

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS.457 & 657 OF 2007****WRIT PETITION NOS.457 of 2007**

1. Mr. Vassudeva Porobo Tamba
alias Vassudev Tamba
son of Rama Porobo Tamba
major of age, businessman,
having Office at 10, Sushila
Building, 18th June Road,
Panaji-Goa
2. Mrs. Vassudeva Porobo Tamba
Office at 10, Sushila Building,
18th June Road, Panaji-Goa. .. Petitioners
Versus
1. Smt. Maria Elba De Souza
widow of Silvestro Santana
Carmo de Sousa, D'Souza,
age 72 years, landlady,
2. Shri Luis Francisco De Souza
Son of Silvestro Santana
Carmo de Sousa, D'Souza,
age 49 years, landlord,
since deceased represented by
(i) Kum Joylyn De Souza,
aged 21 yrs
(ii) Kum Maril De Souza
aged 14 yrs
both r/o H.No.E-29,
Portais, Ribandar,
Ilhas-Goa
and wife.
3. Smt. Georgina De Souza
age 37 years, housewife,
all residents of House
No.E-9, Ribandar, Portias,
Ilhas, Goa.
4. Shri Carlos Everisto De Souza
Son of Silvestro Santana
Carmo de Sousa, D'Souza,
age 45 years, teacher, and
his wife
5. Smt. Martha De Souza

age 40 years, Bank employee,
both residents of 2/A, 194,
Portias, Ribandar, Ilhas, Goa.

6. Shri Antonio Vincent De Souza
Son of Silvestro Santana
Carmo de Sousa,
age 43 years, Agriculturist,
and his wife
7. Shri Dorothy De Souza
age 40 years, housewife,
both r/o residents of House
No.E-9, Ribandar, Portias,
Ilhas, Goa.
8. Smt. Ezilda Mascarenhas
daughter of Silvestro D'Souza,
age 32 years, and her husband,
9. Shri Lector Mascarenhas
Aged 40 years, service,
both residing at Vasco-da-Gama,
Goa.
10. Mr. Xec Anwar Hassan
Son of Nazruddin Hassan
11. Mrs. Xec Anwar Hassan
Wife of Xec Anwar Hassan
12. Mr. Xec Mustaquia Hassan
Son of Nazruddin Hassan
13. Mrs. Xec Mustaquia Hassan
Wife of Xec Mustaquia Hassan
14. Mr. Xec Imatiaz Hassan alias
Taj Hassan Son of Nazruddin
Hassan
15. Mrs. Xec Imatiaz Hassan
Wife of Xec Imatiaz Hassan
all major, married,
all residents Flat No.Not known
Building Roshan Manzil,
Near Pharmacy College,
Panaji-Goa.

.. Respondents

Mr. R. G. Ramani, Advocate for the petitioners.

Mr. E. Dias, Advocate for the respondent nos.1 to 9.

Mr. A. Nachinolkar, Advocate for the respondent nos.10 to 15.

AND
WRIT PETITION NOS.657 of 2007

1. Mr. Xec Anwar Hassan
Son of Nazruddin Hassan
 2. Mrs. Xec Anwar Hassan
Wife of Xec Anwar Hassan
 3. Mr. Xec Mustaquia Hassan
Son of Nazruddin Hassan
 4. Mrs. Xec Mustaquia Hassan
Wife of Xec Mustaquia Hassan
 5. Mr. Xec Imatiaz Hassan alias
Taj Hassan Son of Nazruddin
Hassan
 6. Mrs. Xec Imatiaz Hassan
Wife of Xec Imatiaz Hassan
all major, married,
all residents Flat No.Not known
Building Roshan Manzil,
Near Pharmacy College,
Panaji-Goa. .. Petitioners
- Versus
1. Smt. Maria Elba De Souza
widow of Silvestro Santana
Carmo de Sousa, D'Souza,
age 72 years, landlady,
 2. Shri Luis Francisco De Souza
(since deceased)
(i) Kum Joylyn De Souza,
Aged 21 yrs
(ii) Kum Merlin D' Souza
Aged 14 yrs
both residents of H.No.E-9,
Portias, Ribandar,
Ilhas-Goa
Son of Silvestro Santana
Carmo de Sousa, D'Souza,
age 49 years, landlord,

and wife.

3. Smt. Georgina De Souza
age 37 years, housewife,
all residents of House
No.E-9, Ribandar, Portias,
Ilhas, Goa.
4. Shri Carlos Everisto De Souza
Son of Silvestro Santana
Carmo de Sousa, D'Souza,
age 45 years, teacher, and
his wife
5. Smt. Martha De Souza
age 40 years, Bank employee,
both residents of 2/A, 194,
Portias, Ribandar, Ilhas, Goa.
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Son of Silvestro Santana
Carmo de Sousa,
age 43 years, Agriculturist,
and his wife
7. Shri Dorothy De Souza
age 40 years, housewife,
both r/o residents of House
No.E-9, Ribandar, Portias,
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daughter of Silvestro D'Souza,
age 32 years, and her husband,
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10. Mr. Vassudeva Porobo Tamba
alias Vassudev Tamba
son of Rama Porobo Tamba
major of age, businessman,
having Office at 10, Sushila
Building, 18th June Road,
Panaji-Goa
2. Mrs. Vassudeva Porobo Tamba
Office at 10, Sushila Building,

18th June Road, Panaji-Goa. .. Respondents

Mr. A. Nachinolkar, Advocate for the petitioners.

Mr. E. Dias, Advocate for the respondent nos.1 to 9.

