

GAHC010105442022



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

Case No. : Arb.A./3/2023

M/S THENGALBARI ESTATES (PVT) LIMITED
PRESENTLY KNOWN AS- AIDEOBARIE ESTATES (PVT) LIMITED.
K.B. ROAD, JORHAT- 785001, ASSAM.

VERSUS

M/S GREENFIELD CROPS PRIVATE LIMITED
ADDRESS- KASERAS, H.S. ROAD, DIBRUGARH- 786001, ASSAM.
ALSO AT- MADHOPUR TEA ESTATE,
P.O.- TITABOR,
DIST.- JORHAT, PIN- 7855650, ASSAM.

Advocate for the Petitioner : MR. A K SAHEWALLA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 19-12-2023

Heard Mr. M. Dutta, learned counsel for the appellant. None appears for the respondent on call despite service of notice.

2. By filing this appeal under section 37 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act, 1996" for brevity) , the appellant has assailed the order dated 24.01.2022, passed by the learned District Judge, Jorhat in Misc. (J) Case No. 54/2019, thereby declining to grant relief under section 9 of the Arbitration Act, 1996.

3. The appellant and the respondent are both companies registered under the Companies Act, 1956. In brief, the case of the appellants is that (a) Sri Gokul Bhuyan, and (b) Sri Surajit Bhuyan, both former directors of the respondent Company had transferred all their shares in respondent Company to (i) Sri Vijay Kumar Kasera, (ii) Sri Sachin Kumar Kasera and (iii) Smt. Lalita Devi Kasera.

4. The appellant is the owner of a Tea Garden, having land measuring 1457 bigha- 2 katha- 10 lessa, covered by various *dag* and *patta* numbers as morefully described in para-8 of this memo of appeal. It is projected that as the appellant was facing economic crisis, they had negotiated with the respondent and accordingly, the parties had executed (a) an agreement for sale dated 18.01.2006; (b) a supplementary deed dated 02.11.2007; and (c) registered deed of lease dated 03.11.2007 with tenure of 99 (ninety nine) years. Thereafter, the possession of the entire Tea Garden together with all outstanding liabilities payable to creditors including statutory liabilities, bank dues, provident fund dues, administrative charges on provident fund, annual travelling allowance to staff, arrear salary and staff dues, DLI contribution, bonus, etc., amounting to Rs.1,34,06,479/- (Rupees One crore thirty four lakh six thousand four hundred seventy nine only). The list of outstanding dues of the appellant, as mentioned in the lease deed, contains description of 21 items, which are all not mentioned herein for brevity.

5. The appellant claims that the respondent had failed to perform

their obligations and defaulted in making payment of the outstanding dues to the appellant Company. Accordingly, by issuing advocate's notice dated 07.03.2014, the appellant had terminated the hereinbefore referred agreements; demanded vacant and peaceful possession of the Tea Garden with all its properties; and also claimed compensation towards damages and unlawful occupation of the properties. The lease deed contained arbitration clause and therefore, the appellant had approached this Court for appointment of an arbitrator. Accordingly, by an order dated 24.04.2015, this Court had appointed a Hon'ble former Judge of this Court as the sole arbitrator to adjudicate upon the dispute between the parties. However, the learned Arbitral Tribunal, *inter alia*, by holding that the respondent had not breached the agreement, had dismissed the claim of the appellant by an award dated 11.09.2017.

6. Aggrieved by the said negative award, the appellant had filed an application under section 34 of the Arbitration Act, 1996. The learned District Judge, Jorhat, by an order dated 30.01.2019, had set aside the Arbitral Award dated 11.09.2017.

7. In course of hearing, the learned counsel for the appellant has projected before this Court that after passing of the order dated 30.01.2019 by the learned District Judge, Jorhat, the respondent had filed an appeal before this Court, which is pending for adjudication.

8. The appellant had filed an application under section 9 of the Arbitration Act, 1996 before the Court of the learned District Judge, Jorhat. The said application under section 9 of the Arbitration Act, 1996, amongst others, contained the following prayers, viz., (a) to permit the appellant, through their Managing Director to carry/ conduct inspection of the Tea Garden; (b) for a direction to the respondents to co-operate and facilitate the appellant for

