

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.09.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.599 of 2019

MLR Auto Limited
rep. by its Director
Mr.Sundeeep Rajpal Chhabra
41/1a, Ida Balanagar, Hyderabad,
Telangana-500 037.

.. Petitioner

Vs.

INUDSIND Bank Limited
rep. by Senior Vice President
National Product Head-Small
Commercial Vehicle,
Consumer Finance Division,
New No.34, Old No.115-16,
G.N.Chetty Road, T.Nagar,
Chennai-600 017.

.. Respondent

Prayer : Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to (a) terminate the appointment of the sole arbitrator by the respondent by its letter to the arbitrator dated 08.05.2019 ; (b) appoint an independent Sole Arbitrator having experience in accounts/finance in accordance with law relevant clauses of the memorandums of understanding dated 25.07.2016 and its subsequent renewals dated 25.07.2017 and 25.07.2018 entered into between the parties to adjudicate all the disputes between the petitioner and the respondent.

* * *

For Petitioner : Mr.M.S.Seshadri

For Respondent : Mr.T.Karthikeyan

ORDER

This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an independent Sole Arbitrator having experience in accounts/finance in accordance with law relevant clauses of the memorandums of understanding dated 25.07.2016 and its subsequent renewals dated 25.07.2017 and 25.07.2018 entered into between the parties to adjudicate all the disputes between the petitioner and the respondent, after terminating the appointment of the sole arbitrator made by the respondent by its letter to the arbitrator dated 08.05.2019.

2. The petitioner entered into a Memorandum of Understanding with the respondent dated 25.07.2016 (in short, "MoU") for financing the vehicles, namely, autorickshaws manufactured by it. The said MoU was renewed on 25.07.2017 and subsequently on 25.07.2018. The petitioner entered into dealership agreements with various persons in the states of Andhra Pradesh, Telangana and Orissa for selling their vehicles and the respondent extended finance facilities to the customers directly by entering into the agreements.

3. The MoU mandates the petitioner to deposit a sum of Rs.25,00,000/- as Replenishable Security Deposit (RSD), which was used by the respondent for buying back the vehicles, if there is any default by the customers. Though the petitioner kept replenishing the RSD initially without verifying the records, when it was demanded, during March 2019 some disputes arose with regard to the claim made by the respondent with respect to the buyback of the vehicles and hence, the petitioner sought certain details from the respondent. The respondent furnished a few of those particulars and asked the petitioner to approach the local branch of the respondent for the remaining details. In spite of repeated requests, the petitioner could not secure those details from the branch / local offices of the respondent and there is no co-operation from the subordinates of the respondent. There were exchange of emails between the parties regarding with respect to the claim and counter-claims. Later on, the petitioner was not provided with the particulars on the pretext that the matter is subjudice.

4. In the meanwhile, the petitioner received a letter dated 11.05.2019 from one Mr.V.G.Guhan Murugan, Advocate, to the effect that he was appointed as arbitrator by the respondent. It is the case

of the petitioner that the arbitrator so appointed did not furnish make the disclosure as required under Section 12 of the Arbitration and Conciliation Act, 1996 (in short, "the Act") read with the Seventh Schedule appended therein. The petitioner sent a list of arbitrators to the respondent seeking them to choose one from that list, the respondent failed to reply to the same. Hence, the petitioner has filed this petition invoking Sections 11 and 14 of the Act.

5. Resisting the prayer of the petitioner, a counter-affidavit dated 09.09.2019 has been filed by the respondent. It is claimed by the respondent that the petitioner has not taken the plea that the arbitrator from becoming *de jure* unable to perform the function as envisaged under Section 12(5) of the Act read with Seventh Schedule of the Act. The respondent stated that the petitioner has remedy under Section 13 of the Act, which he did not invoke to challenge the constitution of the Arbitral Tribunal. It is also stated that the respondent acted in terms of the arbitration clause contained in the MoU in appointing the arbitrator and no fault could be attributed on the part of the respondent.

