

GAHC010003222016



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

Case No. : RSA/396/2017

MD ALTAF HUSSAIN MAZARBHUIYA and ORS
S/O- ABDUL SAMAD MAZARBHUIYA, R/O- VILL- BATIRKUPA, P.O-
MATIRGRAM, PORGANA SHIRISPUR, P.S- ALGAPUR, DIST- HAILAKANDI,
PIN- 788151, ASSAM

16: RUKIA BEGUM
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

17: ON THE DEATH OF MUSST. AMINA BEGUM HER LEGAL HEIRS
JAKARIA AHMED LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

18: JAMILA BEGUM
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

19: FARHANA BEGUM LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR

DIST- HAILAKANDI
PIN- 788150
ASSAM

20: FATIMA BEGUM LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

21: JANNATARA BEGUM LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

22: MUNIM RASUL LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

23: RUHITARA BEGUM LASKAR
R/O- VILL- KAKNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788150
ASSAM

24: MUSSTT. MONOWARA BEGUM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

25: SYIDA KHATUN
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI

PIN- 788151

26: LUTFUR RAHMAN
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

27: FATIMA BIBI
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

28: BADRUL ISLAM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

29: NURUL ISLAM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

30: JAINUL ISLAM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

31: ABUL HUSSAIN
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

32: SAFIA BIBI
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR

DIST- HAILAKANDI
PIN- 788151

33: ASIA BIBI
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

34: JILIKA BIBI
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

35: ABDUL JAHIR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
PIN- 788151

36: MUJAMIL ALI
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKANDI

37: FARIJUN NESSA
D/O- MUJAMIL ALI
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKANDI

38: KAMRUL ISLAM
S/O- MUJAMIL ALI
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKANDI

39: NAZRUL ISLAM
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKANDI

40: KAYRUL ISLAM
VILL- MOHANPUR PART-II

P.S- ALGAPUR
DIST- HAILAKANDI

41: JAHIRUL ISLAM
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKANDI

42: RAJIBUL ISLAM
VILL- MOHANPUR PART-II
P.S- ALGAPUR
DIST- HAILAKAND

VERSUS

ON THE DEATH OF MD SURUJ ALI TALUKDAR HIS LEGAL HEIRS ARE
CHAYATUN NESSA TALUKDAR
W/O- LATE SURUJ ALI TALUKDAR

2:KABIL HUSSAIN TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

3:ABUL KAYAR TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

4:SAINA BEGUM TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

5:JAHANARA BEGUM TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

6:AYESHA BEGUM TALUKDAR

VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

7:FARHANA BEGUM TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

8:JAYDUL ISLAM TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

9:TAYAB ALI TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

10:ON THE DEATH OF MOINA MIA TALUKDAR HIS LEGAL HEIRS SABIR
AHMED TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

11:SAKID AHMED TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

12:RUSHNA HAQUE TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

13: AYNUL HAQUE TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

14: BILATUN NESSA
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

15: SIFATUN NESSA TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

16: SAMSUN NESSA TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

17: AZAD UDDIN TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

18: KAMRUL HAQUE TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

19: RUSTANA BEGUM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI

ASSAM

20:KUTOI BEGUM HIS LEGAL HEIRS DILWAR HUSSAIN TALUKDAR
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

21:AMINA BEGUM
VILL- BHATIRKUPA PART-I
P.O- MATIRGRAM
P.S- ALGAPUR
DIST- HAILAKANDI
ASSA

Advocate for the Petitioner : MR. A CHOUDHURY, MR. R A CHOUDHURY, MS. M KONCH,
MR E AHMED

Advocate for the Respondent : MR. A H M R CHOUDHURY, MS. R CHOUDHURY

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 12.06.2023

Date of Judgment & Order : 26.06.2023

JUDGMENT & ORDER (CAV)

Heard Mr. A. Choudhury, learned counsel for the appellants. Also heard Ms. R. Choudhury, learned counsel for the respondents.

2. The present second appeal, under Section 100 of the Code of Civil Procedure, is preferred against the judgment and decree dated 29.09.2015 and dated 30.10.2015, respectively, passed by the learned Civil Judge, Hailakandi, in

Title Appeal No. 32/2014, reversing the judgment and decree dated 14.07.2014, passed by the learned Munsiff No. 1, Hailakandi, in Title Suit No. 139/2006.