conducting a complete survey, to prepare an inventory of the live plants/ tea-bushes within the Tea Garden; (c) to direct the respondent to furnish/ provide the appellant with (i) Fixed assets register of the Tea Garden of the appellate Company; (ii) cash book from 18.01.2006 to 30.01.2019, (iii) Sales Tax and VAT periodic returns and challans for amounts paid between 18.01.2006 to 30.01.2019; (iv) Specified Land Act (cess on green leaf) of Madhopur T.E. including periodic returns and challans for amount paid between 18.01.2006 to 30.01.2019; (v) Tea Estate sectional registers for verification of tea plants, shade trees, and type of tea plants available in each sections from sl. nos. 1 to 31; annual green leaves harvested and the crop yields thereof in each of the said 31 sections; (vi) chemical spray register between 18.01.2006 to 30.01.2019; (vii) Labour Employment Register; (viii) Firewood Compensation Register since 18.1.2006 and payments made on account of this compensation; (ix) Provident Fund Annual Return-V and Periodic Return I with the Bank Deposit Challans between 18.2006-30.01.2019; (x) Labor Wages Register and Monthly Staff Salary Register; (xi) Payment of Gratuity Register; (xii) Payment of Bonus Register; (xiii) List of Sundry Creditors; (xiv) If any Bank Mortgage/ Lien created on the assets of Madhopur Tea Estate / subject Tea-Garden - to allow verification of the Documents; and (xv) Such other and further records that this Hon'ble Court may deem fit and proper, (d) direct the Respondent to file / produce their Monthly Returns by way of their Monthly Income and Expenditure before / and with the Petitioner; (e) freeze/restrain the Respondent from operating their Bank Account(s) except and in / during their usual course of business; (f) appoint a learned Receiver to immediately take charge into custody all the Books of Account(s) of the Respondent and maintain copies thereof; (g) pass such other and further order(s) that this Hon'ble Court deems

fit and proper in the facts and circumstances of the present case and in the interest of justice and equity.

9. The learned District Judge, Jorhat, by order dated 02.07.2019, passed in Misc.(J) Case No. 27/2019, had dismissed the application by refusing to grant any interim relief on the premise that the arbitral award dated 11.09.2017, had been set aside which implies that no award exists and held that in the absence of any award, no relief can be granted to the appellant under Section 9 of the Arbitration Act, 1996.

10. Aggrieved by the rejection of the section 9 application vide order dated 02.07.2019, passed by the learned District Judge, Jorhat in Misc.(J) Case No. 27/2019, the appellant had preferred an appeal before this Court, which was registered and numbered as Arb.A. 15/2019 and this Court by order dated 20.09.2019, allowed the appeal by interfering with the order dated 02.07.2019, requiring the learned District Judge, Jorhat to decide the application on its own merit.

11. Accordingly, the petition under section 9 of the Arbitration Act, 1996, being Misc. (J) Case No. 54/2019 was heard afresh, and the prayer was dismissed once again by the impugned order dated 24.01.2022. The learned District Judge, Jorhat had rejected the prayer by holding that the appellant did not have a *prima facie* case justifying issuance of an interim order under section 9 of the Arbitration Act, 1996, by holding that the respondent had also pleaded that they had developed the Tea Garden phase by phase, including re-plantation, establishment of Tea Factory, construction of godown, and labour quarters, and that there was nothing on record to counter the plea except apprehension expressed by the appellant. Moreover, it was held that the respondent were in possession of the said Tea Garden since 2006 as such

balance of convenience was not found in favour of the appellant for grant of injunction. It was also the opinion of the learned Court below that there is nothing on record to show that the respondent had done anything to damage the live plants, tea bushes or any other property of the Tea Garden. Accordingly, the interim reliefs were refused.

12. The learned counsel for the appellant had submitted that the nature of enquiry proposed by the appellant is to ensure the protection and preservation of the property in dispute. In the said regard, it was submitted that the Tea Garden had live plants and only from the documents which are sought to be inspected, can the appellant come to know if the respondent is acting in the interest of the Tea Garden or whether the respondent is not taking due care of the Tea Garden and tea bushes. It was submitted that the appellant is likely to irreparably damage the Tea Garden and the accruing liability arising out of persistent defaults and non-payment of statutory, labour and other dues, had a potential to render the Tea Garden of the appellant commercially unviable. It was submitted that the learned Court below had erred in law in rejecting the prayer for interim relief merely because the appellant is merely having apprehension of loss and in this regard, it was submitted that the paramount purpose of enacting section 17 of the Arbitration Act, 1996 is to ensure preservation of property and therefore, if the appellant has reasonable apprehension that the Tea Garden would be wasted away, the appellant had a right to approach the Court for relief under section 9 read with section 17 of the Arbitration Act, 1996.

13. In support of his submissions, the learned counsel for the appellant had cited the following cases, viz., (i) *Arcellor Mittal Nippon Steel India Ltd. V. Essar Bulk Terminal Ltd.*, (2022) 1 SCC 712, (ii) *Hindustan*

Construction Co. Ltd. & Anr. V. Union of India & Ors., (2020) 17 SCC 324, (iii) Ultratech Cement Ltd. V. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2018) 15 SCC 210, (v) Dalpat Kumar & Anr. V. Prahlad Singh & Ors., (1992) 1 SCC 719, (vi) Wander Ltd. & Anr. v. Antox India P. Ltd., (1990) Supp SCC 727.

