



GAHC010115452019

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

**Case No. : CRP(IO)/171/2019**

AMULYA SAHA AND 2 ORS.  
LT. JOGESH CH. SAHA, R/O KALAHABHANGA MOUZA- GOBARDHANA,  
P.O. BARPETA ROAD, WARD NO. 3, DIST.-BARPETA, ASSAM

2: BIMAL SAHA  
SON OF LATE JOGESH CH. SAHA  
RESIDENTS OF KALAHABHANGA MOUZA - GOBARDHANA  
P.O. BARPETA ROAD  
WARD NO. 3  
IN THE DISTRICT OF BARPETA  
ASSAM.

3: SHAYAMAL SAHA  
SON OF LATE JOGESH CH. SAHA  
RESIDENTS OF KALAHABHANGA MOUZA GOBARDHANA  
P.O. BARPETA ROAD  
WARD NO. 3  
IN THE DISTRICT OF BARPETA  
ASSAM

VERSUS

ON DEATH OF NARESH CH. ROY HIS LEGAL HEIRS AND 29 ORS  
WEST BENGAL

1.1:LILABATY ROY  
W/O LT. NARESH CHANDRA ROY  
R/O 51 NO. BHAIKAB DUTT LANE  
P.O. SALKIA  
DIST. HOWRAH-6  
WEST BENGAL

1.2:BIDUR ROY  
S/O LT. NARESH CHANDRA ROY



R/O 51 NO. BHAIRAB DUTT LANE  
P.O. SALKIA  
DIST. HOWRAH-6  
WEST BENGAL

1.3:SIPRA ROY  
D/O LT. NARESH CHANDRA ROY  
R/O 51 NO. BHAIRAB DUTT LANE  
P.O. SALKIA  
DIST. HOWRAH-6  
WEST BENGAL

1.4:SHILA ROY  
D/O LT. NARESH CHANDRA ROY  
R/O 51 NO. BHAIRAB DUTT LANE  
P.O. SALKIA  
DIST. HOWRAH-6  
WEST BENGAL

2:TAPESH ROY  
S/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

3:BINA ROY  
W/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

4:SHILPI ROY  
D/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

5:SHIKHA ROY  
D/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

6:LIPI ROY



D/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

7:LEKHU ROY  
D/O LT. KAMAKHYA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

8:HITENDRA NARAYAN ROY  
S/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

9:SANAT ROY  
S/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

10:RAM GOPAL ROY  
S/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

11:RAM PRASAD ROY  
S/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

12:KANCHAN ROY  
D/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.



13:KANAN ROY  
D/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

14:ASHNA ROY  
D/O LT. RAMESH ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

15:HENA ROY  
D/O LT. BIRENDRA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

16:MALATI ROY  
D/O LT. BIRENDRA ROY  
RESIDENTS OF 51 NO. BHAIRAB DUTTA LANE  
P.O. SALKIA  
IN THE DISTRICT OF HOWRAH - 6  
WEST BENGAL.

17:BULA ROY @ BULA SAHA ROY  
WIFE OF SURESH SAHA ROY  
DAUGHTER OF LATE BIREN ROY  
SAHEBGANJ ROAD  
NEAR MAHAMAYA MANDIR  
DINHATA  
P.O. DINHATA  
DISTRICT - COOCH BEHAR  
WEST BENGAL.

18:KHANINDRA NATH DAS  
S/O LT. DHIRENDRA NATH DAS  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 6  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

19:ANIMA DAS  
W/O LT. DHIRENDRA NATH DAS



RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 6  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

20:KALPANA SAHA  
W/O PRADIP KUMAR SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

21:PUERNIMA SAHA  
W/O DILIP KUMAR SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

22:MUNNA SAHA  
W/O ASHOK KR. SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

23:BHUPENDRA NARAYAN SAHA  
S/O LT. TARAPAD SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

24:NRIPENDRA SAHA  
S/O LT. TARAPAD SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

25:SUBHASH CH. SAHA  
S/O LT. TARAPAD SAHA



RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

26:BIBHAS CH. SAHA  
S/O LT. TARAPAD SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

27:TAPASH CH. SAHA  
S/O LT. TARAPAD SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

28:BANGA BIPLAB SAHA  
S/O LT. TARAPAD SAHA  
RESIDENTS OF BARPETA ROAD TOWN  
WARD NO. 5  
MOUZA - GOBARDHANA  
IN THE DISTRICT OF BARPETA  
ASSAM.