Mr. R. G. Ramani, Advocate for the respondent nos.10 and 11.

CORAM :- C. V. BHADANG, J.

DATE :- 20th JUNE, 2016.

ORAL JUDGMENT :

Both these petitions are between the same parties and involve common and connected questions of law and fact. As such, they are being disposed of by this common judgment.

2. For the purposes of convenience, the facts may be narrated in relation to Writ Petition No.457/2007. The respondent nos.1 to 9 are the original plaintiffs in Special Civil Suit No.12/2006/B, which is pending on the file of the learned Civil Judge, Senior Division at Panaji. That suit is filed against the petitioners, who are the defendant nos.1 and 2. The petitioners in Writ Petition No.657/2007 are the original defendant nos.3 to 8.

3. The aforesaid Civil Suit is filed by the plaintiffs for declaration, permanent and mandatory

injunction, damages, mesne profits and consequential reliefs. The suit related to two Agreements of Lease dated 05/02/1983 and 23/06/1983. Indisputably, the subject matter of Lease Deed dated 23/06/1983 has been surrendered in favour of the plaintiffs and thus, the dispute survives only as regards the property which is subject matter of Lease Deed dated 05/02/1983. The Lease Deed, inter alia, contains an arbitration clause vide clause no.XII, which reads thus:

"All cases of dispute with exception of non payment of rent within the prescribed time limit will be submitted to the arbitration under Indian Arbitration Act and the matter decided by three arbitrators being the first to be appointed by the Lessors and the second by the Lessees. The Third arbitrator to be the UMPIRE will be selected by the above two arbitrators. If the Umpire (3rd Arbitrator) finds that there is violation of basic terms of this agreement, this agreement will be rescinded."

4. Consequently, the petitioners in both these petitions, filed separate applications being applications Exh.11 and Exh.12 under Section 8 of the Arbitration and Conciliation Act, 1996 (the Act, for short) for referring the dispute to an Arbitrator,

which were opposed on behalf of the respondents/ plaintiffs.

5. The learned Trial Court, by an order dated 24/07/2007, has dismissed both these applications mainly on the ground that the very jurisdiction of the Arbitrator is depending upon the existence of arbitration clause and the parties have no right to invoke a clause "which perished with the contract". According to the Trial Court, once the Lease Deed had come to an end by efflux of time, the arbitration clause cannot survive, which is the principal reason given by the learned Trial Court for refusal to refer the matter to the Arbitrator. Feeling aggrieved, the petitioners are before this Court.

6. The learned Counsel for the petitioners has pointed out that the arbitration clause cannot come to an end only because the Lease Deed might have expired by efflux of time. He places reliance on the decision of the Hon'ble Apex Court in the case of **Hindustan Petroleum Corporation Ltd Vs. Pinkcity Midway Petroleums**, reported in (2003)6 SCC 503 and **The Branch Manager, Magma Leasing and Finance Ltd. and another vs. Potluri Madhavalata and another**, reported in (2009)10

SCC 103. It is contended that the test in such cases would be whether the contract is determined by something outside itself, in which case, the arbitration clause is determined with it or by something arising out of the contract, in which case, the arbitration clause remains effective and can be enforced. It is submitted that the Lease Deed cannot be said to have come to an end by any circumstances outside it, as a result of which, the arbitration clause would survive.

7. On the contrary, the learned Counsel for the respondent has placed reliance on the decision of the Hon'ble Apex Court in the case of **N. Radhakrishnan Vs. Maestro Engineers and others**, reported in (2010)1 SCC 72, in order to submit that where the dispute involves serious question, which requires detail investigation and production of elaborate evidence, the same has to be tried by a Court and the parties cannot be relegated for resolution of dispute by an Arbitrator.

8. The learned Counsel has then pointed out paras 13, 14, 19, 33, 34 and 35 of the plaint, in order to show that the dispute not only pertains to a matter, which may be covered by the Lease Deed and the

Arbitration clause, but the plaintiffs are also claiming an encroachment in respect of the lands Survey Nos.11/1 and 11/2, which is not the subject matter of the Lease Deed or the Arbitration Agreement. He places reliance on the decision of the Hon'ble Supreme Court in the case of ***Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and another***, reported in AIR 2003 SC 2252, in order to submit that in such a case, the bifurcation of the cause of action and subject matter of the suit is not envisaged. He, therefore, submits that no interference is called for in the impugned order.

9. I have considered the rival circumstances and the submissions made.

10. Admittedly, the dispute only survives in respect of Agreement dated 05/02/1983. It appears that the only reason given by the learned Trial Court for refusal to refer the parties to arbitration is that with the efflux of time, the Lease Deed as well as the Arbitration Clause have come to an end. It appears that the learned Trial Court has not adverted to the aspect as to whether the dispute as raised in the suit including the reliefs claimed (particularly prayer clause (c) thereof) would be arbitrable in nature.

Faced with this situation, the parties, on instructions, state that the matter can be sent back to the Trial Court for deciding the applications filed by the two sets of defendants under Section 8 of the Act afresh, in accordance with law.

11. In that view of the matter, the following order is passed by consent of the parties :

(i) The petitions are partly allowed.

(ii) The impugned order dated 24/07/2007 is hereby set aside.

(iii) The applications Exhs.11 and 12 are sent back to the Trial Court, for deciding the same afresh, in accordance with law.

(iv) Considering that the suit is of the year 2006, the Trial Court shall decide the applications as expeditiously as possible and preferably, within a period of 3 months from the date of the receipt of this order.

(v) All the rival contentions of the parties are left open.

(vi) Rule is made partly absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.