

GAHC010026162015



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

Case No. : FAO/27/2015

M/S BIRLA CORPORATION LTD
A PUBLIC LTD. CO. HAVING ITS REGISTERED OFFICE AT BIRLA BUILDING,
9/A R.N. MUKHERJEE ROAD, KOLKATA AND INTER ALIA THE CEMENT
INDUSTRIES KNOWN AS UNIT SATNA CEMENT WORKS COMPRISED OF
TWO CEMENT PLANTS AT P.O. BIRLA VIKASH, SATNA, MADHYA PRADESH
REPRESENTED BY ITS AUTHORISED SIGNATORY, SRI P.K. SONI, S/O LATE
G.K. SONI, SATNA M.P.

VERSUS

M/S ATAL STORES and ANR

2:GOVARDHAN PRASAD ATAL
S/O LATE MADANLAL ATAL
NO. 1 BEING REGISTERED PARTNERSHIP FIRM AND NO. 2 BEING ITS
PARTNER WITH BOTH OF THEM HAVING THEIR PLACE OF BUSINESS AT
K.K. GOHAI COMPLEX
S.K. BARUAH ROAD
RUKMININAGAR
P.O. GUWAHATI
DIST. KAMRUP
ASSAM
PIN 78102

Advocate for the Petitioner : MR.R K BHATRA

Advocate for the Respondent : MRJ C GAUR

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Mr. B. D. Deka, Advocate.

For the Respondents : Mr. J. C. Gaur, Advocate.

Date of Hearing : 06.06.2023.

Date of Judgment : 06.06.2023.

JUDGMENT & ORDER (ORAL)

1. Heard Mr. B. D. Deka, learned counsel for the appellant. Also heard Mr. J. C. Gaur, learned counsel for the plaintiffs/ respondents.
2. The present appeal is filed assailing an order dated 24.07.2015 passed by the learned Civil Judge No. 1, Kamrup (M) at Guwahati whereby the prayer of the appellant/defendant to return the plaint was rejected. The present litigation is having chequered history of litigation.
3. The plaintiffs/respondents initiated Title Suit being Title Suit No. 20/2005 before the learned Court of Civil Judge No. 1 (Sr. Division), at Guwahati (now Civil Judge No. 1) for realization of an amount of Rs. 16,36,67,493.27/-. It is the case of the plaintiff/respondent that the defendant appointed the plaintiff No. 1 as its Consignment Agent for clearing, forwarding, storing and promoting the sale of its cement in the North Eastern Region on consignment basis on its behalf by way of stock transfer against "F" Form under the Central Sales Tax Act etc and an

agreement has been executed between the parties on 13.06.1986.

4. The further case of the plaintiffs/respondents that though the plaintiffs performed their part of the agreement to the entire satisfaction of the defendant but the defendant did not pay the agreed commission and expenses. Accordingly, such amount accumulated and the suit was filed.
5. On receipt of summons, the defendant/appellant appeared before the learned trial Court and filed an application dated 21.07.2005 raising two fold objection, (i) that the suit is barred by limitation and (ii) that the learned trial Court is not having any jurisdiction to entertain the suit in terms of the agreement dated 13.06.1986 inasmuch as the said agreement stipulates that the agreement was deemed to have been made within the jurisdiction of Madhya Pradesh High Court and the Satna Court only shall have jurisdiction in the event of any dispute arises out of or in connection with the agreement.
6. In the aforesaid application, a prayer was made that till disposal of the issues raised, the filing of written statement be postponed. Thereafter, the defendant/appellant preferred yet another application under Section 10 of the Code of Civil Procedure, 1908 on 26.09.2005. The aforesaid application was dismissed by the learned trial Court below under its order dated 23.06.2006. Being aggrieved, a Civil Revision Petition, was preferred before this Court being CRP No. 327/2006. This Court set aside the order of the learned trial Court below and remanded the matter to the trial Court to take a fresh decision.
7. On being remanded, the learned trial Court below under its order dated

20.12.2006, allowed the application filed under Section 10 of the Code of Civil Procedure, 1908. This time, the plaintiffs/respondents approached this Court by way of filing another revision petition being CRP/45/2007.

8. This Court under its order dated 23.03.2010, set aside the order passed under Section 10 of the Code of Civil Procedure, 1908. Being aggrieved, the defendant/appellant approached before the Hon'ble Apex Court by filing SLP(C) No. 12432/2010. The Hon'ble Apex Court dismissed the aforesaid SLP(C) in its order dated 03.05.2010, thus the order passed by this Court dismissing the application filed under Section 10 of the Code of Civil Procedure, 1908 was restored. Thereafter, the defendant/appellant filed their written statement, however, such written statement was not accepted by the learned trial Court below being filed beyond the prescribed period.
9. The defendant/appellant again approached this Court being aggrieved by the aforesaid order by filing CRP/127/2013. This Court allowed such petition and asked the learned trial Court below to accept the written statement already filed under its order dated 29.07.2013. Thereafter, matter was proceeding before the learned trial Court, the issues were framed and the plaintiff/respondents also filed their evidence on affidavit.
10. It is worth mentioning that in the written statement the defendant/appellant again raised the issue before the learned trial Court having no jurisdiction to try the suit at paragraph -6 of their written statement.
11. At this stage, the defendant/appellant once again filed an application on 02.01.2015 raising the issue of jurisdiction and return of plaint by petition

No. 60/2015 on the same ground of existence of specific agreed jurisdiction clause. The plaintiffs/respondents filed an objection to the aforesaid plea on the ground that the Section 20 of Code of Civil Procedure, 1908 is not applicable in the present case inasmuch as the application is barred under Section 21 of the Code of Civil Procedure, 1908 as the learned trial Court has already settled the issues. It was also a ground of objection that the plaintiffs/respondents waived his right to raise jurisdiction inasmuch as they abandoned their earlier application filed raising the similar issues.

