

Assam Schedule VII, Form No. 132.

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT.

District :- Bongaigaon.

IN THE COURT OF CIVIL JUDGE :::: BONGAIGAON.

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

Friday, the 15th day of December, 2017.

Title Suit No.69 of 2013.

1. Sri Dhiresh Ch. Das,
S/O Late Hiralal Das,
R/O Vill – Raghun and anpur,
P.O. - Boitamari,
P.S. Abhayapuri,
Dist- Bongaigaon, Assam.
2. Sri Dharmeswar Nath,
S/O Sri Chand Mohan Nath,
R/O Vill – Raghun and anpur,
P.O. - Boitamari,
P.S. Abhayapuri,
Dist- Bongaigaon, Assam.

M
15/12/17
**Civil Judge,
Bongaigaon**

Plaintiffs

VERSUS

1. Sri Bishnujyoti Baruah,



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(2)

S/O Late Prafulla ch. Baruah,
R/O Ward No.3, Abhayapuri,
P.S. Abhayapuri,
Dist- Bongaigaon, Assam.

Defendant

The suit coming for final hearing on 20.11.2017.

(I) Given date or dates
in the presence of

Mr. Daniel Das

Advocate for the plaintiffs

Mr. R. N. Das

Advocate for the defendant

and having stood for consideration to this on the 15th day
of December, 2017 the Court delivered the following Judgment:

T.S.69/2013

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

1. This is a suit for specific performance of contract.
2. The plaintiff's case as set out in the plaint is given briefly
hereinunder :

Plaintiff's Case :

3. That the defendant is the lawful owner of a plot of land
measuring 1 katha 10 lecha covered by dag no. 441 under patta no. 287 of
village Abhayapuri under Srijangram Revenue Circle, morefully described in
the schedule to the plaint, with a house standing thereon and that the defendant

Contd.....

15/12/17
Civil Judge,
Bongaigaon



(3)

proposed to sell the scheduled property, which proposal the plaintiffs accepted fixing the total consideration amount at Rs. 14,00,000/- (Rs. Fourteen lakhs) only and accordingly executed an agreement for sale vide serial No. BX-2003, Instrument No. C-2003 dated 15.11.2012 and accordingly paid a sum of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only as advance towards total fixed consideration amount, agreeing further to pay the remaining amount at the time of completion of sale. The defendant acknowledged the received of advance amount and delivered title deeds, periodic patta and papers pertaining to the scheduled properties to the plaintiffs assuring the completion of the sale process within 90 days from the date of execution of the agreement for sale.

It is averred that the defendant delivered possession of the scheduled property to the plaintiff on 15.11.2012 but the plaintiffs allowed the defendant to stay on the suit property till completion of the sale. It is further averred that as per the agreement the defendant was to procure the land sale permission at his own costs and effort but the defendant failed to comply with the terms of the agreement and despite requests neglected the performance of the agreement dated 15.11.2012. It is also averred that the plaintiff have been ready to pay the remaining balance amount to the defendant but the defendant failed to oblige and finding no other alternative the plaintiffs issued a legal notice dated 23.9.2013 requesting the defendant to execute the registered sale deed in their favour receiving the remaining amount but the defendant failed to respond compelling the plaintiff to institute the present suit for declaration that defendant has no legal right to sell the scheduled properties to any other purchasers than the plaintiffs, a decree for declaration that defendant is legally bound to execute the registered sale deed in respect of the suit land in favour of the plaintiff upon receipt of the balance consideration amount, a decree for

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15/12/17
Civil Judge,
Bongaigaon

(4)

permanent injunction and recovery of khas possession and in the alternative for payment of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only with interest @ 11% per annum from the date of payment of advanced money that is from 15.11.2012 alongwith costs of the suit.

