

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.564 of 2019

1. Messrs. Forward Leather Company
rep. by its Managing Partner-
Mr.Yavar Dhala,
New No.37, Old No.50, Raja Muthiah Road,
Periamet, Chennai-600 003
2. Mr.Yavar Dhala .. Petitioners

Vs.

1. M/s.Star Exports,
rep. by its Partners
(i) Mr.Sarfaraz Ahmed &
(ii) Mrs.Shabana Ahmed
No.3, Naval Hospital Road,
Periamet, Chennai-600 003.
2. Sarfaraz Ahmed,
Partner, M/s.Star Exports,
No.3, Naval Hospital Road,
Periamet, Chennai-600 003.
3. Shabana Ahmed,
Partner, M/s.Star Exports,
No.3, Naval Hospital Road,
Periamet, Chennai-600 003. .. Respondents

* * *

Prayer : Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint a Sole Arbitrator to resolve the disputes between the parties as per the agreement dated 05.12.2014 signed on 06.12.2014.

* * *

For Petitioners : Mr.C.Seethapathy

For Respondents : Mr.Rahul Balaji

ORDER

The petitioners have filed this petition seeking for appointment of a Sole Arbitrator to resolve the disputes between the parties as per the agreement dated 05.12.2014 signed on 06.12.2014.

2. According to the petitioners, the respondents are into the leather export business and they sought petitioners' expertise for their business. The parties entered into an agreement dated 05.12.2014, which was signed on the next day, i.e., on 06.12.2014. Clause 8 therein provides for applicable rates on which payments have to be made to the petitioners. Though the respondents were paying the agreed amount, it was stopped later and as on November, 2018, the due mounted to Rs.10,74,718/-. The respondents also failed to furnish accounts thereafter. While so, the petitioners learnt from an e-mail sent by the respondents to their partners that the respondents unilaterally terminated the business agreement without any valid reason. Clause 9 of the agreement mandates the respondents not to deal with the clientele of the petitioners, which is also breached. The

efforts of the petitioners to resolve the disputes amicably proved futile. Hence, the petitioners invoked clause 13 of the agreement, which provides for arbitration of disputes by their trusted external agents, and issued notice dated 01.03.2019 calling upon the respondents to cease all business relations with its clients. It is also claimed that since the first two named Arbitrators are interested persons and the third Arbitrator did not want to arbitrate the dispute, it also nominated an Advocate as the Arbitrator in the place of the said named arbitrators. According to the petitioners, the respondents sent a reply on 13.03.2019 with false and baseless allegations, while denying the existence of the arbitration agreement. Since the respondents failed to give proper reply within the statutory period, the petitioners are before this Court with this petition.

3. Denying the allegations of the petitioners and resisting the prayer made in this petition, a counter-affidavit dated 18.09.2019 is filed by the respondents, *inter alia*, stating that the alleged agreement is an informal arrangement and it is not between the firms, but that of the individuals, which is evidenced from the fact that the first petitioner and first respondent firms and the third respondent are not signatories to the said agreement. It is their case that since the first petitioner firm went into bad weathers, the first respondent was

approached to protect its reputation and its employees and only with a view to assist the second petitioner, the first respondent took over the business and a portion of its liability, i.e., the employees. The second petitioner was paid for the business brought in by him. However, he did not make use of the business marketing trips for the respondents, though he was offering only marketing services. The second petitioner brought in an customer with the assurance that it will be prompt in payment, but the said firm did not pay anything for the supply of goods of substantial value. There are also other breaches committed by the second petitioner, which raised disputes among them. It is stated that even assuming without admitting that there is an arbitration agreement, though the first named Arbitrator therein is an interested person, the second Arbitrator is an independent third party and freelance consultant known to both of them, who could be appointed as the Arbitrator. It is the claim of the respondents that they sent a communication dated 09.09.2019 to the second named Arbitrator, who expressed consent to arbitrate the disputes. Thus, it is prayed by the respondents to dismiss this petition.

