

GAHC010232722017



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

Case No. : Arb.A. 1/2017

1:SMTI BHABANI DAM and ANR
W/O SRI SANJAY KUMAR DAM, R/O NAG NAHA LANE, SILCHAR-788004,
P.S. SILCHAR, DIST. CACHAR, ASSAM

2: SUDIP KUNDU

S/O LATE SHIBAPADA KNDU
R/O AMBICAPATTY
SILCHAR TOWN
P.S. SILCHAR
DIST. CACHAR
ASSAM BOTH ARE PARTNERS OF M/S B.S. CONSTRUCTION
A PARTNERSHIP FIRM
HAVING ITS HEAD OFFICE AT AMBICAPATTY
SILCHAR TOWN
P.S. SILCHAR
DIST. CACHAR
ASSAM
PIN 78800

VERSUS

1:DR BIJIT RANJAN ACHARYYA and 10 ORS

2:BIKASH RANJAN ACHARYYA

3:BISWAJIT ACHARYYA

4:BISWARAJ ACHARYYA

5:BIDYUT RANJAN ACHARYYA

6:BISWADEV ACHARYYA

7:SMT. APARNA ACHARYYA

8:SMTI MAMATA ACHARYYA

RESPONDENTS NO. 1 TO 8 ARE SONS AND DAUGHTERS OF LATE DR.
BIJOY RANJAN ACHARYYA

9:DEBASIS BHATTACHARJEE

10:NIHARANDU BHATTACHARJEE

11:SMTI SHILPI BHATTACHARJEE

RESPONDENTS NO. 9 TO 11 ARE SONS AND DAUGHTERS OF LATE
NIRANJAN BHATTACHARJEE ALL ARE R/O LOCHAR BAIRAGI ROAD
SILCHAR TOWN
P.S. SILCHAR
DIST. CACHAR
ASSAM

Advocate for the Petitioner : MS.J CHETRY

Advocate for the Respondent : MR. D MAZUMDAR

:: BEFORE ::

HON'BLE MR. JUSTICE PRASANTA KUMAR DEKA

For the Appellants : Mr. PK Roy Choudhury
Advocate

For the Respondents : Mr. D Mozumdar
Sr. Advocate

Mr. P Bora
Advocate

Date of Hearing : 28.02.2018

Date of delivery of
Judgment and Order : **28.02.2018**

JUDGMENT AND ORDER (ORAL)

Heard Mr. PK Roy Choudhury, learned counsel appearing on behalf of the appellants and Mr. D Mozumdar, learned Senior Counsel assisted by Mr. P Bora, learned counsel appearing on behalf of the respondents.

2. The present appeal is under Section 37 of the Arbitration and Conciliation Act, 1996 against the impugned order dated 20.12.2016 passed by the learned Additional District Judge (FTC), Cachar in Misc. (Arb) Case No. 15/2016 rejecting the application filed under Section 9

of the Arbitration and Conciliation Act, 1996 by the present appellants, as petitioners, for an interim injunction against the present respondents from disposing the suit property in favour of any person either by way of sale, gift etc. and from handing over possession of the schedule land to any person including any builder for the purpose of construction etc.

3. The present respondents are the owners in possession of a particular plot of land and with a view to develop the land by constructing RCC building thereon entered into a registered deed of agreement on 25.10.2013 with the present appellants as the second part. Along with the said agreement dated 25.10.2013 and irrevocable Power of Attorney dated 25.10.2013 was also executed by the respondents thereby authorising petitioners to take steps for construction of the building and to sell certain specific portion of such building along with undivided proportionate share of land. It is the contention of the present appellants that as per Clause 4 of the agreement, the respondents were required to deliver undisputed vacant physical possession of the land described in the said agreement in order to enable them to undertake the construction works. The respondents without complying the terms of the agreement by way of a revocation deed dated 04.02.2015 revoked authority to the present appellants which, as per the appellants, is illegal. The respondents also practised fraud upon the present appellants inasmuch as subsequent to the execution of the agreement, it was discovered that the respondents had filed Title Suit No. 696/2006 against one Supratim Dhar and others praying for declaration of their ownership, right, title and interest over the schedule mentioned land. The present appellants, as the plaintiffs, filed Title Suit No. 34/2015 in the Court of learned Civil Judge, Cachar praying for a decree of declaration that the deed of revocation of power of attorney be cancelled. After the revocation of the said authority given to the appellants, the respondents started negotiation with some other persons/ builders and planning to induct other persons to carry out constructions. In the said suit, an injunction application was also filed restraining the respondents from giving effect to the deed of revocation. The respondents entered appearance in the said suit and raised objection regarding the maintainability of the suit in view of the arbitration clause in the agreement dated 25.10.2013. Following the objection raised by the respondents with regard to the maintainability of the suit, the learned Civil Judge vide order dated 08.02.2016 dismissed the suit and referred the parties to the arbitral tribunal. After dismissal the respondents started vigorously to transfer the suit land to other builders and as such they sought for the relief mentioned hereinabove.

