



GAHC010016792017

Page No.# 1/14



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

Case No. : CRP/104/2017

MD. ABDUL JALIL BARBHUIYA and 3 ORS.
S/O- LATE JUNAB ALI BARBHUIYA, VILL- CHANDIPUR PART-III, P.O-
CHANDIPUR, P.S- ALGAPUR, DIST- HAILAKANDI, ASSAM

2: MD. ABDUL HASIM BARBHUIYA
S/O- LATE JUNAB ALI BARBHUIYA
VILL- CHANDIPUR PART-III
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

3: MD ABDUL MOTIN BARBHUIYA
S/O- LATE JUNAB ALI BARBHUIYA
VILL- CHANDIPUR PART-III
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

4: MD JASIM ALI BARBHUIYA@ JASIM UDDIN BARBHUIYA
S/O- LATE JUNAB ALI BARBHUIYA
VILL- CHANDIPUR PART-III
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSA

VERSUS

MD. JALAL UDDIN BARBHUIYA and 52 ORS.
S/O- LATE TAPAZUL ALI BARBHUIYA, VILL- CHANDIPUR PART-II, P.O-
CHANDIPUR, P.S- ALGAPUR, DIST- HAILAKANDI, ASSAM, PIN- 788150



2:THE LEGAL HEIRS OF JD LATE LATIFA BIBI

W/O LATE ABDUL GAFUR LASKAR

3:MD IBRAHIM ALI LASKAR

S/O- LATE ABDUL GAFUR LASKAR

4:MD SURUJ ALI LASKAR

S/O- LATE ABDUL GAFUR LASKAR

ALL ARE OF VILL- CHIPOR SANGON PART-III

P.O- CHIPORSANGON

P.S- ALGAPUR

DIST- HAILAKANDI

ASSAM PIN- 788801

5:MD AZIR UDDIN LASKAR

S/O- LATE ABDUL GAFUR LASKAR

DUE TO HIS DEATH IN HIS PLACE HIS LEGAL HEIRS-- A ABDUL WAHID LASKAR

S/O- LATE AZIR UDDUN LASKAR B NAZIRA BEGUM LASKAR

D/O- LATE AZIR UDDUN LASKAR C NOOR NEHAR LASKAR

D/O- LATE AZIR UDDUN LASKAR D NASRUN NEHAR LASKAR

D/O- LATE AZIR UDDUN LASKAR E FAKRUN NEHAR LASKAR

D/O- S/O- LATE AZIR UDDUN LASKAR ALL ARE R/O- VILL CHIPOR SANGON PART-III

P.O- CHIPORSANGON

P.S- ALGAPUR

DIST- HAILAKANDI

ASSAM

PIN- 788801

6:MUSSTT. JAMILA BEGUM LASKAR

D/O- LATE LATE ABDUL GAFUR LASKAR

VILL- CHIPOR SANGON PART-III

P.O- CHIPORSANGON

P.S- ALGAPUR

DIST- HAILAKANDI

ASSAM PIN- 788801

7:SOFINA BIBI

W/O- LATE MOTAI MIA

VILL- CHIPOR SANGON PART-III

P.O- CHIPORSANGON

P.S- ALGAPUR

DIST- HAILAKANDI

ASSAM PIN- 788801

8:NOOR KHATUN BIBI



D/O- LATE ABDUL GAFUR BARBHUIYA@ LASKAR
W/O- MD YASIN ALI LASKAR
VILL BAKRIHAWAR PT-IV
P.O- CHIPORSANGON
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788801

9:THE LEGAL HEIRS OF LATE ASIA BIBI BARBHUIYA

W/O- LATE ABDUL SATTAR BARBHUIYA WHO IS D/O- LATE LATIFA BIBI

10:MD MOINUL HAQUE BARBHUIYA

11:SAMSUL HAQUE BARBHUIYA

12:ANWARA BEGUM BARBHUIYA

13:ANGURA BEGUM BARBHUIYA
ALL ARE SON AND DAUGHTERS OF LATE ABDUL SATTAR BARBHUIYA
OF VILL-VILL- CHIPOR SANGON PART-III
P.O- CHIPORSANGON
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788801

14:THE LEGAL HEIRS OF CHAYARUN BIBI BARBHUIYA @ MAZUMDER
W/O- LATE TAJAMUL ALI MOZUMDER @ TAJOL WHO IS DAUGHTER OF
LATE LATIFA BIBI

15:ABDUL ROHIM MAZUMDER

16:FAKAR UDDIN MAZUMDER

17:ABDUL KAYUM MOZUMDER @ ABDUL KAHIR MOZUMDER

18:MUSSTT. RAJIA BEGUM MAZUMDER

19:MUSSTT. HASNA BEGUM MOZUMDER
ALL ARE SON AND DAUGHTER OF LATE TAJAMUL ALI MOZUMDER @
TAJOI OF VILL- CHIPOR SANGON PART-III



