HIGH COURT OF TRIPURA
AGARTALA

RSA No.44 of 2015

1. Tripura State Electricity Corporation Ltd.,
Bidyut Bhavan, Banamalipur,
P.S. East Agartala, P.O. Agartala, District: West Tripura,
represented by its Chairman-cum-Managing Director

2. The Deputy General Manager,
Tripura State Electricity Corporation Ltd.,
EDV, Kumarghat, Unokoti District

----Appellant(s)

Versus

Sri Sisir Kumar Nandi,
son of late Hemendra Kumar Nandi,
resident of Gobindapur,
P.O. & P.S. Kailashahar,
District: Unokoti

----Respondent(s)

For Appellant(s)	:	Ms. R. Purakayastha, Adv.
For Respondent(s)	:	Mr. D. Bhattacharya, Adv.
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order

30.07.2018

Heard Ms. R. Purakayastha, learned counsel appearing for the appellants as well as Mr. D. Bhattacharya, learned counsel appearing for the respondent.

02. This is an appeal under Section 100 of the CPC from the judgment dated 08.07.2015 delivered in Money

Appeal No.02 of 2013 by the District Judge, Unokoti Judicial District, Kailashahar, as he then was, whereby the judgment dated 10.09.2013 delivered in Money Suit 04 of 2012 by the Civil Judge, Senior Division, Unokoti, Kailashahar has been affirmed.

03. While admitting this appeal by the order dated 01.03.2016, the following substantial questions of law were framed:

1. **Whether the finding of the appellate Court in deciding the period of limitation taking into account Exbt.-8 was according to law?**
2. **Whether the Civil suit was barred in view of an agreement between the parties to refer the dispute to arbitration?**
3. **Whether the finding of the appellate Court suffers from perversity?**

04. Ms. R. Purakayastha, learned counsel appearing for the appellants has at the very outset submitted that in exercise leave granted by the said order dated 01.03.2016, she would further specify the substantial question of law having regard to amendment carried out in the written statement by incorporating paragraph-9, where is has been specifically stated that in terms of the agreement under reference, the work was to be executed within 45(forty five) days. The work was completed and the measurement was taken. Thereafter the bill was prepared for an amount of Rs.2,75,245/- and that amount was paid to the plaintiff by the Bill No.ED-V/KLS/39 dated 18.06.2008. Thus, the

respondent does not have any outstanding on account of the said agreement.

05. Ms. R. Purakayastha, learned counsel has further submitted that that claim has been corroborated by DW-1 by virtue of para-3 of the examination-in-chief and that part was not contested in the examination-in-chief. That apart, Ms. R. Purakayastha, learned counsel has submitted that the trial court has committed a serious illegality by relying on the correspondence dated 30.11.2009 [Exbt.8] where there is no acknowledgement in respect of liability of the defendant-appellant and by relying that letter for purpose of determining the limitation, both the courts below have committed further illegality having acted in contrast to the provisions of law. Ms. R. Purakayastha, learned counsel has also asserted that there is no dispute that there is an arbitration clause in the agreement under No.ED-V/TR/30/2006-07 dated 08.02.2007 [Exbt.B series]. The said arrangement has clearly been provided by clause 47.01. There is no dispute in this regard.

06. According to Ms. Purakayastha, learned counsel the suit should have been dismissed for existence of the arbitration clause. After some interaction, Ms. R. Purakayastha, learned counsel has fairly admitted that the provisions of Section-8 of the Arbitration and Conciliation Act, 1996 which is applicable in the suit, has not been complied with. Section-8 of the Arbitration and Conciliation

Act, 1996 provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applied not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the supreme court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. It further provides that the application referred to under sub-section (1) of the Section 8 of the Arbitration and Conciliation Act, 1996 shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. It is provided further that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the court. Notwithstanding that, an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an

arbitration may be commenced or continued and an arbitral award made.

07. There is no denying fact there exists a legal agreement between the plaintiff and defendant. In **P. Anand Gajapathi Raju vs. P.V.G. Raju** reported in **2000 (4) SCC 539**, the apex court had occasion to observe that the language of Section-8 of the Arbitration and Conciliation Act, 1996 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made, except to refer the dispute to an arbitrator. It is an well entrenched principle that mere existence of the arbitration clause does not oust the jurisdiction of the civil court to try the dispute arising from the said agreement where the arbitration clause is incorporated.

