

O.A.Nos.16 to 19 of 2020

M.SUNDAR.J.,

This common order will dispose of these four applications.

2. Mr.R.Thiagarajan, learned counsel for applicant, Mr.Sharath Chander, learned counsel for first / third respondents and Mr.J.Dinesh, learned counsel for second respondent are before this Court.

3.To be noted, there is one applicant and three respondents in all these four applications. Therefore, all the parties to these four applications are represented by counsel and they are before this Court.

4.Though instant applications are under Section 9 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A and C' for brevity) being pre-arbitral Section 9 applications, all three learned counsel, on instructions, submit that an arbitrator may please be appointed as mediation did not fructify into settlement.

5. In this regard, this order has to be read in conjunction with and in continuation of earlier proceedings/order dated 04.02.2020, which reads as follows:

'Mr.R.Thiagarajan, learned counsel for applicant, Mr.Sarath Chander, learned counsel for first respondent and Mr.J.Dinesh,

learned counsel for second respondent are before this Court. In other words, all the parties in these applications are represented by counsel and all the counsel are before this Court.

2. All the aforesaid learned counsel, on instructions from their respective parties, make a common request in unison that this matter may please be referred to 'Tamil Nadu Mediation and Conciliation Centre under the aegis of this Court' ('TNMCC' for brevity) for exploring the possibility of a settlement so as to give a quietus to the entire lis between the parties.

3. In the light of the aforesaid common request made in unison on instructions, Registry to list this matter before TNMCC on 06.02.2020 (Thursday) at 03.00pm. All the learned counsel submit that the parties will be before TNMCC on said date and time without insisting on a separate hearing notice.

4. TNMCC is requested to send a report to this Court within a fortnight therefrom i.e., by 20.02.2020.

List on 24.02.2020.'

6. All the three learned counsel submit that there were sittings/sessions before TNMCC, but the same could not be crystallised and concluded into a settlement.

7. In the aforesaid backdrop, as mentioned supra, though instant applications are under Section 9 of A and C Act, all the three learned counsel submit/request that there is no dispute or contestation about the existence of an arbitration agreement between the parties and therefore, a sole arbitrator may please be appointed for adjudicating upon

the arbitral disputes that have arisen between the parties to instant applications. In this regard, the arbitration agreement being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act between the applicant and the three respondents is in the form of a covenant in an agreement dated 04.03.2013. This 04.03.2013 agreement is captioned 'DEVELOPMENT AGREEMENT' (hereinafter 'said agreement' for brevity). Three respondents on one side as parties of one part and applicant as party of the other part constitute parties to said agreement. Therefore, all the four entities / persons before this Court, namely sole applicant and three respondents are parties to arbitration agreement i.e., 'party' within the meaning of Section 2(1)(h) of A and C Act.

8. Reverting to arbitration agreement, as already mentioned supra, arbitration agreement is in the form of a covenant in said agreement and the covenant reads as follows:

'ARBITRATION:

All disputes and differences whatsoever which shall at any time hereafter (whether during the continuance in effect of this Agreement or upon or after its discharge or determination) arise between the parties hereto or any of them touching or concerning this Agreement or its construction or effect or as to the rights duties or liabilities of the parties hereto or any or either of them under or by virtue of this Agreement or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this

Agreement shall be referred to a single Arbitrator to be agreed upon by the parties hereto in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any Statutory modification or re-enactment thereof for the time being in force. The venue of the Arbitration shall be at Chennai only and the language used and employed will be the English language. Upon every and any such reference the Arbitrator shall have power to take the opinion or such counsel as he may think fit upon any question of law that may arise and in his discretion to adopt any opinion so taken and to obtain the assistance of such Accountant, Surveyor, Valuer or other expert as he/they may think fit and to act upon any statement of accounts, survey, valuation or expert assistance thus obtained.'

9. In the light of trajectory these applications have taken, before proceeding with the exercise of dealing with the common stand taken by all the three learned counsel, this Court deems it appropriate to remind itself of **Duro Felguera, S.A.** and **Mayavati Trading** principles laid down by Hon'ble Surpeme Court in **Duro Felguera, S.A. versus Gangavaram Port Limited** reported in (2017) 9 SCC 729 and **Mayavati Trading Pvt. Ltd., Vs. Pradyuat Deb Burman** reported in (2019) 8 SCC 714) respectively. In Duro Felguera case law, relevant paragraphs are Paragraphs 47 / 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.’.