29:TARAMANI ROY  
WIFE OF LATE RAMESH ROY  
RESIDENT OF 51 NO. BHAIKAB DUTTA LANE  
P.S. KIYAT HOWRAH  
IN THE DISTRICT OF HOWRAH  
WEST BENGAL.

30:SHIPNI CHOUDHURY  
WIFE OF AMITAB CHOUDHURY  
RESIDENT OF 8 NO. NAYANPUR LANE  
KOLKATA - 6  
WEST BENGAL

**Advocate for the Petitioner** : MS. P CHAKRABORTY

**Advocate for the Respondent** : MR G N SAHEWALLA

**BEFORE  
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

**JUDGMENT & ORDER (CAV)**

**Date : 31.03.2022**

Heard Ms. P. Chakraborty, the learned counsel for the petitioner and Mr. G.N. Sahewalla, the learned Senior Counsel assisted by Ms. S. Todi for the respondents.

2. The instant application under Article 227 of the Constitution of India is directed against the writ issued on 25/03/2019 and the notice dated 25/04/2019 on being in violation to the mandatory provisions of Order XXI Rule 35(1) and 36 of the Code of Civil Procedure, 1908 (for short "the Code") and for a direction to adequately compensate the petitioners for illegally destroying the immovable property on 02/04/2019.

3. The brief facts of the instant case is that the petitioners herein as plaintiffs had instituted a suit being Title Suit No. 8/1999 seeking a declaration of their tenancy rights and confirmation of possession as well as for permanent injunction restraining the defendants therein from selling out the suit premises. The said suit premises consisted of 1 katha 5 lechas out of 2 katha 10 lechas of land covered by Patta No.74/469 of Dag No. 707 situated at Barpeta Road Mouza Goubardhan in the district of Kamrup(Metro), Assam. In the said suit the defendants had filed a counter claim. In the said counter claim the case of the defendants were that the petitioners were not paying rent to the landlord ever since 1960 and the therefore, the original landlord

had executed the power of attorney in favour of the Defendant No. 18 who also failed to realize the rent from the petitioners and had subsequently purchased the entire land including the suit premises on 20/01/1999 by way of a registered sale deed and acquired right, title and interest over the suit premises by mutating the names over the same. Thereafter repeated demands were made for payment of rent by the defendants which were not paid and there was a bona fide requirement of the suit premises and thus prayed for eviction of the petitioners/plaintiffs from the suit land along with payment of arrear rent from the year 1988.

4. By the judgment and decree dated 11/10/2002, the suit filed by the plaintiffs/the petitioners was dismissed on contest and the counter claim of the defendants who are the respondents herein was decreed on contest thereby inter alia declaring that the plaintiffs were the defaulters in payment of arrear rent of the suit premises and the suit premises was bona fide required by the contesting defendants i.e. Defendants Nos. 19 to 28. It was also declared that the plaintiffs are liable to be evicted from the suit premises and the contesting Defendants were entitled to realize the arrear rent of the suit premises w.e.f. 1988.

5. An appeal was preferred by the petitioners herein before this Court which was registered and numbered as RFA No.95/2002 in view of the change in the pecuniary jurisdiction effected by the Bengal, Assam, Agra Civil Courts Act, 1887, the said Regular First Appeal was sent back to the Court of District Judge, Barpeta and thereupon was registered and renumbered as Title Appeal No. 23/2006. The said Title





Appeal filed by the petitioners was dismissed on 20/08/2006 upholding the judgment and decree dated 11/01/2002.

