GAHC010006562009

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

Case No. : RSA/176/2009

ON THE DEATH OF ANIL KALITA HIS LEGAL HEIR SMTI. ANIMA KALITA and ANR

2: NARAYAN KALITA

BOTH ARE SONS OF LATE UMA KALITA
VILL. BAKARIGAON
WARD NO. 4
P.O. MORIGAON
DIST. MORIGAON
ASSAM

VERSUS

TOSESWAR SARMAH and 15 ORS,
S/O LATE SUKRAM SARMAH, VILL. RAJAGAON, MORIGAON TOWN, P.O. and P.S. MORIGAON, DIST. MORIGAON, ASSAM.

2:KHARGESWAR KALITA

S/O LATE TUMBOR KALITA.

3:NARAYAN DEKA

S/O BUTURAM.

4:CHANDRA KR. SARMA

S/O GUNA KANTA.

5:NANDI RAM BORA

S/O BHUMIDHAR.

6:HEMANTA KR. NATH

S/O PRAMESWAR
ALL ARE FROM VILL. BAKARIGAON
MORIGAON TOWN
MOUZA and P.S. MORGAON
DIST. MORIGAON
ASSAM.

7:SRI PUTUL BORA
S/O NAREN BORA
VILL.BARANGABARI
P.O. KUMURAGURI
MOUZA DANDUA
P.S.MORIGAON
DIST. MORIGAON
ASSA

Advocate for the Petitioner : MD.M H CHOUDHURY

Advocate for the Respondent : MS. A NEOG

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

Date : 25-04-2024

JUDGMENT AND ORDER

(CAV)

Heard Mr. P.S. Deka, learned senior counsel, assisted by Mr. B. Bhagwati, learned counsel for the appellants and Mr. N. Choudhury, learned counsel for the respondents.

2) Assailing concurrent finding, the present appeal under Section 100 CPC is directed against the First Appellate Court's judgment and decree dated 12.11.2009 passed by the learned District Judge, Morigaon in T.A. 14/2009, by which the appeal was dismissed and the judgment and decree

dated 31.03.2009, passed by the learned Munsiff No.1, Morigaon in T.S. 25/2007, by which the suit was decreed on contest, was affirmed. The appellants are the principal defendant nos. 1 and 2 in the suit.

3) It would be appropriate to mention that on death of the appellant no.1, he has been substituted by order dated 30.08.2017, passed in connected I.A.(C) 1724/2017. It may also be mentioned that the names of the respondent nos. 3 to 9, 11 and 16 have been struck off by order dated 19.02.2016. Therefore, only the principal respondent no.1 (plaintiff) and the proforma respondent nos. 2, 10 and 12 to 15 (proforma defendant nos. 2, 9, and 11 to 14) remain as respondents in this appeal.

4) This appeal was admitted for hearing on the following substantial question of law:

Whether the suit being T.S. No.25/07 filed by Toseswar Sarmah relating to 14 lechas of land is barred by provision of Section 11 of the CPC resjudicate as the same land has already been adjudicated upon the earlier suit being TA No.2/06 (TS no.10/03) by District Judge, Morigaon between the same party and same land.

Case of the respondent no.1 (plaintiff):

5) The respondent no. 1 had filed T.S. No. 25/2007 for declaration of right, title and interest over 14 lessa land out of 2 katha $3^1/_2$ lessa of land, being 50% of 4 katha- 7 lecha land covered by dag no. 842 of P.P. no. 272 of Morigaon Town Kissam under Morigaon Mouza. The said land is morefully described in the Schedule of the plaint. The respondent no. 1 had also prayed for partition of such 14 lecha land and for delivery of possession thereof.

6) It was projected that the land covered by dag no. 842 originally belonged to two brothers, namely, Tumor Kalita and Uma Kalita, both having

equal shares. Uma Kalita died leaving behind the appellants (defendant nos. 1 and 2) and Sitaram Kalita (since deceased), who was the husband of Smt. Geeta Kalita (defendant no.3). The said Smt. Geeta Kalita is not a party in this appeal. It was claimed that the said Sitaram Kalita was occupying 1 katha- 9 lecha land along with a house thereon, which he sold to the respondent no. 1 (plaintiff) vide sale deed bearing registered deed no. 185/03 and delivered possession to the principal respondent no.1.