4. The respondents had entered appearance and filed their written objection against the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*). The respondents denied the allegations made by the appellants and took the plea that the respondents never applied for any building permission nor did take any step for developing the land by constructing multi-storeyed building nor have shown any interest to perform their part of the contract. In the mean time, the Assam Municipal Act, 1956 and Town and Country Planning Act, 1959 were amended and introduced the zoning regulation specifically for construction of multi-storeyed building under the said Act and as a result of such amendment in the said clause, the respondents would be affected inasmuch as area of construction over the land would be reduced by 40-42%. It is denied that there was any fraud at the time of execution of the agreement played upon the appellants by the respondents. The respondents mainly objected that the appellants were negligent in performing their part of the contract causing loss to the respondents and as such, as against the contention of the appellants that the respondents failed to deliver possession of the land

mentioned in the agreement even after repeated requests on 30.12.2014 has no basis. The respondents pleaded that authority was given to the appellants to enter upon the vacant land of the respondents along with men and materials as may be required for the purpose of their work and to erect a multi-storeyed building. Under such circumstances, there was no question of non-delivery of possession of the land referred in the said agreement. The appellant further pleaded that there was an attachment order of the subject land and on being informed about the withdrawal of the said attachment order, the appellants could come to know about the civil suit referred hereinabove. With the said pleadings both the parties went to the learned Court below along with the documents relied by the parties to the present appeal. The learned court below vide order dated 30.03.2016 was satisfied to pass an order directing both the parties to the appeal to maintain status-quo specifically in respect of possession as well as the nature and feature of the schedule land. After full length hearing, the learned court below vide order dated 20.12.2016 dismissed the said application under Section 9 of the Act. While dismissing the said application, the learned court below held as follows:-

*“It is an admitted fact of the case that the Ops are the owners of the schedule mentioned land over which the petitioner was allowed to construct a multi storied building by executing deed of agreement and also the deed of power of attorney. The deed of power of attorney is also revoked. Our Hon’ble Gauhati High Court in its decision reported in the AIR 2005 GAUHATI 58 held with reference to section 9 of the Arbitration and Conciliation Act, 1996 and section 41 Specific Relief Act 1963 that – ‘**Contract for building construction-Breach of Contract-Persons aggrieved can be adequately compensated by initiation of civil proceeding – No interim relief by way of injunction can be granted u/s 9 in view of Section 41**’. The aforesaid decision of our Hon’ble High Court completely fits in with the case in hand. So relying upon the aforesaid decision we are left in hesitation to arrive at a conclusion that the prayer for injunction U/s 9 Arbitration and Conciliation Act 1996 stands rejected. The ad-interim order of status quo granted by this court vide order dated 30-03-16 shall stand vacated. This Misc Case thus stands dismissed on contest, however, without awarding cost.”*

5. Being aggrieved, the present appellants have preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

6. Mr. Roy Choudhury submits that the learned court below failed to discuss with respect to the three important principles for granting an interim order like injunction. The learned court below simply holding that the dispute between the parties is with respect to the construction of a building on the basis of an agreement and relying on the decision reported in *AIR 2005 Gauhati 58*, had held that injunction could not be granted inasmuch as the petitioners could well be compensated in terms of money. Assailing the said finding, Mr. Roy Choudhury submits that there is a strong prima facie case which the learned court below had failed to discuss. It is submitted that the respondents with an intention to play fraud on the present respondents entered into the agreement inasmuch as they were fully aware with respect to the clarity and legality of the title with respect to the land which is the subject matter of the agreement. The appellants were surprised when the attachment order of the said land was served upon them. With such an intention, the respondents entered into the agreement clearly with a motive to defraud the appellants. The appellants in the mean time had already delivered possession to the third party after entering into development of

agreement with the said third party and under such circumstances, the matter is urgent for which the finding of the court below is to be set aside and the same be remanded back for further hearing by the said court below in order to pass necessary orders considering the subsequent facts. It is submitted by Mr. Roy Choudhury that the appellants had filed an application under Section 11 of the Act for appointment of an Arbitrator in the court of learned District Judge at Cachar, Silchar. The said move was undertaken because of the fact that the Arbitrator appointed by the present appellants, was not accepted and the person who was requested to be the Arbitrator, consensus of both the parties, refused to act as an Arbitrator and thereafter the said application is pending. The findings of the learned court below are cryptic which cannot be passed by a court which is a judicial one without discussing the materials placed before it. Accordingly, as per Mr. Choudhury, the said order is liable to be set aside.

7. Mr. Mozumdar, learned Senior Counsel, opposing the submission of Mr. Roy Choudhury, submits that there is no illegality in the findings of the learned court below. When the appellants cannot enforce the contract even before the arbitral tribunal, under such circumstances, apparently there is no prima facie case going for the trial. Regarding the fraud, Mr. Mozumdar submits that the notice of attachment of the land was in fact served upon both the parties to the present appeal which indicates that the present appellants were delivered the possession so far the land in question is concerned. The respondents entered into an agreement with a company for development of the said land on 01.01.2017 after dismissal of the Misc (Arb) Case No. 15/2016 for injunction on 20.12.2016. On the date of entering into the agreement with the third party, there was no order restraining the present respondents from entering into any agreement with the third party. The possession of the land has already been delivered to the said third party and the construction has already been completed to the plinth level and thereafter the pillars were also raised and preparation for casting the first slab was going on. On the other hand, Mr. Mozumdar submits that the application under Section 11 of the Act is still pending and the respondents had entered appearance and raised the maintainability of the said application. Accordingly, Mr. Mozumdar submits that the findings of the learned court below are proper which requires no interference.

