

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.12.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.928 of 2019

M/s.Mero Asia Pacific Engineering Private Limited
Represented by its Finance Manager
Mr.R.Thavamani
Having its registered office at
F5, Symtec Building
2nd Floor, SIDCO Industrial Estate
Ekkatuthangal, Chennai - 600 032. .. Petitioner

Vs.

M/s.D.Max Engineers
Represented by its Proprietor
Mr.Abudl Rahman Shaikh
Patel Chawl, First Floor
Dongar, Beh, Kalina Church
Santa Cruz, Mumbai - 600 09. .. Respondent

This Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator in terms set out in Section 11(6) of the Arbitration and Conciliation Act, 1996 to decide the dispute between the petitioner and the respondents arising out the agreement dated 04.08.2016 and thereby render justice.

For Petitioner : Mr.Sarath Chander

ORDER

Mr.Sarath Chander, learned counsel representing the counsel on record for petitioner is before this Court.

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

3. Nucleus of instant OP is an agreement dated 04.08.2016, captioned 'Work Order' ('said agreement' for the sake of convenience and clarity) between the petitioner and the respondent. The Arbitration agreement between the parties i.e., petitioner and respondent being arbitration agreement within the meaning of Section 7 of A and C Act is in the form of a clause in the said agreement, said clause is clause 13 and the same reads as follows:

'Settlement of Disputes/Arbitration

All disputes or difference of opinions, on account of interpretation of clauses, technical specifications etc, shall be resolved through direct and mutual discussions at site level at the Project Manager/Project Director -MERO's office at the project site. In the case of any unresolved disputes, the same shall be referred to the Country Head appointed by Principal

Employer at Chennai on occasions of any such dispute being arising, his decision shall be binding on both the parties. If solution is not reached even in that level it will be referred to arbitration as per procedure below.

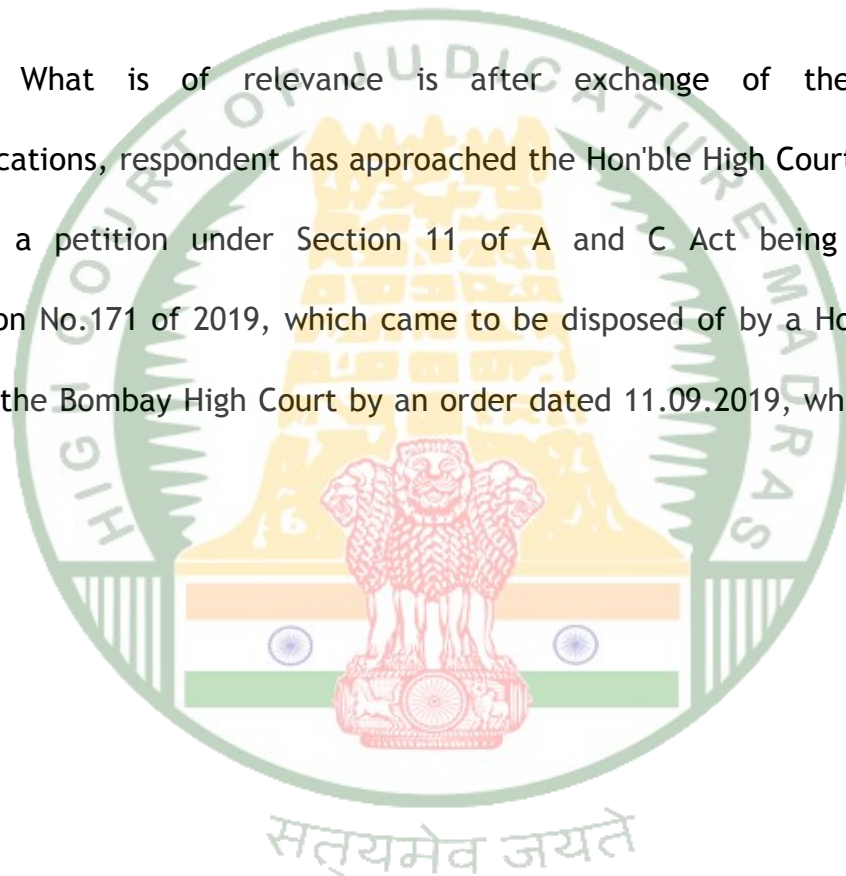
a) Any dispute or difference arising between the parties hereto as to the effect, interpretation or application of this order or as to their rights, duties or liabilities thereunder, or as to any act, matter or thing arising out of, or consequent to, or in connection with the transaction herein shall be referred to any finally resolved by arbitration by sole arbitrator to be appointed by mutual consent of both vendor or Agency. In the event of no such mutual consent, the arbitrator shall be appointed in accordance with Arbitration clause 2015. The arbitration proceedings shall be in accordance with the provisions of the arbitration and conciliation Act, 1996, or any subsequent enactment or amendment thereof. Such arbitration proceedings shall be held in Chennai, India and shall be conducted in English Language Any injunctive action or claim arising out of the transactions arising here from shall be subject to the jurisdiction of the Courts of Chennai.'