6. Learned counsel for the petitioner submitted that the respondent failed to follow Section 12(5) of the Arbitration and

Conciliation Act, 1996 (in short, "the Act") read with the Seventh Schedule appended therein. It is submission that the Hon'ble Supreme Court in **GAIL V. HRD Corporation, (2018) 12 SCC 471**, held that if the arbitrator nominated suffers from disqualification under Section 12(5), he/she becomes incapable of performing his functions *de jure* under Section 14 of the Act.

7. Heard the learned counsel for the respondent on the above submissions. Learned counsel relied on the following judgments of the Hon'ble Apex Court, namely, **Rajasthan Small Industries Corporation Limited V. M/s.Ganesh Containers Movers Syndicate, (2019) 3 SCC 282** and **M/s.Mayavti Trading Pvt. Ltd. V. Pradyuat Deb Burman, 2019 SCC OnLine SC 1164**.

8. The existence of an arbitration agreement is not disputed by the learned counsel for the respondent. His only contention is it is not open to the petitioner to invoke the said clause at this stage, that too, when the respondent fulfilled all their obligations during the subsistence of the Construction Agreement.

9. Sections 12 to 14 of the Act are useful to appreciate the submissions of the learned counsel for the parties and the same read

as hereunder :

"12. Grounds for challenge.— (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

*Explanation 1.—*The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

*Explanation 2.—*The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

13. Challenge procedure.— (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. Failure or impossibility to act — (1) *The mandate of an arbitrator shall terminate if—*

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”

10. A reading of Section 12(1) makes it abundantly clear that a duty is cast upon the Arbitrator, who was approached by one of the parties for possible appointment, to disclose in writing in the form specified in the Sixth Schedule, the existence of circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The Fifth Schedule guides in determination of existence of such circumstances, as per Explanation 1 to Section 12. Sub-section (2) of Section 12 states that the Arbitrator shall disclose to the parties in writing any circumstances referred to in sub-section (1) without delay from the time of his appointment and throughout the arbitral proceedings. Section 13(2) provides for laying challenge of

Arbitrator to a party within fifteen days after becoming aware of the constitution of the Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12. From the above it is clear that only after disclosure of the circumstances, if any, which give rise to justifiable doubts as to the independence or impartiality of the Arbitrator, a party can challenge the appointment of the Arbitrator. The grievance of the petitioner is that the Arbitrator appointed by the respondent did not disclose the information, as mandated under the Act, which would only enable him to challenge his appointment, if necessary. Hence, the submissions of the learned counsel for the respondent that the petitioner failed to avail the remedy available to him under Section 13 of the Act and the petitioner having not taken the plea that the arbitrator became *de jure* unable to perform the function as envisaged under Section 12(5) of the Act read with Seventh Schedule of the Act cannot seek the remedy under Section 11(6) of the Act cannot be accepted.

11. A three-Judge Bench of the judgment of the Hon'ble Supreme Court in **Mayavti Trading Pvt. Ltd. (cited supra)**, upon which, reliance was placed by the respondent, taking note of the fact that Section 11(6A) of the Act has now been omitted by an amendment Act of 2019, which has not yet been brought into force,

held as follows :

"11. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) - see paras 48 & 59."

12. Consequently, the Hon'ble Supreme Court in the aforesaid judgment overruled the judgment in **United India Insurance Company Limited Vs. Antique Art Exports Private Limited, (2019) 5 SCC 362**, wherein it was held as follows :

"20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729. The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-

A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication."