08. Ms. R. Purakayastha, learned counsel has further submitted that in the plaint, the respondent has stated that cause of action arose on 20.10.2009 [Ext.9] when the defendant No.3 received the letter from the Senior Manager. But the trial court has calculated the period of limitation from the day of issuance of the correspondence dated 30.11.2009 [Ext.8]. Ms. R. Purakayastha, learned counsel has submitted that the trial court has properly appreciated the evidence in terms of Section-18 of the Limitation Act and decided the

issue of limitation. But the appellate court reversed that finding by observing that no time was fixed for the extra work done by the plaintiff. The period of limitation will be three years there is no quarrel with such proposition as discussed by the trial court. Section-18 of the Limitation Act mandates that where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Thereafter, on relying on the various correspondences [Exbt.1-9] relying on the letter dated 30.11.2009 [Exbt.-8] in particular, the first appellate court has observed as under:

> **"This letter was intended to finalize the bill of the extra work done by the plaintiff-appellant for which bill for Rs.2,45,920/- was submitted vide bill dated 12-08-2008. Running bill was paid to the plaintiff-appellant by the defendants-respondents for Rs.2,75,245/- on 18-06-2008 as I get from para No.3 of the joint written statement submitted by the defendants-respondents. Thus, the plaintiff-appellant submitted final bill on 12-08-2008, copy of which has been marked Ext. 3 series and if that is considered to be the starting point of limitation, the defendants-respondents through their agents, i.e, Sr. Manager, Electrical Sub-Division No.1, Kailashahar and Sr. Manager, 132 KV Sub-station, Gournagar, Kailashahar acknowledged the claim of the plaintiff-appellant vide letter dated 30-11-2009, marked Ext.8. Thus, a fresh period of limitation shall start from 30-11-2009. The Sr. Manager, Kailasfoiuhahar wrote the letter, i.e., Ext.8 on the basis of Ext. 4, letter dated 25-02-2009 written by the DGM, Ext. 6, letter dated 11-09-2009 by DGM to the Sr. Manager. DGM was impleaded as defendant No.3 in the original suit and defendant-respondent No.3 in the appeal. As such, the Sr. Manager even though not impleaded as a party, the suit was not bad for necessary party as no relief has been claimed against the Sr. Manager, Electrical Sub-Division, Kailashahar. The plaintiff-appellant filed suit on**

> **16-11-2012 i.e., within three years from 30-11-2009. As such, the plaintiff-appellant filed the suit within the period of limitation."**

09. Ms. R. Purakayastha, learned counsel has submitted that for this purpose, the first appellate court in order to reverse the finding returned by the trial court has travelled beyond the pleading and that is wholly irregular.

10. On the face of such submission Mr. D. Bhattacharya, learned counsel appearing for the respondent has submitted that the trial court dismissed the suit holding the suit is barred by limitation.

11. While deciding the other issues, it was also held that since the work done by the plaintiff beyond the contract, he cannot legitimately claim the amount from the defendant. But on the issue of reference to the arbitration, it has been decided the matter in favour of the plaintiff and against the defendant. According to the trial court, unless an application as referred under Section-8 of the Arbitration and Conciliation Act, is filed the civil court shall not entertain any prayer for reference. This part of the finding has been affirmed by the first appellate court.

12. Having referred to a decision of this court in **Bipul Chandra Das and Rakhi Acharjee and Others** reported in **(2014) 2 TLR 386** where this court had occasion to hold that there must be specific and categorical request for referring the parties to arbitration otherwise as per section 9 of CPC the civil court has ample jurisdiction to decide the lis

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between the parties. According to the first appellate court the claim for money is based on the extra work the agreement. It has been admitted by several correspondences that the final bill in respect of the said extra work had been submitted by the plaintiff-respondent, but the work was not measured and no payment was made, even the file was sent for verification by the superior authority. Thus the first appellate court has directed the defendant-appellant to pay a sum of Rs.2,45,920/- with interest @ 9% from the date of institution of the suit i.e., 16.11.2012 till the date of decree with further interest @ 6% per annum on the principal sum from the date of a decree to the date the actual payment.