3. The brief facts of the case is that the respondents/plaintiffs claimed that they are the non-evictable tenants of the appellants/defendants since the days of their predecessor. Their predecessors, namely, Yakub Ali, Munim Ali & Amir Ali, were the non-evictable tenants under the appellants/defendants since the time of their father- Late Fason Mia and the same devolved upon them through inheritance. The tenancy right over the suit land was declared by the Court of learned Munsiff No. 1 in Title Suit No. 44/1988 and it was confirmed by the Appellate Court in Title Appeal No. 18/1992 and also in the Second Appeal No. 46/1996. The respondents/plaintiffs also averred that the appellants/defendants upon being frustrated on failure to evict the plaintiffs lawfully, the defendants tried to dispossess the plaintiffs from the suit land and finally dispossessed them during the pendency of the Title Appeal in the month of October 2005 to December 2005. In Title Suit No. 139/2006, the defendants contested the case by filing their written statement, wherein, it was contended that the suit is barred by *res-judicata*. The plaintiffs were never in possession of the suit land and the suit land is owned and possessed by them exclusively. Further, the defendants assailed that the suit of the plaintiffs has no cause of action and it is not maintainable.

4. On the pleadings of both the parties, the learned Munsiff No. 1 framed the following issues to decide the case:-

1. Is there any Cause of Action for the Suit?

2. Is the suit barred by limitation?
3. Is the suit barred by principle of *res judicata*?
4. Whether the judgment and decree of the Title Suit No. 44/1988 is binding upon the defendants?
5. Is there any relationship of landlord and tenant between the plaintiff and the defendants?
6. Whether the plaintiff acquired occupancy right over the suit land?
7. Whether the plaintiff was dispossessed by the defendants during the pendency of the instant suit from the suit Schedule-I land?
8. Whether the plaintiff is entitled to restoration of possession of the suit schedule land evicting the defendants therefrom?
9. Whether the plaintiff is entitled to the decrees as prayed?
10. What relief(s) the parties are entitled to?

5. The plaintiffs/respondents examined as many as 5 (five) witnesses and also exhibited some documents in favour of their case. The defendants/appellants did not adduce any evidence, however, they duly cross-examined the plaintiffs' witnesses.

6. The issue No. 1 was decreed in favour of the plaintiffs/ respondents which relates to cause of action of the suit. From the pleadings as well as from the written statement of the defendants, it is seen that there is a claim of legal right which needs to be ascertained and hence, the learned Munsiff No. 1 decided the issue of cause of action in favour of the plaintiffs/respondents.

7. Coming to issue No. 2, wherein, it is discussed by the learned Munsiff No. 1 that the cause of action for the present case starts only from the year 2005 when the defendants made attempts to dispossess the plaintiffs and ultimately, it is claimed that they have been dispossessed during the pendency of this case and accordingly, a fresh cause of action arose in the year 2005. Accordingly, the learned Munsiff No. 1 held that the suit is not at all barred by limitation though the appellants/defendants mainly stressed on the point that the judgment and decree of Title Suit No. 44/1988 passed in the year 1992. But, as the fresh cause of action arose in the year 2005, the learned Munsiff No. 1, accordingly, held that the case is not barred by limitation.

8. Issue No. 3 is on *res-judicata*. The appellants/defendants challenged the maintainability of the suit in their written statement and took the ground that the suit is barred by the principles of *res judicata*. It is the claim of the defendants that the occupancy right of the plaintiffs had already been decided by the competent Court in Title Suit No. 44/1988 and hence, the present suit is barred by *res judicata*. In this context, the plaintiffs took the plea that the earlier Title Suit No. 44/1988 was filed by the predecessor of the defendants against the predecessor of the plaintiffs claiming that the predecessors of the present plaintiffs to be licensee under the predecessor of the present defendants and the same was dismissed. The learned counsel for the plaintiffs argued before the learned Munsiff No. 1 that the present suit, being in conformity with the earlier suit, is not hit by the principles of *res judicata*. Rather, the defendants are barred by *res judicata* in denying the tenant landlord relationship between the parties.

