

T.S NO-110/2004

Altaf Hussain and others V/S Abdul Jarip Sk and others

FORM NO-(J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

District: Dhubri

IN THE COURT OF MUNSIFF NO-1, DHUBRI

**Present: Nur Jamal Hoque, AJS
Munsiff No-1
Dhubri**

Monday 20th day of January, 2013

Title Suit No- 110/2004

1. Altaf Hussain
 2. Legal heirs of Tamashajan Bewa
 - a. Jaharuddin
 - b. Surat Ali
 - c. Tayab Ali
 - d. Tarabhanu
 - e. Jobeda Khatun
 - f. Monowara Khatun
 - g. Sajida Khatun.....Plaintiff
- V/S**
1. Abdul Jarip SK
 2. North Pipulbari M.E Madrassa
 3. Sukur Ali.....Defendants

This suit coming on for argument on-7/1/14 in presence of:-

Mr. N. A SK

LD Advocate for the plaintiff

Mr. A. R Ahmed

LD Advocate for the defendant

And having stood for consideration to this day, the court delivered the following judgment:-

JUDGMENT AND ORDER

“This is a suit for declaration, payment of damages and permanent injunction”

1. Plaintiffs case in a nutshell is that plaintiff no-2 filed T.S No-376/95 against the defendants and others in the court Civil Judge(J.D) , Dhubri in respect of land shown in schedule A of plaint and defendants filed W/S cum Counter claim in that suit over land shown in schedule B of this plaint. That counter claim of the defendants was allowed and accordingly the defendants filed T. Ex-3/02 for khas possession of suit B schedule land. That while executing the decree the defendants illegally, fraudulently and collusive entered into the land of dag no-216 and damaged demolished and destructed five numbers of dwelling houses and kitchen of plaintiff and said homestead of plaintiff shown in schedule C of plaint and hereinafter called as suit land.

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(2)

That plaintiffs are also being threatened since- 27/3/04 to quite and vacate the suit C schedule land. That entire land of dag no-250 inclusive of B schedule land is cultivable and plaintiffs never had their dwelling houses thereon. The defendants evicted the plaintiff from suit B schedule land. Hence this suit filed by plaintiffs for declaration of actions of defendants in Ext case no-3/02 illegal along with other reliefs.

2. The defendants contested the suit filling written statements both in law and facts. The defendants with the plea of maintainability, cause of action etc, denied entire averments of plaintiff save and except those are specifically admitted in the written statement. The defendants further pleaded that suit is barred by res-judicata and averred that plaintiff no-2 had instituted T.S No-376/95 for the same subject matter against the same parties seeking almost similar reliefs and the said suit was dismissed on contest and counter claim of the defendants was decreed declaring that Uttar Pipulbari Madrassa has right, title, interest and possession over the suit land measuring 3K-15L under dag no-216 and over the land measuring an area of 1B-2K-18L under dag no-250 covered by khatian no-103. The defendants also got decree for khas possession in respect of the said land and possession was duly delivered to the defendants by executing court in T. Ext-3/02 and the plaintiffs did not prefer any appeal nor file any objection during the execution of said T.Ext-3/02. As such present suit of the plaintiff is barred. Therefore, the defendants prayed for dismissal of the suit with cost and compensation.

3. Upon the above pleadings my predecessor in office framed following issues:-

ISSUES

1. **Whether the suit maintainable in present form or whether the suit is barred under any provisions of law??**
2. **Whether there is any cause of action for the suit?**
3. **Whether the suit is bad for non-joinder of parties?**
4. **Whether the suit is barred under principles of res-judicata?**
5. **Whether the plaintiff is entitled to decree as prayed for?**
6. **To what reliefs the plaintiffs are entitled to?**

4. In this case plaintiff side adduces both oral and documentary evidences before the court. In the other hand defendants side also adduces both oral and documentary evidences.

