

JIN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.12.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.935 of 2019

M/s.Howden Solyvent (India) Pvt Ltd.
No.147, Poonamallee High Road
Chennai - 600 077. ... Petitioner

Vs.

M/s.GTV Engineering Limited
216-217, New Industrial Area - II
Mandldeep - 462046 (Bhopal) .. Respondent

This Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to decide the disputes that have been arisen between the petitioner and the respondent under the terms of the Purchase Order dated 29.11.2017 and thus render justice.

For Petitioner : Ms.Aparajitha Vishwanath

For Respondent : Mr.Adeesh Anto

ORDER

Ms.Aparajitha Vishwanath, learned counsel on record for petitioner and Mr.Adeesh Anto, learned counsel on behalf of sole respondent are before this Court.

2. Instant 'Original Petition' ('OP' for brevity) has been filed under relevant sub-section of Section 11 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A & C Act' for the sake of brevity) with a prayer for appointment of an Arbitrator.

3. Owing to the fair stated position of parties and their respective counsel, which unfurled in the hearing today, the task of disposing of instant OP has become fairly simple. In other words, both the learned counsel do not dispute the existence of an Arbitration Agreement between the parties i.e., petitioner and respondent. It is the common say of both learned counsel that arbitration agreement between the parties to instant OP, being Arbitration Agreement within the meaning of Section 7 of A and C Act is in the form of a clause in a Purchase Order dated 29.11.2017. Relevant clause is clause 17 captioned 'Claims, Disputes or Arbitration and Patent Rights'. Clause 17.1 and 17.2 of Clause 17 of the Purchase Order read as follows:

'17.0.0 Claims, Disputes or Arbitration and Patent Rights

Settlement of disputes and arbitration

17.1.0 Arbitration

Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration and Conciliation

Act, 1996 of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties. The seat of Arbitration shall be in Chennai. Arbitration shall be in accordance with the Indian Arbitration and Conciliation Act, 1996.

17.1.1 Dispute Resolution

All disputes, claims and differences of any kind whatsoever arising out of or in connection with the Contract, whether during the progress of the work or after their completion shall first be tried to resolve amicably with mutual discussions.

17.1.2

Failing to resolve amicably with mutual discussions, either Party may initiate the arbitration proceedings. The arbitration shall be conducted by three arbitrators; one each to be nominated by either part or two such arbitrators will nominate the third arbitrator, who will act as chairman. The proceedings shall be as detailed in clause 18.1.0 herein above. The proceedings shall be held in English language and arbitrators will give reasoned award which shall be final and binding on both the parties.

17.2.0 Defence of suits

If any action in Court is brought against the Purchaser or Engineer or an officer of agent of the Purchaser, for the failure or neglect on the part of the Supplier to perform any acts, matters, covenants or things under the Contract, or for damage or injury caused by the alleged omission or negligence on the part of the Supplier, his agents, representatives or his Sub-Suppliers, or in connection with any claim based on lawful demands of Sub-Suppliers, workmen, suppliers or employees, the Supplier shall in all such cases indemnify and keep the Purchaser, and the Engineer and or his representative harmless from all losses, damages, expenses or decrees arising of such action.

17.3.0.....'

4. A perusal of the arbitration agreement between the parties extracted and reproduced supra brings to light that the parties have contemplated/agreed for arbitration by a three member Arbitral Tribunal, but on instructions, both learned counsel make a request that the Arbitral Tribunal may please be downsized and the Arbitral Tribunal may please be constituted by a sole Arbitrator. This common submission/plea on instructions is taken note of and recorded.

5. Before proceeding further, this Court reminds itself of **Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman** reported in (2019) 8 SCC 714). Relevant paragraph is Paragraph 10, which reads as follows:

'10. 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 judgments, as Section 11(6-A) 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 in Duro Felguera SA.