Defendant's Plea :

4. The defendant entered appearance and filed his written statement. In his written statement the defendant raised the plea of non-maintainability, absence of cause of action etc. The defendant also averred that the suit is hit by the principle of "frustration of contract" as clause 3 of the agreement dated 15.11.2012 is against the Government Regulation, as vide the alleged agreement obligation was cast upon the defendant solely to obtain land sale permission when in fact, the Government Regulation requires both the seller and the purchaser to submit a joint application before the concerned office to obtain permission for transfer of the suit property, for which the contract has become frustrated. The defendant admitting the execution of the agreement for sale with the plaintiff on 15.11.2012 agreeing to execute the registered sale deed within 90 days from the date of execution of the agreement for sale and the delivery of the title deeds and the receipt of advanced money, denied having delivered possession of the suit property to the plaintiff or that he continued to remain in the suit property on permission from the plaintiff.

It is averred that the defendant having gathered the knowledge that a joint application of both the seller and purchasers is to be filed for securing land sale permission, he required the plaintiffs to put their signatures on the form, at a scheduled date and place, but the plaintiffs failed to turn up and instead filed the suit. The defendant denied having neglected to

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15/12/17
Civil Judge,
Bongaigaon



(5)

perform his part of the contract, rather he alleges inaction by the plaintiffs themselves. The defendant accordingly prays for dismissal of the plaintiff's suit.

5. Upon perusal of the pleadings vide order dated 29.10.2014 the following issues have been framed for adjudication :

I S S U E S :

- 1) *Whether the suit is maintainable in its present form ?*
- 2) *Whether there is cause of action for the suit ?*
- 3) *Whether the defendant entered into an agreement with the plaintiff to sell the suit land vide agreement no. BX-2003 Instrument No. C-2003 dated 15.11.2012 for a consideration of Rs. 14,00,000/- ?*
- 4) *Whether the plaintiff paid a sum of Rs. 11,50,000/- only to the plaintiff on 15.11.2012 towards payment of total consideration money for purchase of the suit land ?*
- 5) *Whether the defendant in pursuance of the alleged agreement for sale of the suit land had delivered possession of the suit land to the plaintiff on 15.11.2012 ?*
- 6) *Whether the plaintiff is ready and willing to perform his part of the contract ?*
- 7) *Whether the plaintiff is entitled to a decree directing the defendant to execute and register the sale deed in favour of the plaintiff against the scheduled land upon*

Contd.....

15/12/17
Civil Judge,
Bongaigaon



(6)

depositing the balance consideration amount by the plaintiff or in the alternative the decree directing the defendant for payment of Rs. 11,50,000/- with interest @ 11% per annum to the plaintiff ?

8) To what relief (s) the plaintiff may be entitled to ?

6. Plaintiff side in order to prove his case examined 3 (three) numbers of witnesses. While the defendant side adduced evidence of 2 (two) witnesses. Both sides adduced documentary evidence as well. Either party cross-examined each others witnesses.

Arguments :

7. I have heard the arguments advanced by the learned counsels of both sides.

7. (i) Learned counsel for the plaintiff submits that the plaintiff has been able to prove successfully the existence of a valid contract for sale between the parties and the payment of advance consideration amount of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only to the defendant for purchase of the suit land. Learned counsel also submits that readiness and willingness on the part of the plaintiffs have also been proved by the plaintiffs. Accordingly, the requirement for passing of a decree for specific performance of contract for sale being duly fulfilled, the Court can exercise its jurisdiction to decree a suit for specific performance of contract. Learned counsel prays the suit be decreed.

7.(ii) Controverting the above submission, learned counsel for the defendant submits that the contract has become infructuous as it is against

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15/12/17
Civil Judge,
Bongaigaon



(7)

public policy and said a contract cannot be legally binding on the parties and question for enforcing the same does not arise. Learned counsel submits that receipt of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only is admitted but decree for specific performance cannot be awarded for the fact that contract has been hit by the doctrine of frustration. Learned counsel urges that plaintiff suit be dismissed.

8. Heard both sides.

9. Perused the case record.

10. My decision on the above issues framed for adjudication alongwith reasons is given hereinunder :

Discussion, Decision and reasons therefor

11. **Issue No. 1 :**

Issue No. 1 relates to the question of maintainability of the suit in the present form.

