

GAHC010245642023



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

Case No. : RSA/193/2023

JAKIRUL ISLAM AND 3 ORS
S/O LATE SOMIR ALI @ SOMIR SHEIKH RESIDENT OF VILLAGE KAZIPARA
PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

2: MISS MORJINA BEGUM
D/O LATE SOMIR ALI @ SOMIR SHEIKH
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

3: MUSFICA BEGUM
D/O LATE SOMIR ALI @ SOMIR SHEIKH
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

4: JAHINUR ISLAM
S/O LATE SOMIR ALI @ SOMIR SHEIKH
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
VERSUS

KARIFUDDIN AND 33 ORS.
S/O LATE FARAZULLA
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI

ASSAM 783371

2:MD. SHARIFUDDIN
S/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
3:MD. AHIJUDDIN

S/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
4:MD. JALUFUDDIN
S/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
5:MUSST HAJIRAN NESSA
D/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
6:MUSSTT. GAHIRAN NESSA
D/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
7:MUSSTT. JAHIRAN NESSA
D/O LATE FARAZULLA

RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
8:JAHANARA
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI

PS CHAPAR
DIST DHUBRI
ASSAM 783371

9:MUSSTT. JAMILA
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

10:MD. BABLU AHMED

D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

11:MUSST. HALIMA BEWA
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

12:MD. ZAKIR HUSSAIN
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

13:MD. JAMAL HUSSAIN
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

14:MUSST. RUMUNI BEGUM
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

15:MUSST. ASINA BEGUM
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI

PS CHAPAR
DIST DHUBRI
ASSAM 783371
16:MD. HUSSAIN ALI
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
17:MD. NOOR HUSSAIN
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
18:MD. AYUB HUSSAIN
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
19:MUSST. RINA BEGUM
D/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
20:MD. SHAHIJUDDIN
S/O LATE AYNUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
21:MD. DALIBUDDIN
S/O LATE FARAZUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
22:MD. SHURABUDDIN
S/O LATE FARAZUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
23:MUSST. FAREMJAN NESSA
D/O LATE FARAZUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI

PS CHAPAR
DIST DHUBRI
ASSAM 783371
24:MUSST. MOZIDA BEWA
S/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
25:MUSST. REHENA KHATUN BEWA
W/O LATE MOIDUL ISLAM
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
26:MD. REZAKUL ISLAM
S/O LATE MOIDUL ISLAM
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
27:MD. RAFIQUUL ISLAM
S/O LATE MOIDUL ISLAM
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
28:MUSSTT. MUDHUR SMITA ISLAM
D/O LATE MOIDUL ISLAM
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
29:MD. MOINUL ISLAM
S/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
30:MD. MONIRUL ISLAM
S/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371
31:MD. MEHBUB ISLAM
S/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI

PS CHAPAR
DIST DHUBRI
ASSAM 783371
32:MD. MOFIZ ISLAM
S/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

33:MUSST. KHOTEJA NESSA
D/O LATE KALILUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

34:MD. AZAD ALI
S/O LATE AINUDDIN
RESIDENT OF VILLAGE KAZIPARA PART I GHUNIMARI
PS CHAPAR
DIST DHUBRI
ASSAM 783371

Advocate for : MR. M A SHEIKH
Advocate for : MR. S I TALUKDAR appearing for KARIFUDDIN AND 33 ORS.

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER (ORAL)

Date : 14-11-2023

Heard Mr. M.A. Sheikh, learned counsel for the appellants and Mr. A.R. Sikdar, learned counsel for the respondents.

2. The respondents are the decree holder in respect of a judgment and decree dated 09.03.2009 in Title Suit No. 112/2007 passed by the Court of learned Munsiff, Bilasipara at Dhubri, which had been confirmed by the judgment and order dated 01.11.2011 in RSA No. 277/2011. Accordingly, for

