

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.144 OF 2016

ORDER:

This is an Application for a measure under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

2. I have heard the learned Senior counsel Sri Raghunandhan appearing for the applicant and the learned Senior counsel Sri S.Ravi appearing for the respondent.

3. The respondent is the State Bank of Hyderabad. It issued a Letter of Intent (LoI) to the applicant on 16.02.2009 for providing Online Supply Chain Finance facility, which is a Specialized Information Technology Software developed by the applicant. This application is filed stating that there are disputes between the parties and there is an arbitration agreement which binds them, a copy of the agreement, dated 26.05.2009 is produced in Annexure-4 along with the Arbitration Application. Clause 7 of that agreement provides for 'Dispute Resolution', which reads as follows:-

7) Dispute Resolution:- This agreement will be governed by the laws of India. In the event of any claim, difference, dispute or controversy arising between the parties arising under this agreement or/out of or in connection with this Agreement, including without limiting to the disputes in relation to the execution, validity, enforcement, breach, performance, interpretation, implementation, alleged material breach, termination or expiration of this Agreement, such claim, difference, dispute or controversy shall be referred and settled by arbitration. The arbitration shall be conducted at Hyderabad in accordance with the provisions contained in the Arbitration and Conciliation Act, 1996. The arbitrator shall be a sole and independent arbitrator appointed by the Bank. The language of the Arbitration shall be in English.

4. Contesting this application, the respondent has contended that the agreement, dated 26.05.2009 was for the specified fixed tenure as is evidenced by clause 5 of the said agreement, which prescribes the period of agreement and provides the termination clause. It also includes the provision whereby the Bank, at its discretion, shall have the right to renew the agreement for an additional period of six months or more on the same terms and conditions. It is profitable in the context to extract clause 5 of that agreement. It reads as follows:-

5) Period of agreement and Termination Clauses:-

The agreement will be in force for a period of six months and the Bank at its discretion shall have a right to renew the agreement for an additional period of six months or more on the same terms and conditions. The Bank may terminate the agreement by giving three months notice in writing to the other party. The service provider on such termination shall return of all bank documents and confidential information, stop access to bank's databases and systems and assist the bank in migration of data to any other service or platform, etc. Further, the obligation on the part of service provider till date of termination shall continue and he has to discharge his duties and liabilities if any.

5. The respondent Bank contests the application by pleading that there is no agreement in writing which is in force after 26.05.2012 and after the agreement, dated 09.01.2012, which came to end on 26.05.2012, there is no arbitration agreement and the claims raised are barred by limitation and the arbitration clause does not continue to apply as between the parties. It is pleaded that the claims sought to be raised are in the nature of claims due and payable by the respondent and therefore, the period of limitation is three years from the date on which the applicant would be entitled to receive

payments or damages. On that premise, it is pleaded that this application is barred by limitation.

6. Before I proceed to consider the terms of the agreement between the parties, it needs to be stated that it was submitted in answer to my query that the respondent Bank is still utilizing the facilities of the applicant as the service provider following the different agreements, which came into being as between the parties from time to time, following the first among the agreements, which is in Annexure-4, entered into between the parties on 26.05.2009. The fact of the matter remains that the agreements so entered into were essentially those which continued to hold the field one after the other while the applicant and the respondent engaged among themselves respectively, as the service provider and the recipient of such service.

7. As is evidenced by clause 5 of the first among the agreements, which is quoted above, the period of the agreement was six months with discretion being left with the Bank to have the right to renew the agreement for an additional period of six months or more on the same terms and conditions. One after the other, written agreements followed, verbatim, the first one, as regards the terms and conditions. As already noted, the recipient of service, namely, State Bank of Hyderabad, is still, admittedly, continuing to enjoy the service being provided by the applicant. The continuity of the terms and conditions even upto the last written document, which reflects the terms of the agreement and the continued receipt of the facility and enjoyment of the services extended by the applicant evidently goes to show that whatever be the disputes relating to the claims, the arbitration agreement between the parties survives for the purpose of having the

disputes between them referred for arbitration, including the question of limitation, because the plea of bar of limitation as raised is one which could be decided only by concluding on mixed questions of law and facts; which is undesirable to be done through this Application under Section 11(6) of the Act on the facts of the case in hand.

8. For the aforesaid reasons, it is held that due measure under Section 11(6) of the Act is to be taken by appointing an arbitrator.

9. In the result, this Arbitration Application is allowed appointing arbitrator.

10. Sri Justice V.V.S.Rao, Former High Court Judge, is appointed as the arbitrator to arbitrate on the disputes between the applicant and the respondents and the said arbitrator shall enter on reference and proceed with, as enjoined by the Act.

No order as to costs. Miscellaneous applications, if any, pending in the Arbitration Application, shall stand closed.

THOTTATHIL B. RADHAKRISHNAN, CJ

17.08.2018
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