At this juncture I am reminded of the submissions of the learned counsel for the defendant side. Learned counsel for the defendant submits that the alleged contract dated 15.11.2012 is frustrated due to the operation of "doctrine of frustration of contract" and the alleged contract therefore lose its enforceability. Learned counsel submits that the instant suit for specific performance of a non-enforceable contract is not maintainable. Learned counsel points out that clause 3 of the alleged agreement has led to the frustration of the alleged contract. Defendant has raised the plea of non-maintainability of the suit in his written statement as one hit by the doctrine of frustration of contract.

M
15/12/17
Civil Judge,
Bongaigaon

Contd.....



(8)

Section 56 of the Contract Act provides for the “doctrine of frustration” and same is perused to address the question raised.

Perusal of the quoted provision discloses that the essentials of a doctrine of frustration is based on the impossibility of the performance of the contract when there occurs a changed circumstances, which makes the performance of the contract impossible and parties are absolved from the further performance as they did not promise performance of impossibility. The doctrine comes into play when a contract becomes impossible for performance after it is made on account of circumstances beyond control. This doctrine of frustration is really an aspect of a part of the law of 'discharge of contract'.

Now having comprehended the law relating to the doctrine of 'frustration of contract' when the alleged agreement dated 15.11.2012 is perused, it is seen that at a clause 3 of the alleged agreement, there is a condition that the vendor shall procure all the requisites permission from the concerned departments as per law relating to the sale of the scheduled land and that the vendor shall bear and pay all the out goings and liabilities of the scheduled land and property.

Learned counsel for the defendant submits that due to the entrustment of the responsibility of procuring requisite permissions from the concerned departments on the vendor only the law being that the seller and the proposed buyer both needing to affix their signatures on the application form, for securing permission, said clause cannot be acted upon and is hit by the principles of frustration of contract. Minute perusal of the clause 3 of the alleged agreement discloses that the vendor was only required to procure permission for sale alienation as per law. There is no indication that he is to

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15/12/17
**Civil Judge,
Bongaigaon**



(9)

secure the permission without following the procedure of law. The question of impossibility of the performance does not arise. Though defendant had pleaded that he had required the plaintiffs to affix their signature on the application form at the schedule date and time and due to the inaction of the plaintiff themselves he could not secure permission, yet he could not prove the same by leading cogent evidence.

In his cross-examination DW1 denied the defence suggestion that he had taken the signature of the plaintiff on the application form at the time of execution of the alleged contract and at the time of payment of advance amount.

DW1 had deposed to the fact that he had sent DW2 to inform him to remain present at Abhayapuri on any date to meet the requirements for obtaining sale permission. But DW2 in his cross-examination disclosed that he does not know the plaintiff Dhiraj's title. In his evidence-in-affidavit DW2 disclosed that he came to know the plaintiffs when they came to the house of the defendant in the first week of November and then he learnt that plaintiffs hailed from village Raghunandanpur. From the averment so made by DW2 in his evidence-in-affidavit it is clear that the defendant No. 2 could know the plaintiff only on their visit to the house of the defendant on November 2012. The DW2 not knowing the title or even the name of the plaintiff could not have found out the house of the plaintiff Dhiresh at Boitamari for same is a big place. His evidence of going to plaintiff Dhiraj's house is not believable as the plaintiff is not Dhiraj rather Diresh Ch. Das.

Again PW1 and PW2 maintained in their evidence-in-affidavit and also stood firm in their cross-examination that defendant had taken their signature on the application form at the time of execution for securing

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15/12/17
Civil Judge,
Bongaigaon

(10)

permission for sale of the suit land. Defendant failed to negate the said evidence. It is probable that defendant could have been given the responsibility of securing permission, he being admittedly a Government Official. It is most likely that the entrustment was so made on the believe that he could procure the same without delay, but such entrustment is not against law as claimed.

It is highly probable that the plaintiff who had advanced their money would give signatures on the requisites form on the date of agreement itself as they had parted with a considerable amount of money to the tune of 11,50,000/- (Rs. Eleven lakhs fifty thousand). It is improbable that the plaintiff who were eagerly waiting for the execution of the registered sale deed in their favour would not turn up to give their signature, on request more so, when the balance remaining to be paid is only a meagre amount of Rs. 2,50,000/- (Rs. Two lakhs fifty thousand) compared to the amount the plaintiffs had already parted with. The clause 3 of the agreement alleged is not against law or the Government rules as it clearly mentioned that the permission is to be procured as per law. Defendant failed to prove that plaintiff's inaction had led to the non-fulfillment of the terms of the contract. The question of discharge of contract therefore does not arise, the alleged inaction not being proved.

