T.S.60/2012.

17.4.13. **The suit is fixed for order on the petition No.440/13 dtd.27.2.13 filed by the defendant.**

By this petition, the defendant admitted that the plaintiff instituted suit through his duly constituted attorney against the Assam Agricultural University & other officer of the University claiming some relief against the defendant. They have stated that In para 3 of the plaint, defendant No.1(Assam Agricultural University), a Statutory Body established under Section 3 of the Assam Agricultural University Act, 1968. It is a body corporate having perpetual succession and common seal and is capable to sue and being sued in the said name. They have submitted that the Assam Agricultural University Act, 1968 imposed some Specific Restriction/Bar respecting "Be sued", i.e., for instituting suit, prosecution or other proceedings against the Assam Agricultural University or its authority etc., U/S.48(2) and 48(3) for the purpose of instituting suit/prosecution against the A.A.U. They have also stated that U/S.48(2) provides that "*all acts and orders in good faith done and passed by the University or any of its authorities shall be final and no suit shall be instituted against or damage claimed from the University or its authority for anything done or purported to be done in pursuance of this Act and the Statutes and regulations made thereunder*." U/S.48(3) provides that "*No suit, prosecution or other proceedings shall lie against any officer or other employees or the University for any act done or purported to be done under this Act or the Statutes without the previous sanction of the Board.*" The defendant has stated that the plaintiff filed the suit against the University and its other officers without previous sanction of the Board. Hence, in absence of previous sanction obtained as mooted and provided in the Section of the Act and also non-obtaining the sanction before institution of the suit by the plaintiff, is not maintainable in law as well as on facts. Therefore, they have prayed to reject

the suit under the provision of order VII, R.11(d) of the C.P.C, 1908.

The plaintiff filed written objection wherein he has stated that the petition is not maintainable in law as well as on fact. The plaintiff has stated that the provision of Sec.48(2) & Sec.48(3) of the A.A.U Act, 1968(Assam Act XXIV) does not oust the jurisdiction of the Civil court in any way in instituting suit against Assam Agricultural University or its officials. The suit has been instituted for recovery of Rs.32,58,577/- being the security deposit, earnest money deposit, extra lead with interest along with compensation or Rs.1 crore for violation of the terms of the contract by not clearing the running bills, not making the payments of extra lead and with holding the S.D and E.M.D. The plaintiff, in his written objection, has further stated that he vide letter dtd.13.2.12 requested the Director of Physical Plant to consider the facts stated in the plaint and to take necessary steps for releasing the dues to him. The defendant No.3 accordingly considered the whole matter afresh and forwarded the matter to the defendant No.4 for resolving the matter once for all vide note dtd.21.4.12. The defendant No.4, on objective satisfaction after perusal of the entire records placed a note dtd.2.5.12 before the Vice Chancellor (defendant No.2) requesting to release the amount deposited by him as security deposit, earnest money and as the balance part of extra lead. The Comptroller further observed that he (plaintiff) was wrong in depriving him from his dues. But the Vice Chancellor without due consideration of the matter mechanically turned down the proposal vide office Note dtd.9.5.12. The fact of the defendant No.2 is in clear breach/violation of the mandatory provisions of the statute and the defendants cannot be termed as an act done in good faith and/or act done in comprehension of the statutory provisions. The plaintiff has stated that the petition filed by the defendant is clear violation of the provision of the Act and is liable to be dismissed in limine.

Heard the submission advanced by the Ld.counsel for the parties.

On perusal of the plaint, I find that the defendant No.3 issued notice inviting tender for Repair/Renovation of Roads in the AAU campus having a total length of 9622 meters and by holding selection through tender process of both technical and financial bids, the plaintiff was found to be most suitable candidate and the defendant issued work order No.1/122/07/DPJ/9602 dtd.14.1.2008 and thereby the contract work was allotted to him at Rs.81,50,618/-. As per terms of the contract, the plaintiff deposited Rs.1,63,012/- as earnest money being 2% of the contractual amount. An additional 8% of each of the bills were also chargeable towards security deposit inasmuch as vide Clause D of the contract, security deposit (including earnest money) is 10% of the total value of the work done. It is also mentioned that the items of work built-up Spray Grout, Granular Sub-Base(GSB)with Close graded material, water Bound Macadam(WBM), Close Graded Premix Surfacing and Seal Coat involved carrying of materials from outside the site of work and as per the recital in the contract, the amount quoted and ultimately settled, are relevant only with an initial lead of 5 km which means that the said value will include the carrying cost provided the materials are procured within a distance of 5 km from the work site. As per the norms of the P.W.D which is being followed by the defendants for all purposes including preparation of estimates for civil works, have option as to whether such lead should be for a fixed distance or not. Normally in P.W.D works, a clause is always appended 'including all Leads and lifts" in which event the contractor is not entitled to any Extra Lead for whatever distance he may have to carry the materials, but the defendants, in the instant case, did not opt for such condition consciously and opted for the term with an initial lead of 5 km. The plaintiff has stated that he has a large number of works under him all over the State of Assam and as such it is not possible for him to personally supervise all the works by himself for