13. Ms. R. Purakayastha, learned counsel has contended that modification, extension or alteration of the contract work is totally prohibited under the said agreement. In clause 20.1, it has been provided as follows:

> **"No alterations, amendments, omissions, suspensions or variation of the Works (hereinafter referred to variation) under the Contract as detailed in the Contract Documents, shall be made by the Contract except as directed in writing by owner's Engineer in charge of the work, but he shall have full power subject to the provisions hereinafter contained, from time to time during the execution of the Contract, notice in writing to instruct the Contractor to make such variation without prejudice to the Contract. The Contractor shall carry out such variation and be bound by the same conditions as far as applicable though the said variations occurred in the Contract Documents. If any suggested variations would, in the opinion of the Contractor, if carried out, prevent him from fulfilling any of his obligations or guarantee under the Contract, he shall notify the owner's Engineer in charge of the work thereof in writing and the owner's Engineer in charge of the work shall decide forthwith whether or not, the same shall be carried out and if the owner confirm his instructions, the Contractor's obligations and guarantees shall be modified to such an extent as may be mutually agreed. Any agreed difference in cost occasioned by any such variation shall be added to deduced from the Contract Price as the case may be."**

14. In rejoinder, Mr. Bhattacharya, learned counsel has submitted that the first appellate court has correctly observed that the plaintiff did extra work and submitted the final bill for Rs.2, 45, 920/- to the defendant, but despite demand that was not paid. This amount is distinctly different from the second running bill. Mr. D. Bhattacharya, learned counsel has therefore submitted that the amended part of the written statement or for that matter the part of the deposition where DW-1 has stated that the said amount was paid will not dent the claim of the plaintiff inasmuch as according to the defendant-appellant that was the second running bill that they had paid. Moreover, from the communication dated 22.10.2009 it would be apparent that such bill was not paid. For purpose of reference, the following part of the letter dated 22.10.2009 [Exbt.9] is extracted:

> **"(i) The work already been executed in the year 2008 and completed including the extra work**
>
> **(ii) The Agency also submitted the 2nd R.A. bill, final bill to this office on 12/08/08, but it was neither measured nor sent to the higher authority."**

In continuation to that letter dated 22.10.2009 by the letter dated 30.11.2009, the Senior Manager, Electrical Sub-Division-I, Kailashahar has requested Senior Manager, 132 KV Sub-Station to come to the chamber of Electrical Sub Division-I, Kailashahar to find out the way out as regards the work that was executed by the plaintiff.

15. The first appellate court having referred the part of the written statement filed by the defendants has observed as follows:

> **"From the record, it has been found that the work was involved with some extra item and the matter of time extension issued for finalization of the agreement for which the file has moved to the higher authority for taking necessary step for the order of payment. But there is no mention about the bifurcation line and about the bifurcation line it was not in the knowledge of the D.G.M. and A.G.M. and in the agreement there was no approved drawing of the then A.G.M. & D.G.M. for change of route alignment for this work has been found in the records, moreover there was no written instruction of the then A.G.M. & D.G.M. for change the route of alignment."**

16. The first appellate court has further observed in para-3 of the impugned judgment that the Senior Manager has not been made party. The defendant also pleaded in para-8 of the written statement that the bill submitted by the plaintiff amounting to Rs.2,45,920/- is not correct and extra item and the time extension prayer will be put up to the appropriate authority for further disposal. In this regard one page has been brought on record being Exbt.A series by the defendant on 27.08.2013. By the said page of the cash book [Exbt.A series] the plaintiff wanted to prove that the plaintiff was paid the entire amount of the work that he has executed in terms of the contract.

17. To elucidate further, Mr. D. Bhattacharya, learned counsel appearing for the respondent has submitted that it is an acknowledged fact that the payment was not made, despite persuasion from the plaintiff and despite the demand notice served by him for payment. Thereafter, the plaintiff instituted the suit. Section-18 of the Limitation Act provides

for a special circumstances, i.e. in the event of renewal of liability by way of categorical acknowledgment in writing. But this case has its own uniqueness. The acknowledged fact is that that the defendant could not even measure the extra work and they were grappling with the situation-how to do the measurement. But finally they received the demand notice and maintained their silence over that issue. There is no payment voucher or document in respect of discharging the liability for the extra works whereas Exbt.A series are the page from the cash book. But for the payment of the extra work, there is no entry.