7) Thereupon, the appellants had filed a suit, which was registered as T.S. 10/2003. In the said suit, Smt. Geeta Kalita and Toseswar Sarmah (principal respondent no.1) were the principal defendants and the proforma respondents herein were arrayed as proforma defendants. The suit was for declaration of right, title and interest, confirmation of possession, permanent injunction and cancellation of sale deed no. 185/2003. The said T.S. 10/2003 was decreed on contest vide judgment and decree dated 16.09.2005 passed by the learned Civil Judge (Senior Division), Morigaon. The principal respondent no. 1 had an appeal against the judgment and decree passed in T.S. no. 10/2003, which was registered as T.A. no. 2/2006. The learned District Judge, Morigaon partly allowed the appeal and the decree passed by the learned Trial Court was modified by granting the following reliefs:

(a) *Right, title and interest of the plaintiff was declared on 'A' schedule land leaving 14 lessa on its eastern boundary and the defendants are also restrained from disturbing the plaintiffs in enjoying the aforesaid land (beyond 14 lessas).*

(b) *The sale deed no. 185 dated 28.01.2003 shall be valid only for 14 lessa land falling on the eastern portion of 'A' schedule land and the deed will be inoperative and ineffective in respect of excess land beyond 14 lessa, and order was issued for correction of the land records including mutation passed on the basis of above deed. Accordingly, precept was issued.*

8) There is no dispute at the Bar that the said appellate decree dated 26.09.2006 passed by the learned District Judge, Morigaon in T.A. no. 2/2006 had attained finality.

9) In T.S. No. 25/2007, it was projected that the principal respondent no.1 was dispossessed from 1 katha- 9 lessa land although vide decree passed in T.A. 2/2006, the share of the principal respondent no.1 was modified to the extent of 14 lessa of land, covered by sale deed no. 185/2003. Accordingly, the principal respondent no.1 had filed T.S. no. 25/2007, seeking the following reliefs:-

> (a) *A decree be passed declaring plaintiff's right, title and interest over 14 Ls. of land within the scheduled below land, and;*
> (b) *Defendants be directed to partition the plaintiff 14 lechas of land and deliver the same to him within a specific time and accordingly a preliminary decree be passed;*
> (c) *If the defts. fail to partition and deliver the land fixed by the Court then a formal partition may kindly be done through the Courts officer and the plaintiff be put into the possession of his share and according a decree for khas possession may passed; and*
> (d) *A precept be issued to the Dist. Revenue Authority to issue a separate patta on the basis of the Courts partition;*
> (e) *The cost of the suit be decreed in favour of the plaintiff and against the defts; and*
> (f) *Any other relief or reliefs for which the plaintiff is entitled, such relief or reliefs may be granted in favour of the plaintiff.*

10) The appellants herein had contested the suit and by filing their written statement, amongst others, took a plea that in the earlier suit i.e. T.S. 10/2003, the right of the respondents was affirmed only with regard to 14 lessa land and accordingly, the sale deed was held to be valid only in respect of 14 lessa land. It was claimed that the rights of the parties are already been adjudicated with the decision thereon and accordingly, the subsequently filed suit was barred by section 11 of the CPC. The learned Munsiff No. 1, Morigaon

vide judgment and decree dated 31.03.2009 passed in TS no.25/2007 has decreed the suit. It may be mentioned that the learned trial Court had framed the following issues for trial:-

(1) Whether there is any cause of action for the suit?

(2) Whether suit is maintainable in its present form?

(3) Whether suit is barred by the doctrine of res-judicata?

(4) Whether the plaintiff has right, title, interest over the 14L with in the schedule land?

(5) Whether the plaintiff is entitled for a decree of khas possession as prayed for?