The 'doctrine of frustration' will not find applicability herein thus. The plea of non-maintainability of the suit on the said ground does not arise. Further it is seen that the instant suit for specific performance contract is maintainable in the Civil Court accordingly. This Court has jurisdiction to try the suit. The suit of the plaintiff is maintainable thus.

The issue is decided in the affirmative in favour of the plaintiff.



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15/12/17
Civil Judge,
Bongaigaon

(11)

12. **Issue No. 2 :**

Issue No. 2 relates to the question of presence of cause of action for the suit.

Plaintiff has filed the present suit for specific performance of contract dated 15.11.2012 alleging non-performance by the defendant. The defendant, on the other hand, admitting the execution of the agreement for sale averred the non-enforceability of the contract and also alleged inaction by the plaintiff causing hindrance in the completion of the sale process.

The rival claims and contentions of the parties, discloses grounds for maintaining a suit. A cause of action for the suit is disclosed.

The issue is decided in the affirmative in favour of the plaintiff.

13. **Issue Nos. 3 and 4 :**


Issue Nos. 3 and 4 being inter-related are addressed together for the sake of convenience and avoid repetition in the discussion.

Issue No. 3 relates to the question whether the defendant entered into an agreement with the plaintiff for sale of the suit land on 15.11.2012 for a fixed consideration at Rs. 14,00,000/- (Rs. Fourteen lakhs).

While **Issue No. 4** relates to the question whether the plaintiff paid a sum of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only to the plaintiff on 15.11.2012 towards total consideration amount.

It is the plaintiff's case that defendant executed an agreement for sale of the suit land fixing the consideration amount at Rs. 14,00,000/- (Rs. Fourteen lakhs) only and that pursuant to the agreement they had advanced the sum of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only

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15/12/17
Civil Judge
Bongaigaon



(12)

to the defendant towards total fixed consideration. Plaintiff in support of his case exhibited Ext 1 being the agreement for sale and Ext 1(1) to Ext 1(5) being the signatures of the defendant, Ext 1(6) to Ext 1(10) signatures of the plaintiff No. 1 and Ext 1(11) to Ext 1(15) signatures of the plaintiff No. 2.

Perusal of the defendant's written statement at paragraph no. 9 specifically discloses that defendants had admitted the fact execution of an agreement with the plaintiffs on 15.11.2012 for sale of the suit land and also the fact of receipt of the advanced amount of money from the plaintiffs pursuant to the agreement and as a token thereof delivery of all title deeds, patta etc relating to the suit land to the plaintiff.

Perusal of the agreement for sale which is not disputed, goes on to show that the parties to the agreement had fixed the consideration amount for sale of the suit land at Rs. 14,00,000/- (Rs. Fourteen lakhs) only and that the plaintiffs being the vendee had paid a sum of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only to the defendant / vendor as advance amount for purchase of the suit land.

In view of the admission of the defendant's written statement and the firm evidence of the PW1 and the Ext 1 goes on to show that there was an 'agreement for sale' between the parties on 15.11.2012 fixing the consideration amount at Rs. 14,00,000/- (Rs. Fourteen lakhs) only and that in pursuance of the agreement, plaintiff had advanced a sum of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only to the defendant.

The issues are decided in the affirmative in favour of the plaintiff.

14.

Issue No. 5 :

Issue No. 5 relates to the question whether the defendant

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15/12/17
Civil Judge,
Bongaigaon

(13)

in pursuant of the agreement for sale dated 15.11.2012 had delivered possession of the suit land to the plaintiff.

It is the plaintiff's case that the suit property had been delivered by the defendant to the plaintiffs upon execution of the agreement for sale alongwith the title deeds, patta etc pursuant to the agreement upon receipt of the advance consideration amount of Rs. 11,50,000/- (Rs. Eleven lakhs fifty thousand) only and that plaintiffs had redelivered it back to the defendant for his use, until completion of the land sale transaction.