6. Being dissatisfied with the said judgment and decree passed by the First Appellate Court, the petitioners preferred a Regular Second Appeal before this Court which was registered and numbered as RSA No. 137/2008. The said Second Appeal was filed challenging the dismissal of the suit which was confirmed in the First Appeal. As regards the upholding of the decree passed in the counter claim, a Civil Revision Petition No. 375/2008 was preferred by the petitioners before this Court. The Regular Second Appeal i.e. RSA No. 137/2008 was dismissed by a judgment and order dated 27/11/2018 passed by this Court. The Civil Revision Petition i.e. CRP No.375/2008 vide a separate judgment and order dated 27/11/2018 was also dismissed.

7. At this stage, it may be relevant herein to mention that the respondents had filed a Title Execution Case No. 4/2008 before the Court of the Civil Judge, Barpeta. During the pendency of the Second Appeal as well as the Civil Revision Petition, the said Title Execution Case No. 4/2008 was stayed. With the dismissal of both the Second Appeal as well as the Civil Revision Application, the Title Execution Case No. 4/2008 revived and the Executing Court vide an order dated 19/12/2018 proceeded with the said execution proceedings fixing 23/01/2019 as the next date. As 23/01/2019 was a holiday, the said execution proceedings was taken up on the next date i.e. on 24/01/2019, on which date, the petitioners filed a petition registered and numbered as Petition No. 6/2019. The Executing Court after hearing both the parties,



fixed 8/2/2019 for orders on Petition No. 6/2019. In the meantime, on 04/02/2019 the Judgment Debtors i.e. the petitioners had also filed another application being registered and numbered as Petition No. 23/2019 and the Court fixed the matter on 13/02/2019 for necessary orders. It may be relevant to mention that the Petition No. 23/2019 was an application under Order XLI Rule 5 read with Section 151 of the Code for stay of the execution proceeding on the ground of obtaining stay order from this Court.

8. The Executing Court vide an order dated 13/02/2019 fixed 20/02/2019 for necessary orders. On 20/02/2019 the Executing Court further granted another opportunity to the petitioners to submit the stay order passed by this Court. At this stage, it may be relevant herein to mention that the petitioners filed a Review Application before this Court seeking review of the judgment and order dated 27/11/2018 passed in CRP No. 375/2008. On 11/03/2019, the learned Executing Court after perusal of the record and considering that the petitioners have not produced any stay order from this Court directed the decree holders to take steps upon the Judgment Debtors and fix 04/04/2019 for report. On the basis of the said order the writ was issued to the Bailiff on 26/03/2019 and to file report on 04/04/2019. It may also be relevant herein to mention that on 23/03/2019 the original case record of Title Suit No. 8/2019 was received from this Court and the original case records were tagged along with the execution proceedings. Pertinent herein to note that the order dated 11/3/2019, has not been put to challenge.



9. The record further reveals that on 02/04/2019 the Lat Mandal had carried out the measurement as per the description in the decree and the Chita Map and the Bailiff upon being appraised had handed over the possession to the decree holders and this aspect of the matter was brought to the attention of the learned Executing Court vide an acknowledgment dated 04/04/2019 submitted by the decree holders/respondents. Thereupon vide a notice dated 25/04/2019 the petitioners were directed to deposit an amount of Rs.2,98,699/- on 30/05/2019.

10. It is against the said execution being carried out on the basis of the writ issued on 25/03/2019 and issuance of the notice dated 25/04/2019 the petitioners are before this Court under Article 227 of the Constitution. The contention of the petitioners before this Court is that the execution was carried out in violation to the provisions of Order XXI Rule 35 and 36 of the Code and that the notice issued on 25/04/2019 for payment of the arrear rent of Rs. 2,98,699/- w.e.f September, 2002 till March, 2009 was beyond the decree.

11. Let this Court first take into consideration as to whether the issuance of the writ on 25/03/2019 and on the basis thereof the execution being carried out was in violation to the provisions of Order XXI Rule 35(1) and 36 of the Code. A perusal of the Sub Rule (1) of Order XXI Rule 35 of the Code would show that when a decree is for delivery of an immovable property, possession thereof shall be delivered to the person to whom it has been adjudged or to such person as he may appoint to receive the delivery on his behalf and if necessary by removing any person bound by the

decree, who refuses to vacate the property. Sub-Rule (2) and (3) of Order XXI Rule 35 is not relevant for the purpose of the instant case and as such not dealt herewith. Order XXI Rule 36 of the Code however deals with a decree of immovable property when in occupancy of a tenant. A perusal of the said Rules would show that the said Rules shall be applicable where a decree is for delivery of an immovable property in occupancy of a tenant or other person entitled to occupy the same and not bound by a decree to relinquish such occupancy. The said provisions in the facts of the instant case however, is not applicable in as much as the decree so passed was a decree in terms with Order XXI Rule 35(1) of the Code.