5. I have heard the arguments put forwarded by plaintiff and defendant side. I have also perused the pleadings of both sides along with the entire evidences on records. It appears from the case records that instant suit initially dismissed by my predecessor vide its order dated-5/08/05 and against which appeal was preferred and Learned Appellate court remanded the suit with a direction to dispose the suit after conducting the trial afresh and accordingly after holding a full versions of trial, this judgment.

DISCUSSION, DECISION AND REASONS FOR SUCH DECISION

6. ISSUE NO-1:- MAINTAINABILITY OF SUIT INS PRESENT FOR OR ANY OTHER PROVISIONS OF LAW

The defendant in the instant suit alleged that the suit is not maintainable in its present form. Learned Counsel for the defendants side during the argument hearing strenuously submitted before the court that plaintiffs have instituted this suit challenging the execution of a decree of T. Execution Case No-3/02 arising out of judgment and decree passed in T.S No-376/95, regarding land belongs to the dag no-216&250 is not maintainable.

Cont.P-3

The defendants counsel Mr. A.R Ahmed in his oral argument submitted that any question regarding excessive execution can be decided under section-47 of C.P.C and not by a separate suit. The defendants counsel further submitted that all question between the parties arising out in execution proceeding to be decided in execution proceeding relating execution, discharge and satisfaction of decree, there is a bar for filling separate suit.

The defendants counsel referred two decided case law I.e AIR 1993 GAUHATI 56 and 2002 SAR (CIVIL)457. On contra Learned Counsel for the plaintiffs Mr. N.A Sk in his oral concise argument vehemently submitted that instant suit is maintainable as per law. Before going to the aspect of maintainability of this suit let have a glance over the nature of this suit. The plaintiffs brings instant suit contending that plaintiff no-2 filed T.S No-376/95 against the defendants and others in the court Civil Judge(J.D) , Dhubri in respect of land shown in schedule A of plaint and defendants filed W/S cum Counter claim in that suit over land shown in schedule B of this plaint. That counter claim of the defendants was allowed and accordingly the defendants filed T. Ex-3/02 for khas possession of suit B schedule land. That while executing the decree the defendants illegal, fraudulently and conclusively entered into the land of dag no-216 and damaged demolished and destructed five numbers of dwelling houses and kitchen of plaintiff and said homestead of plaintiff shown in schedule C of plaint and hereinafter called as suit land. That plaintiffs are also being threatened since- 27/3/04 to quite and vacate the suit C schedule land. That entire land of dag no-250 inclusive of B schedule land is cultivable and plaintiffs never had their dwelling houses thereon. The defendants evicted the plaintiff from suit B schedule land. Hence this suit filed by plaintiffs for declaration of actions of defendants in Ext case no-3/02 illegal along with other reliefs.

The pleadings of plaintiffs indicates that entire disputes arose from the execution of decree passed in T.S No-376/95 and said decree has already been executed in T. Ext Case No-3/02. The entire cause of action shown in the plaint based upon the execution case no-3/02. In this suit plaintiffs did not prayed any decree about declaration to nullify the decree passed in T.S No-376/95 and even plaintiffs not prayed restoration of possession of the suit land from where they evicted in execution of decree in T. Ext-3/02. In this case plaintiffs simply prayed declaration about the fact that defendants illegally , arbitrarily and fraudulently damaged, demolished and destructed schedule C land. The plaintiffs in their plaint of this suit shows three schedules of land as A,B and C and all such lands belongs to dag no-216&250. It has already clear from the discussion above and documentary evidences of plaintiffs side that suit land of this suit and suit land of T.S No-376/95 are belongs to dag no-216&250 and right, title, interest and possession of present defendants has already been decided by competent court of jurisdiction in T.S No-376/95 and said judgment and decree still in force as said judgment not yet challenge in any higher forum. More also the decree passed in T.S No-376/95 had already executed in T.Ext-3/02. This court is legally binds by the judgment pronounced in T.S No-376/95, because said judgment is still in force and present plaintiffs not challenge the said judgment in any higher forum of this state. The pleadings of plaintiffs side categorically shows that plaintiffs have no allegations against the judgments and decree passed in T.S No-376/02, instead of that plaintiff in this case challenged the right, title and possession of defendant over suit land.

