

# **Page No.# 1/36 vs The State Of Assam And 2 Ors on 2 November, 2021**

**Author: Prasanta Kumar Deka**

**Bench: Prasanta Kumar Deka**

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GAHC010082962020

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

Case No. : WP(C)/2461/2020

M/S. BARUA AND COMPANY PVT. LTD. AND ANR.  
A PVT LIMITED COMPANY REGD UNDER THE COMPANIES ACT, HAVING  
ITS REGD OFFICE AT DR. B BAROOAH ROAD, GUWAHATI- 781007, REP. BY  
ITS DIRECTOR

2: DIPANKAR BARUA  
S/O- SRI S C BARUA  
R/O- ANIL NAGAR  
GUWAHATI- 781024  
DIRECTOR OF M/S BARUA AND COMPANY PVT LT

VERSUS

THE STATE OF ASSAM AND 2 ORS  
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM,  
DEPTT OF SPORTS AND YOUTH AFFAIRS, DISPUR, GUWAHATI- 06

2:THE BOARD OF SPORTS OF ASSAM  
R G BARUAH SPORTS COMPLEX  
NEHRU STADIUM  
GUWAHATI- 781007  
REP. BY ITS SECRETARY

3:THE SECRETARY  
BOARD OF SPORTS OF ASSAM  
R G BARUAH SPORTS COMPLEX  
NEHRU STADIUM  
GUWAHATI- 78100

Advocate for the Petitioner : MR. N DEKA

Advocate for the Respondent : SR GA, ASSAM

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-BEFORE-

HON'BLE MR. JUSTICE PRASANTA KUMAR DEKA

Advocate for the Petitioners : Mr. K. N. Choudhury.  
Sr. Advocate

Mr. N. Deka  
Advocate

Advocate for the Respondents: Mr. D. Saikia  
Advocate General, Assam  
Ms. P. Baruah.  
Advocate.  
  
Mr. D. Baruah  
Addl. Advocate General, Assam  
  
Ms. N. Upadhaya.  
Advocate.

Date of hearing : 08.10.2021

Date of Judgment : 02.11.2021

JUDGMENT & ORDER (CAV)

Heard Mr. K. N. Choudhury, the learned Senior Counsel assisted by Mr. N. Deka, the learned counsel for the petitioners. Also heard Mr. D. Saikia, the learned Advocate General, Assam assisted by Ms. P. Baruah, the learned counsel for the respondent State representing the respondent No. 1 and Mr. D. Baruah, the learned Additional Advocate General, Assam assisted by Ms. N. Upadhaya, the learned counsel for the respondent Nos. 2 and 3.

2. The Nehru Stadium Sports Complex in the heart of the city of Guwahati was accommodated with a guest house named Radha Gobinda Baruah Guest Page No.# 3/36 House (RGBGH) which was run by the Board of Sports, Assam, the respondent No. 2. The said Board of Sports, Assam was formed under the National Sports Club of Assam (Taking over of Management and Control) Act, 1977 and as per Section 4 of the said Act, 1977, the Board was vested with all properties, movable or immovable, and all rights, powers and privileges of the said Club which immediately before commencement of

this Act belonged to the Club or any other committee or persons and, for the purpose of such management and control, vest in the Board. In the year, 2000, the Board was in a precarious financial condition and the physical condition of the guest house was even worse. The accrued debts of the Board on account of the guest house was about Rs. 1.26 crores including PF and ESI dues of its employees and in that backdrop, a decision was taken to lease out the guest house to a private party through a process of tender, to convert and run the same as a hotel. With the said intent, an advertisement in newspaper was issued by the respondent No. 2. In pursuance of the said advertisement in the newspaper, 5 (five) numbers of private parties came forward to take the Radha Gobinda Baruah Guest House (RGBGH) on lease. For better appreciation the subsequent Cabinet Memorandum circulated under Rule 17 of the Assam Rules of Executive Business, 1968 is extracted herein below:-

"CABINET MEMORANDUM (CIRCULATED UNDER RULE 17 OF THE ASSAM RULES OF EXECUTIVE BUSINESS) Sub:- Lease of the Radha Govinda Barua Guest House in Nehru Stadium, Guwahati.

The Radha Govinda Barua Guest House in Nehru Stadium Guwahati is Page No.# 4/36 under the care and control of the Board of Sports of Assam. The RGBGH was one of the main sources of income of the BSA till some years ago. Because of the lack of proper administration and management the condition of the B.S.A. has gone from bad to worse. Failure of business accumulated the following debts:-

1. Unpaid salary for 12 months to the staff of the BSA- Rs.42.00 lakhs.
2. Irrecoverable loss for food/lodging- Rs. 24.00 Lakhs
3. Unpaid EPF/LIC/ESI etc and gratuity to retired employees- Rs.10.00 Lakhs
4. ASEB/GMC/PHE dues- Rs. 50.00 Lakhs Total- Rs. 126.00 Lakhs.

Now, the RGBGH has almost become defunct for want of the requisite facilities and practically it yields very small income. Govt. extend financial grant in aid annually to the BSA which cannot cater the requisite need.

The Board of Sports of Assam with a view to make the RGBGH to function fully and yield income to the BSA, after careful consideration decided to give the RGBGH on lease to private party periodically and initially for 20(twenty) years.

After advertisement in News paper, 5(five) nos of private parties come forward to take the RGBGH on lease. After scrutiny the core committee short listed 3 (three) groups. The 3 (three) parties were further reduced to 2 (two) on the basis of offers. These 2 (two) parties are:-

1. Uttam Narayan Sarma (UNS) offered for 30 years with Rs. 80,06,985.60. they agreed to take over the existing 37 nos permanent and 7 nos casual employees of the

Guest House under the B.S.A.. They also agreed to make one time payment of Rs. 2.00 lakhs for the use of BAR License.

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2. Barua & Co-Pvt. Ltd. ( BCPL) (Landmark Hotels) has offered Rs. 85,25,000.00 for 20 years lease. Further, the company has offered Rs. 2,50,100.00 as security money. Also the company is agreeable to take over the existing staff.

The conditions for periodic lease are:-

1. Initial lease of the RGBGH will be for 20 years subject to extension for another 10 years upon satisfactory performance.
2. All employees of RGBGH will be retained in the existing scale by the tenderer.
3. Appropriate security deposit will be given. The S/D money will be forfeited in case of failure to start function of the RGBGH within the specified time.
4. The RGBGH will be for Hotel/Restaurant and Hospitality/ tourism activities.
5. No addition/demolition of the existing building will be done without written permission of the Board of Directors of the BSA.
6. For restoration of electricity Municipal services and water connections the arrear dues payable to ASEB, GMC, PHE will be cleared by the lease. This will be adjustable against annual lease rent but exceeding 50% adjustment at a time in a year can be made.
7. Reservation of 25% of the rooms in the RGBGH for BSA at concessional rates at overnight notice for Sports activities in the Nehru Stadium, Guwahati.
8. The RGBGH means the main building and the Annexure for BAR and pumps, materials equipments except the furniture and linens, movable chairs.
9. Penalty of cancellation of lease without cost/compensation with one month notice in case of violation of any of the conditions of the MoU/agreement.