9. The learned Munsiff No. 1 also discussed in detail about the provision of Section 11 of the Code of Civil Procedure, wherein, following conditions are necessary to apply for the principle of *res judicata*:

- i) Identity of matter in issue.
- ii) Identity of parties.
- iii) Same Title.
- iv) Concurrence of Jurisdiction.
- v) Final Decision, i.e. the matter directly and substantially in issue in the subsequent suit was heard and finally decided in the former suit.

10. But, it was decided by the learned Munsiff that the cause of action for the instant suit arose only when the defendants were trying to dispossess the plaintiffs from the suit land, which was already declared to be possessed by them as tenants in the Title Suit No. 44/1988, and thus, the judgment of the earlier suit is the base of their claim and are not being challenged by them and hence, the instant suit filed by the plaintiffs/respondents is not hit by principles of *res judicata*. From the documents as well as evidence brought by the defendants, it is an admitted fact that the position and status of the plaintiffs over the suit land was directly and substantially an issue in Title Suit No. 44/1988, which was finally decided by the competent Court and even affirmed in the appeals, but the instant suit is instituted only with concurrent findings of the suit and the findings or the judgments affirmed by the appellate authority is not reagitated in the present case and thus, the learned Munsiff No. 1 decided that the suit is not barred by the principles of *res judicata*.

11. The issue No. 4 relates as to whether the judgment and decree of the Title Suit No. 44/1988 is binding upon the defendants. It is argued by the defendants that the judgment and decree in Title Suit No. 44/1988 is not binding upon them in any way as the disputed land in the earlier case was only 2 Bighas, but the instant suit is for land measuring 23 Bighas 18 Kathas 9 Chataks and thus, they cannot be debarred from challenging the right of the plaintiffs as claimed in the judgment and decree of Title Suit No. 44/1988. In this context, the learned counsel for the plaintiffs submitted before the learned Munsiff No. 1 that in the earlier suit the occupation and status of the predecessor of the plaintiffs in respect of the suit land was discussed while deciding the issue No. 7, where it was clearly held that the defendants were in possession of entire 23 Bighas 18 Kathas 9 Chataks, which includes the present suit land and hence, the earlier decision will be binding on the defendants. Accordingly, considering the submissions made by both sides, the issue No. 4 was decided in affirmative with an observation that the judgment and decree passed in Title Suit No. 44/1988 is also binding upon the defendants.

12. In regards to issue No. 5, i.e. relationship of landlord and tenant between the plaintiffs and defendants, it was also rightly decided in affirmative by the learned Munsiff No. 1.

13. The issue No. 6 is about the right of occupancy of the plaintiffs over the suit land. In Title Suit No. 44/1988, it has already been held by the Court that the defendants in that suit are the tenants having occupancy right over the land measuring 23 Bighas 18 Kathas 9 Chataks, i.e. the suit land of the instant suit, and admittedly, the plaintiffs, being the descendants of the defendants in Title

Suit No. 44/1988, will have the occupancy right over the entire suit land. With the above observation, the learned Munsiff No. 1 decided the issue No. 6 in affirmative in favour of the plaintiffs.

14. The issue No. 7 relates to dispossession of the plaintiffs by the defendants during the pendency of the case and from the entire circumstances of the case, it was held by the learned Munsiff No. 1 that from the evidence as well as from the documents it is an admitted fact that the plaintiffs are in possession of the suit land and accordingly, the issue of dispossession was also answered in favour of the plaintiffs/ respondents while deciding the said issue.

15. Learned Munsiff No. 1 also decided the issue No. 8 in favour of the plaintiffs/respondents holding that from the above discussion made in other issues, the plaintiffs are entitled for restoration of possession of the suit land by evicting the defendants there from.

