

GAHC010226402024



undefined

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

**Case No. : Arb.A./8/2024**

M/S J.M.B. CONSTRUCTION AND 2 ORS.  
A PARTNERSHIP FIRM REGISTERED UNDER THE INDIAN PARTNERSHIP  
ACT, 1932 HAVING ITS OFFICE AT HOUSE NO. 06, SONALI SARANI PATH,  
ANANDA NAGAR, OLD POST OFFICE, DISPUR, P.O. AND P.S.-DISPUR, DIST-  
KAMRUP (M), ASSAM, PIN-781005, REPRESENTED BY ONE OF ITS  
PARTNER NAMELY SRI BIMAL DUTTA

2: BIMAL DUTTA  
S/O LATE BIDHU BHUSAN DUTTA  
PARTNER OF M/S J.M.B. CONSTRUCTION  
R/O HOUSE NO. 06  
SONALI SARANI PATH  
ANANDA NAGAR  
OLD POST OFFICE  
DISPUR  
P.O. AND P.S.-DISPUR  
DIST- KAMRUP (M)  
ASSAM  
PIN-781005

3: PRADIP SAHA  
S/O LATE PRIYALAL SAHA  
PARTNER OF M/S J.M.B. CONSTRUCTION  
R/O GAURAB BHABAN  
NEW DISPUR LAW COLLEGE  
P.O. AND P.S.-DISPUR  
TINSUKIA  
DIST- KAMRUP (M)  
ASSAM  
PIN-78100

VERSUS

DR. SOMESH DHAR AND 3 ORS.

S/O LATE N.C. DHAR, R/O BOZALONI T.E., P.O.-MAKUM JUNCTION TOWN,  
P.S.-MAKUM, DIST- TINSUKIA, ASSAM, PIN-786170

2:MRS PAPIYA DHAR  
W/O DR. SOMESH DHAR  
R/O BOZALONI T.E.  
P.O.-MAKUM JUNCTION TOWN  
P.S.-MAKUM  
DIST- TINSUKIA  
ASSAM  
PIN-786170

3:NESAB AHMED HAZARIKA  
S/O LATE KAMALUDDIN HAZARIKA  
R/O PARBATIA ROAD  
P.O.  
P.S. AND DIST- TINSUKIA  
ASSAM  
PIN-786125

4:SMTI HUSHNA BEGUM  
W/O LATE MOSHIN AHMED HAZARIKA  
R/O PARBATIA ROAD  
P.O.  
P.S. AND DIST- TINSUKIA  
ASSAM  
PIN-78612

**Advocate for the Petitioner** : MR. BHASKAR DUTTA, SENIOR ADVOCATE, MS L  
RONGPIPI,MR JITENDRA DAS,MR. SAILENDRA DEKA

**Advocate for the Respondent** : MR. A K GUPTA (FOR CAVEATOR), MR. R K MAHANTA (FOR  
CAVEATOR),MR. R S MISHRA (FOR CAVEATOR)

**BEFORE**  
**HONOURABLE MRS. JUSTICE MALASRI NANDI**

**ORDER**

**30.01.2025**

Heard Mr. Bhaskar Dutta, learned senior counsel assisted by Mr. J. Das,  
learned counsel for the appellant. Also heard Mr. P.J. Saikia, learned senior

counsel, assisted by Mr. A. K. Gupta, learned counsel for the respondent.

2. By filing this appeal u/s 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter the Act 1996), the appellant has challenged the impugned order dated 20/09/2024 passed by the learned Civil Judge (Senior Division) Tinsukia in Misc (J) case no. 68/2024 arising out of Title Suit No. 26/2024.

3. The appellant no. 1 is a partnership firm and the appellants no. 2 and 3 are the partners. The respondent No. 1 and 2 as plaintiffs filed a Title Suit vide no. 26/2024 praying for declaration of Specific Performance of Contract. The petitioners/defendant no. 1, 2, 3 are engaged in business of construction and development of land and during the course of business, the petitioners/defendants entered into a deed of agreement with the plaintiffs for sale of flat by incorporating various terms and conditions. As per agreement, the plaintiffs paid the full and final consideration amount of Rs. 30, 00,000/- to the defendants. The plaintiffs requested the defendants to hand over the flat to them but getting no response, on 23/09/2023 the plaintiffs visited the site of construction and found that till then only the slab casting of third floor was done and the construction work was stopped. Thereafter, the plaintiffs served a legal notice to the defendants asking them to hand over the flats within 3 months. In reply, the defendants assured to deliver the flats within a period of one year. Even after expiry of such period the defendants failed to deliver the flats as agreed upon. Hence, the plaintiffs filed the aforesaid suit.