The Memorandum of understanding /AGREEMENT will be prepared Page No.# 6/36 accordingly for execution.

The matter was referred to Finance department whose opinion is reproduced below:-

"Sports and youth Welfare Department. U/O. Your endorsement pre page.

Since the R. G. Baruah Guest House was built with the fund from the State Govt. and leasing out to private parties is a major policy decision, Finance department still advise that Sports and youth Welfare should take an in principle policy decision from cabinet in this regard".

Sd/- 03.04.2000 Under Secretary, Finance (EC-III) department.

In view of the facts and figures depicted above it has been decided to lease out the Radha Govinda Baruah Guest House initially for 20 (twenty) years to the highest tenderer viz, Barua and Co-Pvt. Ltd. (BCPL) (Landmark Hotels) as per negotiated terms and conditions.

The Secretary, BSA will proceed accordingly to sign the Memorandum of Understanding on behalf of the BSA and will complete the process within 1 (one) months 2 (two) members viz is/ Shri Sahajananda Ojha and Rup Kamal Kakoti will sign as witnesses.

The Cabinet is requested to kindly consider the need and approve the proposed/recommended leasing out of the Radha Govinda Baruah Guest House to Barua and Co-Pvt. Ltd (BCPL) (Landmark Hotels) initially for 20 (twenty) years as stated.

(M. K. Barooah) Page No.# 7/36 Secretary to the Govt. of Assam.

Sports and Youth Welfare Deptt."

3. Thereafter, the respondent No. 3 vide letter dated 02.05.2000 requested the petitioner No. 2 being the Director of the petitioner No. 1 Company to sign the Memorandum of Understanding and the Lease Deed and take possession of the Lease premises on completion of the formalities like registration of the Lease Deed and execution of the Memorandum of Understanding. Registered Lease Deed No. 2944 dated 04.05.2000 was accordingly executed between the respondent No. 3, the Secretary, Board of Sports of Assam and the petitioner No. 2, representing the petitioner No. 1 Company. Similarly, the Memorandum of Understanding (MoU) dated 04.05.2000 was also executed between the said two parties. Amongst various terms and conditions stipulated in the Memorandum of Understanding dated 04.05.2000, the relevant ones are extracted hereinbelow:-

"5. That it is agreed that M/s BCPL will pay BSA, as BSA's share, at the under mentioned rates, from the gross revenue earned from the undertaking i.e., RGBSGH as lump sum fees, service charge/ remuneration/profit etc: Rs. 3,25,000.00 (Rupees three lacs twenty five thousand only) for the first two years from the date of handing over, Rs. 3,75,000.00 (Rupees three lacs seventy five thousand only)- for the next three years and Rs. 4,50,000.00 (Rupees four lacs fifty thousand only) for the subsequent years as well as for further renewals with minimum guarantee. It is further agreed that for the Bar and the Bar License, BCPL will pay an additional one time fees of Rs. 2,50,000.00 (Rupees two lacs fifty thousand only). Such payment will be made by Account payee cheque favouring "sports Fund of Assam" to the Secretary, BSA.

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13. That it is agreed that M/s BCPL shall maintain in good condition the said property of the BSA at their own cost and will have the exclusive right to improve the said property, as and when they so desire and require, without causing damage to the structure of the building. It is further agreed that BCPL will not make any new construction in the vacant land except for the exigencies of smooth running of business, with prior written permission of BSA. That it is furthered agreed that all such improvement/construction made with written permission of the BSA will be bought back by BSA at the end of lease at market value.

19. In case of any dispute relating to the terms and conditions of this agreement or the interpretation of the agreement or the interpretation of the agreement arises between the parties the same shall be submitted to a Board of two Arbitrators to be nominated by both the partners, who shall conduct their proceedings within the district of Kamrup.

20. In case of difference of opinion between the two Arbitrators, they shall appoint an umpire, of judicial background, whose decision shall be final and binding on the parties. The provisions of the Arbitration Act, 1996 shall apply to the proceedings before the Arbitrators and / or Umpire".

4. On the other hand, the registered Deed of Lease bearing No. 2944 dated 04.05.2000 stipulated the schedule of the property and a specific mention of the period of lease with an optional clause of extension for further period of 20 years and as per the language of the said Deed it is stipulated as follows:-

"..... The lessor hereby conveys by way of lease ..... for a period of twenty years from the date of takeover and the lessee shall have the option of renewing the lease of the said premises, for a further period of twenty years on giving notice of such intention to the lessor two months before the expiration of the said lease to be granted and the lessor shall forthwith execute and deliver to the lessee a renewed and duly registered lease of the Page No.# 9/36 said premises for such further term of years at the rent and under the same conditions as are herein contained in this Lease Deed and the Memorandum of Understanding entered between the parties hereto excepting only this conditions as to renewal."

5. Further the Lease Deed also authorized the petitioner Company the right to hypothecate or sub lease the said property of the respondent No. 2 in order to enter into any kind of contract with the Financial Institutions and / or any Bank for the purpose of arranging/ raising funds in the interest of smooth running and functioning of the business of the undertaking. The petitioner was required to give a corporate guarantee to return, free from all liabilities with bank/financial institute, the property at the end of the lease period. The rent was stipulated at Rs. 10,000/- (Rupees Ten Thousand) only per year in two installments payable on or before the 31st January and 30th of June

of each year, for the first two years of lease and a sum of Rs. 15,000/- (Rupees Fifteen Thousand) only per year for the remaining period of Lease. Later, a Deed of Rectification was also executed between the aforesaid two parties thereby inserting the Dag and Patta numbers of the land covered by the said building of guest house which is the subject matter of the said Memorandum of Understanding and Lease Deed both dated 04.05.2000. The said property was also valued and as per the valuation report in the year 2000, the value stood at a total of Rs. 73,26,526/-. Thereafter for the renovation and extension work of the said RGBGH, the petitioner No. 1 through the respondent No. 3 applied for approval of plan for extension work at RGBGH to the Chief Executive Officer, GMDA and the said renovation plan was approved in the name of the respondent No. 3 vide approval letter dated 20.11.2000. The petitioner No. 1 availed bank loan to the tune of Rs. 150 Lakhs from the UCO Bank, Industrial Page No.# 10/36 Financial Branch, Kolkatta creating equitable mortgage at the Nehru Stadium Complex for the purpose of the said renovation work. Subsequent to the completion of the said renovation work, the valuation as per the registered valuer which was carried out in the first part of February 2002 was assessed at Rs. 4,85,75,000/-