From the oral and documentary evidences of plaintiffs and defendants side this court finds following facts:-

1. plaintiffs have instituted this suit without challenging the judgment and decree passed in T.S No-376/95;
2. that plaintiffs did not prayed any declaration for cancellation of decree passed in T.S No-376/95;
3. that title of present defendants that has been decided in T.S No-376/95 has not been challenged by the plaintiffs in this suit or any higher court;

4. that plaintiffs not prayed any restoration of possession of suit C schedule land of plaintiff that belongs to dag no-216;
5. that plaintiffs not preferred any appeal against the judgment and decree of T.S No-376/95 and
6. that plaintiffs even not raised any objection against the report of Nazir filed in T. Ext Case No-3/02.

All the above facts clearly indicates that plaintiffs have instituted this suit admitting the judgment and decree passed in T.S No-376/95. In absence of any specific reliefs or averments regarding the correctness, legality and enforceability of decree of T.S No-376/95 at the instance of plaintiffs of this suit in their pleadings this court has got no jurisdiction to enter into those facts.

Abruptly from the pleadings of plaintiff side it has clearly appears before the court that plaintiffs have instituted this suit alleging the fact that defendants illegally, fraudulently took possession of suit C schedule land of plaintiff in T. Ext Case No-3/02. That indicates that dispute in hand taken from Execution Case No-3/02.

To decide the fact of maintainability I have considered the oral arguments put forwarded by both the sides along with settled provisions of law and finds that the provisions Under Section-47 CPC bars filing of a separate suit pertaining to the question arising between the parties to a decreed suit or their representative relating to only the execution, discharge or satisfaction of the decree. The provisions of section-47 of C.P.C imposes bars for filing the suit pertaining to all the question arising between the parties to a decreed suit relating to discharge or satisfaction of the decree. It is observed in **GANAPATHY -VS- KRISHNAMACHARIAR: AIR 1917 PC 121 & HARNADRAL -VS- DEBI DUTT(1973)2 SCC 476 = AIR 1973 SC 2423**, that since section-47 of C.P.C embraces all matters connected with the execution of a decree between the parties or their representative, and covers all questions relating to execution, discharge or satisfaction of the decree, it should be liberally constructed so as to empower the court to determine all such question, unless they clearly fall outside the scope and purview of it. So, if the ground to be taken in the proposed suit is related to execution, discharge or satisfaction of the decree, such suit by either party to the suit or their representative shall be barred under section-47 of C.P.C. As per the ratio given by our parent Hon'ble Gauhati High Court in Babu Ali -VS- Khirada Dutta and others reported in AIR 1993 GAUHATI 56, it is settled that question of excessive execution can be decided under section-47 of C.P.C and not by separate suit. Hon'ble Supreme Court in a case reported in SAR 2002 CIVIL 457, decided that question relating to execution, discharge and satisfaction of decree should be decided in execution proceeding and there is a bar to file separate suit as per section-47 of C.P.C.

It has already clear from the foregoing discussion that instant suit has been filed by the present plaintiffs raising questions about the execution of decree, which passed in T.S No-376/95. The prime contentions of plaintiffs belongs to the execution case no-3/02.

I have also peruses that catena of judgment referred by the plaintiffs side in their written argument and where I find that all those judgment are irrelevant to this suit and ratio given in all those cases not applicable to this suit.

Therefore in the light of all the above discussion I am of considered opinion that instant suit is barred under section-47 of C.P.C and that operates instant suit not maintainable. Hence this issue is answered in negative and against the plaintiffs.