4. The petitioners filed a reply statement dated 23.10.2019 denying the allegations of the respondents.

5. Heard the learned counsel on either side and perused the materials placed before this Court.

6. A perusal of the documents filed along with this petition shows that the parties styled the so-called agreement as "Final draft dated 5th December 2014" and signed by individually on 06.12.2014. Admittedly, Clause 13 of the same provides for arbitration of disputes, which indeed, exist between the parties. Though the respondents denied it to be an agreement, admitted that it was an informal arrangement between the parties. Further, the same is acted upon by the parties, as the petitioners sent notice nominating an Arbitrator, while the respondents sought for and obtained consent from the second named Arbitrator. Thus, from the conduct of the parties it is clear that they were submitted themselves to the arbitration. The fact remains the respondents sent a letter seeking consent from the named Arbitrator only on 09.09.2019, which is very much beyond the period mandated under the statute from the date of receipt of the notice of the petitioner making their nomination and thus, the respondents lost their right of nomination. Since there is no other procedure agreed upon by the parties, they have to fall back only to the provisions of the Arbitration and Conciliation Act, 1996 for appointment of the Arbitrator.

7. When these facts are pointed out, it is contended by the learned counsel for the respondents that even if it is so, the first respondent firm need not be subjected to arbitration. Learned counsel for the respondents submitted that the respondents' rights to raise all these disputes as the preliminary issues may be protected, in which event, they are prepared to go before the Arbitral Tribunal constituted by this Court, for which suggestion, learned counsel for the petitioners has no objection.

8. Having regard to the submissions of the learned counsels on either side, Ms.G.Thilagavathi, Senior Advocate, having office at No.147, Law Chambers, High Court Buildings, Chennai-600 104, (Phone No.25342306), is appointed as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties, shall decide all the questions, including (i) whether the alleged final draft is an agreement containing arbitration clause or an informal arrangement ; and (ii) Who are all the parties to go before the Arbitral Tribunal. Upon hearing them, the learned Arbitrator shall pass orders as expeditiously as possible, preferably within a period of six months from the date of receipt of the order.

9. The learned Arbitrator is at liberty to fix her remuneration and other incidental expenses. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

10. The appointment of the Arbitrator will be subject to the disclosure and declaration made, as per the Sixth Schedule to the Arbitration and Conciliation Act, 1996 coupled with the amendments made therein.

11. The Original Petition is ordered accordingly. The parties shall bear their own costs.

28.11.2019

Index : Yes / No

Internet : Yes

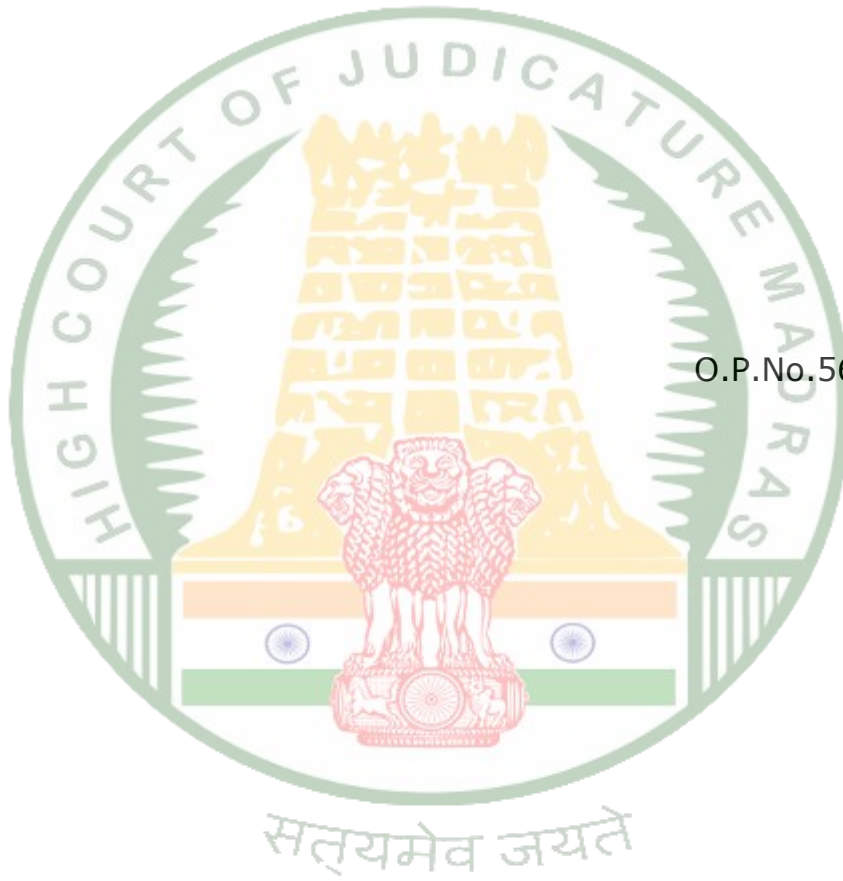
Speaking Order/Non-Speaking Order

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