6. The petitioners after the renovation being carried out possessed the said RGBGH and continued with the lease terms and in terms of the extension clause in the Lease Deed dated 04.05.2000, vide letter dated 20.02.2020 addressed to the respondent No. 3 requested to execute and deliver a renewed and duly registered Lease Deed of the RGBGH for a period of twenty years with effect from 04.05.2020, the date of expiry of the original Lease being 03.05.2020. Vide letter dated 02.05.2020, the respondent No. 3 expressed his unwillingness to renew the Deed of Lease dated 04.05.2000 for any further term. It was stated in the said letter dated 02.05.2020 of the respondent No. 3, Assam being hotspot of National and International sporting events, there was necessity of accommodation for players, coaches etc near to sporting venues. Serious problems for accommodating the participants in last few sporting events including "Khelo India Youth Games, 2020" were faced and accordingly the respondent No. 3 anticipating a number of State Level Sporting Events to be organized at Guwahati every year required proper accommodation for participants and as such the respondent No. 2, Board expressed its unwillingness to renew the Deed of Lease dated 04.05.2000 and accordingly asked the petitioner to vacate the leased out premises at the earliest. The petitioners vide letter dated 08.05.2020 acknowledging the receipt of the said letter dated 02.05.2020 (impugned in this writ petition) sought time in order to reply considering the lockdown prevailing at that relevant time. Thereafter vide Page No.# 11/36 letter dated 02.06.2020, the respondent No. 3 asked the petitioner No. 2 to vacate the lease premises of the RGBGH within 15.06.2020 positively and hand over the possession of the same to the Board of Sports, Assam reiterating the intent of the Board not to renew the Deed of Lease dated 04.05.2000 for further term. Being aggrieved the petitioners filed this writ petition seeking for quashing and setting aside of the letters dated 02.05.2020 and 02.06.2020 with a further direction to the respondent Nos. 2 and 3 to immediately extend the lease of property in question for a further period of twenty years upto 03.05.2040 as per the terms of Lease Deed dated 04.05.2000.

7. Both the respondent Nos. 1 and 3 filed two separate affidavit-in-opposition though the contents therein more or less are similar. The respondent No. 1 in its affidavit-in-opposition raised the issue of maintainability of this writ petition as the same was filed without exhausting the dispute resolution mechanism stipulated in the Memorandum of Understanding dated 04.05.2000.

8. It is further stated that due to bonafide requirement of the property in question for the purpose of providing accommodation to the sport persons participating in various tournaments and camps organized under the respondent No. 2 and also to provide the office spaces to various affiliated sports association of the State which are yet to get accommodated in the RGBGH Sports Complex due to paucity of proper spaces, the lease could not be extended further. By the said affidavit, it was denied that the impugned letters dated 02.05.2020 and 02.06.2020 were arbitrary and illegal as alleged by the petitioners.

9. Further it is the stand of the respondents that the proposal to lease out the RGBGH for twenty years was by the Cabinet in its meeting held on Page No.# 12/36 12.04.2000. The proposal placed before the Cabinet was to lease out the property to the highest bidder for a period of twenty years as per the negotiated terms and conditions and to that effect the respondents relied the minutes of three rounds of negotiations held on 07.01.2000, 25.01.2000 and 03.02.2000. It is further stated that the whole process of grant of lease of the RGBGH was based on two major considerations (i) period of lease, and (ii) amount of lease value/money offered and on the basis of the said parameters the petitioner No. 1 was considered as successful in the bidding process as it categorically sustained his offer of bid for lease for a period of twenty years in all the three aforesaid round of negotiations and the other bidders were eliminated as they demanded lease period of thirty years or more which was not acceptable for the authorities who are the respondents in the present writ petition. The intention of the said respondents was made clear that the period of lease of the property would be for twenty years and not beyond that period while finalizing the bidding process. Once the Cabinet had approved the proposal on the basis of the decision placed before it same had to be adhered to in true letter and spirit and no individual, irrespective of holding any posts has any authority to change any terms and conditions subsequent to the Cabinet decision. If any such changes did take place such decision shall be void-ab-initio and no legal right would emanate from such unauthorized and illegal changes in the decision.

10. The respondent No. 3 through its affidavit-in-opposition supported the aforesaid stand of the respondent No. 1 and in addition to that it was further stated that the present respondent No. 3 (deponent) joined in the said post of Secretary on 20.05.2020. He was informed that the Original File No. BSA/15/77/MEE/Part containing the original records relating to the bidding process for leasing out the RGBGH, minutes of negotiations dated 07.01.2000, Page No.# 13/36 25.01.2000 and 03.02.2000, Lease Deed and Memorandum of Understanding both dated 04.05.2000 in the office of the Board of Sports, Assam were found missing from the office since the year 2000. A part file being File No. BSA/15/77/MEE/Part-II was opened which contained in it photocopies of the original records relating to bidding process etc. In view of the said subsequent discovery letter dated 23.07.2020 was issued to the then Secretary, Board of Sports, Assam Sri Nityananda Barkataki to explain as to under what circumstances the said file had gone missing. An FIR to that effect dated 23.07.2020 was also submitted to the O/C Paltanbazar Police Station. Except such introduction of the said facts regarding missing of the said file both the affidavits-in-opposition of the respondent Nos. 1 and 3 are similar. It was also admitted to the effect that questions relating to RGBGH were raised in the State Assembly. In reply to such questions dated 04.09.2000, then Chief Minister of Assam who was also the Minister of Sports and Youth Welfare Department, had duly informed the State Assembly that the lease of Stadium Guest House was granted to M/s Baruah and Company



Private Limited for a period of twenty years.

11. The respondent No. 1 further in its affidavit-in-opposition reiterated that the lease of the RGBGH was granted to the petitioner by the respondent No. 2 for a period of twenty years only which expired on 03.05.2020. As per the agreement, the petitioner was authorized to enter any contract with financial institutions/bank for the purpose of raising fund in the interest of smooth running of the business of the lease properties and not for any of the purposes including other commercial purposes of the petitioners. The act of taking loan by the petitioner from various banks and financial institutions to the tune of more than Rs. 14 Crores during the twenty years lease period keeping the lease Page No.# 14/36 hold property under mortgage with AXIS Bank, Guwahati was in clear violation of the terms of the Lease Deed which amounts to criminal offence on the part of the petitioner.

