

GAHC010047072024



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

Case No. : CRP(IO)/96/2024

JAGADISH RABHA AND 3 ORS.

S/O- LATE TARINI RABHA, R/O- VILL.- BORIPARA, P.O. SINGRA, P.S. BOKO,
DIST. KAMRUP, ASSAM

2: RAMAL RABHA

S/O- LATE DATTU RABHA

R/O- VILL.- BORIPARA

P.O. SINGRA

P.S. BOKO

DIST. KAMRUP

ASSAM

3: DALIM RABHA

S/O- LATE DHUTI RAM RABHA

R/O- VILL.- BORIPARA

P.O. SINGRA

P.S. BOKO

DIST. KAMRUP

ASSAM

4: GANESH MANDIR

REPRESENTED BY ITS PRESIDENT SRI BHAKTI RAM RABHA

SITUATED AT VILLAGE- BORIPARA

P.O. SINGRA

P.S. BOKO

DIST. KAMRUP

ASSA

VERSUS

CHINTA BALA RABHA AND 3 ORS.

W/O- LATE GOLOK CH. RABHA, R/O- VILL.- CHUKUNAIPARA, P.O. SINGRA,
P.S. BOKO, DIST. KAMRUP, ASSAM

2:NITYANANDA RABHA
S/O- LATE GOLOK CH. RABHA
R/O- VILL.- CHUKUNAIPARA
P.O. SINGRA
P.S. BOKO
DIST. KAMRUP
ASSAM

3:MAHANANDA RABHA
S/O- LATE GOLOK CH. RABHA
R/O- VILL.- CHUKUNAIPARA
P.O. SINGRA
P.S. BOKO
DIST. KAMRUP
ASSAM

4:SASHIDANANDA RABHA
S/O- LATE GOLOK CH. RABHA
R/O- VILL.- CHUKUNAIPARA
P.O. SINGRA
P.S. BOKO
DIST. KAMRUP
ASSA

For the Petitioner(s) : Mr. M. Talukdar, Sr. Advocate
: Mr. P. P. Dutta, Advocate

For the Respondent(s) : None appears.

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 05.04.2024

Heard Mr. M. Talukdar, the learned counsel appearing on behalf of the Petitioners. None appears on behalf of the Respondents.

2. The instant application has been filed challenging the order dated 13.12.2023 passed in Misc.(J) Case No.238/2023 arising out of Title Appeal No.4/2018 by the Court of the Civil Judge, (Senior Division) Kamrup at

Amingaon.

3. From the records, it reveals that an application was filed under Order XLI Rule 25 read with Section 151 of the Code of Civil Procedure, 1908 for framing additional issues before hearing the said appeal. From a perusal of the said application which has been registered and numbered as Misc.(J) Case No.238/2023, an additional issue which the petitioners sought to be framed is "whether the said suit, there is mis-joinder and non-joinder of necessary parties and liable to be dismissed the said suit".

4. To the said application, the Respondents herein filed objections. The learned First Appellate Court rejected the said application vide the said impugned order stating inter alia that the pleadings of the Petitioners herein who were the Appellants in the said appeal did not in any way raise a pertinent question of law or fact regarding the suit being bad for mis-joinder and non-joinder of necessary parties. The learned First Appellate Court also opined that the Court had gone through evidence led by the parties and even after perusal of the evidence as per the learned First Appellate Court framing of issues regarding suit for being bad for mis-joinder and non-joinder of necessary parties is not necessary. Accordingly, the said application was rejected and the said Title Appeal thereupon was fixed for hearing on merits.

5. This Court pursuant to the filing of the instant petition, vide an order dated 06.03.2024 issued notice and further stayed the proceedings in Title Appeal No.4/2018 till the next date. The record reveals that the service have been duly affected upon the Respondents through dasti which aspect have been duly recorded in the order dated 27.03.2024. In spite of that, the Respondents did not care to appear. Under such circumstances, this Court takes up the instant proceedings for disposal at this stage.

