

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.02.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.19 of 2020

M/s.Garuda Aviation Services Private Limited

Represented by its Director

Mr.Vijay Kashinath Shinde

Having Office at

Garuda House

No.42, Upper Govind Nagar

Mumbai - 400 007

... Petitioner

VS.

Airports Authority of India

Represented by the Airport Director

Having Office at

Chennai Airport

Chennai - 600 016

... Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint a sole Arbitrator to adjudicate upon the disputes that have arisen between the petitioner and respondent under the Licence Agreement dated 01.04.2012.

For Petitioner : Mr.Adarsh Subramanian
for Mr.Anirudh Krishnan

For Respondent : Mr.Father Xavier Arulraj
for Ms.A.Arul Mary

ORDER

Heard Mr.Adarsh Subramanian, learned counsel on record for petitioner and Father Xavier Arulraj, learned senior counsel instructed by Ms.A.Arul Mary, learned counsel on record for sole respondent are before this Court.

2. Before proceeding further in this matter, this Court reminds itself about the scope of instant OP or in other words, the contours and confines of a petition under Section 11 of A and C Act. The contours and confines of a petition under Section 11 of A and C Act has been clearly laid down by Hon'ble Supreme Court in *Duro Felguera* and *Mayavati trading* principles. *Duro Felguera* principle was laid down in *Duro Felguera S.A. vs. Gangavaram Port Limited* reported in (2017) 9 SCC 729 and *Mayavati Trading* principle was laid down in *Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714).

3. Relevant paragraphs in *Duro Felguera* 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. '

4. Relevant paragraph in *Mayavati Trading* 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)

5. In the light of *Duro Felguera* and *Mayavati Trading* principles, this Court would look at instant OP, which is under Section 11, with a hood and all that this Court would look at is, the existence of an arbitration agreement between the parties and on *prima facie* satisfaction about the

existence of an arbitration agreement between the parties, this Court would proceed to appointment an Arbitrator. In the instant OP, the arbitration agreement between the parties, being an arbitration agreement within the meaning of Section 7 of A and C Act, is in the form of a covenant in said agreement and that covenant is Clause No.29, which reads as follows:

' 29. All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the Public Premises [Eviction Unauthorised Occupants] Act and the rules framed thereunder which are now enforced or which may hereafter come into force are applicable), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) set up at the airports, for which a written application should be obtained from the party and the points clearly spelled out. In case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole arbitration of a person to be appointed by the Chairman/Member of the Authority. The award of the arbitrator so appointed shall be final and binding on the parties. The Arbitration and Conciliation Act, 1996 shall be applicable. Once the arbitration clause is invoked, the DRC will cease to be operative.

It will be no bar that the Arbitrator appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account.'

6. In the light of the aforementioned Covenant No.29 in said agreement, which serves as arbitration agreement between the parties,

learned senior counsel for respondent submitted that the 'Dispute Resolution Committee' ('DRC' for brevity) has been appointed vide an Office Memorandum dated September 27, 2017 bearing reference No.AAM/Comm/DRC/Car Parking/2017/3402-04. The petitioner replied vide communication dated 29.09.2017 wherein the petitioner *inter alia* took the stand that they have no faith in DRC proceedings.

7. There is no doubt or dispute that 45 days from the date of reference to DRC has since elapsed. Therefore, the first part of the arbitration agreement has been commenced by the respondent and 45 days have elapsed without any resolution. This takes us to the second part of the arbitration agreement, which talks about appointment of an arbitrator. It is in this context that instant OP has been filed.

8. With regard to aforementioned second part of arbitration agreement, learned counsel for petitioner drew the attention of this Court to an affidavit filed by the respondent in instant OP in collateral proceedings (Cont.P.No.382 of 2018 in A.No.3581 of 2017 & A.No. of 2017 in November of 2017). Attention of this Court was drawn to a portion of Paragraph 8 of said affidavit, which reads as follows:

'The petitioner has made proposal to the corporate Head Quarter of AAI at New Delhi to appoint Arbitrator vide letter number AAM/Comm/DRC/Car Parking/2017/3541-45 dated 17.10.2017.'

9. In the light of above averment in the affidavit of the respondent, the existence of an arbitration agreement between the petitioner and respondent is beyond the pale of contestation/disputation.

10 . This Court is also informed that some orders were passed by another Hon'ble Judge in proceedings under Section 9 of A and C Act. The same has been carried in appeal by way of an intra-court appeal and learned senior counsel for respondent points out that a contempt petition is also pending. However, considering the narrow scope of instant OP, as this Court is *prima facie* satisfied about the existence of an arbitration agreement, this Court refrains itself from delving into those aspects of the matter any further.

11. With regard to collateral proceedings, though obvious, all questions are left open and those proceedings will be carried to their logical end at the discretion of the Hon'ble Bench concerned before which it is said to be pending. What is of utmost significance in instant OP is that the existence of an arbitration agreement is not subjected to any disputation or contestation. Therefore, applying ***Duro Felguera*** and ***Mayavati trading*** principles laid down by Hon'ble Supreme Court, this Court proceeds to appoint Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.), at No.47, Pulla Avenue, Shenoy Nagar, Chennai - 30 (Tel:26208788) as sole Arbitrator.

Hon'ble Sole Arbitrator is requested to enter upon reference qua arbitral disputes that have arisen between the petitioner and respondent with regard to licence agreement dated 01.04.2012 and pass an award in accordance with A and C Act.

Instant OP disposed of on above terms. No costs.

07.02.2020

Speaking order: Yes/No

Index: Yes/No

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Note: Registry is directed to communicate this order to Mr.Justice K.P.Sivasubramaniam (Retd.), at No.47, Pulla Avenue, Shenoy Nagar, Chennai - 30 (Tel:26208788) forthwith.



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