12. The respondent No. 1 questioned the authority of the AXIS Bank to accept the lease hold property as security creating equitable mortgage thereon. Disputing further the amount required to be paid annually by the petitioners to the respondent No. 2 it is the stand that keeping in view of the location of the RGBGH at the heart of the city of Guwahati, the said amount of Rs. 3,25,000/- annually and the subsequent enhancement of Rs. 4,50,000/- are too low compared to the market value of the premier hotel at Guwahati. The subject of renewal of the lease beyond twenty years can be granted and subject to approval of Government of Assam as RGBGH is not a property of Board of Sports of Assam, it is a property of Government of Assam and the Government of Assam is the only authority to take decision in respect of RGBGH. At present there is no intention of the State Government to further lease out the Guest House in question moreover the Government of Assam at no point of time agreed and granted any approval for leasing out the RGBGH beyond twenty years lease period and the only approval granted to M/s Baruah and Company Pvt. Limited was for the lease of twenty years which expired on 03.05.2020. The scenario of sports event in the State is vast changing and as such it is the bonafide requirement in the larger public interest of the sports lover within the State and for holding the various sports activities that the Government is not keen for extension of the lease further.

13. Denying the statement of the petitioner in the writ petition in respect of the condition to "buy back" the improvement/constructions made in the Page No.# 15/36 structure with the written permission of the BSA the respondent No. 1 states that the same doesnot arise at all as BSA, the respondent No. 2 is not the owner of the property nor the buy back of the said improvement / constructions work done by the petitioners was never a part of the bidding/negotiation process. It was also never a part of the decision in the Cabinet Memorandum. This condition is a clear example of transgression of authority by the then Secretary of the Board of Sports, Assam and / or some other persons who were at the helm of affairs at the relevant point of time with an ulterior motive and collateral interest as that of the petitioners. Supporting the stand of the respondent No. 3, respondent No. 1 also stated in the affidavit-in-opposition that then Secretary of Board of Sports, Assam had already been issued a letter seeking explanation under what circumstance the said clause of extension of lease period was inserted in the Lease Deed and the Memorandum of Understanding executed by him on behalf of the respondent No. 2.

14. Mr. Choudhury, the learned Senior Counsel for the petitioners in respect of the maintainability of the writ petition because of the Clauses-19 and 20 stipulated in the Memorandum of Understanding dated 04.05.2000 submits that it is the discretion of the Court under Article 226 of the Constitution of India as to whether, the matter can be decided exercising the jurisdiction under Article 226 of Constitution of India. The present case falls in "malice of law" and not a case of interpretation of any stipulation of the lease agreement. The law is clear that it is the respondents who promised extension of the lease period by further twenty years after the expiry of the original period of twenty years and on the basis of the same, the petitioners altered its position by investing a huge amount of money. In support of such investment, Mr. Choudhury relied the valuation before the renovation of the said RGBGH and the subsequent Page No.# 16/36 valuation after the renovation which clearly shows the vast difference in the valuation of the property. Further the stand in the affidavit-in-opposition thereby bringing the element of fraud in insertion of the extension clause in the Memorandum of Understanding dated 04.05.2000 and the Lease Deed dated 04.05.2000, Mr. Choudhury relied the unstarred question No. 39 in the Assam Legislative Assembly wherein the reply dated 04.09.2000 was made by the then Hon'ble Minister, Sports and Youth Welfare. Therein the Assembly questions were raised regarding the terms of lease and to whom the said lease was granted. It was specifically replied that the lease was granted to the petitioner No. 1 and in support of the said answer, the copy of the Lease Deed dated 04.05.2000 was placed in the floor of the House. The said Deed of Lease specifically mentioned the option of renewing the lease of the said premises for further period of twenty years on giving of notice of such intention to the lessor two months before expiry of the said lease period and under such circumstance, the question of fraud cannot be taken into consideration inasmuch as the said question was answered way back in the year 2000 and till the expiry of the lease, the respondents were sleeping over the rights to point out the said fact of fraud. In support of the contention of Mr. Choudhury regarding maintainability of the writ petition he relied the case laws of (i) Kanak -Vs- U.P. Avas Evam Vikas Project reported in (2003) 7 SCC 693, (ii) Union of India - Vs- Tania Construction (P) Ltd. reported in (2011) 5 SCC 697, (iii) Booz Allen & Hamilton Inc. -Vs- SBI Home Finance Ltd. reported in (2011) 5 SCC 532, (iv) Tolaram Bafna Artificial Limb & Caliper Centre & Ors - Vs- The State of Assam & Ors. reported in (2014) 3 GLR 174, (v) Unitech Limited & Ors -Vs- Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors reported in (2021) SCC Online SC 99 and SLP Page No.# 17/36 No. 8630 of 2020 decided by the Hon'ble Supreme Court of India in the case of Uttar Pradesh Power Transmission Corporation Limited - Vs- CG Power and Industrial.

15. Referring to the Lease Deed dated 04.05.2000, the initial period of lease was fixed for twenty years which is in fact was for period of forty years with the option of renewal being given to the lessee only at the end of first period of twenty years, the reason behind in incorporating the said clause as per Mr. Choudhury was that when the property was taken on lease in the year 2000, its condition was a dilapidated one and the petitioners were required to develop the property using their own fund. The petitioners were not sure that the business would yield the required income, to maintain the property and earn profit from it. The petitioners took loan from various banks and financial institutions to the tune of Rs. 14 Crores. The lease hold property is presently under mortgage with the AXIS Bank, Guwahati Branch. The respondents made a promise to the petitioners to lease out the property for the period including the extended one which was not only in a deplorable condition

but was a liability for the respondent No. 2. The petitioners made a capital investment to improve the condition of the building and the same was not the building as it exist today which was handed over to the petitioners for simply running and managing the same on behalf of the Board. The petitioners renovated the same, managed to run the hotel with a reasonable success and earn the goodwill from the public which the respondents wanted to take advantage and take back the property at the costs and expenses of the petitioner by violating the promise made earlier. The total period of lease as per the Lease Deed considering the extension period of twenty years in total is forty years and on that legitimate expectation that the petitioners would get to run the hotel for a period of forty years, invested such Page No.# 18/36 huge amount of money in converting the RGBGH into a Star/Delux category hotel. The respondents cannot by way of a stroke of pen decline to renew the lease, the respondents are thereto duty bound by contract to renew the existing lease on the same terms and conditions for the period of twenty years and by declining to do so, they have acted in arbitrary and in unreasonable manner for which interference of this court under Article 226 of the Constitution of India is required. In support of the said stand of the promissory estoppel, Mr. Choudhury relied the case laws of (i) Commissioner of Police -Vs- Gordhandas Bhanji reported in AIR 1951 SC 469, (ii) Motilal Padampat Sugar Mills Co. -Vs- State of U.P reported in (1979) 2 SCC 409 and (iii) Shreejee Sales Corpn. -Vs- Union of India reported in (1997) 3 SCC

