

**GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR**

**Course: Advanced Contracts (Evolving Jurisprudence in Contract Law)
Semester-VII (Batch: 2013-18)**

Mid Semester Test: August-2016

Date: 12th August, 2016

Duration: 2 hours

Max. Marks: 30

Instructions:

- Read the questions properly and write the answers in the given answer book.
- The respective marks for each question are indicated in-line.
- Do not write any thing on the question paper.
- Indicate correct question numbers in front of the answers.
- No questions or clarifications can be sought during the exam period, answer as it is, giving reason, if any.
- **Bare Act is not allowed.**

Answer all the questions

Marks

- Q.1 'PD' and 'RP' enter into an agreement for sale of an immovable property. An advance payment of ₹ 5 lakh is paid by the buyer (PD) and he is put in possession of the property. Subsequently, a dispute arises between the parties, and RP files a suit in the Civil Court for recovery of possession and mesne profits against PD. (5+5 =10)

PD files a petition under section 8 of the Arbitration and Conciliation Act 1996, alleging that RP filed a suit in the Civil Court for recovery of possession and mesne profits against PD despite the fact that there is an arbitration clause in their agreement for the appointment of one Shri P V Shah as arbitrator. In view of the arbitration clause, the dispute before the Civil Court has to be referred to the arbitrator to settle the dispute between the parties, and therefore, the suit is not maintainable before the Civil Court. Hence, PD sought to refer the matter to arbitrator, invoking arbitration clause contained in their agreement.

Some relevant clauses of their agreement are extracted hereunder for better appreciation of the problem:

- (i) Sale of ...property for ₹ 45 lakh.*
- (ii) 30 September 2012 is fixed for payment of sale consideration and registration of sale deed.*
- (iii) Advance payment of ₹ 5 lakh shall be forfeited on 01 October 2012, if no registration is done on 30 September 2012.*
- (iv) Shri Z is to make sale deed, and fees for the same shall be paid by both the parties equally.*
- ...
- (viii) Shri P V Shab shall be the arbitrator for interpretation of this agreement.*
- (ix) The property shall be sold on 'as is where is' basis in respect of title/ sanction/ measurements/ condition.'*

RP contends that the arbitration clause incorporated in the agreement is only to refer the matter pertaining to interpretation of the terms of agreement, and not for resolving any other dispute(s). Therefore, the dispute for recovery of possession and mesne profits is beyond the scope of the arbitration clause and the petition should, therefore, be dismissed. He also contends that the document is to be interpreted basing on the language used in the document taking literal meaning, and intention of the parties is

irrelevant when there is no ambiguity in the language used in the arbitration clause of the agreement.

- (a) Based on the afore-stated facts, decide: whether or not the arbitration clause covered reference of the dispute relating to delivery of possession and mesne profits?
- (b) What is meant by the rule: 'harmonious construction must be placed on the contract as far as possible.?'

- Q.2 A Corporation floated a tender dated 17 October 2012 for construction of some official buildings. 'ABC Contractor' submitted its bid in response to the said tender notice enclosing therewith an amount of ₹ 5 lakh towards earnest money deposit (EMD). The tender document was in two parts: one technical and the other commercial. While the technical bids were opened and found compliant, the financial bids had yet to be opened when ABC Contractor moved an application addressed to the official concerned of the Corporation at Surat withdrawing the bid submitted by it and asking for being excluded from consideration for the award, besides praying for refund of the EMD deposited along with the bid. In response to this application, the Corporation issued a letter, dated 27 January 2013, stating that although the bid offered by the Contractor was not being considered, the prayer for refund of the EMD could not be considered because the same stood forfeited. Aggrieved by the said order, the Contractor filed a Writ Petition before the High Court of Gujarat challenging the refusal of refund of the EMD. The said petition was opposed by the Corporation. (5+5 =10)

Condition No. 2 of the Special Conditions of Contract, as stated in the tender document, reads as under:

'2. The earnest money deposit shall be forfeited on the following grounds:

- (a) On revocation of the tender/bid by the bidder during the period of bid validity; or*
- (b) On refusal or failure to sign a formal Contract after the contract is awarded to the selected bidder; or*
- (c) If the work is not commenced after the contract is awarded to the selected bidder.'*

On the basis of the afore-stated facts, decide the following issues:

- (a) Was the forfeiture of the EMD by the Corporation illegal?
 - (b) Does the right to withdraw an offer before its acceptance nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of the agreement?
- Q.3 'HB Group' carries on medical practice in New Jersey. On 01 April 2014, it entered into an agreement (called 'Managed Support Plan') with 'P Computer Service' (PCS) whereby PCS agreed to provide information technology services to it in exchange for a monthly fee. (10)

On 10 July 2015, a representative of PCS informed it that HB was displeased with its (PCS's) services. Approximately 15 minutes later, PCS remotely accessed HB's computers, created network passwords, and failed to provide the passwords to HB. As a result, HB was locked out of its server, and despite a demand to PCS, HB's network was not restored until the next day. HB averred that while it was locked out of its network, it could not access its electronic business records, including patient files, thereby forcing it to cancel 50 previously scheduled appointments for that day and the next.

In August 2015, HB sued PCS and asserted claims for breach of contract, besides other claims. PCS sought dismissal of this action based on a mandatory arbitration clause

purportedly contained in the agreement between the parties.

In fact, the agreement (Managed Support Plan) did not, in itself, contain an arbitration clause. Rather, the clause was contained in a separate “Terms and Conditions” document that, according to PCS, was integrated into the contract. Actually the parties entered into the said agreement in this manner: The Managed Support Plan had been sent in electronic form to HB, and the “Terms and Conditions” document was attached as a clickable hyperlink to the last page of the contract/Plan. This clickable hyperlink — which included, in small font, the text “Download Terms and Conditions”— was located directly above the line where the HB signatory could sign to indicate acceptance of the agreement. Specifically, Paragraph 12 of the Terms stated that:

‘Mandatory Arbitration: Any controversy or claim arising out of the Plan, or relating to it, including any statutory claims, will be settled by arbitration administered by the American Arbitration Association ... PCS and HB are voluntarily and knowingly choosing arbitration instead of litigation to resolve their disputes ...’

In a unique circumstance of the case, the representative from HB received the Plan electronically, but subsequently printed it so as to affix a signature, as was necessary to validate the agreement. In other words, the document could not be signed electronically. Over here, the *electronic version* of the Plan contained the following text in the said clickable hyperlink: “Download Terms and Conditions”; whereas when it was printed, the *printed version* included only the HTML coding for the link, i.e. the *printed version* presented the link in the following form: ‘<abref=“http://www.helpmepcs.com/site_media/terms.conditions.pdf”> Download Terms And Conditions ’. Thus, when the Managed Support Plan was printed on paper, the coding for the hyperlink appeared as stated above rather than as a hyperlink in the *electronic version* (i.e. “Download Terms and Conditions”).

HB argued that it did not agree to the separate “Terms and Conditions”, as it was never made aware that the “Terms and Conditions” were to be incorporated into the agreement, and was, thus, not bound by the arbitration clause contained therein. It also pointed to the fact that the agreement was signed as a hard copy rather than in electronic format, and the hard copy contained only the coding for the “Terms and Conditions” hyperlink. It thus asserted that it was not abundantly clear that there was a hyperlink which contained additional terms of the contract.

On the contrary, according to PCS, when HB’s authorised agent signed the Managed Support Plan, it should be assumed that he read the entire agreement — including the “Terms and Conditions” contained in the hyperlink — and assented to such terms.

On the basis of the above factual matrix, decide: could the “Terms and Conditions”, including the mandatory arbitration clause, be held binding on the parties?