14. At the outset, it would be relevant to extract herein below the provisions of section 9 and 17 of the Arbitration Act, 1996, which are as follows:-

9. *Interim measures, etc., by Court.*

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—*

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
- (b) securing the amount in dispute in the arbitration;*
- (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
- (d) interim injunction or the appointment of a receiver;*
- (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain

an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

* * *

17. *Interim measures ordered by arbitral tribunal:*

(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—*

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
- (b) securing the amount in dispute in the arbitration;*
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
- (d) interim injunction or the appointment of a receiver;*
- (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.*

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

15. We have already extracted the nature of prayer made in Misc. Arb. Case No. 27/2019, which upon remand, was re-registered as Misc. Arb. Case No. 54/2019 and heard by the learned District Judge, Jorhat.

16. On a perusal of the clauses contained in the registered lease agreement dated 03.11.2007, it is seen that in the said agreement the parties have not given a detailed description of assets and live plants, tea bushes, etc. handed over to the respondent, but the schedule appended to the said

agreement only contains the description of land (in form of *dag*, and *patta* numbers and name of *Mouza* and Grant number) of land measuring 1460 bigha- 2 katha- 6 lessa and thereafter, reference is made to include Manager's Bungalow, Staff quarters, Labour quarters, Dispensary, Office premises with old tractors. Moreover, under clause 17 of the said agreement, it has been agreed by the parties to the effect – "*That either of the parties shall be duty bound to discharge their respective obligations created under this Deed of Lease and any breach thereof shall terminate in actionable claim by the aggrieved party.*" It may be mentioned that the said agreement does not even contain any clause that the respondent is required to render accounts to the appellant.

17. The nature of enquiry, as proposed by the appellant has already been indicated in para-8 hereinbefore. In the opinion of the Court, when the lease agreement between the parties do not envisage (a) rendition of accounts, (b) periodical disclosure of assets and liabilities of the Tea Garden leased out to the respondent, (c) periodical disclosure of steps taken by the respondent in order to protect the assets of the Tea Garden, it would not be appropriate to allow the Director of the appellant to conduct a roving and fishing enquiry into the affairs of the respondent and affairs relating to the Tea Garden leased out to the respondent.

18. Hence, the Court is constrained to hold that the nature of enquiry which is prayed for by the appellant is not at all found to be in consonance with the interim relief envisaged under section 17(1)(ii) of the Arbitration Act, 1996. Moreover, when the lease agreement casts a duty to the parties to discharge their respective obligations created under the said Deed of Lease and moreover, it has been agreed by the parties that in case of any breach of the said lease agreement, the aggrieved party shall have a right to terminate the agreement

with liberty to make actionable claim by the aggrieved party against the respondent.

19. The Court has no doubt that the provisions of Section 17(1)(ii)(c) of the Arbitration Act, 1996 empower the Courts to order inspection of property which is the subject matter in dispute. Moreover, it appears to the Court that the principles of Order XXXIX, Rule 7 of the CPC gives similar power to the Court regarding inspection of property as Section 17(1)(ii)(c) of the Arbitration Act.

20. However, under the facts and circumstances of the case, the appellant has not been able to demonstrate how the disclosure and/or enquiry as prayed for by the appellant (and morefully extracted in para-8 above) would be in aid of preservation of the property. In the absence of any inventory in the lease agreement, it would not be appropriate for the appellate Court to allow inspection of property so as to ascertain its condition on the date of inspection, moreso when the said lease agreement does not even refer to any asset register or register of plantation. The lease agreement has not given any value to the assets handed over to the respondent. The said lease agreement also does not envisage liability to be borne by the respondent in any immovable or movable asset of the Tea Garden is damaged, lost or destroyed. It would be appropriate to mention that the tenure or currency of the lease agreement is of 99 years and it is not disclosed by the appellant as to the extent of life that the assets handed over to the respondent would be on and from the date of execution of the said lease deed.

21. None of the decisions cited by the learned counsel for the appellant is authority on the point that when preservation of assets during the tenure of the agreement is not envisaged, then also inspection of the asset is required to be carried out. Therefore, the Court does not find any need to

discuss the said case citations.

22. Therefore, the Court is of the opinion that the nature of enquiry and inspection as prayed for ought not to be allowed at this stage when the status or value of those assets, as it stood when lease was executed, is not brought to the notice of the Court.

23. Hence, the Court is disinclined to grant any relief to the appellant at this stage. The challenge by the appellant to the order dated 24.01.2022, passed by the learned District Judge, Jorhat in Misc. (J) Case No. 54/2019 fails. For the reasons assigned herein before, which are different from the reasons given by the learned District Judge, Jorhat, this appeal fails and the same is dismissed.

24. The appellant is left to bear its own cost.

JUDGE

Comparing Assistant