

GAHC010036702024



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

Case No. : CRP(IO)/78/2024

ABDUR REZZAK AMIN SK. AND 7 ORS.
S/O- LATE TAIB ALI, R/O- VILL.- HATSINGIMARI, NAYAPARA
(BHIMAPARA), DIST. DHUBRI, ASSAM, PIN- 783127.

2: ZAHIRUL ISLAM SK.
S/O- LATE TAIB ALI
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

3: AMIR HAMZA MOLLAH
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

4: ABBAS ALI MOLAH
S/O- JALIL MOLLAH
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

5: SAFIUL ISLAM
S/O- HASAN MONDOL
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

6: SOFIQUL ISLAM
S/O- LATE FOTIK ALI
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

7: ABDUL JALIL SK.
S/O- SHONAULLAH SK.
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127.

8: SK FOYZUL HOQUE
S/O- SHONAULLAH SK.
R/O- VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA)
DIST. DHUBRI
ASSAM
PIN- 783127

VERSUS

HABIYA BEGUM AND ANR
D/O- LATE IMAN ALI, W/O- ABDUR RASHID ALI, VILL.- HATSINGIMARI
NAYAPARA (BHIMAPARA), P.S. SOUTH SALMARA, DIST. DHUBRI, ASSAM,
PIN- 783127.

2:ANJUMA BEGUM
W/O- MONAF ALI
VILL.- HATSINGIMARI NAYAPARA (BHIMAPARA)
P.S. SOUTH SALMARA
DIST. DHUBRI
ASSA

Advocate for the Petitioner : MR. K K DEY

Advocate for the Respondent : MS. R CHOUDHURY (R-1)

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

BEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

For the Petitioners : Mr. KK Dey, Advocate and
Shri VK Barooah, Advocate.

For the Respondents : Mrs. R Choudhury, Advocate,
Ms. FN Zaman, Advocate and
Ms. B Hazarika, Advocate.

Dates of Hearing : 03.06.2024.

Date of Judgment : 03.06.2024.

JUDGMENT & ORDER

Recourse to Article 227 of the Constitution of India has been taken against the impugned orders dated 06.01.2024 and 22.01.2024 passed by the learned Civil Judge (Jr. Division), Hatsingimari, Dhubri in Misc. (J)/59/2022 and Title Execution/10/2019.

- 2.** To understand the issue involved, it would be convenient if the brief facts of the case are narrated.

- 3.** The petitioner is the defendant in the suit, being Title Suit/118/2016 which was for declaration and recovery of possession. The suit was decreed *ex parte* on 30.07.2019 and the plaintiff-decree holder had filed Execution Case/10/2019.

Since, there were certain anomalies in the identification of the suit land, the present petitioner had earlier approached this Court by filing CRP/13/2021. The said revision petition was, however, disposed of vide order dated 01.11.2021 on a consensus arrived at by the parties that before execution, the land in question would be identified first. Subsequent thereto, a report was called for by the concerned ASO whereafter such report was submitted by the concerned Lat Mondal on 22.11.2021. In the aforesaid report, however, it was stated that the suit land was not identifiable. The report was accordingly furnished to the learned Court and subsequently, vide an order dated 15.12.2021, the execution proceeding was dismissed as the suit land was not identifiable.

4. At that stage, the present respondent (plaintiff) had approached this Court by filing CRP(IO)/43/2022. The said revision petition was disposed of vide order dated 06.06.2022 wherein the present respondent was given liberty to cross-examine the Amin Commissioner and also to file objection. It appears that thereafter Misc. (J)/59/2022 was filed by the present respondent under Order XXVI Rule 10 (3). Thereafter, Misc. (J)/22/2023 was filed for review of the earlier order dated 15.12.2021. The application for review registered as Misc. (J)/22/2023 was allowed by the learned executing court on 16.02.2023. Thereafter, vide the impugned order dated 06.01.2024, Misc. (J)/59/2022 was also allowed whereby the respondent-decree holder was directed to take steps against the Amin Commissioner for cross-examination. It is the validity and legality of the aforesaid orders which are the subject matters of challenge in this proceeding.

5. I have heard Shri KK Dey, learned counsel for the petitioners whereas the respondent/opposite party no. 1 is represented by Mrs. R Choudhury, learned counsel.

6. The materials placed on record have been duly considered.

7. Shri Dey, learned counsel for the petitioners has submitted that unless the execution case was restored, the powers under Order XXVI Rule 10 (3) could not have been invoked. It is submitted that at no point of time, any Amin Commissioner was appointed and therefore, there was no occasion to call for such Amin Commissioner for cross-examination. It is also submitted that if at all there was a report, it is the report of the Mondal and such Mondal, if required to be examined, has to be done by calling him as a witness and not by the procedure adopted. The learned counsel, accordingly submits that the impugned orders are not sustainable in law and liable to be interfered with.