P.O- CHIPORSANGON
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788801

20:THE LEGAL HEIRS OF DULAI BIBI LASKAR
W/O- LATE ABDUL ROHIM LASKAR

21:SAFOR UDDIN LASKAR

22:ALIM UDDIN LASKAR

23:ABDUL KALAM LASKAR

24:AZIM UDDIN LASCAR

25:TAJIM UDDIN LASKAR

26:NIZAM UDDIN LASCAR

27:MUSSTT. RABIA BEGUM LASKAR

28:MUSSTT. HUSNA BEGUM LASKAR

29:MUSSTT. ARINA BEGUM LASKAR
ALL ARE SONS AND DAUGHTERS OF LATE ABDUL ROHIM LASKAR OF
VILL- CHIPOR SANGON PART-I
P.O- CHIPORSANGON
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788801

30:THE LEGAL HEIRS OF HAWATUN BIBI BARBHUIYA
W/O- LATE SUNAHAR ALI BARBHUIYA

31:JAKIR HUSSAIN BARBHUIYA

32:ABDUL HUSSAIN BARBHUIYA



33:JAMAL UDDIN BARBHUIYA

34:SIBAL HUSSAIN BARBHUIYA

35:HILUR HUSSAIN BARBHUIYA

36:FORIDA BEGUM BARBHUIYA

37:TAHERA BEGUM BARBHUIYA

38:FATIMA BEGUM BARBHUIYA

39:IMRANA BEGUM BARBHUIYA
ALL ARE SON AND DAUGHTERS OF LATE SUNAHAR ALI BARBHUIYA
VILL- UTTAR NARAYANPUR PART-III
P.O- NARAYANPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM
PIN- 788801

40:LEGAL HEIRS OF LT NESSA BEGUM - LATE ABDUL HAQUE BARBHUIYA

41:LEGAL HEIRS OF LATE ABDUL HAQUE BARBHUIYA
S/O- LATE ATAR ALI BARBHUIYA

42:RUSNA BEGUM BARBHUIYA
W/O- AYNUL HAQUE
VILL CHANDIPUR PART-II
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788150

43:LEGAL HEIRS OF LATE ABDUL KHALIQUE BARBHUIYA
S/O- LATE TAJAMUL ALI BARBHUIYA

44:NURUN NESSA BARBHUIYA
W/O- LATE ABDUL KHALIQUE BARBHUIYA



45:SHUKKUR AHMED BARBHUIYA
S/O- LATE ABDUL KHALIQUE BARBHUIYA

46:HAMIDA KHATUN BARBHUIYA
S/O- LATE ABDUL KHALIQUE BARBHUIYA

47:MONORA BEGUM BARBHUIYA
D/O LT. ABDUL KAHALIQUE BARBHUIYA ALL ARE R/O- VILL-
CHANDIPUR PART-III
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM
PIN- 788150

48:THE LEGAL HEIRS OF LATE ABDUL LATIF BARBHUIYA
S/O- LATE TAJAMUL ALI BARBHUIYA

49:HAFSA BEGUM BARBHUIYA
W/O- LATE ABDUL LATIF BARBHUIYA

50:NOOR AHMED BARBHUIYA
S/O- LATE ABDUL ALTIF BARBHUIYA

51:HUSSAIN AHMED BARBHUIYA
AGED ABOUT 16 YEARS
S/O- LATE ABDUL LATIF BARBHUIYA

52:HASNA BEGUM BARBHUIYA
AGED 11 YEARS
D/O- LATE ABDUL LATIF BARBHUIYA

O.P NO. 42and43 ARE MINORS
THE DEFENDENT NO40 BEING MOTHER WILL REPRESENT THEM ALL
ARE OF VILL- CHANDIPUR
PART-III
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM PIN- 788150

53:THE OTHER LEGAL HEIRS OF LATE TAJAJUL ALI BARBHUIYA

54:LATIFUL BIBI BARBHUIYA
W/O- LATE TAJAJUL ALI BARBHUIYA
VILL- CHANDIPUR PART-II
P.O- CHANDIPUR



P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

55:HAFSA BEGUM BARBHUIYA
W/O- SAMSUL BEGUM BARBHUIYA
W/O- SAMSUL HAQUE MAZARBHUIYA
VILL- KAPNARPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

56:ASMA BEGUM BARBHUIYA
W/O- LATE SAROF UDDIN BARBHUIYA
VILL- CHANDIPUR
PART-II
P.O- CHANDIPUR
P. S- ALGAPUR
DIST- HAILAKANDI
ASSAM