7. ISSUE NO-2:- CAUSE OF ACTION

In the law, a **cause of action** is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit (such as breach of contract, battery, or false imprisonment).

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To pursue a cause of action, a plaintiff pleads or alleges facts in a complaint, the pleading that initiates a lawsuit. A cause of action generally encompasses both the legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant). Often the facts or circumstances that entitle a person to seek judicial relief may create multiple causes of action. Although it is fairly straightforward to file a Statement of Claim in most jurisdictions, if it is not done properly, then the filing party may lose his case due to simple technicalities.

In other words cause of action can be defined as bundle of facts affirmed by one party and denied by the other. A cause of action in a civil suit, renders several sets of facts asserted by some body against other, which give right to sue and when the parties in a civil suit successfully proves such facts in their favor that helps the parties to get judicial reliefs through competent court of jurisdiction.

Let have look whether the plaint discloses any such bundles of facts, that requires adjudication in this suit. I have carefully gone through the entire case records and finds that plaintiffs filed instant suit challenging the actions taken by the defendants in respect of demolishing the houses of the plaintiffs over C schedule land in execution of a decree in Ext-3/02. On contra defendants side pleaded that T. Ex Case No-3/02 executed properly and they have been delivered possession of the decreetal land. The defendant side also raise some questions of facts and law, that requires adjudication this suit. All the above facts of arose from the pleadings of both sides in this case gives rise cause of action and that requires adjudication in this case. The pleadings of plaintiff give raise assertion and denial of both law and facts, which requires adjudication in this suit.

Therefore in the light of all the above discussion I am of considered opinion that plaintiff in this case succeeds to show cause of action in this case. Hence this issue is answered in affirmative and in favor of plaintiff.

8. ISSUE NO-3 NON-JOINDER OF NECESSARY PARTIES

The defendants in their written statement alleges that suit is bad for non-joinder of necessary party for not imp-leading that parties of previous suit No-376/95 and T.Ext-3/02 namely the State of Assam, D.E.E.O Dhubri, Sub-Registrar Dhubri, Settlement Officer Dhubri, A.S.O, Mankarchar. The dispute put forwarded by the plaintiffs in this suit not warranted the presence of all the above persons to adjudicate the real points of controversy between the parties and the present plaintiffs have no reliefs against them or plaintiffs not alleges anything against them. Hence upon the above it can be safely decide here that suit is not bad for non-joinder of all the above persons. Hence this issue is answered in affirmative and in favor of the plaintiffs.

9. ISSUE NO-4- PLEA OF RES-JUDICATA

The defendants in their written statement alleges that suit is barred by principles of res-judicata on the ground that plaintiff no-2 had instituted T.S No-376/95 for the same subject matter against the same parties seeking almost similar reliefs and the said suit was dismissed on contest and counter claim of the defendants was decreed declaring that Uttar Pipulbari Madrassa has right, title, interest and possession over the suit land measuring 3K-15L under dag no-216 and over the land measuring an area of 1B-2K-18L under dag no-250 covered by khatian no-103. The defendants also got decree for khas possession in respect of the said land and possession was duly delivered to the defendants by the decree executing court in T. Ext-3/02 and the plaintiffs did not prefer any appeal nor file any objection during the execution of said T.Ext-3/02.

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I have considered pleadings of both sides along with the evidences led by both sides and found that my predecessor in office vide its order dated- 5/08/05 dismissed instant suit on the ground of res-judicata and against such order plaintiffs preferred appeal and appellate court vide its judgment dated-30/4/2008, in T.A No-36/05 remanded the suit to decide the case afresh and now this judgment.

Now let us see whether instant suit is barred by principles of res-judicata and also let us discuss the essentials of res-judicata.