(6) To what relief/ reliefs parties are entitled to?

11) During trial, the prinicpal respondent no.1- plaintiff had examined two PWs, namely, Toseswar Sarmah and Meghram Bordoloi, and had exhibited 11 documents, viz., original Registration receipt (Ext.1); Certified copy of registered sale deed no. 185/03 (Ext.2); original copy of registered sale deed no. 185/03 (Ext.3); certified copy of *jamabandi* of periodic patta no. 272, dag no. 842 (Ext.4); Copy of draft *chitha* in respect of dag no. 842 (New), corresponding to dag no. 50 (old) of periodic patta no. 22 (Ext.5); Copy of draft *chitha* in respect of dag no. 235 (New), corresponding to dag no. 431 (old) of periodic patta no. 20 (Ext.6); certified copy of order dated 26.09.2006, passed by District Judge, Morigaon in T.A. no. 2/2006 [Ext.7(i)]; certified copy of judgment dated 26.09.2006, passed by District Judge, Morigaon in T.A. no. 2/2006 [Ext.7(ii)]; certified copy of decree dated 26.09.2006, passed by District Judge, Morigaon in T.A. no. 2/2006 [Ext.7(iii)]; land revenue paid receipt for the land [Ext.8(i) and 8(ii)]. The appellant no.2 examined himself as the sole witness of the defendants and he had exhibited two documents, viz., certified copy of order, judgment and decree dated 16.09.2005 in T.S. No. 10/2003

(Ext.Ka); plaint in T.S. No. 10/2003, from the original record that was called for (Ext.Kha) and certified copy of order, judgment and decree dated 26.09.2006 in TA no.02/2006 (Ext.Ga).

Finding and decision of the learned Trial Court:

12) In respect of issue nos. (ii) and (iii), the learned trial Court had held that the issue in the formal suit was regarding validity of the sale deed and right, title and interest of the appellant over the suit dag and that the learned District Judge, Morigaon had held the sale deed no. 185/2003 was valid only for 14 lessa land and thus, the right, title and interest of the appellant was decreed over the remaining part of the land. However, on the ground that the right title over the 14 lessa land and issue of *khas* possession was not declared in the earlier proceeding, it was held that decision rendered in TA 2/2006 will not be *res judicata* in the present suit and accordingly, the suit was held to be maintainable.

13) In respect of issue no. 1 regarding cause of action for the suit, the said issue was decided in favour of the principal respondent no.1-plaintiff.

14) In respect of issue no. 4, the learned Trial Court had referred to the decision of the learned District Judge, Morigaon in T.A. No. 2/2006, by which the sale deed no. 185/03 dated 28.01.2003 was held to be valid for 14 lessa land and not be operative for land in excess of 14 lessa. Accordingly, it was held that the principal respondent no.1 had the right, title and interest over 14 lessa land within the schedule and that it fell within the boundary of the said schedule.

15) In respect of issue no. 5, it was held that the principal respondent no.1 was entitled to the decree of *khas* possession in respect of 14 lessa land

falling in the eastern portion of the schedule land as stated in the sale deed.

16) Accordingly, in respect of issue no.6, it was held that the principal respondent was entitled to a decree for recovery of *khas* possession of 14 lessa land that fell in the eastern side of the schedule of deed no. 185/03, covered by the suit dag. Resultantly, the suit was decreed by declaring that the principal respondent no.1 had the right, title and interest over 14 lessa land which falls in the eastern side of the boundary of the schedule of the sale deed no. 185/2003 and the appellants were directed to give vacant possession of the said land to the principal respondent no.1 immediately.

17) Aggrieved by the decree passed in the suit, the appellants had preferred an appeal, which was registered as T.A. no. 14/2009. The learned First Appellate Court i.e. the learned Civil Judge, Morigaon vide appellate judgment and decree dated 12.11.2009 dismissed the appeal by affirming the judgment and decree passed by the learned Trial Court. It would suffice to mention that the finding of the learned Trial Court on all the issues was affirmed. The discussions on the issues are by and large similar and therefore, this judgment is not burdened with repetitive discussions.