57:SAINA BEGUM
W/O- NURUL HAQUE
VILL- WEST MOHANPUR
P.O- MOHANPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

58:THE LEGAL HEIRS OF LATE NUR JAHAN BEGUM
D/O- LATE TAFAJUL ALI BARBHUIYA

59:MOINUL HAQUE BARBHUIYA
S/O- LATE ABDUL JABBER BARBHUIYA

60:SAMSUL HAQUE BARBHUIYA
S/O- LATE ABDUL JABBER BARBHUIYA
BOTH ARE OF VILL- KAPNAPAR
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

61:SURATUN NESSA
W/O- LATE MAKBUL ALI LASKAR

62:AFRATUN NESSA



W/O- NUR UDDIN
BOTH ARE VILL- BATAJANGURI
P.O- KALIBARI BAZAR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

63:HAWATUN NESSA
W/O- ABDUR RAHIM
VILL- CHANDIPUR PART-II
P.O- CHANDIPUR
P.S- ALGAPUR
DIST- HAILAKANDI
ASSAM

64:SAIRA BEGUM
W/O- INNUS ALI
VILL- CHIPORSANGON
PART-II
P.O- CHAIPERSANGON
P.S- ALGAPUR
DIST- HAILAKANDI
ASSA

Advocate for the Petitioner : MR.A M S MAZUMDER

Advocate for the Respondent : MR.A A R KARIMR- 2 to 34 and 36 to 43

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

01.11.2021

Heard the learned counsel for the petitioners and the respondent nos.1. None appears on behalf of the other respondents on call.

2. This is an application under Article 227 of the Constitution of India read with Section 115 of the Code of Civil Procedure challenging the order dated 07.11.2016 passed by the learned Civil Judge, Hailakandi in Misc. Case No.3/2015 arising out of Title Execution Case



No.7/2013 whereby the learned Executing Court dismissed the petition filed by the petitioners under Order XXI Rule 98, 99, 100 and 101 of the Code of Civil Procedure read with Section 47 and 151 of the said Code vide the order impugned in the instant proceedings.

3. Upon perusal of the impugned order dated 07.11.2016 and taking into consideration that the instant proceedings has come up for admission, having heard the learned counsel present before me, I am of the opinion that the instant proceedings can be disposed of at this stage.

4. The impugned order emanates from an application filed by the petitioners under Order XXI Rule 98, 99, 100 and 101 read with Section 47 and 151 of the Code of Civil Procedure, 1908 whereby the basic claim of the petitioners was adjudication of their right, title, interest and possession over the suit land which was decreed by the Trial Court in favour of the respondent no.1 on 27.03.2017 in Title Suit No.18/1999 and on the basis of which Title Execution Case No.7/2013 was filed. Before further going into the legality of the order impugned, it would be necessary to look into the provisions of the Order XXI Rule 97 to 103 of the Code of Civil Procedure which has a vital bearing to the adjudication of the instant *lis*.

5. Order XXI Rule 97 to 103 of the Code of Civil Procedure were substantially amended by the Code of Civil Procedure (Amendment) Act, 1976. As per the unamended Rule 101, a person who was a bonafide claimant and who satisfied that he was in possession of the suit property on his account or on account of another other than the judgment-debtor could have been put in possession of the suit property on an application under Rule 100 and 101. Now after the amendment carried out by the Amending Act of 1976, the person who seeks to be restored back in possession has not only to prove that the person was in bonafide possession but also that he has to prove his right, title or interest in respect to the suit property. In other words what was required to be adjudicated in a suit under the unamended Rule 103 is now to be adjudicated in Rule 101 pursuant to the Amending Act of 1976. Similarly the right to file a suit under the unamended Rule 103 has been taken away by amendments made to both Rule 101 and 103 by the Amending Act of 1976 and by necessary implication the legislature



relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it for which now the orders passed on the application under Rule 98 and 100 are to be treated as decrees. The said amendments brought by the Amending Act of 1976 are therefore with the objective to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution.

6. A perusal of the Rule 97 of Order XXI shows that not only a decree-holder or a purchaser but also a third party can complain of resistance and obstruction to the decree for execution and this aspect is clear from the caption "Resistance to delivery of possession to decree-holder or purchaser" as subsumed in Order XXI Rule 97 to 106 and the term "any person" as contained in Rule 97. Further Sub-Rule (2) of Rule 97 makes it incumbent on the Court to proceed to adjudicate upon such complaint in accordance with the procedure laid down. In this regard reference can be made to the judgments rendered by the Supreme Court in the case of *Silverline Forum Pvt. Ltd vs. Rajiv Trust and Another* reported in (1998) 3 SCC 723 and *Shreenath and Another vs. Rajesh and Others* Reported in (1998) 4 SCC 543.