Section 11 of the Code of Civil Procedure, 1908 defines Res Judicata as: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII. An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised. **The doctrine of res judicata is based on three maxims:-**

(a) Nemo debet lis vexari pro eadem causa (no man should be vexed twice for the same cause)

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(b) Interest republicae ut sit finis litium (it is in the interest of the state that there should be an end to a litigation); and Cont.P-7

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(c) Re judicata pro veritate occipitur (a judicial decision must be accepted as correct)(Lakhidevi -vs- State of Assam:1982(1)GLR(NOC)38)

As laid down in Sheodan -vs-Daryao Kunwar(AIR SC 1332), Syed Md -vs-Md Hanifa(1976)4 SCC 780(790)=AIR 1976 1563, Ibomcha Singh -vs- K.T Singh(1983) GLR (NOC) 50, Jaswant Singh -vs- Custodian of Evacuee Property(1985)3 SCC 648, Mayarani Das -vs-Matasin Ali(2000)HLT 164 following are the test for application of res-judicata:-

- #Matter which was directly and substantially in issue in former suit must be directly and substantially issue in the subsequent suit also.
- #Both the former and subsequent suit should have been between the parties or between the parties litigating under some titles.
- #The former suit should have been decided by competent court which can try subsequent suit also.
- #Any matter, which might and ought to have been made a ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in each suit. The onus of proof lies on the party relying on the theory of res judicata. The provisions of section 11 of CPC are not directory but mandatory. The judgment in a former suit can be avoided only by taking recourse to section 44 of the Indian Evidence Act on the ground of fraud or collusion. Where several defendants are there, in a suit the collusion of one of them alone is not enough to avoid the operation of rule of res judicata. Gross negligence is different from fraud and collusion.

Now let us see whether the principles of res-judicata as enunciated above truly applicable to this suit. In this case defendants side pleaded that plaintiff no-2 had instituted T.S No-376/95 for the same subject matter against the same parties seeking almost similar reliefs and the said suit was dismissed on contest and counter claim of the defendants was decreed declaring that Uttar Pipulbari Madrassa has right, title, interest and possession over the suit land measuring 3K-15L under dag no-216 and over the land measuring an area of 1B-2K-18L under dag no-250 covered by khatian no-103. The defendants also got decree for khas possession in respect of the said land and possession was duly delivered to the defendants by the decree executing court in T. Ext-3/02 and the plaintiffs did not prefer any appeal nor file any objection during the execution of said T.Ext-3/02.

The plaintiffs in their plaint pleaded that plaintiff no-2 filed T.S No-376/95 against the defendants and others in the court Civil Judge(J.D) , Dhubri in respect of land shown in schedule A of plaint and defendants filed W/S cum Counter claim in that suit over land shown in schedule B of this plaint. That counter claim of the defendants was allowed and accordingly the defendants filed T. Ex-376/95 for khas possession of suit B schedule land. That while executing the decree the defendants illegally, fraudulently and collusive entered into the land of dag no-216 and damaged demolished and destructed five numbers of dwelling houses and kitchen of plaintiff and said homestead of plaintiff shown in schedule C of plaint and hereinafter called as suit land.

The pleadings of plaintiffs and defendants of this suit categorically indicates that earlier suit vide No-376/95 was filed by plaintiff no-2 Tamashjan Bibi, against the defendants of this suit regarding the land belongs to dag no-216 and 250. It further appears to be admitted fact that in T.S -376/95, the defendants contested the suit by filling written statement cum counter claim praying their right, title, interest and possession over land of dag no-250 and 216 and accordingly the counter claim was decreed , while dismissing the suit of plaintiff.

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Hence from the pleadings of both sides, it has categorically proved that earlier suit was filed by plaintiff no-2 regarding the land of dag no-216 and 250 and suit of plaintiff no-2 was dismissed.

