

**HIGH COURT FORM NO. (J) 2**

**HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE**

**District: Sonitpur**

In The Court of the Munsiff No. 1, Tezpur, Sonitpur

**Present: Mrs.Chitra Rani Saikia, AJS**

Saturday, the 16<sup>th</sup> day of February ,2013

**Title Suit No. 44/05**

Sri Raj Kr. Jain-----

Plaintiff

-Versus

Sri Sikhar Chand Chalani-----

Defendant

The suit coming on for final hearing on 2<sup>nd</sup> February, 2013 in the presence of:-  
Sri T. C. Khatri

..... Advocate for the Plaintiff

And

Sri Tushar Kanti Maitra

..... Advocate for the Defendant

And having stood for consideration to this day the court delivers the following judgment.

**JUDGMENT**

1. The plaintiff's case in brief as averred in the plaint is that plaintiff No 1 purchased the apartments of the 1<sup>st</sup> floor by two registered Sale Deeds being Nos 1673 of 1999 dated 29.10.99 and 474 of 1999 dated 31.11.99 from the plot of land belonging to defendant No 1 comprising holding No 1970/1 of Ward No 9 of Tezpur Town within the district of Sonitpur. After the said purchase the plaintiff took possession of the complete 1<sup>st</sup> floor of the said building as absolute owner thereof having common right with other floor owners into the roof of the said building. It is further averred in the plaint that plaintiff No 2 purchased the naked terrace of the 3<sup>rd</sup> floor of the said building from defendant No 1 vide registered Sale Deed No 1799 of 2002 dated 11.12.02 for the purpose of developing the building by raising construction on the 3<sup>rd</sup> and last floor of the building with its top roof keeping open for common use for the occupants of the 1<sup>st</sup> ,2<sup>nd</sup> and 3<sup>rd</sup> floor of the building. After purchase plaintiff No 2 constructed the 3<sup>rd</sup> floor of the building and engineering expert opined that no further construction should be made above the 3<sup>rd</sup> floor

and that was accordingly informed to defendant No 1. But defendant No 1 paid deaf ear to such opinion held by the engineering expert and entered into deal with defendant No 2 without consent of the plaintiffs and thereby permitted defendant No 2 to induct over the top roof of the said building for the purpose of installing there heavy tower of Airtel Mobile Phone service. Hence this case.

2. Defendants contested the suit by filing written statement questioning the maintainability of the suit, inter alia, on the ground that there is no cause of action for the suit. The defendants stated that as there is no finalization of any deal between defendant No 2 and defendant No 2 the case is a false one. Therefore the defendant prays for dismissing the suit with cost.

3. Before proceeding further it would be pertinent to mention here that the plaintiffs prayed before the court to strike out the name of defendant No 2 from this suit and accordingly defendant No 2 was struck out by way of amendment of the plaint. Therefore this suit proceeded only against defendant No 1.

4. Upon the pleadings of both sides this court framed the following issues:

- (i) Whether there is any cause of action for the suit?
- (ii) Whether the suit is maintainable ?
- (iii) Whether the suit is barred by Section 34 of The Specific Relief Act?
- (iv) Whether the plaintiffs have right, title and interest of common use and enjoyment of the top roof of the 3<sup>rd</sup> floor of the building?
- (v) Whether the plaintiffs are entitled to get relief of permanent prohibitory injunction as prayed for?
- (vi) Whether the plaintiffs are entitled to a decree as prayed for?
- (vii) To what relief/reliefs the parties are entitled to?

5. The plaintiff side adduced the evidence of two witnesses in support of its case and exhibited five documents. Exhibit 1 and 2 are Sale Deeds, exhibit 3 is holding tax paid receipt, exhibit 4 the registered Sale Deed No 1799 of 2002 and exhibit 5 is Misc(caveat ) 2004/05. Defendant side adduced evidence of one witness and exhibited no document.

I have heard the arguments of both sides, perused the case record and come to the determination as follows:

**DISCUSSION, DECISION AND REASONS THEREOF:**

**Issue No (i): Whether there is any cause of action for the suit?**

6. The defendant challenged the maintainability of the suit on the ground that there is no cause of action for the suit. It is the settled law that where there is infringement of civil right there is occasion for a suit. In the instant suit it is alleged by the plaintiff that defendant has illegally entered into deal to raise construction over 3<sup>rd</sup> floor of the building infringing rights of the plaintiffs which the defendant denies. Therefore, there arises a question of dispute between the parties which is necessary to be settled. Thus, I find that there is cause of action in this suit.

**Issue No (ii): Whether the suit is maintainable ?**

7. In his written statement the defendant stated that this suit is not maintainable in its present form. Maintainability of a civil suit depends upon the admitted position of pleadings. As there is a cause of action as discussed in issue No 1 the suit is maintainable. Hence this issue is also decided in favour of the plaintiff.

