

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: **20.02.2020**

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.60 of 2020

1. M.Sivalingam
2. S.Mukundhan
3. Surendar

.. Petitioners

Vs.

1. Mrs.Jagadeeswari
W/o.Late D.Mahendran
2. Mr.M.Ashok Kumar
S/o.Late D.Mahendran
3. Mr.Sarath Kumar
S/o.Late. D.Mahendran

.. Respondents

This Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to appoint a Nominee Arbitrator on behalf of the respondents pursuant to the MOU dated 06.10.2018.

For Petitioners : Mr.S.Parthasarathy,
Senior Counsel
for Mr.S.Selvanandam

For Respondents : Mr.V.Anand

ORDER

Mr.S.Parthasarathy, learned Senior Advocate instructed by Mr.S.Selvanandam, learned counsel on record for the three petitioners and Mr.V.Anand, learned counsel on record for the three respondents are before this Court.

2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) is under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for brevity, clarity and convenience and instant OP has been filed with a prayer for appointment of an arbitrator.

3. Before I proceed with the matter, it is necessary to capture the trajectory hearing in instant OP has taken. Mr.V.Anand, learned counsel for all the respondents submits that he has entered appearance by filing two separate vakalatnamas, one for respondents 2 and 3 and the another for respondent no.1, besides filing a typed set of papers dated 18.02.2020 containing 30 documents and running to 157 pages. Learned counsel for respondents submitted that the main OP itself can be taken up, heard out and disposed of though respondents have filed only typed set of papers and not a counter. All the respondents have filed a single typed set of papers. Therefore, main OP itself is taken up with

consent of learned counsel on both sides.

4. As already alluded to supra, instant OP is under Section 11 of A and C Act and therefore, this Court reminds itself about the contours and confines of a OP under Section 11 of A and C Act. The scope of a OP under Section 11 of A and C Act or in other words, the contours and confines of a petition Section 11 have been elucidatively laid down by Hon'ble Supreme Court vide two principles viz., **Duro Felguera, S.A.** principle [**Duro Felguera, S.A. versus Gangavaram Port Limited** reported in **(2017) 9 SCC 729**] and **Mayavati Trading** principle [**Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman** reported in **(2019) 8 SCC 714**]. Relevant Paragraphs in **Duro Felguera, S.A.** 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. '

5. **Duro Felguera, S.A** principle was reiterated by Hon'ble Supreme Court in **Mayavati Trading** case. Relevant paragraph in **Mayavati Trading** case 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)

6. **Duro Felguera, S.A** principle and **Mayavati Trading** principle are to the effect that in a petition under Section 11 of A and C Act, this Court will have to look at the matter with a hood and restrict itself to *prima facie* satisfaction about existence of an arbitration agreement between the parties. In the instant

case, there is no dispute or contestation about existence of an arbitration agreement between the parties.

7. To be noted, **Mayavati Trading** case law was rendered by Hon'ble Supreme Court on 05.09.2019, which is after notification of The Arbitration and Conciliation (Amendment) Act, 2019 (Act No.33 of 2019) (hereinafter 'Amending Act 33 of 2019' for brevity) on 30.08.2019. To be noted, vide Section 3 of Amending Act 33 of 2019 Sub Section (6A) of Section 11 of A and C Act stands deleted. That provision i.e., Section 3 in the Amending Act No.33 is yet to be notified.

8. The scope of Section 11 of A and C Act has also been considered by Hon'ble Supreme Court in **Garware** case, being **Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited** reported in **(2019) 9 SCC 209**. Relevant paragraph in **Garware** case is Paragraph 22 and the same reads as follows:

'22. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a

plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMA Tea Estates has, in no manner, been touched by the amendment of Section 11(6-A).'

9. However, it is to be noticed that **Garware** case is being mentioned only to complete the scope of Section 11 of A and C Act and there is no doubt or dispute that no issue touching upon **Garware** principle i.e, insufficiency of the stamped agreement arises in the case on hand.

10. Referring to the case on hand, in the light of the narrow and limited scope of instant OP, suffice to say that the petitioners and respondents are in transport service business. Subsequently, there were cash transactions between the parties, which were used to purchase *inter alia* transport equipments such as Trailers, there are a series of Memoranda of Agreement between the Parties with regard to the transactions. In the light of the limited scope of instant OP, which has been alluded supra, it is not necessary to dilate further on facts. To be noted, instant OP, is predicted on a 'Memorandum of Understanding' dated 06.10.2018 [hereinafter referred to as 'said MOU' for brevity, clarity and convenience].

11. Clause 9 of the said MOU is an Arbitration clause and the same reads as follows:

'The parties of the Second Part hereby declares that in the event of any dispute with regard to the terms and conditions of this Memorandum of Understanding for the purpose of partnership such dispute or disputes shall be referred to a common arbitrator mutually acceptable to both parties and if not satisfied the court jurisdiction should be within the madras Limit and for this Jurisdiction Point the Parties of the First Parties agrees hereto and signed this Memorandum of Understandings.'

12. In other words, Clause 9 of the said MOU serves as Arbitration Agreement between the petitioners and respondents i.e., Arbitration Agreement within the meaning of Section 2 (i) (b) read with Section 7 of A and C Act. The specific issue now narrows down to existence of aforementioned Arbitration Agreement between the petitioners and respondents and as to whether this Court comes to *prima facie* satisfaction about the existence of the aforementioned Arbitration Agreement.

