

**THE HIGH COURT OF TRIPURA  
AGARTALA**

*RSA NO. 65 OF 2011*

**APPELLANTS :**

**1. Sri Prasanna Kapali,**  
S/O. Late Prafulla Kapali,

**2. Shri Paritosh Kapali,**  
S/O. Late Prafulla Kapali,

**3. Shri Prabhat Kapali,**  
S/O. Late Prafulla Kapali,

**4. Shri Pandav Kapali,**  
S/O. Late Prafulla Kapali,

**5. Shri Pranay Kapali,**  
S/O. Late Prafulla Kapali,

- All are residents of Vill.- Machmarra,  
P.O. Machmarra, P.S. Pecharthal,  
District-North Tripura,

**BY ADVOCATES :**

Mr. A. Lodh,  
Mr. M. Dutta,

- *V/s* -

**RESPONDENTS :**

**1. Shri Rabindra Kapali,**  
S/O. Late Kumud Chandra Kapali,

**2. Shri Balaram Kapali,**  
S/O. Late Kumud Chandra Kapali,

**3. Shri Jagannath Kapali,**  
S/O. Late Kumud Chandra Kapali,

**4. Smti. Supreeti Choudhury(Kapali),**  
W/O. Shri Subal Choudhury,  
D/O. Late Kumud Chandra Kapali,

**5. Smti. Bani Bala Sarkar(Kapali),**  
W/O. Shri Kanu Sarkar,  
D/O. Late Kumud Chandra Kapali,

**6. Smti. Rani Bala Das(Kapali),**  
W/O. Shri Samar Das,  
D/O. Late Kumud Chandra Kapali,

- All are resident of vill.-Machmarra,  
P.O. Machmarra, P.S. Pecharthal,  
District-North Tripura,

**BY ADVOCATES :**

Mr. S. Bhattacharji,  
Mr. S. K. Patari,

**BEFORE  
THE HON'BLE MR. JUSTICE S.C. DAS**

Date of hearing : **19.06.2015.**

Date of delivery of Judgment  
& order : **06.07.2015.**

Whether Fit for Reporting : 

| Yes | No |
|-----|----|
|     | √  |

**JUDGMENT & ORDER**

This second appeal, preferred under Section 100 of the Code of Civil Procedure, 1908, has been admitted for hearing on the following substantial question of law :-

***"1. Whether non-consideration of the evidence on record itself can be considered as perverse and as to whether such perversity itself liable the impugned judgment?"***

2. Heard learned counsel, Mr. A. Lodh for the appellants and learned counsel, S. Bhattacharji for the respondents.

3. The respondents as plaintiffs (hereinafter mentioned as 'plaintiffs') instituted Title Suit No.04 of 2009 in the Court of

Civil Judge, Junior Division, Kanchanpur, North Tripura, *inter alia*, praying for declaration of their right, title and interest in the suit land and for recovery of possession against the appellants herein, arraying them as defendants (hereinafter mentioned as 'defendants').

4. In their plaint, the plaintiffs, *inter alia*, contended that their father, Kumud Chandra Kapali and the father of the defendants, Prafulla Kapali were full blood brothers and Kumud Chandra Kapali died on 23.03.2002. Prafulla Kapali died in the year 2001. During their lifetime they had been residing in the separate homestead with their respective family members and in separate mess. The suit land described in the schedule of the plaint belonged to Kumud Chandra Kapali. On 15.05.1990 Prafulla Kapali, father of the defendants, being very poor, approached Kumud Chandra Kapali and made a request to cultivate the suit land and accordingly, being full blood brother, Kumud Chandra Kapali had given consent to the proposal made by the father of the defendants and accordingly, Prafulla Kapali started cultivation of the suit land being a permissive possessor. In the record of right, i.e., in Khatian No.120/2 of Mouja-Uttar Machmarra, the name of Prafulla Kapali was recorded as permissive possessor of the suit land. After death of Prafulla Kapali in the year 2001, the plaintiffs requested the defendants to vacate the suit land and to handover possession of the suit land to them with a view to cultivate the land, but the defendants did not vacate the suit land. On 01.08.2008 at about 08-00 am

the plaintiffs requested the defendants to vacate the suit land, but they did not pay any heed. The plaintiffs thereafter on 03.11.2008 sent an Advocate's notice to the defendants to vacate the suit land within 15 days and in reply to that Advocate's notice, the defendants through their Advocate falsely contended that the suit land was sold out by father of the plaintiffs to father of the defendants in the year 1984 at a consideration of Rs.10,000/- and thereafter handed over possession to the father of the defendants and thereby the father of the defendants had been possessing the suit land. The claim made by the defendants was false and the defendants have no right, title and interest in the suit land and hence, the plaintiffs prayed for decree of declaration of right, title and interest and for recovery of possession.