**Issue No (iii): Whether the suit is barred by Section 34 of The Specific Relief Act?**

8. In his written statement the defendant has stated that the plaintiffs did not disclose in the plaint as to how they are entitled to any legal character or to any right to the suit properties and as such the suit is bad u/s 34 of The Specific Relief Act. In the plaint as the plaintiffs have stated that they purchased the 1<sup>st</sup> and 3<sup>rd</sup> floor of the suit property they are entitled to institute this suit. Hence this issue is also decided in favour of the plaintiff.

**Issue No (iv): Whether the plaintiffs have right, title and interest of common use and enjoyment of the top roof of the 3<sup>rd</sup> floor of the building?**

9. In his cross examination PW 1 Narendra Kr. Jain stated that Raj Kr. Jain is his father and he instituted this suit along with Suraj Devi Bothra. He testifies that both the plaintiffs in this suit have not filed any evidence on affidavit as witnesses. According to him on 29.10.99 defendant No 1 sold 440 square feet (20 x22 sq feet) of the 1<sup>st</sup> floor of the suit building being the western part of the 1<sup>st</sup> floor, together with right of user of common passage, approach from road, staircase, sanitary tank, underground storage tank, overhead water tank with common user of roof of the 2<sup>nd</sup> floor vide exhibit 1 Sale Deed. The evidence of PW 1 regarding the fact that vide exhibit No 1 his father was given the right of common user of roof of the 2<sup>nd</sup> floor is not believable because in the latter part of his cross examination PW 1 stated candidly that the top roof of the 2<sup>nd</sup> floor of the building was not allowed to be used as common terrace to his father vide exhibit 1 and 2 Sale Deeds.

10. PW 1 clarified that no terrace of 1<sup>st</sup> floor was sold or allotted for common user to his father. He deposed that defendant No 1 further sold built area of 23x22 square feet (506 square feet ) of the 1<sup>st</sup> floor to his father on 31.11.99 vide exhibit 2 with right of user of

common passage, common road approach, stair case, sanitary tank, underground water storage tank and overhead water tank. He stated that in exhibit 2 there is no mention of common user of any terrace on the 1<sup>st</sup> floor. He further deposed that the remaining portion of the 1<sup>st</sup> floor of the said building is the eastern part.

11. PW 1 deposed in his evidence that defendant No 1 sold the roof of the 2<sup>nd</sup> floor of the said building to plaintiff No 2 vide exhibit 4 permitting her to raise construction up to a height of 10 feet with right of common user of common passage, common road approach, staircase, sanitary tank, underground water storage tank and overhead tank along with common top floor terrace measuring 394 square feet in certain. He stated that there is no mention in exhibits 1, 2 and 4 that the roof of the 3<sup>rd</sup> floor would be permitted for common user of the plaintiffs no 1 and 2. He admitted that the plaintiffs and their family members do not have any authority to use the present roof top of the 3<sup>rd</sup> floor.

12. PW 2 Narendra Kr. Jain is the husband of plaintiff No 2. The evidence of PW 1 is corroborated by the evidence of PW 2 in all material particulars like plaintiff No 1 purchasing the 1<sup>st</sup> floor of the building from defendant No 1 in two terms, his wife purchasing the terrace of the 2<sup>nd</sup> floor up to a height of 10 feet with common user of top floor terrace measuring 394 square feet only vide exhibit 4. In his cross examination PW 2 admitted that defendant No 1 did not allow common user of top floor terrace to the tenants except top floor terrace measuring 394 square feet to his wife alone vide exhibit 4.

13. From the evidence of PW 1 and PW 2 as discussed in paragraph 9, 10 and 11 above it is clearly established that plaintiff No 1 does not have any right, title and interest of common use of the top roof of the 3<sup>rd</sup> floor of the building. Plaintiff No 2 has right of common user of top floor terrace of the building only regarding specified area of 394 square feet. This fact is fortified from the schedules of exhibit 1, exhibit 2 and exhibit 4.

14. At this point it would be appropriate to consider the contention raised by learned senior advocate Sri T.C.Khatri, appearing on behalf of the plaintiff. Learned senior advocate submitted that terrace should be open for all occupants of the building as buildings are constructed to be used conveniently by all users. Learned senior advocate draws the attention of this court to the evidence in cross of DW 1 Sikhar Chand Challani who is the defendant of this suit where defendant No 2 admitted categorically, “ I have given right to common user over the 946 square feet to the plaintiff No 2 out of the top floor” and submitted that in view of such evidence of DW 1 the plaintiffs are entitled to right, title and interest of common use and enjoyment of top roof of the 3<sup>rd</sup> floor of the building.