Submissions by the learned senior counsel for the appellants:

18) The learned Senior counsel for the appellants had submitted that a declaration of decree in respect of 14 lessa share in land in favour of the principal respondent no.1 has already been decreed in the previously instituted suit i.e. T.S. No. 10/2003. Therefore, there is duplicity of the same decree in the present suit i.e. T.S. No. 25/2007, which was filed after decree was passed in T.S. no. 10/2003. Hence, it was submitted that the subsequent suit ought not to have been allowed to proceed as the suit was barred by the principle of *res*

judicata. By his submissions, the learned senior counsel for the appellants has supported the substantial question of law as formulated by order dated 01.11.2017.

Submissions by the learned counsel for the principal respondent no.1:

19) Per contra, the learned counsel for the principal respondent no.1 had submitted that the principal respondent no.1 was compelled to file this subsequent suit as they were dispossessed from the suit land. Accordingly, it was submitted that as in the second suit, the principal respondent no.1 had prayed for recovery of *khas* possession, and that part of the prayer cannot be hit by the principles of *res judicata* on the ground that such part of the decree was on a different and distinct cause of action. Accordingly, he has submitted in support of the concurrent finding of facts.

Finding and decision:

20) On a perusal of the first appellate decree dated 26.09.2006, passed by the learned District Judge, Morigaon in T.A. No. 2/2006 [Ext. nos. 7(i), 7(ii) and 7(iii)], it is seen that the said learned Court had passed the decree for declaring the right, title and interest of the appellants in respect of 'A' Schedule land leaving 14 lessa land on eastern boundary. Moreover, the principal respondent no.1 was restrained from disturbing the appellants in enjoying the said land (beyond 14 lessa).

21) Thus, the appellate decree was operating against the principal respondent no.1 in so far as injunction is concerned. It is reiterated at the cost of repetition that the principal respondent no.1 was restrained from disturbing possession of the appellants over land beyond 14 lessa. However, the case of the principal respondent no.1 in T.S. No. 25/2007 was that despite the finding

that registered sale deed no. 185/2003 was valid in respect of 14 lessa land, the learned District Judge, Morigaon did not pass any decree or order in T.A. No. 2/2006, for handing over the said part of land to the principal respondent no.1. Hence, TS No. 25/2007 was filed for declaration of right, title and interest and for recovery of *khas* possession of 14 lessa land.

22) On a perusal of the judgment and decree passed in T.S. No. 10/2003 and T.A. No. 2/2006, we do not find any mention that the principal respondent no.1 herein had filed any counter-claim in the suit in respect of 14 lessa land in his favour. The learned senior counsel for the appellants could not show from the contents of appellate judgment and decree in T.A. No. 2/2006 [Ext. nos. 7(i), 7(ii) and 7(iii)] that there was any issue framed by the learned Trial Court in T.S. No. 10/2003 in respect of declaration of right, title, interest or recovery of possession of 14 lessa land in favour of the principal respondent no.1. Therefore, in the absence of such an issue relating to principal respondent no.1 in T.S. No. 10/2003, there cannot be an issue in present suit i.e. T.S. No. 25/2007, which can be said to be directly and substantially in issue in the former suit. The decision of the learned District Judge, Morigaon in T.A. No. 2/2006 in respect of 14 lessa land in favour of the principal respondent no.1 no.1 can be said to be an incidental decision while deciding the question/ issue of right, title, interest of the appellant in T.A. No. 2/2006 in respect of entire 'A' schedule land, but it cannot be said that the said decision would operate as a *res judicata* in T.S. No. 25/2007, filed by the principal respondent no.1. In the said regard, we find support from the decision of the Supreme Court of India in the case of *Sajjadanashin Sayed Md. B.E. Edr. (Dead) by LRs. V. Musa Dadabhai Ummer & Ors., AIR 2000 SC 1238: (2000) 0 Supreme(SC) 419*, cited by the learned counsel for the respondents. Relevant paragraphs 11 to 20 and 24 and 25 [as

extracted from *(2000) 0 Supreme(SC) 419]* are quoted below:-

Point No. 1:

***11**. The words "collaterally" or "incidentally in issue" have come up for interpretation in several common law jurisdictions in the context of the principle of res judicata. While the principle has been accepted that matters collaterally or incidentally in issue are not ordinarily res judicata, it has however been accepted that there are exceptions to this rule. The English, American, Australian and Indian Courts and Jurists have therefore proceeded to lay down certain tests to find out if even an earlier finding on such an issue can be res judicata in a later proceedings. There appears to be a common thread in the tests laid down in all these countries. We shall therefore refer to these developments.*

***12**. Matters Collaterally or incidentally in issue:*

It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only `collaterally or incidentally in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

***13**. As pointed out in Halsbury's Laws of England (Vol.16, para 1538) (4th Ed.), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question [R v. Knaptoft Inhabitants; Heptulla Bros v. Thakore; or if any matter was incidentally cognizable Sanders (otherwise Saunders) v. Sanders (otherwise Saunders)].*

***14**. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression collaterally or incidentally in issue implies that there is another matter which is directly and substantially in issue (Mulla, CPC 15th Ed., p. 104).*

***15**. Difficulty in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and tests laid down in various Courts:*

Difficulty in this area of law has been felt in various jurisdictions and therefore some tests have been evolved. Halsbury says (Vol. 16, para 1538) (4th Ed.) that while the general principle is clear, "difficulty arises in the application of the rule in determining in each case what was the point decided and what was the matter incidentally cognizable, and the opinion of Judges seems to have undergone some fluctuations".

***16**. Spencer Bower and Turner on The Doctrine of Res Judicata (2nd Ed, 1969) (p. 181) refer to the English and Australian experience and quota Dixon, J. of the Australian High Court in Blair v. Curran to say: "The difficulty in the actual*

application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation of a groundwork of the judgment". The authors say that in order to understand with essential distinction, one has always to inquire with unrelenting severity-is the determination upon which it is sought to find an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do. It is suggested by Dixon, J that even where this inquiry is answered satisfactorily, there is still another test to pass: viz. whether the determination is the immediate foundation" of the decision as opposed to merely "a proposition collateral or subsidiary only, i.e. not more than part of the reasoning supporting the conclusion". It is well settled, say the above authors "that a mere step in reasoning is insufficient. What is required is no less than the determination of law, or fact or both, fundamental to the substantive decision".

***17**. American jurists and Courts have also found difficulty but they have tried to lay down some tests. It is conceded in Corpus Juris Secundum (Vol. 50, para 725) that "it is sometimes difficult to determine when particular issue determined is of sufficient dignity to be covered by the rule of estoppel. It is said that estoppel by judgment does not extend to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on (Per Taft, J. in North Carolina R Co. v. Story). But this rule does not however prevent a judgment from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining the ultimate vital point. American Jurisprudence (Vol. 46 Judgments para 422) too says:*

> *"Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties". (Per Harlan, J. in Hoag v. New Jersey), quoting Restatement, Judgments [para 68(1)] and `Developments in the Law-Res Judicata (1952) 65 Harv. L. Review 818 (820). [See also collateral estoppel by judgment-by Prof. Scott. (1942) Harvha R 1.]*

***18**. In India, Mulla has referred to similar tests (Mulla, 15th Ed. p. 104). The learned author says: A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter directly and substantially in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was directly and substantially in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The*

question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as directly and substantially in issue and if it is clear that the judgment in fact based upon that decision, then it would be res judicata in a latter case. (Mulla, p.104) One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwar Singh v. Sarwan Singh, Mohd. S. Labbai v. Mohd. Hanifa). We are of the view that the above summary in Mulla is a correct statement of the law.