18. So far the finding as returned by the courts below as regards non-compliance of Section-8 of the Arbitration and Conciliation Act Mr. Bhattacharya, learned counsel has submitted that the statute without leaving any gap unambiguously provided that jurisdiction of the civil court can only be ousted, if there is an arbitration clause in the agreement and before the final date of filing of the written statement, an objection has been raised about maintainability of the suit, couched with the prayer for refering the matter to the arbitrator.

19. But in the case in hand, it has been admitted by Ms. Purakayastha, learned counsel that no such application was at all filed.

20. In view of that, this court is of the considered opinion that there is no infirmity in the finding returned by

the courts below. So far the question of limitation is concerned, it is a reversal finding by the first appellate court. According to the first appellate court since the measurement was not taken and the amount as claimed has not been paid, the limitation would run un-stopped. By the letter dated 30.11.2009 the said fact can be gathered that the measurement was still awaited and as such there was no delay in filing the suit.

21. Mr. Bhattacharya, learned counsel has referred the Section 18(1) of the Limitation Act which provides that where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall commence from the time when the acknowledgment was signed. It can be noticed that some of the relevant and essential requirements of the valid acknowledgment is that it must be made before the period of limitation has expired. It may be in regard to the liability in respect of the right in question and it must be made in writing and signed by the party against whom such right is claimed.

22. Section 18(2) provides that where the writing containing the acknowledgment is undated, oral evidence

may be given of time for purpose of determining when it was signed; but subject to the provisions of the Indian Evidence Act, 1872. The evidence about the contents of document is excluded. Explanation 1 is also relevant. It provides inter alia that for the purpose of Section 18, an acknowledgment may be sufficient enough if it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by refusal to pay or is compound with a claim to set of or is address to a person other than the person entitled to the right. In the decision of the apex court in **Shapoor Freedom Mazda vs. Durga Prosad Chamaria and Others** reported in **AIR 1961 SC 1236**, the apex court has observed as follows:

> **"6. It is thus clear that acknowledgment as prescribed by S. 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledge judgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly s. excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly G. without intending to admit the existence of jural relationship such intention could' be fastened on the maker of the statement by an involved or far-fetched process of reasoning.**

> **Broadly stated that is the effect of the relevant provisions contained in S. 19, and there is really no substantial difference between the parties as to the true legal position in this matter."**

23. According to Mr. D. Bhattacharya, learned counsel, there is no delay inasmuch as the conditions as recorded in the correspondence dated 22.10.2009 [Exbt.9] and the same condition has been reflected in the correspondence dated 30.11.2009. As such, there is no harm in considering the correspondence dated 30.11.2009 to show the acknowledgment of fact that the measurement for payment did not occur on that day. The court should always search for the truth from the evidence as laid before it. To contend that some evidence which has been recorded beyond the pleading, requires due circumspection. Pleading means the content relating to the dispute whereas the evidence supports the prayer made, including the emergence of the cause of action. If specifically any document is not referred in the plaint, that will not preclude any person to introduce and rely on such documentary evidence.

24. Ms. R. Purakayastha, learned counsel has added that the assessment has been made by the first appellate court is not supported by any document or reasoning. This contention however, cannot be accepted inasmuch as the total amount as claimed under the Money Suit is Rs.2, 45,920/-. Even from the demand notice it is seen that no specific demand was made. Absence of demand may be for the reason that the bill was raised by the respondent. But it

was still awaited for decision of the defendants. The final bill for extra work which is under dispute has fallen for adjudication before this court was of Rs.2,45,920/-.

25. Finally, on scrutiny of the records no such claim would be available. On the contrary, it is found that the said bill was raised before the competent authority but was not paid for whatever reason, but according to the the money against the extra work done by the plaintiff.

26. Thus, this court does not find any infirmity in the judgment dated 16.11.2012 delivered in Money Appeal No.2 of 2013 and as such this appeal stands dismissed.

Draw the decree accordingly and send down the records thereafter.

JUDGE

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