12. In the backdrop of the above, if we look into the proceedings before the Executing Court, i.e. the orders dated 24/01/2019, 04/02/2019, 13/02/2019 and 20/02/2019, the Executing Court had granted various opportunities to the petitioners by putting them into notice that in absence of any order being produced from this Court, the Executing Court shall proceed with the execution of the decree. Accordingly, on 11/03/2019 the Executing Court after rejecting the request of the petitioners to adjourn, directed the decree holder to take steps upon the Judgment Debtor and fix 04/04/2019 for report. In consequence to the order dated 11/03/2019 the writ was issued on 25/03/2019. The order dated 11/03/2019 however is not a subject matter of challenge. What has been put to challenge is the writ issued on 25/03/2019 which apparently was issued in accordance with the order dated 11/03/2019 as well as the provisions of Order XXI Rule 35(1) of the Code. Consequently this Court did not

finding any error in the said exercise of jurisdiction and accordingly no interference is called for to the said execution so carried out in terms with the judgment and decree dated 11/10/2002 which had attained finality vide the judgment and order dated 27/11/2018 passed by this Court in CRP No.375/2008.

13. The next question which arises is as to whether the issuance of the notice on 25/04/2019 directing the petitioners for payment of the arrears from September, 2002 till March, 2019 of an amount of Rs. 2,98,699/- is beyond the decree.

14. A perusal of the judgment and decree dated 11/10/2002 would show that the Trial Court had decreed that the contesting defendants were entitled to realize the arrear rent of the suit premises w.e.f. 1988. The First Appellate Court by the judgment and decree dated 29/08/2008 passed in Title Appeal No. 23/2006 had upheld the judgment and decree dated 11/10/2002 passed in Title Suit No.8/1999. This Court vide a separate judgment and order dated 27/11/2018 passed in RSA No. 137/2008 and CRP No.375/2008 respectively had upheld the judgment of the Trial Court as well as the First Appellate Court. Admittedly only on 02/04/2019 the possession could be delivered to the decree holders and as per the decree, the decree holders are entitled to realize the arrear rent of the suit premises w.e.f. 1988 which includes the period from September, 2002 till March, 2019. It is no longer res integra that the tenant is liable to pay rent during the pendency of the ejectment proceedings. In that regard, reference may be drawn to the judgment of the Division Bench of this Court rendered in the case of Shobha Biswas vs Ranjit Lodh Vs reported in 2006 (1) GLT 479. At this

stage, it is also relevant to take note of paragraph 13 of the judgment of the Supreme Court rendered in the case of *Atmaram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.* reported in (2005) 1 SCC 705 and the same is quoted herein below:-

*“13. In Shyam Charan Vs. Sheoji Bhai this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation,, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In Bhagwandas Lakhamsi v. Kokabai the learned Chief Justice of the Nagpur High Court held that the Rent Control Order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of a tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.”*

15. A perusal of the said judgment would show that after determination of the tenancy, the position of a tenant is akin to that of a trespasser and he cannot claim that the measure of damages awarded to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. In the instant case, a perusal of the notice issued on 25/04/2019 would show that the Executing Court had limited the compensation on the basis of the monthly rent @ Rs.1501/- and on the basis thereof had arrived at an amount of Rs.2,98,699/-. This Court is of the view that neither the issuance of the said notice is



beyond the decree nor exorbitant or excessive, and as such the issuance of notice on 25/04/2019 does not call for any interference.

16. In view of the above, the instant petition stands dismissed. The learned Executing Court shall proceed with the execution for the purpose of realisation of the arrear rent. In the present facts, this Court is not inclined to impose costs.

**JUDGE**

**Comparing Assistant**