execution of the decree, Title Ex. Case No. 03/2011 had been instituted by the respondents in the Court of learned Munsiff, Bilasipara at Dhubri. The present petitioners/appellants claiming adverse possession over the suit land involved in the decree in favour of the respondents filed an application under Order XXI Rule 97 and 101 of the CPC read with Section 47 of the CPC resisting the execution of the decree. Order XXI Rule 101 makes it explicit that an application under Order XXI Rule 97 or Rule 99 shall be determined by the Court in respect of all questions including questions relating right, title and interest of the property arising between parties and not by a separate suit for the purpose. Accordingly, it has to be understood that the application under Order XXI Rule 97 read with Section 47 of the CPC would have to be understood to be a proceeding in the nature of a suit. The application of the petitioners/appellants under Order XXI Rule 97 and 101 read with Section 47 of the CPC was rejected by the order dated 17.09.2019 in Misc. (J) Case No. 65/2012 passed by the Court of learned Munsiff, Bilasipara at Dhubri.

3. On dismissal of the resistance to the execution of decree under Order XXI Rule 97 and 101 read with Section 47 of the CPC, the appellants instituted an appeal under Section 96 read with Order XLI of the CPC which was registered as Misc. Appeal No. 16/2019. The Misc. Appeal No. 16/2019 was determined by the learned appellate Court being the Court of the Civil Judge (Sr. Div.), Dhubri by the judgment dated 05.08.2022. The very first paragraph of the judgment dated 05.08.2022 provides as extracted:

“1) The appeal under Section XLIII Rule 1 of the CPC has been preferred by the appellant against the judgment and order dated 17/09/2019 passed in Misc. (J) Case No. 65/2012 by the Ld. Munsiff, Bilasipara.”

4. The afore-extracted paragraph of the judgment dated 05.08.2022 makes is discernible that the learned Civil Judge proceeded with the appeal

understanding it to be an appeal under Order XLIII Rule 1 of the CPC. Order XLIII Rule 1 of the CPC is extracted as below:

“1. Appeal from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely:—

a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court [except where the procedure specified in rule 10A of Order VII has been followed];

2[***]

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;

3[***]

(f) an order under rule 21 of Order XI;

4[***]

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

[(ja) an order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that Order is appealable.]

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

6[***]

(n) an Order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

5[(na) an order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent persons;]

7[***]

(p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;

(r) an order under rule 1, rule 2 [rule 2A], rule 4 or rule 10 of Order XXXIX;

(s) an order under rule 1 or rule 4 of Order XL;

(t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;

(u) an order rule 23 [or rule 23A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

2[***]

(w) an order under rule 4 of Order XLVII granting an application for review.”

5. In respect of which order an appeal would lie under Order XLIII Rule 1 is

provided therein from sub-clauses (a) to (w), but a perusal thereof no provision is found that a judgment or order that may have been passed in an application under Order XXI Rule 97 and 101 would be also be included in Order XLIII Rule 1. Further as already expressed, Order XXI Rule 101 requires that an application for resisting decree would not be decided in a separate suit, meaning thereby that the application itself would be decided in the manner as if it is a suit of its own.

6. As the determination of an application under Order XXI Rule 97 and 101 requires it to be decided in the manner of a suit, it is for this reason that any order passed in the application is not included in the orders that may be appealable under Order XLIII Rule 1.

7. We have perused the memo of appeal in Misc. Appeal Case No. 16/2019 of the appellants wherein the appellants are specific that it is an appeal under Section 96 read with Order XLI of the CPC and not an appeal under Order XLIII Rule 1 of the CPC. As the appellate Court had proceeded in a manner not to be an appeal under Section 96 read with Order XLI, considering it to be an appeal under Order XLIII Rule 1 of the CPC, we interfere and set aside the judgment dated 05.08.2022 in Misc. Appeal No. 16/2019 and remand the matter back to the learned Civil Judge, Dhubri for a fresh adjudication by considering the appeal instituted by the appellants to be an appeal under Section 96 read with Order XLI of the CPC. Both parties to appear before the learned Civil Judge, Dhubri on 18.12.2023.

8. We are clarifying that the interference of the judgment dated 05.08.2022 in Misc. Appeal No. 16/2019 is not to be construed that the issues have been decided on its merit, and it is only a technical reason that the appeal is to be given its consideration as an appeal under Section 96 read with Order XLI of the

CPC and it will be open for the learned Civil Judge to decide the appeal in any appropriate manner, as may be advised.

Regular second appeal stands disposed of as indicated above.

JUDGE

Comparing Assistant