which he appointed Saurav Sarmah Rajguru as Attorney Holder to look after the contract work on his behalf and executed a letter of authority in his favour for that purpose. The Power of Attorney Holder, personally conducted the operation including all matter such as liaison with the defendants, raising bills, receipt of cheque etc. The plaintiff, initially carried out Tack Coat over the road in question, without which carpeting of road is not possible. However, there was no specific item in the contract agreement for the purpose inasmuch as it is understood that unless Tack Coating is one no repair/renovation of road is possible. As per the terms of the contract agreement, there was no requirement for paver finishing. But, once the work was being performed, the defendants adopted the PWD schedule for the year 2006-07 and urged the plaintiff to go for Paver Finishing. Under such compelling circumstances, the plaintiff did Paver Finishing. The defendants, however, made payment for the same with Extra Lead as per the PWD schedule 2006-07. The plaintiff also had to undergo many other extra items such as laying of Hume Pipes at several laces, bamboo palasiding at certain locations, i.e., in front of the office of the Vide Chancellor, near the Tea Garden and near the Fisheries. No payment was made against the works on the understanding that the final payments of the contractual work would be done as per the current schedule of the PWD. The nearest quarry from the work site is located at Bihubor in the Sivasagar District which is about a distance of 93 km from the work site and the plaintiff is entitled to Extra Lead of 5 km as laid down in annexure to the contract agreement. Accordingly, the plaintiff while raising running bills claimed such amount for carrying materials to work site, but the defendant did not clear any of the 9 bills and disbursed only a partial sum of Rs.69,98,069/- withholding a substantial part of the Extra Lead. Ultimately, the defendant No.2 agreed to release the quantum of Extra Lead ,but while making sanction for the same, the defendants made provision for 8 lakhs

only as against the total claim of Rs.20,83,443/0 under the head of Extra Lead in APWD schedule. For non clearance of the running bills, the plaintiff suffered great loss as he had to perform the work by mobilizing finance from market at high interest while his money remained stalled with the defendants for no justifiable ground. The plaintiff had already completed 90% of the total contract work which is discernible from the certificate jointly signed by the defendant Nos.3 and 5 as well as the in-charge , Junior Engineer at site. The certificate was countersigned by the Chairman of the Supervisory committee. By that certificate, the physical progress of the plaintiff on percentage basis is quoted as 88.20% and the work done was rated to be satisfactory. A sum of Rs.8,00,000/- was sanctioned to the plaintiff towards payment of Extra Lead vide letter No.AAU/DPP/232 dtd.19.4.10, yet while releasing the amount the defendant No.3 paid only Rs.6,00,000/-. The plaintiff is still entitled to Rs.14,83,443/- towards Extra Lead which the defendants are bound to pay under the terms of the Contract. The plaintiff is entitled to a total sum of Rs.20,83,443/-. Because of non payment of such substantial amount, the plaintiff could not resume work so as to complete the balance 11.8% of the work which is only a nominal part of the original contract work which can be performed by the plaintiff at any time once the defendants clear the unpaid bills of the plaintiff. The plaintiff requested the defendants time and again to cooperate with him for clearing the pending bills, but in vain. The plaintiff was hard pressed for performing 88% of works already by taking loan from market at high rate of interest and thus it was not possible for the plaintiff to proceed any further by collecting fund from private sources any more. Vide letter dtd.24.9.10, the plaintiff requested the Director of Physical Plant for release of the balance amount at an early date, but the defendants did not pay any heed. The plaintiff, further stated that while he was awaiting for release of dues, a letter No.1/122/07/DPJ/Part/8705 dtd.22.11.2010 was issued to him out of the blues wherefrom the

plaintiff was communicate that the work allotted to him vide office order No.6294 dtd.27.10.08 had been withdrawn. In doing so, no show cause notice was issued to the plaintiff and no opportunity of hearing was given to him. The said action was taken by the defendants surreptitiously. The plaintiff has stated that the defendants have violated the terms of their own contract by not clearing the running bills and by not making payment of the Extra Lead as required under the contract and as such the defendants are guilty of breach of contract and thereby they have rendered them liable for damage and compensation in addition to cancellation of the impugned order of withdrawal order communicated by letter dtd.22.11.10. The defendants are liable to make payment of the balance amount as mentioned in schedule I with interest @ 24% p.a from the date of cancellation of work, i.e., 22.11.2010 till the date of realization. The plaintiff vide letter dtd.13.2.12 requested the Director of Physical Plant to consider the facts and to take necessary steps for releasing the dues. The defendant No.3 , accordingly, considered the whole matter afresh and forwarded the matter to the defendant No.4 for resolving the matter once for all vide Note dtd.21.4.12. The defendant No.4 on objective satisfaction after perusal of entire records placed a note dtd.2.5.12 before the Vide Chancellor, i.e., defendant No.2 requesting to release the amount to the plaintiff. In the Note of Comptroller observed that the plaintiff was wrong in depriving him from his dues. But the Vice Chancellor without due consideration of the matter mechanically turned down the proposal vide office note dtd.9.5.12 and in the process, the plaintiff has been greatly effected.