8. *Per contra*, Ms. Choudhury, learned counsel for the respondent/opposite party no. 1 has submitted that the instant petition is nothing but a procedure adopted to further delay the outcome of the execution proceeding. It is submitted that the title suit was instituted in the year 2016 in which, the present respondent had initially contested by filing written statement. However, after such filing, the petitioner, as defendant, stopped appearing. The petitioner had also failed to cross-examine the PWs and did not adduce any evidence in spite of opportunities. The petitioner, as defendant, also did not advance any arguments and ultimately, the suit was decreed on 30.07.2019. The learned counsel for the respondent/opposite party no. 1 has also clarified that though

the petition under Order XXVI Rule 10 (3) of the CPC was filed prior in point of time, no effective orders were passed in the said petition and it was only after the order dated 16.02.2023 passed in Misc. (J)/22/2023 whereby the earlier order dated 15.12.2021 was reviewed, the Misc. (J)/59/2022 was disposed of vide order dated 06.01.2024. Mrs. Choudhury, learned counsel, accordingly submits that there was absolutely no violation of any procedures or the requirement of law. As regards the aspect of the Amin Commissioner, the learned counsel has submitted that the ASO was, indeed appointed as the Amin Commissioner at the time of execution of the decree, who had called for a report from the concerned Mondal. She has also informed this Court that in terms of the order dated 22.01.2024, the petitioner had taken steps for calling the concerned Officer for cross-examination and on the next date fixed i.e. 22.02.2024, the concerned Lat Mondal was cross-examined. It is only thereafter that pursuant to the order of this Court dated 23.02.2024, further proceedings have been put on halt.

9. Ms. Choudhury, learned counsel for the respondent/opposite party no. 1, accordingly submits that the present petition is liable to be dismissed as filing of the same is only to further delay the proceedings. It is submitted that a decree holder cannot be denied of the fruits of the litigation and in any case, the duty of the Court is only to arrive at the truth. The learned counsel for the respondent has relied upon the judgment of Hon'ble Supreme Court in the case of ***Pradeep Mehra Vs. Harijivan J. Jethwa & Ors.***, reported in **2023 0 Supreme (SC) 1089** wherein the aspect of inordinate delay in execution of decree has been discussed. Ms. Choudhury, learned counsel has also clarified that the decree is not an *ex parte* but was a decree on contest with cost.

10. Upon hearing of the learned counsel for the parties and on perusal of the materials on record, this Court is of the opinion that while the learned counsel for the petitioner may be right in contending that when there being an order of review of the order dated 15.12.2021 and consequent restoration of the execution proceeding, no order could have been passed in allowing the respondent-decree holder to have the Lat Mondal cross-examined by taking steps, it is clear that though the application under Order XXVI Rule 10 (3) of the CPC which was registered as Misc. (J)/59/2022 was filed earlier in point of time, the impugned orders passed thereon on 06.01.2024 is after review/restoration of the execution petition on 16.02.2023. The present respondent-decree holder during the pendency of Misc. (J)/59/2022 had filed Misc. (J)/22/2023 for review/restoration of the execution petition which was dismissed on 15.12.2021. A bare perusal of the said order dated 16.02.2023 would make the aforesaid position clear. For ready reference, the relevant observation of the learned trial court on the aforesaid issue is extracted hereunder:

“In the present case, the petitioner/D.H has filed this petition under Order XLVII read with section 114 of the code of Civil Procedure, 1908 (CPC) wherein the petitioner has prayed for review of the order dated 15.12.2021 passed in Title Execution Case No. 10/19 arising out of Judgment and Decree dated 30.07.2019 passed in TS No. 118/2016.”

11. Once the order dated 16.02.2023 was passed by the learned Trial Court, the execution case was restored as the earlier order of disposal dated 15.12.2021 was reviewed. After such restoration, it cannot be argued that the subsequent order dated 06.01.2024 has been passed without jurisdiction.

12. This Court has also noticed that in terms of the order dated 22.01.2024 of the learned Trial Court, the concerned Lat Mondal was cross-examined on 22.02.2024 which was the date fixed and thereafter the matter is put to a halt because of the interim order passed by this Court.

13. The suit having been decreed vide the judgment and decree dated 30.07.2019 and the said decree not being put to challenge by filing appropriate appeal, the present procedure adopted by the petitioner at the stage of execution does not appear to be with *bona fide* intention. Though it would be open for any party to raise objections in accordance with law, in the instant proceeding, no illegality is noticed in the procedure adopted, more so in terms of the earlier order passed by this Court in CRP(IO)/43/2022.

14. In view of the aforesaid discussions, this Court is of the view that the present petition is without any merits and accordingly, the same is dismissed. Consequently, the interim order dated 23.02.2024 is also vacated.

JUDGE

Comparing Assistant