4. Along with the said suit, the plaintiffs also filed an application under Order 39 Rule 1 and 2 praying for grant of ad-interim mandatory injunction and the trial court issued ad-interim mandatory injunction directing the opposite party/appellants to complete the suit property and hand over the same within a

period of three months from the date of institution of the suit.

5. On receipt of the notices, the appellants appeared and filed an application under Order 7 Rule 11 CPC and Section 5 and 8 of Arbitration and Conciliation Act, 1996, praying for referring the matter for arbitration and also prayed for modification of the ad-interim mandatory injunction in Misc (J) case no. 68/2024.

6. Against the aforesaid petition filed by the appellants, the plaintiffs/respondents no. 1 and 2 filed their objection to the said Misc (J) case no. 68/2024 stating that the ingredients of valid arbitration clause is not mentioned in the said agreement and therefore, it is not mandatory for the parties to opt for arbitration before taking shelter of civil court. It was further averred that the arbitration clause should be univocal in displaying an intention on the part of the parties to mandatorily refer their dispute to arbitration and willingness to bound by decisions of such tribunal and in the agreement the clause do not mandate the parties to refer the dispute to be resolved through arbitration. It was also averred that the choice being left open to the parties to have settled dispute through arbitration is not equivalent to the parties mutually agreeing that they shall refer themselves to arbitration and thereby prayed for dismissal of application.

7. The trial court after hearing both the parties rejected the prayer of the appellants vide order dated 20/09/2024.

8. It was urged by learned counsel for the appellants that the learned trial court while passing the impugned order dated 20/09/2024 ignored the clause "23" of the agreement for sale of flat wherein it is clearly mentioned that any dispute arising

out of this deed shall only be mutually resolved in a spirit of good faith, in exceptional cases, it will be resolved by arbitration as per law within the exclusive jurisdiction of Tinsukia.

9. According to learned counsel for the appellants, clause "23" of the agreement makes it clear that if the parties failed to resolve the dispute mutually, then they have to opt for arbitration for resolving their dispute and no judicial authority shall intervene in the subject matter of the suit. As such, the impugned order dated 20/09/2024 is liable to be set aside.

10. It is also the submission of learned counsel for the appellants that it is well settled principle of law that the language of section 8 of the Act, 1996 is peremptory in nature and therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration. But the learned trial court has come to a conclusion that the parties have not agreed to resolve all disputes by arbitration which is totally perverse.

11. Learned counsel for the appellants has also pointed out that the finding of the trial court that the appellants have not filed any original or certified copy of the arbitration agreement is not in accordance with law as because the plaintiffs have not denied the execution of the agreement and the content thereof, rather, the plaintiffs have annexed the said agreement in question along with their plaint and the same was relied on by the trial court while granting ex-parte ad-interim injunction. It is further submitted that in Misc (J) case no. 68/2024, the appellants made a specific prayer to issue necessary direction to the plaintiffs/respondents to produce the original copy of the agreement before hearing of the application as the original agreement is in the custody of the plaintiffs.

12. Accordingly, learned counsel for the appellants has stated that if the order

passed by the learned trial court dated 20/09/2024 is allowed to stand, there will be total failure of justice and the appellants would face irreparable loss and injury.

In support of his submissions, learned counsel has placed reliance on the following case laws –

- a. (2015) 14 SCC 444 (Sundaram Finance Ltd vs. T. Thankam)
- b. (2003) 6 SCC 503 (Hindustan Petroleum Corporation Ltd. vs, Pink City Midway Petroleums)
- c. (2021) 2 SCC 1 (Vidya Drolia vs. Durga Trading Corporations)
- d. (2021) 4 SCC 786 (Deccan Paper Mills Co. Ltd. vs. Regancy Mahabir Properties)
- e. (2022) SCC Online Gau 638 [(International Air Transport Association vs. Indrani Air Travels (P)Ltd.)]

13. On the other hand, learned counsel for the opposite parties/ plaintiff has submitted that the order passed by the trial court is in accordance with law. Clause "23" of the agreement for sale of flat as pointed out by the learned counsel for the appellants/defendants is not applicable at all since the same is in respect of dispute arising out of the said deed. But in the case in hand, all the terms and conditions incorporated in the said deed are all admitted fact and the matter involved is only substantial delay in handing over the subject matter of the said deed. According to learned counsel for the respondent it cannot be presumed that once it is found that the contract between the parties contains arbitration clause, jurisdiction of the civil court stands ousted automatically and

is barred explicitly and that to take benefit of arbitration clause.

