

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.02.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.50 of 2020

M/s. Shiv Mahadev Logistics Pvt. Ltd.
Represented by its Director H.Sahadevram Choudhary,
Having Office at No.4/3,
MCD Complex, M.R.H. Road,
Madhavaram, Chennai - 600 060. ... Petitioner

VS.

The Senior Divisional Commercial Manager,
Park Town - Southern Railway,
Chennai - 600 003. ... Respondent

Original Petition filed under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator to adjudicate on the disputes between the petitioner and the respondent arising out of the Tender Document dated 19.12.2018 containing the licence agreement, accepted by the respondent under the Letter of Acceptance dated 07.01.2019 and the consequent licence agreement dated 09.12.2019 pertaining to manning of vehicle parking stand at Tambaram East.

For Petitioner : Mr.J.Srinivasa Mohan
for Mr.Manoj Sreevalsan

For Respondent : Mr.P.T.Ramkumar,
Standing Counsel for Railway.

ORDER

Mr.J.Srinivasa Mohan, learned counsel representing counsel on record for petitioner and Mr. P.T.Ramkumar, learned Standing counsel for Southern Railway for sole respondent are before this Court.

2. Instant 'Original Petition' ('OP' for the sake of brevity) is filed under Section 11(5) & (6) of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', (hereinafter 'A and C Act' for the sake of brevity) with a prayer for appointment of an arbitrator.

3. Instant OP is predicated on the arbitration clause in a license agreement dated 09.12.2019 which shall hereinafter be referred to as 'said agreement' for the sake of convenience and clarity. To be noted, said agreement was processed by tendering documents dated 19.12.2018 which contains the said agreement and the same was accepted vide letter of acceptance dated 07.01.2019.

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4. Suffice to say that clause 23 of said agreement serves as the arbitration agreement between the parties. Clause 23 of the said agreement reads as follows:

'23.(1) : Demand for Arbitration:

23.(1)(i): *In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these conditions, the contractor after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration'.*

5. Respondent has invoked the arbitration clause by sending a communication through counsel being communication dated 08.10.2019.

6. The respondent Southern Railway responded vide communication dated 18.10.2019, which reads as follows:

*SOUTHERN RAILWAY
DIVISIONAL RAILWAY MANAGER'S OFFICE
COMMERCIAL BRANCH
PARK TOWN, CHENNAI – 600 003.*

M/C.300/Parking/TBM_(East).

Date: 18.10.2019

*Mr.J.Srinivasa Mohan,
Advocate,
TVJ Associates,
No.212, Law Chambers,*

High Court Buildings,
Chennai – 600 104.

Sir,

Sub: *Tambaram East Two wheeler parking stand manned by M/s. Shiv Mahadev Logistics Pvt Ltd – Reply to your notice – Reg.*

Ref: *Your notice dated 08.10.2019.*

With regard to your notice, it is stated that demand for arbitration should be made by the contractor only. It is also stated that the Railway Administration had vide its reply letters clarified the correct facts to the contractor, M/s.ShivMahadev Logistics Pvt. Ltd. The contractor has not raised any dispute so far and has also till date not submitted any request for arbitration in relation to any dispute. Only in the present notice has the demand for arbitration been made and as stated supra, the request for appointment of arbitrator should be made in writing by the contractor only as per Clause 23 (1) of the License Agreement.

Yours faithfully

-sd/-

Senior DCM, Chennai.

Copy to: PCCM for kind information please.

*M/s. Shiv Mahadev Logistics Pvt. Ltd. represented by its
Director Shri. R.Sahadevan Choudhary, No.4/3, MCD Complex,
M.R.H. Road, Madhavaram, Chennai – 600 060.*

7. Adverting to the aforesaid communication dated 18.10.2019,

learned counsel for respondent submitted that in the arbitration clause extracted and reproduced supra, clause 23 makes it clear that the claim has to be made by the contractor, whereas in instant case, legal notice has been issued.

8. The arbitration agreement no doubt is a creature of contract. Be that as it may, even if a strict interpretation of the covenant is given, the covenant speaks about the arbitration agreement being invoked by contractor.