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16. Mr. Saikia, the learned Advocate General, Assam referred extensively to the facts and the documents annexed to the writ petition. Referring to the bid of the petitioners he submits that the same was for twenty years. The Cabinet Memorandum also stipulated the lease period to be twenty years initially subject to extension for another ten years upon satisfactory performance. On the basis of the said Cabinet Memorandum, the then Secretary of the respondent No. 2 was directed to proceed on the basis of the facts and figures recorded in the said Cabinet Memorandum to sign the Memorandum of Understanding on behalf of the respondent No. 2 in presence of two specified persons to sign as witnesses. Surprisingly if the registered Lease Deed bearing No. 2944 dated 04.05.2000 and the contents of the Memorandum of Understanding dated 04.05.2000 are taken into consideration and compared with the Cabinet Memorandum, it is very much clear and apparent that a fraud was played on the respondent No. 1, the Government by the said signatory representing the Page No.# 19/36 respondent No. 2 by violating the terms of the Cabinet Memorandum which had its approval of the Cabinet. The mode of enhancement of rent clearly shows that there was no enhancement after the fifth year of the lease period for the next fifteen years which is totally unheard of in a commercial transaction and a specific indication of unholy nexus between the then Secretary representing respondent No. 2 and the petitionrs.

17. Clause 13 of the Memorandum of Understanding dated 04.05.2000 referred hereinabove included that all such improvement / construction made with written permission of the respondent No. 2 would be bought back by respondent No. 2 at the end of lease at market value. The said signatory representing the respondent No. 2 at that relevant point of time was never authorized to accept the said terms of "buy back" of the improvement/constructions made by the petitioners. These are the terms which the signatory representing the respondent No. 2 executed and agreed without the authority of the Government.

18. Referring Article 299 of the Constitution of India it is submitted by Mr. Saikia, that all contracts made in the exercise of the executive power of the Union or the State shall be expressed to be made by the President, or by the Governor of the State as the case may be and all such contracts and all assurance of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorized. Again referring back to the Cabinet Memorandum which was admittedly circulated under Rule 17 of the Assam Rules of Executive Business and put before the Cabinet decided to lease out RGBGH initially for twenty years subject to extension for another ten years upon satisfactory Page No.# 20/36 performance. Nowhere it was mentioned in respect of the "buy back" of the constructions carried by the petitioners at the present market value nor it was agreed for extension of further period of twenty years on giving notice of such intention by the lessee to the lessor (respondent No. 2) two months before the expiration of the lease to be granted and the lessor shall forthwith execute and deliver to the petitioners/ lessee a renewed and duly registered deed of the said premises for such further terms of the twenty years. On the other hand, as approved by the Cabinet the extension was for another ten years and that too upon satisfactory performance of the lessee i.e. the petitioners. As there was specific violation of the direction of the Cabinet and one of the executants of the Lease Deed and MoU both dated 04.05.2000 representing the Government went beyond the scope of authority thereby violating the terms of the Cabinet Memorandum to the extent of extension clause and the "buy back" clause both in the Lease Deed and the Memorandum of Understanding as such both the said clauses are void-ab-initio and to that effect a finding is required to be given by this court. For the said reason, even if the Memorandum of Understanding and the Lease Deed arising out of the said Memorandum of Understanding though purportedly forms a concluded contract but as there was specific violation of the provision of Article 299 of the Constitution of India as such the same cannot be specifically enforced and in support of the said contention of Mr. Saikia he relied the case laws of (i) State of West Bengal -Vs- B. K. Mandal and sons reported in AIR 1962 SC 779, (ii) The Bihar Eastern Gangetic Fishermen Co-Operative Society Ltd. -Vs- Sipahi Singh and Others reported in (1977) 4 SCC 145, (iii) State of Uttar Pradesh and Another -Vs- Murari Lal and Brothers Ltd. reported in 1971(2) SCC 449 and (iv) Bishandayal and Sons -Vs- State of Orissa and Others reported in (2001) 1 SCC 555.

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19. Mr. Saikia referring to the affidavit-in-opposition of the respondent Nos. 1 and 2 and the relevant reply filed by the petitioners submits that the petitioners disputed the fact of negotiations held on 07.01.2000, 25.01.2000 and 03.02.2000. Further the petitioners denied in the reply that the Government never approved the lease beyond twenty years and reiterated by the petitioners that the property doesnot belong to the State of Assam and accordingly disputed the fact that the Government of Assam is the only authority to take a decision in respect of RGBGH. It was further denied that Article 299 of the Constitution of India had applicability in the present case as the respondent No. 2 is not the Government but a statutory body constituted under an Act and further approval of the Government is not required to be taken under the Act of 1977 for leasing out the property by the respondent No. 2, the Board of Sports, Assam. On the other hand, it is contention of Mr. Saikia that the respondent State disputed the valuation subsequent to the renovation of the RGBGH. Moreover, mere putting in the floor of the Assam Assembly doesnot make a fraudulent

document valid and the liability purportedly which stood against the petitioner as on today i.e. 14 Crores is totally disputed by the respondent State. It is the contention that so far the loan availed by the petitioner from the UCO Bank in the year 2000, the respondent State has no objection to it but the subsequent loan if availed by the petitioner thereby creating equitable mortgage over the lease hold property, the Government cannot accept the same inasmuch as the said encumbrance was created without the sanction of the Government.

20. The Deed of Rectification which was subsequently executed was an act of the respondent No. 3 but not supported by the Government as required under Article 299 of the Constitution of India. Referring to the affidavit-in-opposition of both the respondents it is submitted by Mr. Saikia that larger public interest is Page No.# 22/36 involved for which the extension was not granted by the respondent No. 3 and even if the doctrine of promissory estoppel is held to apply but considering the larger public interest the same cannot be accepted by this court and only on the said principle the lease cannot be directed to be renewed. In support of the said contention Mr. Saikia relied the ratio in *Kasinka Trading and Anr -Vs- Union of India* and Another reported in (1995) 1SCC 274. The respondent State had already issued a notice under the Arbitration and Conciliation Act, 1996 thereby naming the arbitrator on its part and as the foundation for challenging the claim of the petitioners is on the ground of fraud and in order to decide the said issue of fraud respondents had already initiated the alternate dispute resolution agreed to by both the parties to the Memorandum of Understanding dated 04.05.2000 the petitioners may be directed to participate in the said arbitral proceeding. In support of the contention regarding the scope of arbitrators in respect of giving a decision against the dispute based on the foundation of fraud Mr. Saikia relied *Vidya Drolia and Ors -Vs- Durga Trading Corporation* reported in (2021) 2 SCC 1 in order to show that arbitral forum being chosen by the parties in an agreement must be given the first preference as the dispute resolution mechanism. Accordingly Mr. Saikia sought for passing an appropriate order thereby relegating the petitioners to the appropriate forum either in the Civil Court or in the Arbitral Forum in order to decide the dispute between the parties.