The plaintiff got the copy of the office notes by filing application under the RTI Act. Appraisal of the notes vis a vis the letter dtd.13.2.12 submitted by the plaintiff with enclosures would show clearly that the plaintiff is entitled to the amounts mentioned in the note placed by the Comptroller on 2.5.12 and the action of the Vide Chancellor is

illegal, unjust , unfair and arbitrary. Accordingly, he has filed the suit.

From the documents enclosed with the plaint, it reveals that the plaintiff had completed 88% of works. Due to non release of fund, he could not complete the balance 11.8% of the work. Though he requested the authorities but the defendants failed to clear the pending bills. And on 22.4.2010 vide letter No.1/122/07/DIJ/part/8705, the remaining part of the work had been withdrawn from him. As the plaintiff is entitled to get the balance amount, he vide letter dtd.13.2.2012 requested the Director of Physical Plant to consider and take steps for releasing the dues to him. The Director of Physical Plant (Defendant No.3) accordingly considered the whole matter afresh and forwarded the matter to the defendant No.4 for resolving the matter once for all vide note dtd.21.4.12 before the Vice Chancellor (Defendant No.2) that security deposit of Rs.5,35,895/-; earnest money deposit Rs.1,63,012/-; Balance part of Extra Lead of Rs.14,83,443/- can be released to the plaintiff. But the Ld.Vice Chancellor refused to release the amount on the ground that "the contractor assured him in his Chamber that they would complete the remaining work of the road if they were paid part of the amount against Extra Lead saying further that their should remain as guarantee. Due to this and for the interest of the work they were paid Rs.6 lakhs against Lead. They also assured him that they would resume the work within a week. But the contractor (the plaintiff) did not resume the work. In view of breach of faith and non completion of the work, their security deposit was not released and Earnest Money was apparently forfeited and not released Rs.14.83 lakhs.

Sec.48(2) and 48(3) of the Act which deals the exclusion of jurisdiction of Civil Court is as under-

Sec.48(2) – "*Save as otherwise provided in this Act all acts and orders in good faith done and passed by the University or any of its authorities shall be final and no suit shall be instituted against*

***or damage claimed from the University or its authority for anything done or purported to be done in pursuance of this Act and the Statutes and regulations made thereunder.*"**

Sec.48(3)- "*No suit, prosecution or other proceedings shall lie against any officer or other employees or the University for any act done or purported to be done under this Act or the Statutes without the previous sanction of the Board.*"

Sec.48(2) of the Act bars the institution of suit claiming damage.

Ld.counsel for the plaintiff has submitted that as there is no alternative remedy to a party , so this suit is maintainable. He has submitted that whether the Order dtd.9.5.12 was passed in 'good faith' is to be examined in the trial. Without going into trial, it is difficult to say that the order was passed in good faith.

Ld.counsel for the plaintiff has drawn my attention of a decision of the Hon'ble Apex Court in AIR 2002 SC 2841 (Dhruv Green Field Ltd versus Hukam Singh & Ors). In this Judgment, it is held that " *The question about the exclusion of the jurisdiction of Civil courts either expressly or by necessary implication must be considered in every case, in light of the words used in the Statutory provision on which the plea is restored, the scheme of the relevant provisions, their object and their purpose. It is pertinent to enquire whether remedies normally associated with actions in Civil Courts are prescribed by said statutes or not.*"

Ld.counsel for the plaintiff has also relied a decision of our own Hon'ble High court reported in (1991) 1 GLR 43 (Tarakeswar Chakravarty versus Union of India & Ors). In this case, Hon'ble High court held that "*the mere fact that a special statute provides for certain remedies does not, by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matter covered by the said Statute.*"

In Biswanath Pant & Ors versus Sadoymari Roy & Ors (1997(II)GLT 315), our own Hon'ble High court held that "*An exclusion of the jurisdiction of the Civil court is not readily to be inferred unless it can be gathered from necessary facts and circumstances. Mere finality clause is not sufficient. Such provisions would , however, exclude the jurisdiction of Civil Court, if there is adequate remedy to do what the Civil Court would normally do in a suit*."

In the above two Judgments, our Hon'ble High court relied the Judgment reported in AIR 1969 SC 78 (Dulabhai versus State of M.P).

Hearing both sides and going through the facts and circumstances of the suit and settled law, I am of the opinion that the Act has not provided adequate remedy to do what the Civil Court would normally do in a suit.

Accordingly, this suit is not barred under section 48(2) and 48(3) of the Act. The Question of bar U/S.10 of the C.P.C also does not arise.

Fix 21.5.13 for W.S.

CIVIL JUDGE,
JORHAT.