10. In **Mayavati Trading** case law relevant paragraph 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. Though the aforesaid case laws were rendered in dealing with applications under Section 11, the principle is, if a Court is prima facie

satisfied about the existence of an arbitration agreement between the parties, an Arbitral Tribunal could be constituted.

12. In instant case, as already alluded to supra, there is no disputation or contestation between the three learned counsel before this Court about existence of arbitration agreement between the parties, the details of which have already been alluded to supra.

13. In the scenario set out supra, all the three learned counsel agreed for appointment of Hon'ble Mr. Justice G. Rajasuria (Retd.), at No.31, III Cross, Brindavanam, Puducherry, (Mob:94421 50864), as sole arbitrator. Hon'ble Arbitrator is requested to enter upon reference, adjudicate upon the arbitral disputes that have arisen between the applicant and three respondents with regard to Development Agreement dated 04.03.2013 (said agreement) and pass an award in accordance with A and C Act and 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. It is open to the parties to instant applications to present photocopies of instant applications before Hon'ble Arbitrator with a request to treat the same as applications under Section 17 of A and C Act and if this course is

adopted by the parties, it is open to the Hon'ble Arbitrator to deal with the prayers in Section 17 application(s) on its own merits and in accordance with law.

All applications disposed of on above terms.

24.02.2020

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Note: Registry is directed to communicate this order to Hon'ble Mr.Justice G.Rajasuria (Retd.), at No.31, III Cross, Brindavanam, Puducherry, (Mob:94421 50864) forthwith.

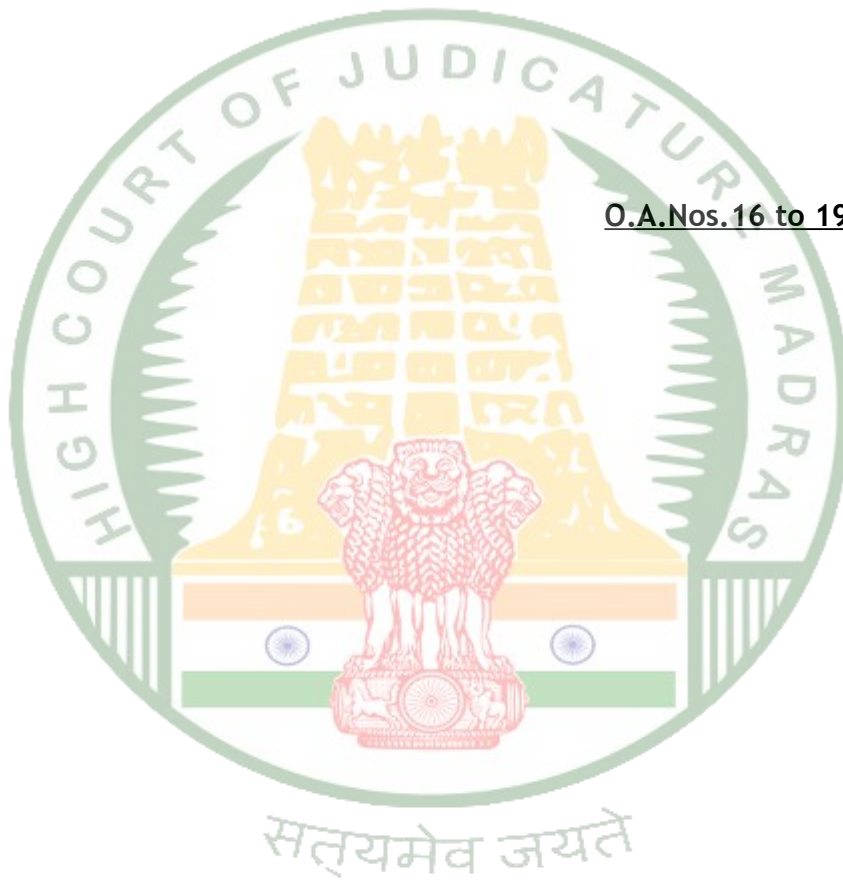


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