PW1 and PW2 both in their cross-examination had admitted the fact of defendant still residing in the suit land. The exhibition of the Ext 2 periodic patta, Ext 3 certified copy of sale deed no. 1380/06 discloses that the same were in the custody of the plaintiff. Ext 3 is the document vide which title was transferred from the original owner Ira Bayan Borbora in favour of the defendant. Its presence in the plaintiff's hand goes on to show that the delivery of the same to the plaintiff. But plaintiff failed to show there was actual physical delivery of possession of the suit land by leading cogent evidence. The presence of defendant in the suit land still does not probalise the plaintiff's plea.

The issue is decided in the negative against the plaintiff.

15.

Issue No. 6 :

Issue No. 6 relates to the question whether the plaintiff is ready and willing to perform his part of the contract.

Plaintiffs in their plaint has categorically pleaded that they are ever ready and willing to perform their part of the contract though the same is not in the required proforma, as has been pointed out by the learned

Contd.....



15/12/17
Civil Judge,
Bongaigaon

(14)

counsel for the defendant. But non fulfillment of on such technicalities would only mar justice.

It is only required that on reading of the plaint in its entirety the condition precedent of readiness and willingness can be inferred. This has been settled by the Hon'ble Supreme Court in a catena of decisions. The plaintiff though had not pleaded in the required form, but it can be gathered from the averment that plaintiff has averred in respect of his readiness and willingness to perform his part of the contract.

PW1 / plaintiff and PW2 in their respective evidence-in-affidavit had averred that they had approached the defendant many times with the balance consideration amount and had requested the defendant to execute the registered sale deed in their favour.

In their respective cross-examination, PW1 and PW2 remained firm that they had met the defendant many times with the balance consideration before the issuance of the advocate notice. Though defendant had elicited from the mouth of PW1 that they had not submitted any document in respect of their visiting the defendant's house but any visit to a house is not put down into writing and no such minute is maintained. Hence, the non-submissions of any document to the effect of any visit to the defendant's house will not be disastrous to the plaintiff's case.

PW1 admitted in his cross-examination that they had not requested the defendant in writing to execute the sale deed. But this is not the general tendency of human being to make request in writing to a private person. Only in official correspondence written applications are made. The issuance of the legal notice dated 23.9.2013 being Ext 6 goes on to show that plaintiff had willingness to perform his part of the contract. Had there been no willingness

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15/12/17
Civil Judge,
Bongaigaon

(15)

and readiness the plaintiff would not have issued the legal notice nor would have instituted the suit. Accordingly, I am constrained to hold from the firm evidence of both PW1 and PW2 that plaintiffs are willing to perform their part of the contract.

The issue is decided in the affirmative in favour of the plaintiff.

16.

Issue No. 7:

Issue No. 7 relates to the question whether the plaintiff is entitled to a decree directing defendant to execute the registered sale deed in favour of the plaintiff. Upon receipt of the balance amount or whether plaintiff in the alternative is entitled to a decree for refund of Rs. 11,50,000/- with interest @ 11% per annum.

In view of the discussions and decisions arrived at in Issue Nos. 1, 2, 3, 4 and 6 I am constrained to hold that the plaintiff is entitled to a decree for specific performance of the contract dated 15.11.2012 on payment of Rs. 2,50,000/- (Rs. Two lakhs fifty thousand) only to the defendant.

In view of the fulfillment of the conditions precedent for obtaining a decree for specific performance of contract, and also considering that defendant had intended to give the suit properties to the defendant which he had expressed so, by the handing over of the title deed etc, I am inclined to exercise my discretion to decree the suit for specific performance of contract. Further the price of land having escalated, the amount of money which the plaintiff parted with in the year 2012 with the elapse of time same would not be sufficient for obtaining any land in present time. Moreover, the alternative decree for payment of money not being pressed by the plaintiff, no decree for refund of money advanced is passed.

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15/12/17
Civil Judge,
Bongaigaon

(16)

The issue is decided in the affirmative in favour of the plaintiff.

17.

