.2003 alleging that the defendant had constructed the bath room latrine near the plaintiff's well and kitchen which was against the approved plan. PW 2 admitted that no steps have been taken till the time of deposing before the Court in respect of the said allegation.

In his cross-examination PW 2 disclosed that on 24.12.2001 the defendant had secured the 'no objection certificate.'. PW 2 further disclosed that the septic tank was situated at a distance of 2 feet from the boundary wall. PW 2 further disclosed that the Chairman is the final authority in respect of any rule made by the Bongaigaon Development Authority. PW 2 exhibited the site plan of the defendant as Ext B and Ext B (1) disputed septic tank, Ext B(2) the signature of Junior Engineer and Ext B(3) the signature of the Chairman.

DW 1, on the other hand, Kamal Kr Das deposed that he had not violated any rules and regulation of the Bongaigaon Development

Contd....

(9)

Authority and stated that the same was constructed as per the approved plan and further averred that the soak-pit of the septic tank was constructed at more than 30 feet from the septic tank and that adequate precaution was taken so that no emission of materials could take place. DW 1 stated that the alleged well of the plaintiff is 6 feet away from the septic tank and more than 35 to 36 from the soak-pit. So, there is no scope for creation of health hazard. It is further averred by the DW 1 that the septic tank and latrine and bath room of the plaintiff is within 1 ½ feet from her boundary wall. DW 1 exhibited Ext C being the no objection certificate in connection with the transfer of the plot of land, Ext D being the land sale permission and Ext F being the no objection certificate issued by the Chairman, Bongaigaon Development Authority dated 30.5.2002 in the name of the defendant.

When put to cross-examination DW 1 disclosed that as per Ext B the site plan of the bath room and latrine were next to the bath room and there was no objection certificate in respect of such construction. DW 1 further disclosed that there is a gap of 1.6 meters between his building wall and the boundary wall and admitted that there is a gap of .6 meters from his boundary wall and that of the septic tank. DW 1 exhibited Ext 8 (1) being the memo of local inspection and as per Ext 8(1) the boundary wall and the tank was separated by a distance of 17 inches. DW 1 also disclosed that the tank was situated at a distance of 1 ½ feet from the ground and that after construction of the septic tank the Development Authority had come for site verification.

Contd....

(10)

Perusal of the plaint disclosed that plaintiff has filed the instant suit alleging that the defendant does not have the requisite rear set back for construction of the septic tank as per requirement of the Bongaigaon Development Authority.

It is the trite of law that the plaintiff has to prove her own case and cannot depend on the weakness of the defendant's case and cannot take advantage therefrom. Plaintiff has averred that it is required that a 5 feet gap has to be maintained as per norms of the Bongaigaon Development Authority but plaintiff has not exhibited nor proved the said rules of the Bongaigaon Development Authority against whose violation the plaintiff has brought about the instant suit against the defendant. Further more from the perusal of the evidence on record it is seen that as per Ext B which is proposed residential building plan of the defendant, a rear set back of .60 meters is to be maintained from the boundary wall, bounding the plot of the defendant and that of the plaintiff. In perusal of Ext D disclosed that a set back of 1.54 meters is to be maintained on the north. Further perusal of Ext D also disclosed that if the owner on commencement of his work defies the conditions of the no objection certificate he/she shall liable to action requiring further correction as per approved plan. Ext D, in fact, disclosed that it was the prerogative of the Bongaigaon Development Authority to look into the matter as to whether a permit holder constructs his building as per approved plan or not. It is not the plaintiff's case that the proforma-defendant i.e Bongaigaon Development Authority has issued the no objection certificate illegally rather it is contended that the area of rear set back which was permitted was not maintained by the defendant in

Contd.....

(11)

constructing the alleged septic tank.

Though it is averred by PW 2 that a gap of 2 feet is to be maintained by the defendant, but same is not substantiated. Again perusal of Ext 11(1) which a office note submitted in the office file BDA/BP/BLBR/2002/1, it is sent that there was a recommendation for correction of set back to 3.05 meters and the approved in respect of 1.54 m was not with the approval of the of Sub-Committee.

The plaintiff again has failed to prove by adducing cogent evidence as to which rules have been flouted.

From the memorandum of local inspection done by Court on 20.3.2003, it was found that there was a gap of 17 inches maintained between the septic tank with that of the boundary wall, but again, at the risk of repetition, it is seen that plaintiff has failed to show, as to which norms had been flouted as the alleged approval of 1.534 mtrs is again disputed vide Ext 11 (1))

In fact, plaintiff has not established that the structure so constructed by the defendant is constructed in gross violation of law. Accordingly, the decision of the learned trial Court is not sustainable.

The issue is decided in the negative against the plaintiff.

12. Issue no.3

The issue no.3 relates to the point whether the plaintiff is likely to face serious nuisance while using the septic tank by the defendant.

