

A.A. No.41/2014

(Terra Software Ltd. v. Principal Revenue Commissioner)

09.03.2016

Shri Abhijeet A. Awasthi, Advocate for the appellant.

Shri Amit Seth, Govt. Advocate for the respondents/State.

Heard counsel for the parties.

As short question is involved, appeal is taken up for final disposal forthwith, by consent. Counsel for the respondents waives notice for final disposal.

2. This appeal arises from the decision of the 10th Additional District Judge, Bhopal dated 16th December, 2014 rejecting the application filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 on the finding that the said Court had no jurisdiction to entertain the application. This finding has been recorded notwithstanding the stipulation in Clause 8.2(b) of the Agreement executed between the parties. Having referred to that stipulation, the view taken by the Court below is manifestly wrong. Inasmuch as, Clause 8.2(b) reads thus:-

“8.2(b) – The Arbitration proceedings shall take place in Bhopal (MP) in India.”

Even in the tender document similar condition has been specified. Suffice it to observe that it was not open to the Trial Court to hold that the Bhopal Court had no jurisdiction to entertain the application under Section 9 filed by the appellant.

3. Counsel for the respondent-State relying on the decision of the Supreme Court in the case of **Firm Ashok Traders and another vs. Gurumukh Das Saluja and others** reported in **(2004) 3 SCC 155**, however, would contend that the application under Section 9 cannot proceed in absence of any intention of the appellant to invoke arbitration proceedings manifest from the circumstances available on record.

4. Counsel for the appellant, on the other hand, relies on Clause 8 of the Agreement dealing with settlement of disputes, which reads thus:-

“8. SETTLEMENT OF DISPUTES

8.1 Amicable Settlement- Performance of the contract is governed by the terms & conditions of the contract, in case of dispute arises between the parties regarding any matter under the contract, either party of the contract may send a written Notice of dispute to the

other party and attempt to reach an amicable settlement through the following method:

a) The matter shall be referred to a three member expert committee constituting of the Principal Secretary, Planning, Economics and Statistics, Secretary/Principal Secretary – Information Technology, govt of M.P. and Deputy Director General (RO Delhi) – UIDAI.

b) The three member expert committee shall hear the representations of both the sides and pass its verdict to resolve the issue in an amicable manner, which shall be applicable to both the parties. If the dispute cannot be amicably settled or either parties is not satisfied with the proposed solution within 60 days, clause GC 8.2 shall become applicable.

8.2 Arbitration - (a) In the case of dispute arising upon or in relation to or in connection with the contract between the Purchaser and the Supplier, which has not been settled amicably, any party can refer the dispute for Arbitration under (Indian) Arbitration and Conciliation Act, 1996. Such disputes shall be referred to an Arbitral Tribunal consisting of 3 (three) arbitrators, one each to be appointed by the Purchaser and the Supplier, the third arbitrator shall be chosen by the two arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach a consensus regarding the appointment of the third arbitrator within a period of 30 days from the date of appointment of the two arbitrators, the Presiding arbitrator shall be appointed by the authority specified in SC 8.2 (a). The Arbitration and Conciliation

Act, 1996 and any statutory modification or re-enactment thereof, shall apply to these arbitration proceedings.

(b) Arbitration proceedings shall be held in India at the place indicated in SC 8.2 (b) and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(c) The decision of the majority of arbitrators shall be final and binding upon both parties. The expenses of the arbitrators as determined by the arbitrators shall be shared equally by the Purchaser and the Supplier. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself. All arbitration awards shall be in writing and shall state the reasons for the award.”

5. It is not in dispute that the appellant has already given notice for settlement of the claim on 15.09.2014. It is a different matter that no decision has been taken on the said representation sent by the appellant. Since no solution has been found within sixty days, Clause 8.2 is attracted. That gives rise to resorting to remedy of arbitration proceedings.

6. It is not in dispute that so far formal reference has not been made by any party, as required under Clause 8.2 read with provisions of the Arbitration and Conciliation

Act, 1996. The decision of the Supreme Court, in our opinion will be of no avail to the respondent-State. In that, the Supreme Court in paragraph 13 has expounded that remedy under Section 9 can be resorted to before the Court having jurisdiction either “before” or “during arbitral proceedings” or “at any time after the making of the arbitral award but before it is enforced in accordance with Section 36”.

7. Counsel for the respondent has, however, invited our attention to paragraphs 17 and 18 of the said decision. The fact as to whether the appellant is in a position to satisfy the Court that arbitral proceedings are actually contemplated or manifestly intended, is a matter to be canvassed before the District Court at Bhopal where the application under Section 9 must proceed. We are not expressing any opinion on that aspect of the matter. The factum of satisfaction in that behalf must be recorded by the said Court, in the first place.

8. Counsel for the appellant submitted that as the matter is being relegated to the District Court for reconsideration under Section 9 of the Act, the parties be directed to appear before the District Court, Bhopal at the earliest; so that the appellant can apply for interim relief

or any other relief as may be essential keeping in mind the apprehension of the appellant that the Bank Guarantee may be invoked by the concerned Authorities.

9. We may accede to this limited request of the appellant that the parties must appear before the District Court, Bhopal **tomorrow (10.03.2016) at 11:00 a.m.** and whence the appellant may move a formal application for relief as may be advised in addition to or in furtherance of relief already claimed in Section 9 application – which is remitted back to the District Court in terms of this order. Accordingly, we set aside the impugned order and relegate the Section 9 application before the District Court at Bhopal for consideration afresh or *de novo*.

10. We, however, make it clear that the District Court will consider proposed application for grant of interim relief or otherwise on its own merits in accordance with law and without reference to the observations noted in order dated 20th December, 2014.

11. Copy of this order be forwarded to the District Judge, Bhopal for information and necessary action by e-mail/fax forthwith.

12. The original record received by the Registry be remitted back to the concerned District Court,

Bhopal forthwith being necessary by Special Messenger as the matter will be moved tomorrow at 11:00 a.m. before that Court.

Appeal **disposed of** accordingly.

C.C. today.

(A. M. Khanwilkar)
Chief Justice

(Sanjay Yadav)
Judge

psm