

GAHC010132792023



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

Case No. : CRP(IO)/184/2023

M/S ASSAM WOOD PRODUCTS PRIVATE LTD. AND 3 ORS.
A COMPANY INCORPORATED UNDER THE INDIAN COMPANIES ACT,
HAVING ITS REGISTERED HEAD OFFICE AT MAKUM ROAD, TINSUKIA
TOWN,
P.O. AND P.S. TINSUKIA, DISTRICT- TINSUKIA,
ASSAM, PIN- 786125.

2: SANJAY RASIWASIA
SON OF SRI ISHWAR DAS RASIWASIA
DIRECTOR- M/S ASSAM WOODS PRODUCTS PRIVATE LIMITED
HAVING ITS REGISTERED HEAD OFFICE AT MAKUM ROAD
TINSUKIA TOWN
P.O. AND P.S.- TINSUKIA
DISTRICT- TINSUKIA
ASSAM
PIN- 786125

3: GOPAL MITTAL
DIRECTOR- M/S ASSAM WOODS PRODUCTS PRIVATE LIMITED

HAVING ITS REGISTERED HEAD OFFICE AT MAKUM ROAD

TINSUKIA TOWN
P.O. AND P.S.- TINSUKIA

DISTRICT- TINSUKIA
ASSAM

PIN- 786125

4: DEEPAK KUMAR MORE
DIRECTOR- M/S ASSAM WOODS PRODUCTS PRIVATE LIMITED

HAVING ITS REGISTERED HEAD OFFICE AT MAKUM ROAD

TINSUKIA TOWN
P.O. AND P.S.- TINSUKIA

DISTRICT- TINSUKIA
ASSAM

PIN- 78612

VERSUS

MAHESH KR. RASIWASIA AND 9 ORS.
SON OF LATE GOPIRAM RASIWASIA,
RESIDENT OF 9A JUDGES COURT ROAD,
ALIPORE, KOLKATA, (WEST BENGAL)
AND PRESENTLY RESIDING AT MAKUM ROAD, TINSUKIA TOWN,
P.O. AND P.S. TINSUKIA, DISTRICT- TINSUKIA, ASSAM,
PIN- 786125.

2:M/S ASSAM WOODS PRODUCTS
A PARTNERSHIP FIRM HAVING ITS PRINCIPAL PLACE OF BUSINESS AND
OFFICE AT A.T. ROAD
TINSUKIA TOWN

P.O. AND P.S.- TINSUKIA
DISTRICT- TINSUKIA
ASSAM

PIN- 786125.

3:M/S R.P.S. ESTATE
A PARTNERSHIP FIRM HAVING ITS PRINCIPAL PLACE OF BUSINESS AND
OFFICE AT BABULAL MARKET

CHIRWAPATTY

TINSUKIA TOWN
P.O. AND P.S.- TINSUKIA

DISTRICT- TINSUKIA
ASSAM
PIN- 786125.

4:PAWAN KUMAR KEJRIWAL
MANAGING PARTNER
M/S R.P.S. ESTATES

A PARTNERSHIP FIRM HAVING ITS PRINCIPAL PLACE OF BUSINESS AND

OFFICE AT BABULAL MARKET

CHIRWAPATTY

TINSUKIA TOWN
P.O. AND P.S.- TINSUKIA

DISTRICT- TINSUKIA
ASSAM
PIN- 786125.

5:KAMAL KUMAR RASIWASIA
SON OF LATE GOPIRAM RASIWASIA

RESIDENT OF 23/71
PUNJABI BAGH (WEST)

NEW DELHI- 110026.

6:SHYAM SUNDER RASIWASIA
SON OF LATE GOPIRAM RASIWASIA

RESIDENT OF 23/71
PUNJABI BAGH (WEST)

NEW DELHI- 110026.

7:UMA DEVI AGARWAL
WIFE OF SRI MADANLAL AGARWAL

RESIDENT OF GNB ROAD
TINSUKIA TOWN

P.O. AND DISTRICT- TINSUKIA
ASSAM

PIN- 786125.

8:INDIRA DEVI AGARWAL
WIFE OF SRI HARI PRASAD AGARWAL

RESIDENT OF NALIAPPOL
DIBRUGARH

P.O. AND DISTRICT- DIBRUGARH
ASSAM

PIN- 786001.

9:PUSPHA DEVI ZINDAL
WIFE OF SRI MAHABIR PRASAD ZINDAL

RESIDENT OF 56/21
PUNJABI BAGH (WEST)

NEW DELHI- 110026.

10:MANISHA AGARWAL
WIFE OF MAHENDRA AGARWAL

RESIDENT OF PANITOLA

P.O.- PANITOLA
P.S.- TINSUKIA

DISTRICT- TINSUKIA
ASSAM

PIN- 786125

Advocate for the Petitioner : MR. BHASKAR DUTTA, SENIOR ADVOCATE

Advocate for the Respondent : MR. S CHAMARIA

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 21.06.2023

Heard Mr. B. Dutta, the learned Senior Counsel assisted by Mr. J. Das, the learned counsel appearing for the Petitioner and Mr. S. Chamaria, the learned counsel appearing on behalf of the Respondent Nos. 1.

2. Mr. S. Chamaria, the learned counsel has also filed a Caveat No. 560/2023 and the Caveat is accordingly discharged.

3. This is an application under Article 227 of the Constitution challenging the order dated 15/5/2023 passed by the Court of the learned Civil Judge, Tinsukia in Misc. (J) Case No. 40/2020 arising out of Title Suit No. 75/2019. A perusal of

the impugned order dated 15/5/2023 passed in Misc. (J) Case No. 40/2020 reveal that vide the said order, the learned Trial Court rejected the application under Section 8 of the Arbitration and Conciliation Act, 1996 (for short the 'Act of 1996').