6. This Court has duly heard Mr. M. Talukdar, the learned counsel appearing on behalf of the Petitioners who submitted that the Title Appeal No.04/2018 is directed against the judgment and decree dated 11.01.2018 passed in Title Suit No.283/2014. He submitted that in the written statement filed in the suit by the Petitioners, a specific preliminary objection was taken as regards the maintainability of the suit at paragraph No.3 on the ground of mis-joinder and non-joinder of necessary parties. Though that preliminary objection was taken but no issues were framed by the learned Trial Court which is one of the grounds taken in the Memo of Appeal terms with Section 105 of the Code of Civil Procedure, 1908. He therefore submitted that this aspect as regards mis-joinder and non-joinder of necessary parties ought to have been taken into consideration by the learned First Appellate Court while adjudicating the appeal or the learned First Appellate Court taking into account that the said issue was not framed ought to have exercised the powers under Order XLI Rule 25 to remand the suit to the learned Trial Court by framing the specific issue for decision. It is under such circumstances the application was filed which was registered and numbered as Misc.(J) Case No.238/2023. The learned counsel submitted that although written objection was filed but the application under Order XLI Rule 25 could not have been taken for decision prior to deciding the Appeal inasmuch the said application had to be decided along with the Appeal and therefore, a gross illegality has been committed by the learned First Appellate Court.

7. I have heard the learned counsel for the Petitioners. This Court had duly perused the written statement wherein a specific preliminary objection has been taken as regards mis-joinder and non-joinder of necessary parties. Admittedly, no issue was framed on that aspect in the suit. The record further reveals that

the said aspect of non-joinder and mis-joinder is taken as a ground of objection in terms with Section 105 of the Code and to that effect, the ground of objection in the Memo of Appeal is enumerated at Serial No.5. This Court further takes note of the provisions of Order XLI Rule 1 of the Code which stipulates that the Appellant has a right to urge or be heard in support in any of the grounds of objections set forth in the Appeal. The power which is available with the learned First Appellate Court under Order XLI Rule 25 is a power to be exercised by the Court basing upon the grounds of objections so taken or urged during the hearing of the Appeal. The filing of the application under Order XLI Rule 25 was not necessary inasmuch as it is for the Appellate Court to decide as to whether the Appeal ought to have been remanded or the appeal could have been decided by the First Appellate Court. It is absolutely within the discretion of the First Appellate Court to exercise the powers under Order XLI Rule 25 of the Code or not. However in the instant case, the learned First Appellate Court vide the impugned order pre-decided the said ground of objection even when the appeal was not taken up for hearing. The impugned order therefore is not in consonance with the provisions of Order XLI Rule 31 of the Code.

8. Therefore, the said impugned order dated 13.12.2023 passed in Misc. (J) Case No.238/2023 is set aside with a direction to the learned First Appellate Court to decide the Appeal on its merits including the ground of Objection No.5 which pertains to mis-joinder and non-joinder of necessary parties and in the circumstances, the learned Appellate Court is of the opinion that there is a requirement for remanding the suit by framing an issue in that regard, the learned First Appellate Court would be at discretion to do so but the said exercise has to be made only at the time of pronouncing the judgment in terms with Order XLI Rule 30. This Court further observes and directs that the learned

First Appellate Court shall decide the appeal being Title Appeal No.04/2018 without being influenced by the observations made in the impugned order dated 13.12.2023 passed in Misc. (J) Case No.238/2023.

9. The order of stay dated 06.03.2024 passed by this Court is vacated and the Petitioners herein are directed to produce a certified copy of the instant order before the learned First Appellate Court on 30.04.2024 and on the said date, the learned First Appellate Court shall proceed with the said appeal by duly informing the counsels representing the Respondents in the said appeal.

10. In view of the above, the instant petition stands disposed of.

JUDGE

Comparing Assistant