Issue No. 8 :

Issue No. 8 relates to the question of entitlement of the plaintiffs to reliefs in the suit.

In view of discussions and decisions arrived at in Issue Nos. 1 to 7, I am constrained to hold that plaintiff is entitled to a decree for specific performance of contract dated 15.11.2012. The defendant is to execute the registered sale deed in respect of the suit land receiving the balance consideration amount and deliver possession of the suit land free from encumbrance to the plaintiffs, consequent to the execution of the registered sale deed, within 120 days from the date of decree, failing which the same will be executed by Officer of the Court as per the provision of Order 21 Rule 34 of the Code of Civil Procedure, on the deposit of balance consideration amount in Court and furnishing of requisite stamp papers by the plaintiff and the plaintiffs shall be then entitled to a decree of possession of the suit premises from the defendant's legal representatives, defendant being deceased already. It has come to the fore, before the pronouncement of the judgment that the defendant has expired on 12.12.2017. The provisions of order 22 Rule 6 CPC would find attraction herein. Hence, the decree is passed against the defendant. The legal heirs of the deceased defendant would thereby be bound by their decree.

The issue is decided in the affirmative in favour of the plaintiff.

18.

ORDER

In the light of the foregoing discussion, plaintiff's suit is decreed on contest with costs.

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RB
15/12/17
Civil Judge,
Bongaigaon

(17)

It is hereby decreed and declared that the plaintiff is entitled to a decree for specific performance of contract against the defendant (since deceased) and on his death against his legal representatives. It is further decreed that the legal heirs of defendant (since deceased), shall execute the registered sale deed in respect of the suit land, on receipt of balance consideration amount of Rs. 2,50,000/- (Rupees two lakhs fifty thousand) and deliver possession of the suit land free from encumbrance to the plaintiffs, consequent to the execution of the registered sale deed, within 120 days from the date of decree, failing which the same will be executed by Officer of the Court as per the provision of Order 21 Rule 34 of the Code of Civil Procedure, on the deposit of balance consideration amount in Court and furnishing of requisite stamp papers by the plaintiffs and the plaintiffs shall be then entitled to a decree of possession of the suit premises from the defendant's legal representatives, defendant being deceased already.

Prepare a decree accordingly.

Given under my hand and the seal of this Court on the 15th day of December, 2017.

M.C. Bordoloi
15/12/17
Civil Judge,
Bongaigaon

M.C. Bordoloi
(M.C.Bordoloi) 15/12/17
CIVIL JUDGE,
Bongaigaon. Civil Judge,
Bongaigaon

Dictated & corrected by me,

M.C. Bordoloi
(M.C.Bordoloi) 15/12/17
Civil Judge,
Bongaigaon Civil Judge,
Bongaigaon



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A P P E N D I X

Plaintiff's witnesses :

PW 1 - Dhiresh Ch. Das.

PW 2 - Dharmeswar Nath.

PW 3 - Dwijendra Das.

Defendant's witnesses :

DW 1 - Bishnu Jyoti Baruah.

DW 2 - Dipen Deka.

Court witness

Nil

Plaintiff's exhibit

Ext 1 - Agreement for sale dated 15.11.2012.

Ext 1(1) to Ext 1(5) - Signatures of the defendant.

Ext 1(6) to Ext 1(10) - Signature of PW1.

Ext1(11) to Ext (15) - Signature of PW2.

Ext 2 - Periodic Patta No. 41 dag no. 441.

Ext 3 - Certified copy of sale deed No. 1340 of 2006.

Ext 4 - Land holding certificate dated 4.12.2009.

Ext 5 - Jamabandi for surveyed villages dated 4.12.2009.

Ext 6 - Legal Notice dated 23.9.2013.

Ext 7 - postal Slip dated 23.9.2013.

Ext 8 - Acknowledgement card dated 24.9.2013.

Ext 8(1) - Signature of the defendant.

Defendant's exhibit

Nil.

15/12/17
[Signature]
Civil Judge,
Bongaigaon

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(M.C.Bordoloi) *15/12/17*

Civil Judge, **Civil Judge,**
Bongaigaon. **Bongaigaon**