21. Mr. Baruah, the learned Additional Advocate General, Assam on the other hand supporting the argument placed by Mr. Saikia, also added that the question of promissory estoppel is applied only upon the reference or representation made by a party. In the present case in hand, no such representation was made by the Government or the respondent No. 2 inasmuch Page No.# 23/36 as what was agreed between the parties that forms part of the terms of the agreement for instance Memorandum of Understanding dated 04.05.2000 and the registered Lease Deed dated 04.05.2000. In view of the same, the doctrine of promissory estoppel cannot be applied and in support of the said contention Mr. Baruah relied the case law of *Ester Industries Ltd. -Vs- U.P. State Electricity Board and Others* reported in (1996) 11 SCC 199. Mr. Baruah submits that before entering into the agreement by the respondent No. 2, it is sine-qua-non for an approval to be given by the Government. But in the present case in hand, the extension of lease for twenty years further after completion of the accepted period of twenty years had no approval of the Government and as such the question of promissory estoppel shall also not come into play inasmuch as the agreement must have to conform the requirements as per Article 299 of the Constitution of India. In support of the said contention Mr. Baruah relied the case law of *Shabi Construction Company -Vs- City & Industrial Development Corporation and Another* reported in (1995) 4 SCC 301.

22. The scope of plea of doctrine of promissory estoppel against the Government was held by the Hon'ble Supreme Court as stated by Mr. Baruah in M/s Jitram Shiv Kumar and others -vs- State of Haryana and others reported in (1981) 1 SCC 11. Therein it was specifically stated that when the officer of the Government acted outside the scope of his authority, the plea of promissory estoppel is not available. Referring to the said action on the part of the respondent No. 3 beyond the scope of the Cabinet Memorandum, it is the contention of Mr. Baruah that the doctrine of promissory estoppel cannot be invoked in the present case in hand. Citing further that the public interest always defeats the doctrine of promissory estoppel, Mr. Baruah relying the decisions relied by Mr. Saikia submits that the petitioners are required to get the Page No.# 24/36 relief in a Civil Court or any other alternate forum wherein the said forum is required to go for a fact finding process inasmuch as there are disputed facts raised in this writ petition in respect of various terms and conditions stipulated in the Lease Deed dated 04.05.2000 and the Memorandum of Understanding dated 04.05.2000. Accordingly this court shall relegate the petitioner to the appropriate forum in order to resolve the dispute raised in this writ petition.

23. I have given due consideration to the submissions of the learned counsel. Let me examine whether the issues involved in this writ petition as can be inferred from the submissions of the learned counsel referred above are possible to be decided without oral evidence being led by the parties.

24. The petitioners possessed the RGBGH within the Nehru Stadium Sports Complex since the year 2000. Their entry to the said RGBGH was on the basis of the Memorandum of Understanding and the registered Lease Deed bearing No. 2944 both dated 04.05.2000. In terms of the Lease Deed and the Memorandum of Understanding both dated 04.05.2000, the petitioners enjoyed the possession thereof and acted as per the terms stipulated in the said Lease Deed. The lease period expired on 03.05.2020 i.e. twenty years from the date of execution of the Lease Deed dated 04.05.2000. The cause of action in filing this writ petition arose when the petitioners in terms of the extension clauses in both the Lease Deed and the Memorandum of Understanding vide letter dated 20.02.2020 requested the respondent No. 3 to execute and deliver a renewed and duly registered Lease Deed in respect of the RGBGH being the leased out property for another period of twenty years with effect from 04.05.2020. The respondent No. 3 vide letter dated 02.05.2020 expressed his unwillingness to renew and extend the lease for any further time on the ground of bonafide requirement, Page No.# 25/36 Assam being hotspot of National and International sporting events, there is necessity of accommodation for players, coaches etc. near to sporting venues. For instance, the respondent No. 3 cited the problems faced in accommodating the participants in last few sporting events including "Khelo India Youth Games, 2020" for which the respondent No. 2, the Board of Sports, Assam expressed its unwillingness to renew and extend the lease.

25. On the basis of the said cause of action, the petitioners filed this writ petition for enforcement of the said clause of extension in the registered Lease Deed dated 04.05.2000 and as per the terms of the Memorandum of Understanding dated 04.05.2000 after setting aside and quashing the letters dated 02.05.2020 and the subsequent notice dated 02.06.2020, asking the petitioners to vacate the lease premises within 15.06.2020 positively. The main ground in seeking the said relief as per the pleadings in the writ petition is that on the promise made by the respondents that there would be

further extension of the lease period beyond the original period of twenty years without any conditions and considering the total lease period as forty years, the petitioners invested and modified the RGBGH after incurring huge expenditure. Now, the respondents are estopped in backing out of the promise made by the respondents at the time of entering into the Lease Deed which is clearly stipulated in the Lease Deed itself and the Memorandum of Understanding dated 04.05.2000.