***19**. We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision".*

***20**. The Privy Council and the supreme Court had occasion to deal with these points. Three decisions,-two of the Privy Council and one decided by the supreme Court-can be referred to in this context as illustrations of cases where in spite of an issue and a decision in an earlier case, the finding was treated as being only collaterally or incidentally in issue and not res judicata. In Run Bahadur v. Lucho Koer (See Mulla p. 107), A, a Hindu, died leaving a widow and a brother C. The widow sued B, the tenant for rent of certain property forming part of the estate of her husband. C, the husband s brother, claimed the rent on the ground that the property was joint family property and that he was entitled to the rent by survivorship. C was then joined as a defendant. Two issues were framed (1) whether the deceased alone received the whole rent of the property in his life time, or whether the rent was received by him jointly with his brother C? (2) whether any rent was due and if so, how much was due from B? The finding on the first issue was that the deceased alone received the whole rent in his life time. Subsequently, C sued the widow for declaration that he and his brother were joint, and he claimed that property by right of survivorship. The question arose whether the deceased and C were joint or separate and the earlier finding was held not res judicata inasmuch as the matter was not directly and substantially in issue in the earlier suit. It was in issue in the earlier suit only collaterally or incidentally , as it did not cover the entire question of C's title but related merely to the joint or separate receipt of rent.*

***24**. Before parting with this point, we would like to refer to two more rulings. In Sulochana Amma v. Narayanan Nair, this Court held that a finding as to title*

given in an earlier injunction suit would be res judicata a subsequent suit on title. On the other hand, the Madras High Court, in Uthiva Somasundareswarar v. Rajanga, held (see para 8 therein) that the previous suit was only for injunction relating to the crops. May be, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above referred to were satisfied for holding that the finding as to possession was substantially rested on titled upon which a finding was felt necessary and in the latter a case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum (Vol. 50, para 735, page 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> *"Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title".*

* * *

***25**. We have gone into the above aspects in some detail so that when a question arises before the Courts as to whether an issue was earlier decided only incidentally or collaterally, the Courts could deal with the question as a matter of legal principle rather than on vague grounds. Point 1 is decided accordingly*.

23) In the case of *Alka Gupta v. Narender Kumar Gupta, (2010) 10 SCC 141*, cited by the learned senior counsel for the appellants, the legal issue relating to *res judicata* and constructive *res judicata* has been elaborately dealt with. But it does not touch upon the issue relating to "*matters collaterally or incidentally in issue*". Hence, the case of *Alka Gupta (supra)* does not apply to the facts of this case and rather, the case of *Sajjadanashin Sayed Md. B.E. Edr.*

(Dead) by LRs. (supra), is found to apply under the facts of this case. Therefore, the judgment in the case of *Alka Gupta (supra)* is not found relevant to answer the substantial question of law.

24) Thus, in light of the discussions above as well as considering the decision of the Supreme Court of India on point no. 1 in the case of *Sajjadanashin Sayed Md. B.E. Edr. (Dead) by LRs. (supra)*, the Court is of the considered opinion that the decision of the learned District Judge, Morigaon in T.A. No. 2/2006, arising out of decree passed in T.S. no. 10/2003, in so far as exclusion of 14 lessa land out of 'A' schedule land in favour of the appellants, in relation to the issue no. 4 in T.S. No. 25/2007, cannot be said to be an issue which is directly and substantially in issue in the former suit.

25) Hence, the substantial question of law in this appeal is answered by holding that T.S. No. 25/2007, filed by principal respondent no. 1, namely, Toseswar Sarmah, relating to 14 lessa land is not barred by *res judicata* as per the provision of section 11 of the CPC because adjudication relating to 14 lessa land in T.A. No. 2/2006 (arising out of T.S. No. 10/2003) was an incidental finding in T.A. No. 2/2006 and cannot be held to be in answer to any issue framed by the learned Trial Court because Toseswar Sarmah, principal respondent no.1 herein (i.e. appellant in T.A. No. 2/2006), had not filed any counter-claim in T.S. No. 10/2003.

26) Thus, this appeal fails and the same is dismissed with cost.

27) Let a decree be prepared.

28) Let the TCRs be sent back to the respective Courts.

JUDGE

Comparing Assistant