12. The learned trial Court below by way of the impugned order dated 24.07.2015 rejected such application of the appellant/defendant on the ground that the petition is barred under Section 21(1) of the Code of Civil Procedure, 1908. It was also a finding of the learned trial Court below that the first application raising point of jurisdiction was filed in the year 2005 and admittedly such application was abandoned by not pressing it and re-agitated the same after lapse of 10 years and allowed the suit to proceed to the stage of settlement of issue and taking steps under Order 16 of the Code of Civil Procedure, 1908. The learned trial Court was keeping in mind the very old nature of the suit directed the defendant to submit evidence on affidavit of all the witnesses and rejection the objection as to the jurisdiction.
13. Mr. B. D. Deka, learned counsel for the appellant/defendant while assailing such order argues that the basic issues to be determined was whether the clause of the agreement dibars the plaintiffs/respondents to file the suit before the learned trial Court below. The defendant/appellant has time and again raised such issue, firstly by filing the petitioner immediately after their

appearance, and secondly when the suit started to proceed.

14. Mr. Deka, learned counsel further contends that the delay was not caused by the appellant rather it was due to the judicial proceeding inasmuch as the suit proceeded only after dismissal of SLP(C) No. 12432/2010 under its order dated 03.05.2010. Thereafter, the matter got delayed as the trial Court did not accept the written statement filed by the appellant/defendant. Therefore, it cannot be said that the application initially filed was abandoned by the appellant/defendant inasmuch as there is neither any application withdrawing such petition nor there is any order by the Court in the aforesaid application. Therefore, the trial Court instead of dismissing the issues raised by the appellant ought to have decided the same on merit.
15. Per contra, Mr. J. C. Gaur, learned counsel for the respondents submits that the learned trial Court has not committed any error of law by dismissing the application. Therefore, the present appeal is liable to be dismissed. The fact remains that the appellant filed the application immediately after appearing before the learned trial Court below however, they have never pursued such application rather they filed application under Section 10 of the Code of Civil Procedure, 1908, which finally got dismissed at the hands of the Hon'ble Apex Court. Therefore, the finding of the Court that the defendant has abandoned the application raising the point of jurisdiction cannot be faulted with.
16. It is also the contention of Mr. Gaur, learned counsel that once the issue has been settled and evidence on affidavit is filed by the plaintiff, at this stage, the issue of jurisdiction cannot be entertained. Therefore, the

learned trial Court is rightly dismissed such application.

17. This Court is of the considered opinion that a vital issue regarding the jurisdiction has been raised by the defendant immediately after appearing before the Court. Such application remains unattended till date. The record reveals that initially, the plaintiff also filed objection to such petition and thereafter, the plaintiff filed an application in the proceeding of the aforesaid petition for cross-examination and the matter was adjourned and it was remained as it is. Thereafter, an application was filed under Section 10 of the Code of Civil Procedure, 1908 by the defendant and as discussed hereinabove, the same went up to the Hon'ble Apex Court. After dismissal of the SLP, the defendant filed written statement, which was not accepted by the trial Court. This Court again remanded back the matter to the learned trial Court. Thus, it cannot be said that there is any tangible material available to come to a conclusion that the defendant has abandoned its objection as to the jurisdiction of the trial Court and thus it can be said that the delay was caused for the fault of the defendant alone.
18. In view of aforesaid, this Court is of the considered opinion that the issue of jurisdiction should be decided first. The law is also well settled that the bar to raise such issue under Section 21 (1) of the Code of Civil Procedure, 1908 is applicable in respect of the appellate and revisional Courts only and not in respect of the trial Court inasmuch as the language of Section 21 of the Code of Civil Procedure, 1908 is clear. However, at the same time, this Court cannot also be oblivious of the fact that the suit is pending since the year 2005. Therefore, in the aforesaid backdrop, the present first appeal stands allowed by setting aside the order dated 24.07.2015 passed by the

learned Civil Judge No. 1, Kamrup (M) at Guwahati and the matter is remanded back to the learned trial Court below. The learned trial Court below shall consider the application filed on 21.07.2005 and also the application filed on 02.01.2015 and determined the issue of jurisdiction.

19. At this stage, Mr. Gaur, learned counsel for the respondent raises an objection that in view of earlier petition filed, the subsequent petition shall be barred under the principle of res-judicata. This Court cannot make such determination in the present appeal and the learned trial Court shall be at liberty to decide all the issues including the principle of constructive res-judicata as has been raised by the learned counsel for the plaintiff/respondent.
20. With the aforesaid observations, this appeal stands allowed.
21. This Court requests the learned trial Court below to decide the issue of jurisdiction as early as possible subject to its convenience as the matter is pending since the year 2005. Parties shall appear before the learned trial Court below on 27.06.2023.

JUDGE

Comparing Assistant