15. Answering to this contention Sri T.K.Maitra, learned counsel for the defendant refers to the provision of sections 91 and 94 of The Indian Evidence Act, 1872 and submitted that in view of the said provisions of law, the evidence of DW 1 as referred by learned counsel for the plaintiff can not be taken into consideration.

16. Let me quote here the provision of section 91 and section 94 of The Indian Evidence Act, 1872 for better appreciation.

“Section 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property , or of such matter , except the document itself , or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. ..”

“Section 94. When language used in a document is plain in itself , and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.”

17. In the schedules of exhibit 1, exhibit 2 and exhibit 4, the terms of selling of the particular flats to the plaintiffs by defendant No 1 were specifically jotted down and thereby same was reduced to the form of a document as mentioned in section 91 of The Indian Evidence Act, 1872 barring any other evidence except the document itself. Moreover, the language used in the schedules of the said documents is plain in itself and it accurately applies to existing facts. So in view of the provision of sections 91 and 94 of The Indian Evidence Act, 1872 the contention made on behalf of the plaintiffs can not be accepted. Therefore, with all respect to the contention made on behalf of the plaintiffs I reject the contention.

For the aforesaid discussion and reasons this issue is decided partly in favour of plaintiff No 2 only.

**Issue No (v): Whether the plaintiffs are entitled to get relief of permanent prohibitory injunction as prayed for?**

18. In the plaint the plaintiffs have prayed for permanent prohibitory injunction restraining and prohibiting the defendants from construction or installation of any tower for mobile phone service belonging to defendant No 2 with machineries and powerful and heavy generator over the top roof of the 3<sup>rd</sup> floor of the building.

The allegation of installation of tower for mobile phone service by defendant No 2 is no more valid because both PW 1 and PW 2 stated in their cross examination that defendant

No 2 did not install their tower in the top roof of the said building and so his name was struck out as defendant by petition to the court. Hence there is no need for passing any injunction prohibiting the installation of tower for mobile phone service as there remains no issue in this regard.

19. Regarding further construction over the top roof of the 3<sup>rd</sup> floor of the building learned counsel for the plaintiffs Sri T.C.Khatri has submitted that as per report of scientific commission there can not be any further construction in the said building after the 3<sup>rd</sup> floor. He submitted that if further construction is made over the top roof of the 3<sup>rd</sup> floor of the said building, the life of the inhabitants thereof will be in danger. Learned counsel for the defendant Sri T.K.Maitra has fairly submitted that the defendant has accepted the report of scientific commission and accordingly he is not going to make further construction over the top roof of the said building. Therefore, there remains no issue regarding this.

Accordingly I find no point to be decided in this issue.

**Issue No(vi): Whether the plaintiffs are entitled to a decree as prayed for?**

20. As transpires from the discussion in issue No (iv) plaintiff No 1 is not entitled to any right, title and interest of common use and enjoyment of the top roof of the 3<sup>rd</sup> floor of the suit building. As per schedule of exhibit 4 and evidence of PW 1 and PW 2 as discussed in issue No (iv), plaintiff No 2 is entitled to right of common user of top floor terrace of the building regarding specified area of 394 square feet only. Apart from that specified right the plaintiff No 1 is also not entitled to get anything more.

Accordingly this issue is decided partly in favour of plaintiff No 2 only.

**Issue No (vii) : To what relief/reliefs the parties are entitled to?**

21. As per discussion in the foregoing issues plaintiff No 2 is entitled to get the decree of right of common user in the top roof of the said building up to a specified area of 394 square feet only. Apart from that the parties are not entitled to get any other relief.

Hence this issue is decided partly in favour of plaintiff No 2.

**ORDER**

This suit is decreed partly on contest with cost.

Prepare the decree accordingly.

This judgment and order is delivered and operative part of this judgment is pronounced in the open court today, the 16<sup>th</sup> day of February 2013 under my hand and seal.

CHITRA RANI SAIKIA  
Munsiff No 1, Tezpur

## **APPENDIX**

### **A. Plaintiff's witnesses:**

1. PW 1—Sri Narendra Kr. Jain
2. PW 2—Sri Kishan Lal Bothra

### **B. Plaintiff's exhibits:**

1. Exhibit 1 is the Sale Deed;
2. Exhibit 2 is Sale Deed;
3. Exhibit 3 is holding tax paid receipt;
4. Exhibit 4 is the registered Sale Deed No 1799 of 2002;
5. Exhibit 5 is Misc(caveat ) 2004/05.

### **C. Defendant's witnesses:**

1. DW 1: Sri Sikhar Chand Challani

### **D. Defendant's exhibits:** Nil

CHITRA RANI SAIKIA

Munsiff No 1, Tezpur