14. Learned counsel for the respondent has further submitted that the so-called ground agitated by the appellants is not at all tenable under the law. Since ingredients of arbitration clauses is not available in the agreement to sale and as such the instant appeal is not tenable under the law and the civil court has jurisdiction to try the relevant suit. Mere use of word "arbitration clause" in the agreement does not oust the jurisdiction of civil court. The learned counsel for the respondent has also pointed out that on perusal of the agreement of sale of flat dated 29/08/2018 would indicate that the ingredients of said arbitration clauses is not mentioned in the said agreement. It is not mandatory for the parties to opt for arbitration before taking shelter of civil court. In the alleged agreement, the clauses did not mandate the parties to refer the dispute to be resolved to arbitration.

15. Learned counsel for the respondent also has referred the provision of section 8(2) of the Act, 1996, which is reproduced as follows –

“....The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.”

Accordingly, learned counsel for the respondent has contended that it is not in dispute that the original arbitration agreement has not been filed along with the petition filed by the appellant/ defendant. Therefore, the learned counsel for the respondent prays for dismissal of the appeal.

16. Having heard the learned counsel for the parties, the question of law posed for consideration of this court is whether in view of the arbitration clause

in the agreement of sale of flat providing for resolving the dispute by arbitration and considering the provisions of the Arbitration Act, 1996, whether the jurisdiction of the civil court is ousted!

17. Learned advocate appearing on behalf of the appellants has relied upon Section 8 of the Act of 1996, in support of his submission that the civil court would not have any jurisdiction and the civil court has to refer the dispute for arbitration.

18. A bare perusal of 'clause 23' as mentioned in the deed of agreement, it is true and it provides all disputes between the plaintiff and the defendant is to be resolved on mutual consideration, however, in exceptional cases the matter be referred to arbitration.

Now the question is whether in view of arbitration agreement, can it be said that the civil court would not have any jurisdiction at all?

19. As observed by the **Hon'ble Supreme Court in the case of S.Vanathan Muthuraja vs. Ramalingam @ Krishnamurthy Gurukkal & Ors., (1997) 6 SCC 143**, considering Section 9 of the CPC and the question of exclusion of civil court's jurisdiction, the Hon'ble Supreme Court has observed and held that when a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil courts would take cognizance of it. It is further observed by the Hon'ble Supreme Court in the said decision that the normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded. The rule of construction being that every presumption would be made in favour of the existence of a right and remedy in

a democratic set up governed by rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded.

20. In **ITI Ltd. vs. Siemens Public Communications Network Ltd., reported in (2002) 5 SCC 510**, considering the relevant provisions of the Arbitration Act, 1996, the Hon'ble Supreme Court has observed that there is no express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court, and therefore that being so, by inference it cannot be held that the Code is not applicable. In para 11 of the said decision the Hon'ble Supreme Court has further observed and held that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature. It is also further observed by the Hon'ble Supreme Court in the said decision that therefore if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction.

21. In an identically situated matter, the Rajasthan High Court in the case of **Mahesh Kumar vs. RSRTC, reported in AIR 2006 Rajasthan 56**, the Rajasthan High Court has specifically held that mere existence of arbitration clause in the agreement does not bar jurisdiction of the civil court automatically. It is held that it cannot be presumed that the civil court would not have any jurisdiction to entertain the suit only because that there is contract for referring the dispute to arbitrator. It is not a case of total ouster of jurisdiction of the Court in the cases

where the arbitration clause is there in the contract between the parties to the suit, but it depends upon compliance of the conditions by the persons seeking for referring the matter to the arbitration.

22. In view of the principles enunciated by the Hon'ble Supreme Court as well as the Rajasthan High Court in the above referred decisions, the contention on behalf of the appellants that in view of agreement providing for resolving the dispute between the parties only by arbitration, the jurisdiction of the civil court would be barred and/or ousted cannot be accepted more particularly when there is no specific provision in the Arbitration Act excluding the jurisdiction of the civil court in a case where the dispute is to be referred to the arbitration.

23. In the backdrop of the aforesaid discussion, this court is of the view that merely because there is an arbitration clause provides for referring the dispute and the claim to the arbitration, the civil court's jurisdiction is not barred but the same is subject to Section 8 of the Arbitration Act, 1996. Under the circumstances, it cannot be said that the trial court has committed any error and/or acted illegally in dismissing the application filed by the appellants herein under Section 8 of the Arbitration Act, by which, it was prayed to reject the plaint. No illegality has been committed by the trial court in dismissing the said application, which warrants any interference at the end of this Court.

24. In the result, the present appeal is dismissed. There is no order as to cost.

25. With the above observation, this arbitration appeal is disposed of.

**JUDGE**

**Comparing Assistant**