26. The respondents through their affidavit-in-opposition referred to the Cabinet Memorandum and the contents thereof, wherein it was stipulated that after detailed discussion and negotiations with the various parties who were the participants against the notice inviting bids for leasing out the RGBGH had Page No.# 26/36 arrived at a decision that the petitioner No. 1 being the successful bidder would hold the leased out property for a period of twenty years and subject to satisfactory performance for extension of another ten years. As against the said decision accepted by the Cabinet, the then Secretary to the Board of Sports Association one Sri Nityananda Borkataki was authorized to execute the registered Lease Deed and the Memorandum of Understanding as per terms accepted by the Cabinet. Subsequently it came to the notice of the present respondent No. 3 that the original file containing the original papers in respect of the lease was missing and a supplementary file was opened. A letter was issued by the respondent No. 3 to the then Secretary Sri Nityananda Borkataki to explain as to under what circumstances the original files were missing and to that effect FIR was lodged on 23.07.2020 to the O/C Paltanbazar Police Station. Further it is also pleaded that under Article 299 of the Constitution of India the Government authorized the then Secretary, Board of Sports Association to execute the Lease Deed and the Memorandum of Understanding as per the terms in the Cabinet Memorandum which is reproduced in this writ petition. The subsequent introduction of the clauses of extension of lease period for twenty years and that too without any condition of satisfactory performance is clearly an act of fraud being played by the then Secretary, Board of Sports, Assam on the Government and due to such act of fraud the original file was missing for which necessary action had been initiated by lodging an FIR. As the said executant representing the respondent State had no authority to introduce the extension clause of twenty years in clear violation to the Cabinet memorandum, as such the contract under Article 299 of the Constitution of India is void-ab- initio to the extent of the extension clause stipulated in the Lease Deed and the Memorandum of Understanding both dated 04.05.2000. Further it is the stand Page No.# 27/36 of the respondents as per the affidavit-in-opposition that the petitioners had no authority to encumber the lease hold property to the Bank and create a liability of Rs. 14 Crores in respect of the lease hold property. Moreover, the stipulation in the Lease Deed and the Memorandum of Understanding both dated 04.05.2000 that the respondents would "buy back" the construction/extension carried out in the RGBGH at the present market value at the time of handing over the possession of the RGBGH to the respondent No. 2 is also beyond the authority given to the then executant who was the Secretary of the respondent No. 2. The fraudulent intention of the executant representing the respondent No. 2 as authorized by the respondent State is clear inasmuch as there was no enhancement of the annual rent beyond the period after completion of fifth year of lease which is not at all believable for a prudent person. Moreover, the rent fixed in respect of the lease and the annual payments required to be made to the respondent No. 2 by the petitioners are too meager considering the valuation of the property situated at a prime location of the city of Guwahati.

27. Mr. Choudhury, the learned Senior Counsel for the petitioners in support of his submission that the petitioners are entitled to the reliefs on the ground of legitimate expectation and on the principle of promissory estoppel from the respondents relied various decisions. In *Motilal Padampat Sugar Mills Co. - Vs- State of U.P. (supra)* it was held that the parties need not be in any kind of legal relationship before the transaction from which the promissory estoppel takes its origin. The doctrine would deem to apply even where there is no pre- existing legal relationship between the parties, but the promise is intended to create legal relations or affect a legal relationship which will arise in future. In support of the said submission, Mr. Choudhury referred to the evaluation process of various bidders who participated in the tender for leasing out the Page No.# 28/36 property and the subsequent negotiations carried out between the parties including the petitioners. It was made known once the petitioners were considered as the successful bidders that there would be extension of lease beyond the period quoted i.e. twenty years and under such circumstances, now the respondents more specifically the respondent No. 1 cannot say that there was no representation on the part of the respondent State or the respondent No. 2 in respect of the extension of the lease period. But the respondent State wanted to over ride the said doctrine of promissory estoppel on the ground of bonafide public interest, for instance citing accommodation problems in respect of the participants of major sports events to be held in future at Guwahati. However, the respondents failed to prove such difficulty which it had faced even during holding of past sporting events and as such there is absolute failure on the part of the respondents including the Government to discharge the burden to show that there is public interest involved in not extending the lease period.

28. Countering the said submission of Mr. Choudhury, Mr. Saikia, the learned Advocate General, Assam referred to the *State of West Bengal -Vs- B. K. Mondal and Sons (Supra)* and submits that Section 175(3) of the Government of India Act, 1935 was enacted by the parliament with the intent that the State should not be burdened with liability based on unauthorized contracts and accordingly it is the intent to save the State from spurious claims made on the strength of such unauthorized contracts.

29. In this regard it would be proper to look Section 70 of the Contract Act, 1872 which stipulates that a person who lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make Page No.# 29/36 compensation to the former in respect of, or to restore, the thing so done or delivered. Accordingly three conditions must be satisfied before the person invoking the said provision is successful. The prime consideration is that the person asking for any relief invoking Section 70 must do something lawfully and the person denying the lawful transaction must show that the said sanction of law is missing. So the necessary ingredients of Section 70 of the Contract Act, 1872 are required to be proved by the petitioners i.e. the MoU and Lease Deed dated 04.05.2000 were executed lawfully and the respondents acted reciprocally in order to perform its part stipulated in the agreement.

30. Relying the *State of Uttar Pradesh and Another -Vs- Murari Lal and Brothers Ltd (Supra)* it is submitted by Mr. Saikia that a contract entered into without complying with the requirements of Articles 299 is void and is not capable of ratification. If there is no contract in the eye of law question of ratification will not come. This ratio has been relied on the ground that the Secretary of the



respondent No 2 who executed the Lease Deed and the Memorandum of Understanding acted beyond the authority given vide the Cabinet Memorandum inasmuch as the executant representing the respondent No. 2 on the authority of the Cabinet acted beyond his authority by introducing the extension clause and "buy back" stipulation in the contract bound by the State. As the contract cannot be held to be a concluded one due to non compliance of the provision of Article 299 of the Constitution of India as such as held in Bishandayal and Sons -Vs- State of Orisa and Others (supra), the said contract cannot be specifically enforced. Here also burden lies on the respondents to prove the same in order to show that the contract cannot be specifically enforced.

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31. Now it is the contention of Mr. Baruah that if there is a contract, under such circumstances as held in Ester Industries Ltd. -Vs- U.P. State Electricity Board and Another (Supra) promissory estoppel would not apply. But the learned Senior Counsel for the petitioners submits that there exists a contract for extension of the lease period under such circumstances the applicability of promissory estoppel cannot be considered at all. That fact is also required to be proved by the respondent.

32. It is submitted by Mr. Baruah that in the present case in hand, the petitioners failed to show that there was a representation made by the government that the lease would be extended for a period of twenty years and only on such representation, the petitioners participated in the tender process for which the action on the part of the respondents for non extension of the lease period beyond the original period of twenty years is hit by the doctrine of promissory estoppel and in support of the said contention, Mr. Baruah relied the ratio held by the Apex Court in Shabi Construction Company -Vs- City & Industrial Development Corporation and Another reported in (1995) 3 SCC 301 relying the scope of the plea of doctrine of promissory estoppels against the government .

33. In M/s Jit Ram Shiv Kumar and Others -Vs- State of Haryana and Others reported in (1981) 1 SCC 11, it was held that when the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the government cannot be held bound by the unauthorized acts of its officers. So in order to overcome the said ratio also the burden lies on the petitioners either to prove the fact of representation or the fact of concluded contract Page No.# 31/36 binding both the parties either to get the benefit of plea of promissory estoppel or enforcement of the concluded contract. Similarly the respondent State and others are also required to rebut the onus put upon them by the petitioners by adducing cogent evidence.