(Underlining made by this Court to supply emphasis and highlight)

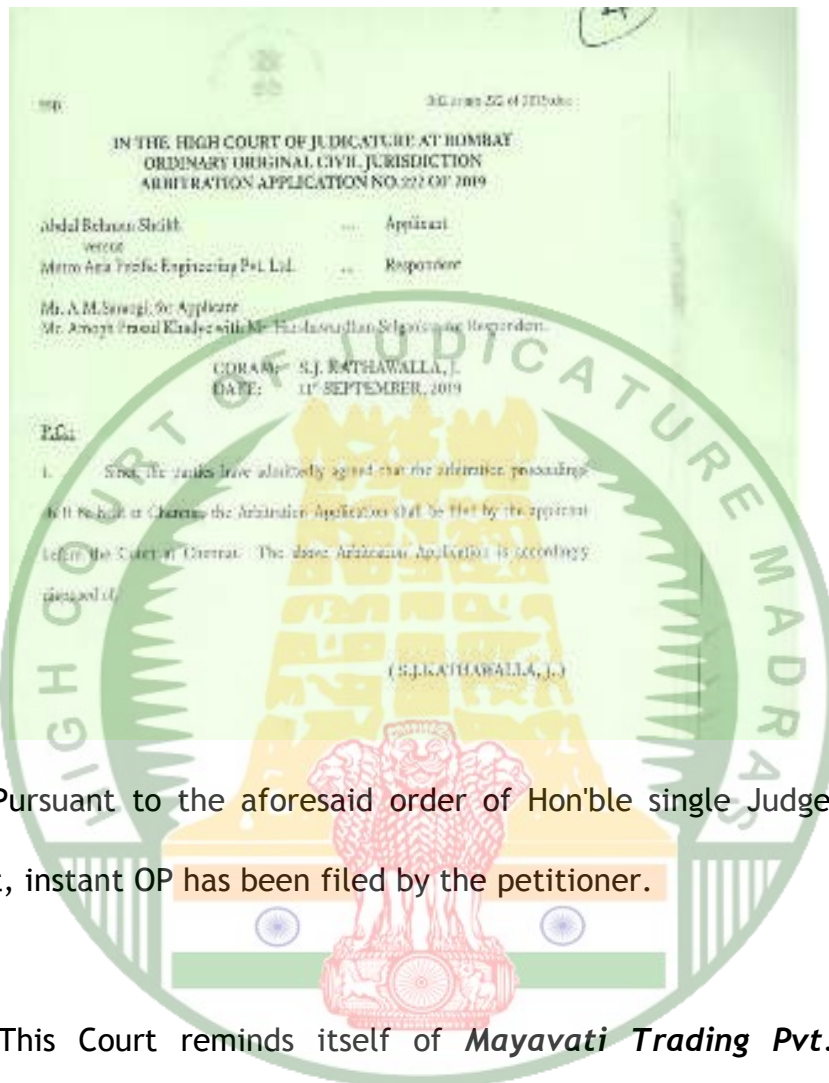
4. If said contract is nucleus of instant OP, arbitral disputes which erupted between the parties is the epicentre of instant OP. Respondent has invoked the arbitration clause, vide a notice through advocate dated 07.02.2019. To this, petitioner replied vide reply notice through advocate dated 16.02.2019. It may not be necessary to advert to the aforesaid exchange of communications between the parties and dilate on facts in this regard, as a perusal of 07.02.2019 trigger communication from the respondent brings to

light that the existence of an arbitration agreement between the parties has not been subject to any disputation or contestation. On the contrary, Arbitration Agreement, which is in the form of a clause in the said agreement viz., clause 13 has been invoked.