Plaintiffs in their evidences exhibited the plaint, written statement cum counter claim, written statement of defendant filed by plaintiff no-2 against the counter claim, judgment and decree of T.S No-376/95 as Ext-3, 4, 5, 6 and 7. I have carefully gone through all such documents and find that plaintiff no-2 of this instant suit filed T.S No-376/95 praying declaration of her right, title, interest and possession over land of dag no-216 and 250 along with some other reliefs and defendants in that suit by filling Ext-4 written statement cum counter claim prayed declaration of right, title, interest and possession over the suit land belongs to dag no-216&250 along with recovery of khas possession of land dag no-250. It is further appears that counter claim was decreed declaring right, title, interest of counter claimants I.e present defendants over suit land belongs to dag no-216 and 250 and subsequently said decree was executed in Title Execution Case No-3/02.

Thereafter in the year 2004 plaintiff brings instant suit claiming that decree was illegally, arbitrarily and fraudulently executed in T. Ex Case No-3/02 in land of dag no-216. The plaintiffs in their plaint of this suit shows three schedules of land as A,B and C and all such lands belongs to dag no-216&250. It has already clear from the discussion above and documentary evidences of plaintiffs side that suit land of this suit and suit land of T.S No-376/95 are belongs to dag no-216&250 and right, title, interest and possession of present defendants has already been decided by competent court of jurisdiction in T.S No-376/95 and said judgment and decree still in force as said judgment not yet challenge in any higher forum. More also the decree passed in T.S No-376/95 had already executed in T.Ext-3/02. This court is legally binds by the judgment pronounced in T.S No-376/95, because said judgment is still in force and present plaintiffs not challenge the said judgment in any higher forum of this state.

From the discussion above, the following facts are appears to be proved:-

1. That the subject matter of this suit and earlier suit vide T.S No-376/95 are directly and substantially same;
2. That parties of present suit and earlier suit vide T.S No-376/95 are same and they are litigating under the same title;
3. That earlier suit has been decided by a competent court of jurisdiction and said court is competent to decide the question arises in this suit.

Therefore in the light of all the above discussion I am of considered opinion that instant suit filed by the plaintiffs barred under the principles of res-judicata as per section-11 of C.P.C, because by judgment and decree in T.S No-376/95, the matter in issue of this suit has been directly and explicitly decided and the decision operates as res-judicata and bars the trail of an identical issue in a subsequent proceeding between the same parties. That plaintiff in his suit claims that actions of defendants in T. Ext No-3/02 are illegal and arbitrary only on the ground that the defendant having no right, title, interest over land of dag no-216&250, got executed the deree of T.S No-376/95, whereas the real fact is that right, title, interest of defendant over dag no-216&250 already decided in T.S No-376/05 and said judgment is still in force. Hence, upon the above it can be safely decide

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here that instant suit is barred by principles of res-judicata. As such this issue is answered in negative and against the plaintiffs. Cont.P-9

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10. ISSUE NO-5&6:- RELIEFS

Both the issues no-5&6 are co-relates and same in nature, that is why both issues are taken together for discussion and decision. In the light of discussion and decision made in issue no-1,2 & 4 plaintiffs are not entitled to get any reliefs as prayed for. Hence both the issues answered in negative and against the plaintiffs.

ORDER

11. In the result plaintiff suit is dismissed on contest with cost.
12. Prepare a decree accordingly.
13. Judgment is pronounced and delivered in open court under the hand seal of this court on 20th day of January , 2014.

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Dhubri**

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APPENDIX

1. **PLAINTIFFS WITNESSES** PW- 1 Tayab Ali SK
 PW-2 Bilal Hussain
 PW-3 Kishore Kumar Tamuli

2. **DEFENDANTS WITNESSES:-** DW-1 Sukur Ali

3. **PLAINTIFFS EXHIBITS** :- Ext-1 Photostat Copy of Khatian no-103
 Ext-2 Photostat copy of land holding certificate
 Ext-3,4,5,6-Plaint, W.S, Objection& Judgment and decree
 Ext-7 Order of T.E No-3/02
 Ext-8 W/P with Nazir Report
 Ext-9 Photostat Copy Jamabandi
 Ext-10 Photostat copy of Trace Map

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