34. Thus it is found that in order to decide whether there exists any enforceable contract evidence is required. Because if the same is void-ab-initio then it is not enforceable. Moreover if the act of executant was beyond the authority given to him by the Government then also the same would be a void or voidable contract at the option of the respondents.

35. From the aforesaid discussions, I am of the opinion that before granting relief to the petitioners, it is required to decide as to whether - (i) the petitioners are entitled for the reliefs under the

doctrine of promissory estoppel,

(ii) non extension of the lease period as per the terms of the registered Lease Deed and the Memorandum of Understanding amounts to breach of contract,

(iii) the extension clause is void-ab-initio due to violation of the provision under Article 299 of the Constitution of India and as such the same is not enforceable under the law, (iv) whether if the petitioners are entitled for the extension as per the Lease Deed, the rent stipulated therein required to be enhanced upon consideration of the valuation of the property and any other reliefs to which the petitioners are found entitled. So there are serious disputed facts which goes to the very root of the cause of action of the writ petition. In order to decide the aforesaid points, in my considered opinion evidence both documentary and oral are required including commission report seeking the valuation of the property.

36. There is no dispute that there is an arbitration clause stipulated in the Page No.# 32/36 Memorandum of Understanding dated 04.05.2000. It is also on record that in terms of the said arbitration clause, the respondents had already issued notice thereby naming the arbitrator on behalf of the respondents. Though the petitioners had filed an affidavit and brought it on record however, the petitioners didnot challenge the act of issuance of the said notice invoking clauses 19 and 20 of the Memorandum of Understanding dated 04.05.2000. So I am of the considered opinion that the said arbitration clause was stipulated consensus both to the petitioners and the respondents. On the other hand it is held that before granting the relief/reliefs to the petitioners, there must be a fact finding authority which needs oral evidence and only on proving of the allegations and counter allegations referred above the entitlement of the petitioners to the reliefs prayed for can be decided.

37. In Kanak (SMT) and another -Vs- U.P. Avas Evam Vikas Parishad and Others reported in (2003) 7 SCC 693, the Apex Court held that only for the arbitration clause, the writ petition cannot be held to be not maintainable rather it is the discretion of the court to decide whether the relief sought for by the petitioners can be granted by exercising the jurisdiction under Article 226 of the Constitution of India accordingly the discretion is up to the court to decide the same. Similarly, in Union of India -Vs- Tania Construction (P) Ltd reported in (2011) 5 SCC 697 it was held that the existence of an arbitration clause in an agreement between the parties cannot be an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court without exhausting such alternative remedy and for that reason the writ petition cannot be held to be not maintainable.

38. Now let me refer to the decision in Joshi Technologies International Page No.# 33/36 INC -Vs- Union of India and Others reported in (2015) 7 SCC 728 wherein it was held as follows:-

"69. There is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion;

69.1 The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances".

39. Finally it can be concluded that the existence of an arbitration clause cannot be a ground for non maintainability of a writ petition under Article 226 of the Constitution of India. But it is the discretion of the High Court to look into the controversies between the parties and apply its discretion and which doing so if there are very serious nature of disputed facts the parties may be relegated to an appropriate forum"

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40. In Booz Allen & Hamilton Inc. -Vs- SBI Home Finance Ltd. reported in (2011) 5 SCC 532 wherein the well-recognized examples of non- arbitral disputes are mentioned which includes eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. It is the contention of Mr. Choudhury that the lease out premises is within the urban jurisdiction and as such the said Lease shall be governed by the Special Rent Control Statute i.e. The Assam Urban Areas Rent Control Act, 1971 as such the dispute between the parties if at all cannot be resolved without any oral evidence, under such circumstances, the parties may be relegated to the Civil Court. The said submission though has relevancy but at the same time it must also be considered that there are other issues like fraud, questioning the validity of certain clauses stipulated in the MoU dated 04.05.2000 due to alleged fraud being played on the government. In view of the same, in my opinion the case may not be covered by the Tenancy Act alone as there is an issue of voidability of clauses stipulating terms in the Lease Deed and MoU both dated 04.05.2000

41. In Vidya Drolia and others -Vs- Durga Trading Corporation reported in (2021) 2 SCC,1 therein it was held by the Apex Court as follows:-

"154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in

terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub- clause (i) of Section 34(2)(b) of the Arbitration Act".

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42. This writ petition cannot be held to be non maintainable only because of the arbitration clause stipulated in the Memorandum of Understanding dated 04.05.2000 but in order to grant the relief/reliefs evidence both oral and documentary are required for which it would be proper and appropriate on the part of both the parties to act as per the terms of the Memorandum of Understanding dated 04.05.2000 more specifically clauses 19 and 20 thereof by invoking the arbitration clause and refer the dispute to an Arbitral Tribunal. Now whether the issues relating to fraud can be decided by the Arbitral Tribunal? As per the decision of the Apex Court in Vidya Drolia and others -Vs- Durga Trading Corporation (supra) and from the admitted facts, the arbitral tribunal is the preferred first authority for dispute resolution of the parties as per the MoU dated 04.05.2000 and as such the petitioners are required to accept the same. In the event, the Arbitral Tribunal feels it necessary it shall be at liberty to take the assistance of the Civil Court in taking the evidence or the parties may raise before the Arbitral tribunal regarding the non-arbitrability of the disputes before it owing to the allegations of fraud. The Arbitral Tribunal can decide the issue accordingly and if either of the parties are dissatisfied by the finding of the Tribunal a final decision can be given by a Court under Section 34 of the Arbitration and Conciliation Act 1996.

43. Though Mr. Saikia urged before this court to give a finding in respect of voidability of the extension clause due to non compliance of the provision under Article 299 of the Constitution of India, but in my considered opinion, it would not be proper to make any observation which affects the merit of the case of the both the parties to the writ petition left out to be decided by the Arbitral Tribunal. Further it is clarified that the Tribunal or any Civil Court is not bound by any of the observations made in this order while adjudicating the issues Page No.# 36/36 between the parties to this writ petition before it.

44. With the said observations, I dispose of this writ petition thereby directing the petitioners to approach the Arbitral Forum within a period of 60 (sixty) days from today and till then the respondents shall not initiate any steps for disturbing the possession of the petitioners over the leased out premises without due process of law. Thereafter the Arbitral Forum shall have the jurisdiction to pass any interim order. For the said purpose the petitioners may take steps for constitution of the Arbitral Tribunal afresh in consultation with the respondents or otherwise the petitioners may appoint its Arbitrator in response to the notice issued by the respondents which was duly received by the petitioners. No Costs. Interim order passed earlier stands vacated.

JUDGE Comparing Assistant