16. Issue Nos. 9 & 10, in regards to entitlement of relief, are the most vital and important issues of the entire case. The learned Munsiff No. 1, while deciding the relief entitled by the parties, discussed that in Title Suit No. 44/1988, the occupancy right was declared in favour of the defendants and in the instant case, the plaintiffs are the legal heirs of the defendant Nos. 1 & 2 of the Title Suit No. 44/1988, but the legal heirs of the defendant Nos. 3 to 5 in original Title Suit No. 44/1988 are not made parties in the said suit. In the earlier Title Suit No. 44/1988, the occupancy right was declared in favour of the defendant Nos. 1 & 2 and 3 to 5 and the present plaintiffs are the descendants or the legal heirs of the earlier defendant Nos. 1 & 2, but they have not made party the descendants or the legal heirs of defendant Nos. 3 to 5 in Title Suit

No. 44/1988 for whom also, the occupancy right was declared by the learned Court which was finally affirmed by the competent Court. Accordingly, it was held that in absence of the legal heirs of the defendant Nos. 3 to 5, prejudice may be caused to them and the descendants or the legal heirs of defendant Nos. 3 to 5 are the necessary parties and the present plaintiffs, i.e. the legal heirs of defendant Nos. 1 & 2 in the earlier suit, cannot claim the entire suit land and hence, in their absence or in absence of the necessary party to the suit, the right over the suit land cannot be declared in favour of the plaintiffs. Accordingly, it is held by the learned Munsiff No. 1 that it is not possible to pass an effective decree in absence of all the defendants or their legal heirs in the instant suit. Thus, though the learned Munsiff No. 1 decided all the issues in favour of the plaintiffs with the observation that the plaintiffs have the occupancy right over the suit land and also decided that they have been dispossessed during the pendency of this case, but refused to decree the suit in favour of the plaintiff and also refused to give the consequential relief, i.e. the recovery of khas possession and permanent injunction in favour of the plaintiffs, only on the ground that the descendants of the defendant Nos. 3 to 5 in the original Title Suit No. 44/1988 were not made parties in this case.

17. Accordingly, the learned Munsiff No. 1, Hailakandi, after appreciating the evidence on record and hearing the arguments put forward by both the parties, dismissed the suit on contest.

18. Thereafter, on being highly aggrieved and dissatisfied with the judgment and decree passed by the learned Munsiff No. 1, Hailakandi, the plaintiffs, as appellants, preferred an appeal before the learned Civil Judge, Hailakandi, and

after hearing the arguments from both sides, the learned Civil Judge allowed the appeal on contest without cost and set aside the judgment and decree passed by the learned Munsiff No. 1, Hailakandi, dated 14.07.2014, declaring that the respondents/plaintiffs have occupancy rights over the schedule suit land, i.e. Schedule-I and Schedule-II, described in the plaint and also declared that the respondents/plaintiffs are entitled to recover khas possession of the suit land by evicting the defendants/appellants there from. Accordingly, the appellants/defendants were permanently restrained to interfere in the said plot of land.

19. In regards to issue Nos. 9 & 10, the most vital issues of the suit, it was held by the learned Civil Judge that the learned Court below ought to have framed the issue on the point of necessary parties and both the plaintiffs and the defendants should have given an opportunity to adduce their evidences to that effect. Further it was observed that all the surviving defendants and their legal heirs were already made party to the suit and they have contested the same. Even Amina Begum and all the successor of Late Amir Ali were also impleaded in the suit and accordingly, it is opined that the learned Court below ought to have decreed the suit in favour of the plaintiffs as all other issues were decided in favour of the plaintiffs. Accordingly, the order passed by the learned Munsiff No. 1 was reversed and set aside declaring occupancy right of the plaintiffs/respondents over the suit land and also declared the decree for khas possession evicting the defendants/ appellants from the suit land.

20. Hence, on being aggrieved and dissatisfied with the judgment and decree passed by the learned Civil Judge, Hailakandi, the present second appeal has

been preferred by the appellants/defendants.

21. This Court while admitting the appeal vide order dated 23.05.2018 had formulated the following substantial question of law –

“Whether an issue of non-joinder of necessary parties which is fatal to a suit can be gone into by a court even without any pleadings to that effect raised by the defendants/appellants and overcome the findings of a trial court by the appellate court and decree the suit in favour of the plaintiffs/respondents merely on the submission of the counsel without there being any issue framed?”