13. At this juncture, it is apt to note that in the aforesaid earlier judgment in **Duro Felguera S.A. Vs. Gangavaram Port Limited, (2017) 9 SCC 729**, it was held by the Hon'ble Apex Court that,

"48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

"11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-

section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* and *Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267]*. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

14. While holding so, the Hon'ble Apex Court also took note of the earlier judgment in ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.***, in the following manner :

"58. This position was further clarified in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267. To quote:

"22. Where the intervention of the court is sought for

appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [*SBP and Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration

clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

15. In view of the findings of the Hon'ble Apex Court in **Duro Felguera S.A. Vs. Gangavaram Port Limited, (2017) 9 SCC 729**, "all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected." Therefore, this Court need not venture into the submissions of the learned counsel for the respondent, as admittedly, there is an arbitration clause in existence between the parties.

16. The next judgment of the Hon'ble Apex Court relied on by the learned counsel for the respondent in **Rajasthan Small Industries Corporation Limited (cited supra)** was not applicable to the facts of the instant petition and thus, of no avail to the respondent to further its cause.

17. Now coming to the question of appointment of the Arbitrator already appointed, it is apt to quote the following paragraphs from the judgment of the Hon'ble Apex Court in **Voestalpine Schienan GMBH V. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665 :**

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in **Hashwani v. Jivraj (2011) 1 WLR 1872** in the following words:

"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the

parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury* [*Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.], underlined that:

“an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”

* * *

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single

controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.”

18. The Hon'ble Apex Court also referred to the above judgment in the recent judgment **Bharat Broadband Network Limited V. United Telecoms Limited, (2019) 5 SCC 755** and held in paragraph 17 as hereafter :

17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the

parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them."

19. If the appointment of the sole arbitrator made by the respondent is weighed with the touchstone of the principle laid down by the Hon'ble Apex Court in the above decisions, it definitely requires interference from this Court and thus, the petitioner is entitled to maintain this petition to seek the remedy.

20. Accordingly, this Court appoints Mr.S.R.Sundar, Advocate, having office at 235 (112), 5th Floor, Angappa Naicker Street, Chennai-600 001, (Phone No.044-25224477) 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 and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his 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.

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

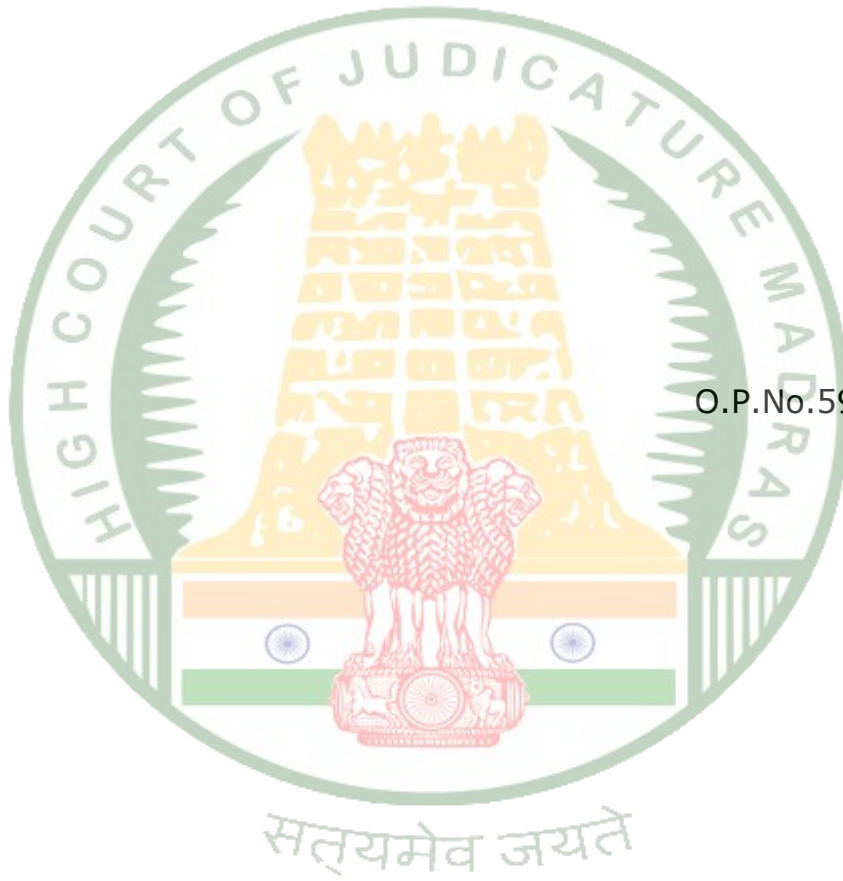
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PUSHPA SATHYANARAYANA, J.

