

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

ARBITRATION APPLICATION No.52 OF 2016

ORDER:

This is an Application for a measure under Section 11 (5) and (6) of the Arbitration and Conciliation Act, 1996; for short, 'the A&C Act'.

2. Heard the learned counsel for the applicant in the light of the pleadings on record.

3. That there existed an agreement between the parties and that it contained an arbitration clause, which is not in dispute. That arbitration agreement reads as follows:-

“11. If any dispute or difference arises between the parties, it shall be resolved only by the arbitrator appointed by the Vendor, under the provisions of Arbitration and Conciliation Act, 1996, at Secunderabad and any interim orders, directions, Specific Performance of this agreement along with the final award passed by the Arbitrator shall be final, binding and enforceable without any recourse.”

4. The stamp papers, on which that agreement was engrossed, were purchased at Secunderabad and the agreement was also entered into at Secunderabad between the respondent, who is in Secunderabad, and the applicant, who is in Bangalore.

5. Keeping aside the rival contentions, on the factual disputes between the parties touching the due performance or discharge of that contract through any other mode available in law, it needs to be noted that the applicant moved C.M.P.No.297 of 2009 before the Karnataka High Court invoking Section 11(6) of the A&C Act. After the appearance of the respondent before that Court, in response to notice in that matter, that petition was disposed of on 05.07.2011

recording that the matter was settled out of Court. According to the applicant, he filed I.A.No.1 of 2014 to recall that order, dated 05.07.2011. That application was rejected on 13.10.2014 in view of the certain office objections as to failure to file application for condonation of delay. That order of the Karnataka High Court, dated 13.10.2014, which is Ex.P.10, reads as follows:-

“There is non-compliance with the office objections on the application in I.A.No.1/2014. In any event, the application does not merit consideration, as the order merely records the settlement of the matter out of court. The application is rejected.”

6. After the rejection of the aforementioned interlocutory application; thereby maintaining Ex.P.9 order on C.M.P.No.297 of 2009 on record, the applicant filed C.M.P.No.228 of 2015 before the Karnataka High Court again invoking provisions of the A&C Act. That was objected to by the respondent as not maintainable. That led to Ex.P.13 order issued by the Karnataka High Court on 02.03.2016 on C.M.P.No.228 of 2015, whereby that petition was permitted to be withdrawn with liberty to the applicant to file fresh Civil Miscellaneous Petition before the appropriate Court.

7. The application on hand, namely, A.A.No.52 of 2016, was thereafter filed before this Court. This application is objected to by the respondent, fundamentally on the plea that the finality that had accrued to the order on C.M.P.No.297 of 2009 and which was not re-opened in spite of I.A.No.1 of 2014 on account of its default disposal through Ex.P.10 order, dated 13.10.2014; the present application is not to be entertained by this Court.

8. Arguments are advanced on behalf of the respondent bringing in principles of Order II Rule 2 of Code of Civil Procedure and also

principles of *res judicata*, including constructive *res judicata* as well as *issue estoppel*. More particularly, it is argued that Ex.P.9 order on C.M.P.No.297 of 2009 was on the submission on behalf of the applicant and the respondent that the matter has been settled out of Court. According to the learned Senior counsel for the respondent, a matter, which has been settled out of Court, before a competent jurisdictional authority, ought not to be overcome by any subsequent proceedings in co-equal jurisdiction.

9. The argument of the learned counsel for the applicant in answer to the aforesaid is that the order on C.M.P.No.297 of 2009 was one which was obtained while negotiations between the parties were in progress and disputes, therefore, continued to linger and hence, the jurisdiction under sub-sections (5) and (6) of Section 11 of the Act, could well be exercised. His more fundamental argument is that the High Court of Karnataka did not have jurisdiction in view of the fact that the agreement was entered into between the parties at Secunderabad and the seat of arbitration was fixed as Secunderabad, which is within the jurisdiction of this Court. He argued that the rejection of I.A.No.1 of 2014 for recalling the order of C.M.P.No.297 of 2009 may not be treated as decisive in view of the fact that parties were again before the Karnataka High Court in C.M.P.No.288 of 2015, which was permitted to be withdrawn with liberty to file fresh Civil Miscellaneous Petition before appropriate Court.

10. Learned counsel for the applicant referred to the decisions in **Kandapazha Nadar vs. Chitraganimmal¹, Indian Oil Corporation Limited vs. SPS Engineering Limited², Schlumberger Asia Services**

¹ (2007) 7 SCC 65

² (2011) 3 SCC 507

Limited vs. Oil and Natural Gas Corporation Limited³, Arasmeta Captive Power Company Private Limited vs. Lafarge India Private Limited⁴ and Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited⁵, and the learned Senior counsel for the respondent referred to the decision in **Hope Plantations Limited vs. Taluk Land Board, Peermade⁶**. Be that as it may, the fact of the matter remains that the order, dated 02.03.2016 of the Karnataka High Court permitting withdrawal of C.M.P.No.228 of 2015 is not seen to be one with the consent of the respondent. The rejection of I.A.No.1 of 2014 and the order on C.M.P.No.297 of 2009 would continue to evidence that the Karnataka High Court had recorded the submission on behalf of the applicant and the respondent that the matter has been settled out of Court. It would not be proper for this Court to sit in Judgment on correctness or otherwise of that order. It would be suffice for this Court to say that the said order recording that the matter has been settled out of Court is a judicial order, which evidences as to what transpired in that Court, during the consideration of C.M.P.No.297 of 2009 on 05.07.2011. It would not, therefore, be available for this Court to pass any order contrary to what has been recorded therein.

For the aforesaid reasons, this Application fails and the same is accordingly dismissed.

THOTTATHIL B. RADHAKRISHNAN, CJ

31.12.2018
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³ (2013) 7 SCC 562

⁴ (2013) 15 SCC 414

⁵ (2017) 7 SCC 678

⁶ (1999) 5 SCC 590