8. Mr. Roy Choudhury in order to support his arguments relied on the case of **A. Ayyasamy v. A Paramasivam and others** reported in **(2016) 10 SCC 386**. On the other hand, Mr. Mozumdar, learned Senior Counsel relies on the case of **Mohd. Mehtab Khan and others v. Khushnuma Ibrahim Khan and others** reported in **(2013) 9 SCC 221**, paragraphs No. 20 and 21 of which are quoted below for ready reference:-

“20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions

*what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in **Wander Ltd. v. Antox India (P) Ltd.***

*21. Para 14 of the aforesaid judgment which is extracted below would amply sum up the situation: (**Wander Ltd. case, SCC p. 533**)*

*“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant of refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these principles Gajendragadkar, J. in **Printers (Mysore) (P) Ltd. v. Pothan Joseph: (AIR p. 1159, para 9).***

*‘9. ... These principles are well established; but, as has been observed by Viscount Simon in **Osenton (Charles) & Co. v. Johnston: (AC p. 138)***

“... The law as to the reversal by a Court of Appeal of an order made by [a] Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case.” ’

The appellate judgment does not seem to defer to this principle.”

9. Considered the submissions of the learned counsels appearing for the parties. The arbitration clause in an agreement has its life even after cancellation of the original agreement between the parties and any dispute arising out of the said agreement is arbitrable on the strength of the arbitration clause. In a specific query to Mr. Roy Choudhury by this court that as there is an allegation of fraud whether the arbitral tribunal would be the proper forum to resolve the dispute wherein the question of fraud is involved. Mr. Roy Choudhury submits that the nature of the fraud would be the dependent criteria whether the said arbitral tribunal is well equipped to decide the said fraud and even after the question of fraud is raised, the same must be referred to the arbitrator to decide the same. In the present case in hand, it is the contention of the present appellants that the respondents played fraud on them while entering into the said agreement. If that is accepted, under such circumstances, the agreement is vitiated with fraud and there does not arise any question of performance of the stipulated clause agreed to be performed by the parties. It is the specific averment made in the petition under Section 9 of the Act that subsequent to execution of the said agreement, the appellants discovered the fraud inasmuch as the title which they claimed to be undisputed in fact, not found to be true and the said title suit was filed way back in the year 2006 which the respondents did not disclose to the present appellants at the time of entering into the said agreement. Mr. Roy Choudhury further submits that reliance of the

decision as recorded in the said impugned order is not proper inasmuch as the findings therein was as per *in curiam* because of the fact that Section 14 (3)(c) of the Specific Relief Act, 1963 specifically stipulates that where the suit is for enforcement of a contract for the construction of any building or any execution of any other building on land, the Court may enforce specific performance. Section 41 under such circumstances cannot be considered to be the end of road. Mr. Roy Choudhury submits that Section 14 of the Specific Relief Act, 1963 would come as the saviour of the plaintiff in such a case. Let me examine whether there is a prima facie case to go for a trial. From the discussions and the submissions of the learned counsels, more specifically, with respect to the vitiation of the agreement by fraud it is very much apparent that the clauses stipulated therein are all vitiated by fraud. Any act or performance by the appellants was totally on the misrepresentation of the respondents. If that be so, under such circumstances, there does not arise any question of performance of the agreement at best the appellants are entitled for compensation as against the loss what they have incurred owing to such misrepresentation. However, the dispute consists of one of the elements which the appellants wanted to term as fraud, on the other hand, the other side wanted to say that there was no fraud at all. The dispute can very well be referred to the arbitral tribunal and regarding the subsequent development which both the learned counsels have argued and as per the submission of Mr. Mozumdar, learned Senior Counsel, that already construction work above the plinth level has been constructed under such circumstances, this Court cannot enter into the said development. There is no bar in filing a fresh application seeking for injunction and as such, the appellants can very well place it before the competent court with respect to the subsequent development. However, with respect to the submission of Mr. Mozumdar that a discretion applied by the court below cannot be replaced by the appellate court even if there is a possibility of a second view. I would like to clarify that the order passed under Section 9 of the Act is purely a discretionary one and as the court below has applied its discretion thereby holding that the matter involves '*contract for building construction and breach of contract persons aggrieved can be adequately compensated by initiation of civil proceeding*' is not a proper finding inasmuch as a duty was cast upon the learned court below at least to record the facts pleaded by the parties, drawing inference from the recorded facts, the learned court below ought to have come to the said conclusion. Accordingly, the finding of the learned court below is set aside. This appeal is accordingly allowed.

10. Send down the records.

JUDGE

Comparing Assistant