5. The defendants by filing a joint written statement, *inter alia*, contended that father of the plaintiffs, namely, Kumud Chandra Kapali and father of the defendants, namely, Prafulla Kapali were full blood brothers and they jointly purchased about 24 acres of land in the year 1949 at Mouja-Uttar Machmarra, Tehashil-Machmarra, North Tripura and had been jointly owning and possessing the land. They constructed their residential houses and started living there with their family members. In the year 1984 they mutually partitioned the landed property purchased by them and thereafter enjoying their respective shares exercising all rights, title, interest and possession as per verbal agreement. Though there was a mutual partition, but

some portion of the land remained in possession of the father of the defendants since the father of the defendants was cultivating that part of the land. After mutual partition, father of the plaintiffs tried to sell the suit land to one Santiswar Barua to which father of the defendants raised objection and since the land was in his possession, the father of the defendants intended to purchase the suit land and accordingly, in presence of many villagers including the plaintiffs, father of the defendants paid Rs.10,000/- towards price of the land as per the claim of the father of the plaintiffs and father of the plaintiffs handed over physical possession of the suit land to the father of the defendants. That settlement was arrived on 06.06.1984 and from that day the father of the defendants and after his death the defendants had/have been possessing the suit land exercising all rights, title and interest and possession and the name of Prafulla kapali, the father of the defendants, was recorded in the Khatian as a permissive possessor. Due to some family dispute between the plaintiffs and defendants, the plaintiffs have threatened to teach a good lesson to the defendants and thereafter instituted the suit to dispossess the defendants from the suit land. The plaintiffs had/have no right, title and interest in the suit land and the suit should be dismissed.

6. The trial Court considering the pleadings of the parties framed five issues, namely :-

***"1. Whether the suit is maintainable in its present form and nature?"***

**2. Whether the plaintiffs have any right, title or interest over the suit land?**

**3. Whether the plaintiffs have any cause of action to institute the instant suit?**

**4. Whether the plaintiffs are entitled to get any relief or reliefs as prayed for? If so, up to what extent?**

**5. Whether any other relief or reliefs the parties are entitled?"**

7. In course of trial, plaintiff No.2 examined himself as PW1 and also examined two more witnesses, namely, PW2, Sri Mohanlal Kapali and PW3, Sri Gopal Baishya and in support of their case, they have proved Khatian No.120/1, 120/2 and 120/3 and those were marked as Exbt.-1 series and also proved a map of Mouja-Uttar Machmarra marked as Exbt.-2, Advocate's notice dated 03.11.2008 marked as Exbt.-3 and reply to the notice dated 22.11.2008 marked as Exbt.-4.

8. Defendant No.2 examined himself as DW1 and also examined three more witnesses, namely, DW2, Sri Rai Charan Debnath, DW3, Sri Dipak Chakraborty and DW4, Sri Dilip Kapali. The defendants adduced no documentary evidence.

9. The trial Court decided the material issues in favour of the plaintiffs and accordingly, decreed the suit.

10. Aggrieved, the defendants preferred Title Appeal No.04 of 2011 in the Court of learned Additional District Judge, Dharmanagar, North Tripura and the learned Additional District Judge by judgment dated 05.08.2011 dismissed the appeal and hence, this second appeal.

11. Learned counsel, Mr. Lodh, appearing for the appellants has submitted that Kumud Chandra Kapali, father of the plaintiffs, and Prafulla Kapali, father of the defendants jointly purchased vast area of land measuring about 24 acres(55 Kanies) and the suit land is a part of that area of land. They were possessing the purchased land amicably, but there was no actual documentation about partition. The father of the defendants, Prafulla Kapali had been possessing the suit land from inception though the suit land was later on recorded in the name of Kumud Chandra Kapali, the father of the plaintiffs, but Kumud Chandra Kapali never owned or possessed the same.

12. On the other hand, Mr. Bhattacharji, learned counsel for the respondents submitted that the submission of learned counsel of the appellants is contrary to their pleadings. It is clearly pleaded by the defendants that there was an amicable partition and that the father of the defendants purchased the suit land in the year 1984.

13. At the very outset, I find no merit in the submission made by learned counsel, Mr. Lodh since the submission is contrary to the pleadings of the defendants. The plaintiffs contended that the suit land belonged to their father Kumud Chandra Kapali. The defendants contended that Kumud Chandra Kapali and Prafulla Kapali purchased vast area of land including the suit land and there was amicable partition of the suit land between them and the suit land was all along in possession of

Prafulla Kapali, whereas it was recorded in the name of Kumud Chandra Kapali and Kumud Chandra Kapali made an attempt to sell out the suit land to someone else and at that time Prafulla Kapali intervened and proposed to purchase the land and there was a meeting held on 06.06.1984 and in that meeting as per demand of Kumud Chandra Kapali, Prafulla Kapali paid Rs.10,000/- towards price of the suit land to Kumud Chandra Kapali and got possession of the suit land. While such a clear stand has been taken by the defendants, the argument that the suit land was all along in possession of the father of the defendants and there was no effective partition cannot stand in the given facts and evidence of the case.