22. The learned counsel for the appellants/defendants submitted that the findings of the Appellate Court suffers from perversity in respect of the decree for khas possession and permanent injunction as there is apparently neither any pleadings nor any evidence on record about the dispossession of the plaintiffs/respondents by the appellants/defendants. The learned Appellate Court *suo moto* discussed the issue and given a perverse findings by setting aside and reversing the order passed by the learned Munsiff No. 1, Hailakandi. It is further submitted that the learned Munsiff No. 1, while passing the judgment, rightly discussed that the legal heirs/descendants of the defendant Nos. 3 to 5 were not made parties in that case and in absence of the said necessary parties, the Court cannot pass an effective decree and hence, the learned Munsiff No. 1 rightly dismissed the suit of the plaintiff mainly on the ground that the suit is bad in absence of necessary parties as effective decree cannot be passed in that regard.

23. In this context, the learned counsel for the respondents/ plaintiffs submitted that the decree passed in earlier Title Suit No. 44/1988 was also affirmed in second appeal and the subsequent suit was only for the permanent injunction. No plea of non-joinder of parties was taken by the defendants/appellants and hence, the issue of non-joinder of parties could not be framed as the issues are mainly framed only where there is any denial from the other party. There was no pleading at all in the written statement in regards to necessary parties. The learned Munsiff No. 1 discussed and decided all the issues in favour of the plaintiffs and only while deciding the issue Nos. 9 & 10, the learned Munsiff No. 1 dismissed the suit of the plaintiffs/ respondents only on the ground that the effective decree cannot be passed due to non-joinder of the necessary parties. But, from the judgment passed by the First Appellate Court, it is evident that all the surviving defendants and legal heirs of the Title Suit No. 44/1988 were made as party and hence, effective decree can be passed in favour of the plaintiffs/respondents even if there is no specific issue in regards to necessary party. The suit was earlier filed for permanent injunction, but subsequently when the present respondents/plaintiffs were dispossessed by the defendants/appellants, the plaint was accordingly amended and prayer for recovery of khas possession was also incorporated. Further it is submitted by the learned counsel for the respondents/plaintiffs that the appellants/defendants also admitted their possession over the suit land and thus, it is very much evident that the plaintiffs were dispossessed during the pendency of the case. Accordingly, it is submitted that no illegality has been committed by the learned Appellate Court while setting aside or reversing the order of learned Munsiff No. 1 passed in Title Appeal No. 32/2014.

24. After hearing the submissions made by the learned counsels for both sides, I have carefully gone through the appeal as well as the judgments passed by the learned Courts below.

25. So, it is to be decided that as to whether without any plea in the written statement regarding the non-joinder of necessary parties, can the Trial Court dismiss the suit only on the ground that the suit fails for non-joinder of necessary parties as the effective decree cannot be passed in absence of necessary parties. In the same time, it is also to be decided as to whether the order passed by the learned Appellate Court, reversing the judgment and decree passed by the learned Munsiff No. 1, has a conclusion that all the legal heirs are made parties in the suit and hence, even in absence of any specific issue on non-joinder of parties, the suit can be decreed in favour of the plaintiffs and there cannot be any question of failure of the suit for non-joinder of parties. It is also to be seen as to whether the Court can apply for its discretion in overcoming the findings of the Trial Court without there being any evidence of any parties to the suit, more specifically, the affected parties are questioned and affirmed by the learned Court below.

26. It is a fact that the learned Munsiff No. 1 decided all the issues in favour of the plaintiffs/respondents, but dismissed the suit and also refused to grant any consequential relief only on the ground that all the descendants of the defendant Nos. 3 to 5 are not made parties in this case. It is held by the learned Munsiff No. 1 that the legal heirs/descendants of defendant Nos. 1 & 2 of the original suit were made party, however, the legal heirs/descendants of the other

defendants, i.e. defendant Nos. 3, 4 & 5, were not made party to the suit and hence, in their absence, it will cause prejudice if the suit is decreed in favour of the plaintiffs/respondents. On the other hand, from the discussion made by the learned Civil Judge, it is seen that in absence of any evidence or issue, it is held by the learned Appellate Court that all the legal heirs of the defendants in the earlier suit were made party in this case and hence, the suit cannot be dismissed for non-joinder of necessary parties and with the said observation, the learned Appellate Court decreed the case in favour of the plaintiffs/appellants by reversing or setting aside the judgment and decree passed by learned Munsiff No. 1. In the judgment passed by the learned Munsiff No. 1, there was a specific observation that the plaintiffs did not made the legal heirs/descendants of the defendant Nos. 3, 4 & 5 as a party to the suit. On the other hand, without any evidence or any issue the Appellate Court observed that all the surviving defendants and the legal heirs of the defendants are already made party in this case and hence, there cannot be any ground for dismissal of the suit only on the ground of non-joinder of necessary parties.