(underlining made by this Court to

supply emphasis and highlight)

6. This takes us to Duro Felguera SA principle being Judgment of Hon'ble Supreme Court in ***Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in **(2017) 9 SCC 729**. Relevant paragraphs are Paragraphs 47 and 59 and the same read as follows:

'47. What is the effects of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the 2015 Amendment') with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'

'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. (supra) and Boghara Polyfab (supra). 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 minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected. '

7. It is clear as daylight from the narrative thus far that existence of an arbitration agreement between the parties is not subject matter of dispute or contestation and therefore, this Court proceeds to appoint a sole Arbitrator

(in the light of request for downsizing the size of Arbitral Tribunal, alluded supra).

8. Hon'ble Mr.Justice M.Vijayaraghavan (Retired), former Judge of this Court, residing at New No.2, Old No.15, T.V.Naidu Road, Flat No.2B, Abiramai Foliage, Chetpet, Chennai -31, is appointed as sole Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference and conduct arbitration qua the arbitral disputes between the parties in accordance with A and C Act, more particularly in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules, 2017, in the Madras High Court Arbitration Centre under the aegis of this Court.

OP is disposed of on above terms. There shall be no order as to costs.

18.12.2019

Speaking/Non-Speaking order

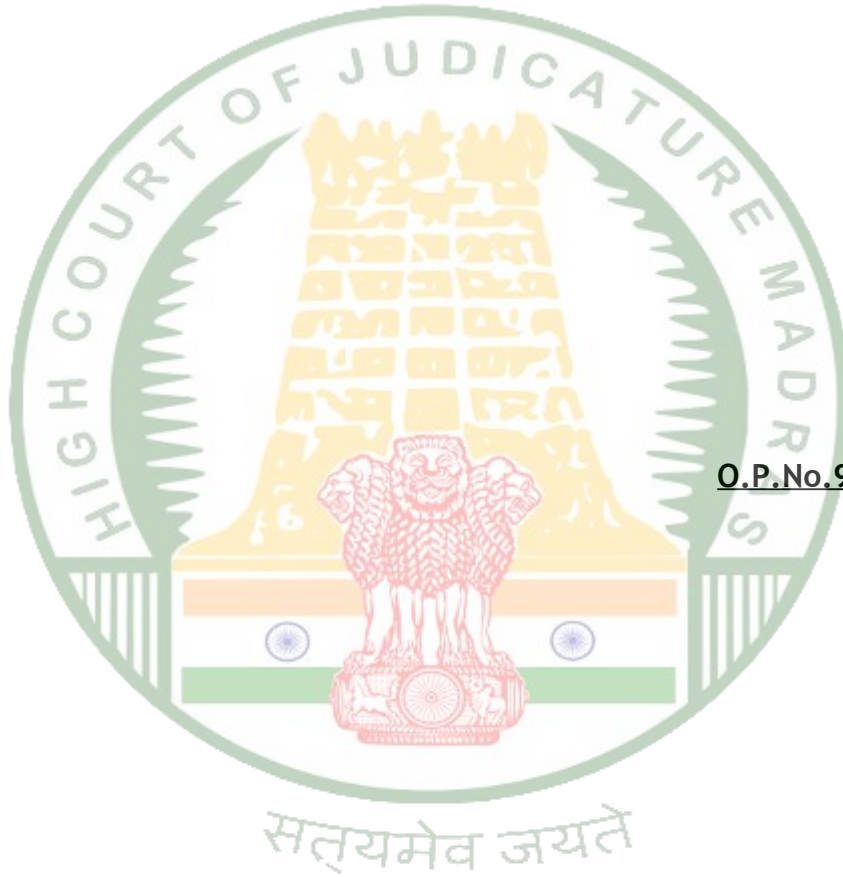
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Note: Registry is directed to communicate this order to Hon'ble Mr.Justice

M.Vijayaraghavan (Retired), residing at New No.2, Old No.15, T.V.Naidu Road, Flat No.2B, Abiramai Foliage, Chetpet, Chennai -31 forthwith.

M.SUNDAR, J.
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