5. What is of relevance is after exchange of the aforesaid communications, respondent has approached the Hon'ble High Court of Bombay by filing a petition under Section 11 of A and C Act being Arbitration Application No.171 of 2019, which came to be disposed of by a Hon'ble Single Judge of the Bombay High Court by an order dated 11.09.2019, which reads as follows:



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6. Pursuant to the aforesaid order of Hon'ble single Judge of Bombay High Court, instant OP has been filed by the petitioner.

7. 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)

8. 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 Sectin 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. '*

9. As already alluded supra, a perusal of communication dated 07.02.2019 from the respondent through advocate, wherein the arbitration

clause has been invoked, viewed in the light of respondent having filed a petition under Section 11 of A and C Act in Bombay High Court which came to be disposed of on territorial jurisdiction issue (as alluded to supra) makes it clear that the respondent has not put in issue or raised any dispute or contestation regarding the existence of the arbitration agreement between the parties. To be noted, this Court is informed that respondent has been duly served but has not chosen to come before this Court and oppose instant OP.

10. Therefore, Hon'ble Mr. Justice J.A.K. Sampath Kumar (Retd.), former Judge of this Court, residing at No.5, Maigai Vinayagar Street, Kripa Garden, Amaravathi Avenue, Madipakkam, Chennai -91, is appointed as sole Arbitrator. Hon'ble Arbitrator is requested to enter upon reference and conduct arbitration in 'Madras High Court Arbitration Centre' ('MHCAC' for brevity) 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.

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

18.12.2019

Speaking/Non-Speaking order

Index : Yes/No

Internet: Yes/No

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Note: Registry is directed to communicate this order to Hon'ble Mr.Justice J.A.K.Sampath Kumar (Retd.), former Judge of this Court, residing at No.5, Maigai Vinayagar Street, Kripa Garden, Amaravathi Avenue, Madipakkam, Chennai -91, forthwith.

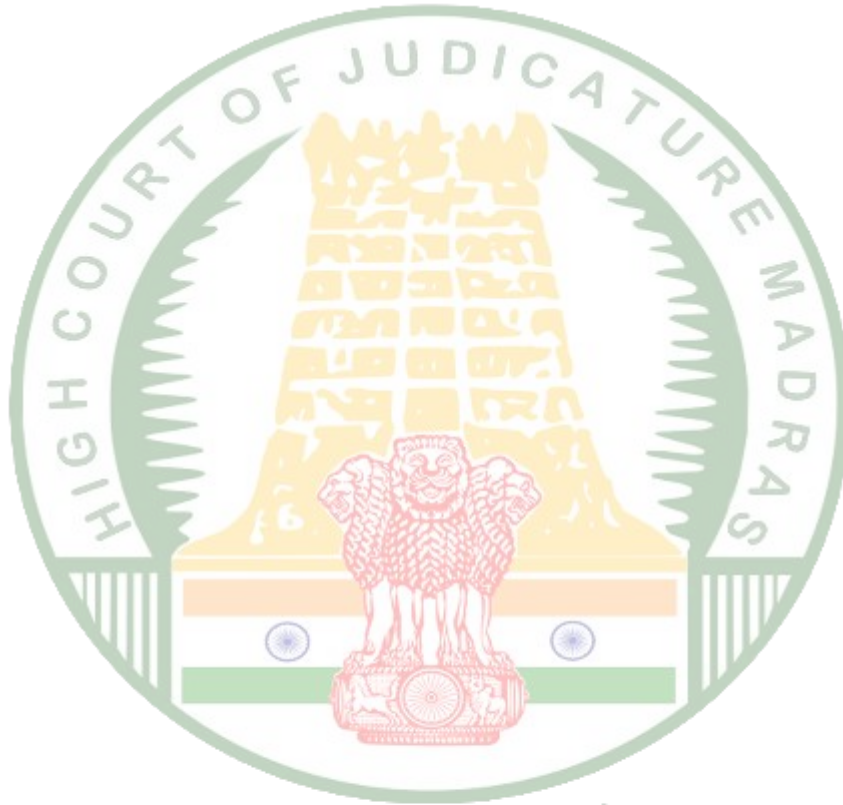


M.SUNDAR, J.

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