This petition is listed today under the caption "for being mentioned" at the instance of the learned counsel for the petitioner.

2. Learned counsel for the petitioner contended that this Court vide order dated 18.09.2019 appointed Mr.S.R.Sundar, Advocate, as the Sole Arbitrator to adjudicate the disputes between the parties. But, the said Advocate appeared for one of the parties and as such, he may be replaced with some other Advocate.

3. Considering the submissions of the learned counsel for the petitioner, this Court appoints Mr.S.Parthasarathy, Senior Advocate, having office at No.39, Law Chambers, High Court Buildings, Chennai-600 104, as the Sole Arbitrator, in the place of Mr.S.R.Sundar. 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.

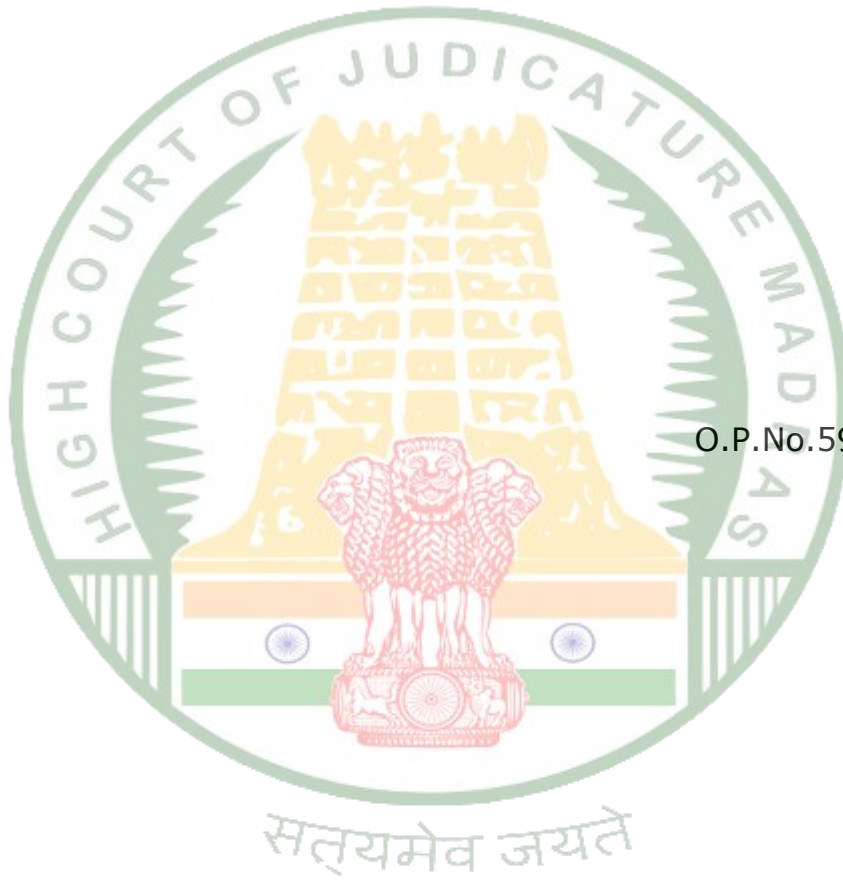
4. Except the above modification, the order dated 18.09.2019 remains unaltered. The Registry is directed to issue corrected order copy to the parties.

25.10.2019

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PUSHPA SATHYANARAYANA, J.

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