

GAHC010010422013



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

Case No. : CRP/318/2013

SMT KAMLA DEVI AGARWAL and 2 ORS
W/O- LT. HARIRAM AGARWAL.

2: SUSHIL KR. AGARWAL
S/O- LT. HARIRAM AGARWAL

3: VIMLA AGARWAL
W/O- LT. VIJAY AGARWAL
ALL ARE THE PERMANENT R/O- CHATTRIBARI
GUWAHATI

VERSUS

ANIL AGARWAL and ANR
S/O- LT. HARIRAM AGARWAL, R/O- NABIN NAGAR, GUWAHATI.

2:DIPANKAR GHOSH
R/O- BARA BAZAR ROAD
KAMAKHYA COLONY
PANDU
GUWAHATI

Advocate for the Petitioner : MR.P N GOSWAMI

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 26.09.2023

Mr. W. Ahmed, learned counsel for the petitioner, submits that they are no longer appearing in the matter. The Court cannot take cognizance of this submission as it was the duty of the learned counsel to produce a proof that a written notice was served to the petitioner regarding their intention to withdraw from the case, which has not been done. Accordingly, the present set of counsel continues to remain on record even if they choose not to address the Court.

2. This matter being a revision of the matter of the year 2013, the Court is inclined to proceed with the matter without the assistance of the learned counsel for the petitioner.

3. By the impugned order dated 05.01.2013 passed by the learned Civil Judge No.2, Kamrup (M), Guwahati in Misc.(J) Case No. 2/2011 in the proceedings of TS 21/2009, the said learned trial Court took up for adjudication of an application filed under Order XLVII Rule 1 read with Section 151 CPC for review of the judgment and order dated 06.12.2010 passed by the said learned Court in TS 21/2009, by which the suit of the petitioner-plaintiff was dismissed.

4. It appears from the LCR that the prayer in the suit is for (1) decree of declaration that there exists no arbitral agreement between the plaintiffs and defendant no.1, (2) a decree of declaration that there being no arbitral agreement between the plaintiff and defendant no.1, the defendant no.2, has no power and jurisdiction to act as an arbitrator, (3) a decree of permanent injunction restraining the defendant no.2 in passing any order against the plaintiffs in the so called arbitral proceeding commenced without jurisdiction and presently said to be pending before him, (4) any other relief and (5) cost of the suit.

5. It appears from the contents of the impugned order that the learned

Civil Judge No.2, Kamrup (M), Guwahati in TS 281/2007, had passed an order appointing an arbitrator and accordingly, the Court held that the said suit was an appeal in disguise and therefore, it was held that the Court cannot sit on appeal over the decision rendered in TS 281/2007.

6. In the review application being Misc. (J) Case No. 2/2011, ground no. (a) relates to acceptance of service of notice by taking recourse to Section 27 of the General Clauses Act, which is not at all relevant to assail the impugned order dismissing the suit which is the subject matter of review. In ground no. (b), it has been stated that in the proceedings of TS 281/2007, the learned Civil Judge No.2, Kamrup (M), Guwahati had not passed any order for appointment of arbitrator and in this regard reliance was placed on the copy of order dated 09.08.2010, by which according to the petitioners, the plaintiffs were permitted to withdraw TS 281/2007 from the Court of learned Civil Judge No.1, Kamrup (M), Guwahati. Copy of the said order dated 09.08.2010 has not been annexed to this application. Therefore, the LCR was perused. In the LCR, the copy of order dated 09.08.2010 is found appended as Annexure-1 to the review petition being Misc.(J) Case No. 2/2011. The said order read as follows.

“Both parties are represented. Seen petition no.1968/2010 filed by the plaintiff praying for allowing the plaintiff to withdraw the case unconditionally. Hence, petition is allowed.

Accordingly, the suit is dismissed on withdrawal.”

7. The name of the petitioner no.1 herein appears as the plaintiff(s) in the said TS 281/2007. In the absence of any document being annexed to this revision, it cannot be said if there any other plaintiffs in the case.

8. Therefore, on examination of the factual matrix, it appears that the observations made in the order dated 06.12.2010 passed in TS 21/2009 by the

learned Civil Judge No.2, Kamrup (M), Guwahati to the following effect- "*it may be mentioned that being TS 281/2007, the Court had appointed an arbitrator. The defendant no.2, Dipankar Ghose was appointed as the arbitrator.*" is factually incorrect and inconsistent with the photocopy of the certified copy of order dated 09.08.2010, referred to hereinbefore which is found available in the LCR. Therefore, it appears that the petitioner has been able to successfully show that the order dated 06.12.2010 passed by the learned Civil Judge No.2, Kamrup, (M), Guwahati in TS 21/2009 was vitiated by error apparent on the face of record. However, no conclusive finding is returned as the certified copy of the order dated 09.08.2010 in TS 281/2007 is not available in the LCR.

9. Resultantly, the Court is of the considered opinion that as the order dated 06.12.2010 was erroneous on facts, the review was otherwise be maintainable against the said order as no appeal has been filed which is the condition precedent of filing of review under Section XLVII Rule 1 CPC.

10. Accordingly, the Court is inclined to set aside and interfere with the impugned order dated 05.01.2013 passed by the learned Civil Judge No.2, Kamrup, Guwahati in Misc.(J) Case No. 2/2011 by which the review application was dismissed. As a consequence thereof, the proceeding of Misc.(J) Case no. 2/2011 is restored to file before the learned Civil Judge No.2, Kamrup, Guwahati for fresh decision in accordance with law by examining the records of TS 281/2007, which is referred to in the order dated 06.12.2010 passed in TS 21/2009.

11. The petitioners are directed to appear before the learned trial Court on 06.10.2023 by producing the certified copy of this order and await further instruction from the said learned Court.

12. This order is based on photocopy of the certified copy of the order dated 09.08.2010. Therefore, it is made clear that if the original record shows otherwise, then the learned Civil Judge No.2, Kamrup (M), Guwahati would have the liberty to take whatever view the said Court is inclined to take.
13. Revision stands allowed.
14. Let the LCR be sent back expeditiously.

JUDGE

Comparing Assistant