7. It is true that the Rule 99 of Order XXI is not available to any person until he is dispossessed of the immovable property by the decree-holder but taking into consideration that Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the Executing Court, it is therefore incumbent upon the Executing Court to decide all such legal questions relevant to the adjudication of the application is taken up for consideration. In this regard reference may be made to the judgment of the Supreme Court rendered in the case of *Shamsher Singh & Another vs. Lieutenant Colonel Nahar Singh (Dead) through legal representative & Others* reported in (2019) 17 SCC 279 and particularly to paragraph 28 and 29 and the same is quoted hereinbelow :

"28. The use of the words "all questions (including the questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 ..." has to be given meaning and full play. It is

also relevant to note that prior to the 1976 Amendment, under Rule 103, the aggrieved party could have brought a suit for determination of rights between them but by the 1976 Amendment, Rule 103 has been amended to the following effect :

“103. **Orders to be treated as decrees.** – Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.”

29. The purpose of amendment under Rule 103 is also that any adjudication made under Rule 101 shall have same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. Rule 101, thus, affords an opportunity to get all issues relating to right, title or interest in the property to be determined. When Respondent 1 filed his application claiming to be put back into possession, it was obliged to establish his right, title or interest in the property without which his application could not have been allowed. The executing court has considered the application of Respondent 1 in right perspective and has clearly held that Respondent 1 failed to prove his title by adverse possession, hence the application deserves to be rejected.”

8. In the backdrop of the above, let me consider the order impugned in the present proceedings. A perusal of the impugned order shows that the Executing Court instead of adjudicating the *lis* brought out by the petition under Order XXI Rule 98, 99, 100 and 101 registered as Misc. Case No.3/2015 rejected the application without exercising the jurisdiction conferred upon it on the ground that the petitioners had made a false statement that they have no knowledge about the judgment and decree passed in Title Suit No.18/1999. On the specific query being made to the counsel appearing for the respondent no.1 as to what was the suit for i.e. Title Suit No.18/1999, the learned counsel for the respondent no.1 has drawn my attention to Annexure-1 of the petition which is the judgment and decree passed in Title Suit No.18/1999 which would go to show that the said suit was filed for specific performance of a *Biananama* dated 27.04.1998. It is no longer *res-integra* that in the suit for specific performance of a contract for sale the necessary parties to the said suit are the parties to the contract or if they are dead the legal representatives as also a person who had purchased the contracted property from the vendor but not a person who claims adversely to the interest of the vendor. The presence of 3rd party claiming independent right, title and interest is not

conceived in a suit for specific performance. In this regard reference can be drawn to paragraph 7 of the judgment of the Supreme Court rendered in the case of *Kasturi vs. Iyyamperumal and Others* reported in (2005) 6 SCC 733. The said paragraph 7 is quoted hereinbelow:

“7. In our view, a bare reading of this provision, namely second part of Order I Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party.”

9. In view of the above, the dismissal of the application filed by the petitioners i.e. Misc. Case No.3/2015 in Title Execution Case No.7/2013 on the ground that the petitioners had knowledge about Title Suit No.18/1999 without adjudicating the legal questions relevant to the adjudication of the application filed by the petitioner amounts to failure of exercise of jurisdiction conferred upon the Court below by law and consequently is revisable under Section 115 of the Code of Civil Procedure. In this regard reference made to the judgment of the Supreme Court rendered in the case of *Sameer Singh and Another vs. Abdul Rab and Others* reported in (2015) 1 SCC 379 and more particularly to paragraph 26 and 27 which is quoted hereinbelow :

“26. The aforesaid authorities clearly spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the



executing court. Order 21 Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. If a court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it. The appellants had approached the High Court as per the dictum laid down by this Court in *Surya Dev Rai vs. Ram Chander Rai*.

27. Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable as has been held in *Joy Chand Lal Babu vs. Kamalaksha Chaudhury*. The same principle has been reiterated in *Keshardeo Chamria vs. Radha Kissen Chamria* and *Chaube Jagdish Prasad vs. Ganga Prasad Chaturvedi*. Needless to emphasise, the said principle is well settled. After the amendment of Section 115 CPC w.e.f. 1-7-2002, the said power is exercised under Article 227 of the Constitution as per the principle laid down in *Surya Dev Rai*. Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication."

The said impugned order under no circumstances can be said to be a decision on merit and consequently there was failure to exercise the jurisdiction conferred upon the Executing Court by law for which the impugned order is liable to be interfered with.

10. In view of the above observation, the order dated 07.11.2016 is set aside and quashed and the Court below is directed to dispose of the application filed by the petitioner i.e. Misc. Case No.3/2015 in Title Execution Case No.7/2013 in accordance with law without being influenced by the order dated 07.11.2016 which have been set aside by this Court. The



parties are directed to appear before the Executing Court on 29.11.2021 and the interim order dated 02.05.2017 passed by this Court shall continue till 29.11.2021. The learned Executing Court shall thereupon decide about the further stay of the execution proceedings in accordance with law.

11. With the above observations, the instant petition stands disposed of. No cost.

JUDGE

Comparing Assistant