Perusal of the evidence on record it is seen that the plaintiff's bath room and septic tank is at a distance of 1 ½ feet from the

Contd....

(12)

alleged boundary wall and admittedly the plaintiff's latrine is situated near his bath room. It is in the evidence of PW 1 that it is at a distance of 3.2 inches from the boundary wall there is a wall and a tube well at a distance of 5 feet from the boundary wall. PW 1 has also testified to the effect that the kitchen of the plaintiff is 10 feet away and the dining room 15 feet away from boundary wall. From the above evidence of PW 1 it is seen that plaintiff's own septic tank, bath room and latrine is situated nearer to her own kitchen and dining space. It is also an admitted position that the water source of the plaintiff is nearer to her own septic tank within than of the defendant. The soak-pit belonging to the defendant is at a distance of 36 to 35 feet from the disputed boundary wall. Further more that the defendant had constructed a sanitary latrine is not disputed. It is also not in dispute that the septic tank is constructed at a height of 1 ½ feet from the ground. It must be well understood at this juncture that a septic tank means a tank in which the organic matter is disintegrated through bacterial activities and the tank is based on the modern mechanism of eliminating bacteria and harmful materials. A septic tank based on such mechanism cannot be a cause of contamination of water source even if it is situated in proximity to a water source. Further more the fluid materials of the septic tank is absorbed by a soak-pit which is indicator of any over flow from the septic tank. Having understood such mechanism it is seen that a septic tank in normal cases cannot be a cause for contamination of any water source.

It is not the case of the plaintiff that alleged septic tank was constructed unscientifically and not based on modern mechanism.

Hence, in the above circumstances, when the plaintiff has constructed her

Contd.....

(13)

own septic tank is more nearer to her water source and is apprehensive that it could pollute her water source, she failed to show how the defendant's septic tank and not hers could contaminate her water source. Further it is also in the evidence of the PW 1 that defendant have been using using the septic tank since 3 years prior to his deposing in the Court in March, 2006. Hence, admittedly there was no contamination which, belies plaintiff's apprehension and fear that the alleged septic tank could contaminate her water source through the emission of obnoxious smell and materials. Accordingly, I am of the measured opinion that the learned Munsiff, Bongaigaon had rightly decided that the plaintiff is not going to face serious nuisance while the defendant uses the septic tank and I concur with the findings.

This issue is decided accordingly.

13. Issue no.4,5 and 6

Issue no.4,5 and 6 are all being inter related I take up these issues together for consideration. In view of the decisions in issue no.1, 2 and 3 I am of the measured opinion that the plaintiff is not entitled to the relief as prayed for. Accordingly, the findings of the learned trial Court in respect of the reliefs are wrongly arrived at.

The issues are accordingly decided in the negative against the plaintiff.

14. O R D E R

In the result, considering the foregoing discussions the

Contd....

(14)

appeal is allowed on contest with cost. The judgment of the learned trial Court is set aside. The plaintiff's suit is accordingly dismissed on contest with cost.

Prepare a decree accordingly.

Send back the case record of Title Suit no. 48/2006 with a copy of this judgment to the learned Court below.

Given under my hand and the seal of this Court on this 7th day of January, 2015.

Dictated & corrected by me,

(M.C. Bordoloi)
Civil Judge,
Bongaigaon.

(M. C.Bordoloi)
CIVIL JUDGE,
BONGAIGAON.

Contd.....

(15)

APENDIX

1. Plaintiff's exhibit – Ext 1 – Regd Sale deed no.93 dated 20.2.1998.
Ext 2 – Approved sketch map of plaintiff's house.
Ext 3 – NOC of plaintiff's house.
Ext 4 – Complaint against construction of septic tank dated 18.11.2002.
Ext 5 – Complaint against construction of septic tank dated 2.1.2003..
Ext 6- Complainant against construction of Septic tank dated 25.11.2002.
Ext 7 – Complaint against construction of septic tank dated 2.1.2003.
Ext 8 – Case record of Misc.(J) 32.2002.
Ext 8(1) Local Inspection Report with sketch Map made by the Court on 20.3.2003.
2. Defendants Exhibit : Ext B- Approved site plan.
Ext B(1) – Septic Tank in the site plan.
Ext B(2)-Signature of the concerned Jr. Engineer.
Ext C – NOC of BDA.
Ext D – Land sale permission.
Ext E – Regd. Sale deed No.129 dtd. 5.3.2002.
Ext F – NOC of BDA regarding construction of building.
Ext G – Land Holding certificate.
3. Court Exhibit - NIL
4. Plaintiff's witnesses – PW 1 – Sri Sushil Kr Mitra.
PW 2 – Sri Kunja Mohan Baruah.
5. Defendant's witnesses : DW 1 – Sri Kamal Kr Das.
6. Court witness : - NIL

(Smti M.C.Bordoloi)
Civil Judge,Bongaigaon