14. Mr. Lodh, learned counsel for the appellants has further submitted that Prafulla Kapali left behind the defendants as his sons and also left behind four daughters, namely, Smt. Puspa Kapali, Smt. Fulmati Kapali, Smt. Pratima Kapali and Smt. Pranati Kapali, but those four daughters have not been made parties in the suit and so, the suit suffers from defects of parties because of non-joinder of necessary parties and, therefore, liable to be dismissed. In support of this contention he has relied on decisions of the Apex Court in the Cases of **Kanakarathanammal V. V.S.Loganatha Mudaliar & anr.**, reported in **AIR 1965 SC 271**, **Textile Association(India) Bombay Unit V. Balmohan Gopal Kurup & anr.**, reported in **AIR 1990 SC 2053** and **Prafulla Chorone Requitte & ors. V. Satya Choron Requitte**, reported in **AIR 1979 SC 1682**.

15. Learned counsel, Mr. Bhattacharji countering the submission of learned counsel, Mr. Lodh, argued that no plea was taken about non-joinder of necessary parties in the pleadings of the defendants. So, such a plea cannot be taken now in the second appeal in view of the provision of Order I Rule 9 of CPC. He has also submitted that as per the provision contained in the Order VIII Rule 2 of CPC this plea of non-joinder of parties ought to be taken in the pleadings of the defendants and since the plea has not been taken it cannot be raised in the second appeal. The next contention of learned counsel, Mr. Bhattacharji, is that no substantial question of law was formulated on the issue of non-joinder of parties and so, the appellants cannot raise this issue.

16. In their pleadings the defendants did not raise any plea that Prafulla Kapali left behind four daughters apart from the defendants. In their pleadings the defendants simply stated that the suit is not maintainable for non-joinder or misjoinder of necessary parties. They have not stated anything in the pleadings as to why the suit was not maintainable for non-joinder or misjoinder of necessary parties. No issue was also insisted or framed on non-joinder or misjoinder of parties. No argument also advanced before the trial Court on non-joinder or misjoinder of parties. Further law is quite clear that for non-joinder or misjoinder no suit shall be defeated. Order I Rule 9 of CPC reads as follows:-

***"9. Misjoinder and non-joinder. – No suit shall be defeated by reason of the misjoinder or non-joinder of***

***parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.***

***PROVIDED that nothing in this rule shall apply to non-joinder of a necessary party.”***

17. As per the above provision a suit shall not be defeated for the reason of misjoinder or non-joinder of the party, but the provision shall not apply in case of non-joinder of necessary party. The question is whether the four daughters of Prafulla Kapali, who were not arrayed as defendants in the suit, were a necessary party for decision of the suit.

18. Learned counsel, Mr. Bhattacharji has contended that the suit is not for partition of land among the legal heirs. It is a suit for declaration of right, title and interest and for recovery of possession. So, the plaintiffs only arrayed the necessary parties, who were in possession of the suit land. The four daughters of Prafulla Kapali are in no way connected with the suit land and they are not in possession of the suit land and so, they have not been arrayed as defendants.

19. The case of the defendants is that their father purchased the suit land from the plaintiffs on payment of Rs.10,000/-. The transfer of an immovable property should be effected by a registered instrument. The defendants though pleaded that their father purchased the suit land, but there is nothing that there was any transfer deed. So, in the absence of any transfer deed the plea of the defendants that their father purchased the suit land is of no consequence at all. Exbt.-1

series shows that Prafulla Kapali was a permissive possessor of the suit land. So, the ownership was with Kumud Chandra Kapali and Prafulla Kapali was a permissive possessor. According to the plaintiffs, after the death of Prafulla Kapali, the defendants, who are sons of Prafulla Kapali, are in possession of the suit land and so, the suit is instituted against them for recovery of possession. Under such circumstances, I find no force in the argument of learned counsel, Mr. Lodh that the suit is bad for non-joinder of necessary parties.

20. I have gone through the decisions referred by learned counsel, Mr. Lodh. The facts of those referred cases are clearly distinguishable to that of the fact of the present case and ratio of those decisions cannot be applied in this case. I find no force in the argument of learned counsel, Mr. Lodh that the suit should be dismissed for non-joinder of necessary parties.

21. No substantial question of law was formulated on the point of non-joinder of necessary parties. However, considering the submission of learned counsel, Mr. Lodh that the issue was raised in the first appeal also, I have taken into consideration the submission though there was no such substantial question of law formulated in the second appeal. But to my considerate opinion, the point of non-joinder of necessary parties as raised by learned counsel, Mr. Lodh, has not vitiated the claim of the plaintiffs in the present facts and circumstances of the suit and hence, the argument advanced by learned counsel, Mr. Lodh, is rejected.

22. It is also argued by learned counsel, Mr. Lodh that the evidence on record has not been properly appreciated, but I find noting to attach any importance in the argument of learned counsel. The oral evidence as well as the documentary evidence adduced by the parties has been taken to consideration by the Courts below and I find nothing to arrive at a conclusion that the Courts below arrived at a perverse finding.

23. The second appeal, therefore, merits no consideration and hence, the same is dismissed with cost.

**JUDGE**