27. In this context, a decision of the Hon'ble Supreme Court reported in **(2008) 17 SCC 491 [Bachhaj Nahar Vs. Nilima Mandal & Anr.]** can be relied on, wherein, it has been held that "the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon."

28. Further, in paragraph No. 10 of the aforesaid judgment, it has been held as under:

10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are :

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

(ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

29. It is a fact that the learned Munsiff No. 1 decided all the issues in favour of the plaintiffs. But, while deciding the issue Nos. 9 & 10 in regards to entitlement of relief, the learned Munsiff No. 1 has come to a conclusion that no effective decree can be passed due to absence of the necessary parties and made an observation that the legal heirs of the defendant Nos. 3 to 5 of the original Title Suit No. 44/1988 were not made parties and hence, while refusing the prayer for relief, the learned Munsiff No. 1 also refused for any consequential relief and dismissed the suit accordingly. It also cannot be denied that no evidence was led by the parties and no issue on necessary parties was framed by the learned Munsiff No. 1 and hence, no evidence was led to that effect by the parties, i.e. neither by the plaintiffs nor by the defendants. But, at the time of deciding the Title Appeal, it is held by the learned Civil Judge that the learned Munsiff No. 1 could have framed the issue at any point of time before passing the judgment or could have given an opportunity to the parties to led evidence on the said

issue. But, without giving any opportunity to the parties and also without framing any issue to that effect, the suit of the plaintiffs was dismissed. But, at the time of argument or at the time of hearing of the appeal, the learned Civil Judge observed that all the surviving defendants and the legal heirs of the other defendants to the original suit are already made party by the plaintiffs and hence, the observation made by the learned Munsiff is not tenable and accordingly, the learned Civil Judge reversed and set aside the judgment and order passed by the learned Munsiff No. 1.

30. So, from the entire discussions made above, it is seen that the plaintiffs/respondents could established their entitlement for a declaration of occupancy right over the suit land as a tenant and it is seen that in the earlier suit also, their occupancy right was affirmed in the second appeal. However, the subsequent suit has to be instituted for other relief. The issue on necessary parties also could not be framed by the learned Court below as there was no pleading to that effect. However, the Court had the authority to frame an additional issue if required at any stage of the case. But, without framing any issue or without giving any opportunity to the parties to led evidence, the learned Munsiff No. 1 dismissed the suit of the plaintiff though all the issues were discussed and decided in favour of the plaintiffs/ respondents. On the other hand, the learned Civil Judge had observed that though there is no specific issue on the necessary parties, but from the plaint itself, it is very much evident that all the surviving defendants and legal heirs of the deceased defendants are already made party in the suit and hence, even without going through the evidence of the parties, it can be seen that all the necessary parties are there in the plaint. Moreso, it is seen that the occupancy right has already

declared in favour of the plaintiffs or the defendants in earlier suit which is already affirmed in the Second Appeal and hence, the plaintiffs or the defendants in earlier suit cannot be prejudiced even if for the sake of argument, it is admitted that all the descendants of the defendants on the earlier suit are not made party. Accordingly, I do not find any mistake or illegality committed by the learned Civil Judge, Hailakandi, while setting aside and reversing the order of learned Munsiff No. 1, Hailakandi, passed in Title Suit No. 139/2006.

31. Accordingly, in view of the aforesaid facts and circumstances and discussion, the substantial questions of law have been answered in the above manner and the same is decided against the present appellants/defendants.

32. Thus, I am of the opinion that the present second appeal has no merit and accordingly, the same stands dismissed without any cost affirming the judgment and decree dated 29.09.2015 and dated 30.10.2015, passed by the learned Civil Judge, Hailakandi, in Title Appeal No. 32/2014.

33. Registry to transmit back the records of the case to the learned Courts below forthwith.

JUDGE

Comparing Assistant