9. In the considered view of this Court, the contractor should have either invoked the clause by sending communication through his lawyer or by himself. In other words, the clause can be invoked by the contractor either by writing a letter by himself/itself or through his/its lawyer. In instant case, the latter has happened. This by itself does not become an impediment qua instant OP which is under section 11. The reason is scope of section 11 or in other words, the contours and confines of a petition under section 11 of A and C Act is limited and the contours and confines have been laid down by Hon'ble Supreme Court in Duro Felguera principle and Mayavati Trading Principle. Duro Felguera principle has been laid down by Hon'ble Supreme Court vide ***Duro Felguera S.A. vs. Gangavaram Port Limited*** reported in **(2017) 9 SCC 729**. Relevant paragraphs in ***Duro Felguera*** case law are Paragraphs 47 and 59, which 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.’

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

10. Mayavati Trading principle has been laid down by Hon'ble Supreme Court vide *Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714). Relevant paragraph in *Mayavati Trading* case law is Paragraph 10 and the same 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)

11. As there is no dispute about the existence of arbitration

agreement between the parties which alone is the touchstone for a petition under section 11, this Court appoints Ms.M.Rajalakshmi, Retd. District Judge, No.3B, Ramaniyam Jeganath, Sivasamy Avenue, M.G.R.Road, Palavakkam, Chennai - 600 041, Mobile:8754920985 as sole arbitrator. Learned Arbitrator is requested to enter upon reference and adjudicate upon arbitral disputes that have arisen between the parties qua said agreement and pass an award 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.

12. Instant OP disposed of on above terms. No costs.

18.02.2020

Speaking Order/Non-Speaking Order

Index : Yes/No

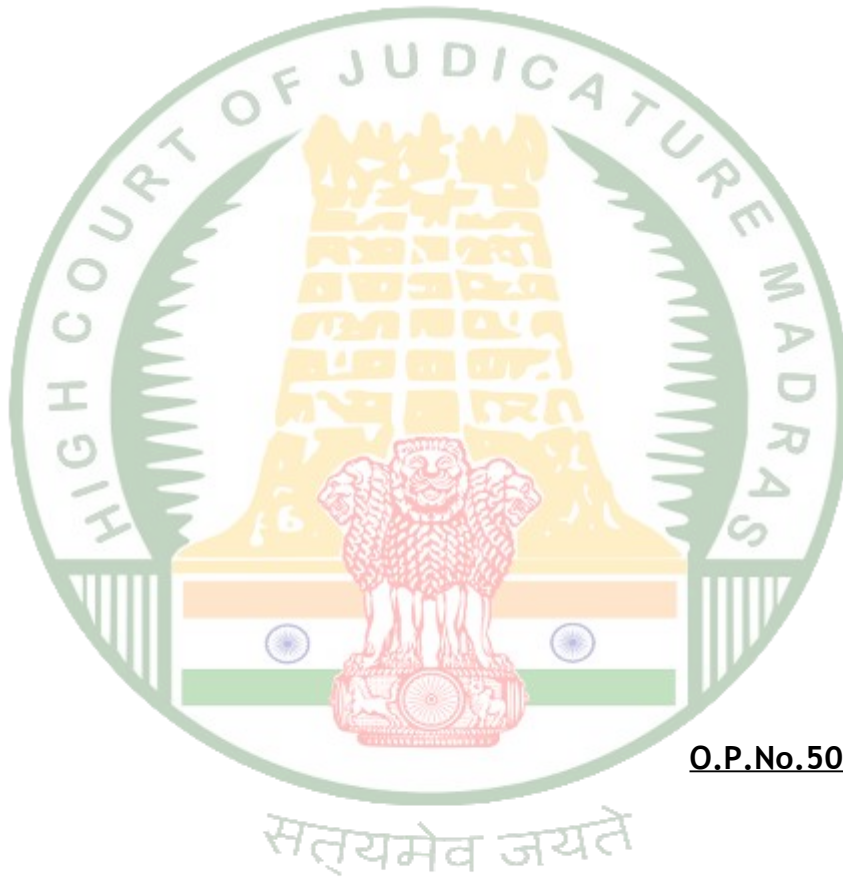
Internet: Yes/No

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Note: Registry is directed to communicate this order to Ms.M.Rajalakshmi, Retd. District Judge, No.3B, Ramaniyam Jeganath, Sivasamy Avenue, M.G.R.Road, Palavakkam, Chennai - 600 041, Mobile:8754920985.

M.SUNDAR.J.,

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