4. It appears from the records that the Respondent No. 1 herein as Plaintiff had instituted a suit being Title Suit No. 75/2019 against the various persons including the Defendant Nos. 1 to 4, who are the Petitioners in the instant proceedings. A perusal of the Plaint reveals that various reliefs were inter alia sought, including the relief for cancellation of the Registered Lease Deed No.1722 of 1978; for declaration that the mutation order dated 3/12/2019 passed in Mutation Case No. 39/1999-2000 was unlawful, void and liable to be cancelled and accordingly for issuance of a precept to the Circle Officer, Tinsukia Revenue Circle for cancellation of the mutation order; for declaration that the Registered Sale Deed No. 291/2003 was void, illegal, inoperative in law; for issuance of a precept to the Senior Sub-Registrar, Tinsukia to cancel the Sale Deed No. 291/2003 and for other reliefs.

5. It reveals from the records that the Respondent Nos. 1 to 5 i.e. the Petitioner 1 to 4 herein and the Proforma Respondent No. 2 herein had jointly filed an application under Section 8 read with Section 5 of the Act of 1996 for referring the parties to arbitration in view of Clause 4(e) of the Registered Deed of Lease No. 1722 of 1978 wherein there is arbitration clause. The said clause for the sake of its importance in the subject-matter of the instant proceedings is reproduced herein under:

“4(e) If during the continuation of this Lease, any dispute, doubt or question shall arise between the Lessor and the Lessee touching its construction, meaning or effect of this Indenture of Lease or any clause thereof or their respective rights and liabilities, the same shall

be referred to two arbitrators one to appointed by each party in accordance with provisions of Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force”

6. A perusal of the above clause would show that if during the continuation of the lease any dispute/doubt or question arises between the Lessor and the Lessee touching its construction, meaning or effect of the Deed of Lease or any clause thereof or their respective rights and liabilities, the same shall be referred to two arbitrators one to be appointed by each party in accordance with the provisions of the Arbitration Act, 1940 or any statutory modification thereof for the time being in force.

7. It is relevant herein to mention that the parties to the said Deed of Lease were the Petitioner No. 1 and the predecessor-in-interest of the Respondent No. 1 herein. It is relevant herein to further take note of that the Registered Deed of Sale No. 291/2003 in respect to which a declaration was sought for to the effect that the said Deed of Sale was void, illegal, inoperative and a precept to be issued to a Senior Sub-Registrar, Tinsukia to cancel the said Deed of Sale was executed by the Respondent No. 2/Defendant No. 5 in favour of Respondent No. 3/Defendant No. 6. The said Respondent No. 2/Defendant No. 5 as well as the Respondent No. 3/Defendant No. 6 are not parties to the Deed of Lease bearing Deed No. 1722 dated 30/11/1978 wherein the arbitration agreement is contained. Apart from that, this Court further finds it relevant to take note of the relief so sought for in the suit amongst others includes the reliefs relating to declaration of registered Deed of Lease dated 30/11/1978 as well as the registered Deed of Sale bearing No.291/2003 to be declared null and void, illegal, inoperative and for issuance of a precept to the Senior Sub-Registrar, Tinsukia in that regard. In the opinion of this Court, the said reliefs would come within the ambit of a right in rem and as such the suit for declaring

a registered Deed of Sale and a registered Sale Deed to be null and void, illegal and inoperative and for issuance of a precept cannot be arbitrable. In this regard, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of **Booz Allen Hamilton Inc. Vs. SBI Home Finance Limited & Ors.** reported in (2011) 5 SCC 532 and more particularly to paragraph Nos. 37, 38 and 39 and the same are extracted hereinunder :

“**37.** It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide *Black's Law Dictionary*.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that “the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force”.

8. Further to that the Supreme Court in the case of **Vidya Drolia Vs. Durga Trading Corporation** reported in (2021) 2 SCC 1 had observed at paragraph

76 and its subparagraphs wherein the Court that the dispute are not arbitrable.

The paragraph 76 and its sub-paragraphs are extracted hereinunder :-

“76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (2) When cause of action and subject-matter of the dispute affects third-party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.*²: (SCC p. 669, para 35)

“35. ... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir v. Leeman*). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (*Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill*)”.

9. From the above quoted paragraphs, it would reveal that when the cause of action in or the subject matter of dispute relates to question of right in rem, such dispute cannot be arbitrable. It was further held that when the cause of action or subject-matter of dispute affect third party rights, it would require

centralised adjudication and mutual adjudication would not be appropriate and enforceable.

10. Taking into account the above, this Court is of the opinion that as the dispute in question relates to right in rem and also involves third parties who were not parties to the arbitration agreement contained in the lease registered Deed of Lease dated 30/11/1978, the said dispute arising in Title suit No. 75/2019 in the opinion of this Court cannot be referred to arbitration. This Court have also perused the impugned order and is of the opinion that the learned Trial Court had correctly applied the principles while rejecting the application under Section 8 filed by the Defendant Nos. 1 to 5.

11. Before parting with the record, this Court further finds it relevant to take note of the submission of Mr. B. Dutta, the learned Senior Counsel to the effect that the some further time may be granted by this Court for filing the written statement by the Defendant Nos. 1 to 4/ the Petitioners herein.

12. This Court is of the opinion that the period during which the application under Section 8 of the Act of 1996 was filed and pending, is required to be excluded while computing the period for filing of the written statement. The learned Trial Court accordingly shall do the needful and if entitled grant such opportunities for filing the written statement.

13. With the above observations and directions, the petition stands dismissed subject to the observations made in paragraphs 11 & 12 hereinabove.

JUDGE

Comparing Assistant