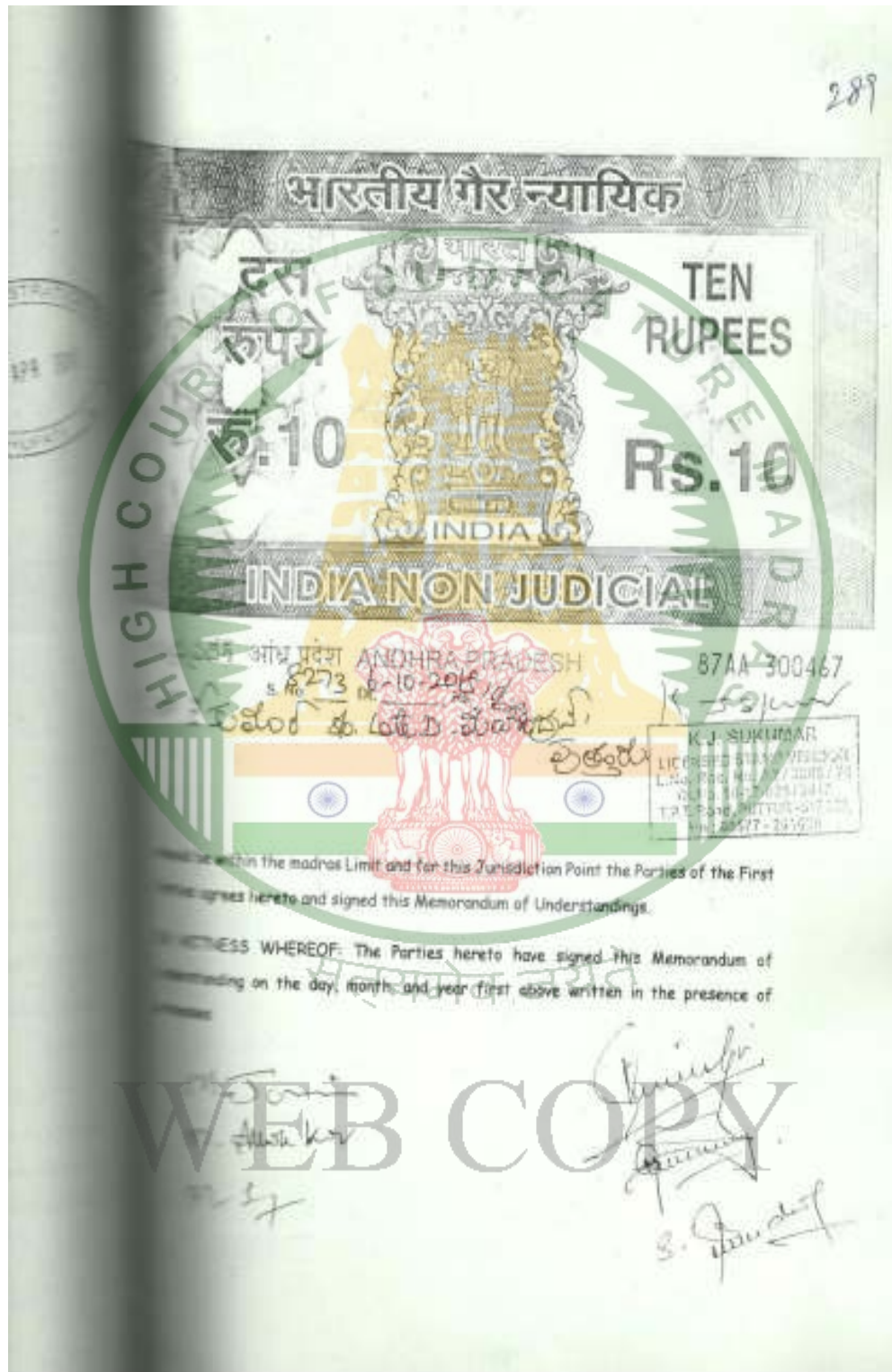
13. Adverting to said MOU, learned counsel for respondents submitted that it is forged, fabricated and it is a case of fraud. Learned counsel for respondents pressed into service two judgments of Hon'ble Supreme Court, they being (i) **S.P.Chengalvaraya Naidu Vs. Jagannath and others** reported in **(1994) 1 SCC 1** and (ii) **Ram Chandra Singh Vs. Savitri Devi and others** reported in **2004-2-L.W-70**. Both these judgments are for the principle that when a decree has been obtained by practicing fraud *res judicata* cannot be applied. Furthermore, these two judgments are for the broad proposition that fraud is anathema to equitable principles. While these propositions laid down by Hon'ble Supreme Court in **Chengalvaraya Naidu** and **Ram Chandra Singh** cases are indisputable, in the considered view of this Court, it does not help the case of respondents in the instant case.

14. Further, on the submission regarding fraud/fabrication qua said MOU, learned counsel for respondents pointed out that one sheet of stamp paper in the said MOU which has been executed is dated 06.12.2018, whereas the said MOU itself is dated 06.10.2018. The other submission obviously is that signatures are not signatures of the respondents.

15. This Court has carefully examined both these submissions. The said MOU runs to 12 sheets of non-judicial stamp paper of values of Rs.10/- or

Rs.20/-. A perusal of these 12 non-judicial stamp paper sheets as placed before this Court as part of the case file reveals that 11 out of 12 non-judicial stamp papers are dated 06.10.2018 and only one, which is the 10th sheet in the 12 sheets MOU is dated 06.12.2018. More importantly, the 10th, 11th and 12th sheets run with successive stamp paper Nos.87AA 300466, 87AA 300467 and 87AA 300468. For the sake of clarity these three sheets are extracted and reproduced hereunder:





16. Therefore, it is clear as daylight that it is an error committed by the stamp vendor, as the remaining papers are dated 06.10.2018. Therefore, out of 12, only one sheet with a different date, is obviously an error. This is corroborated by the fact that the stamp papers after this sheet have successive running numbers.

17. The other aspect pertains to signatures of the respondents.

18. I summoned the aforementioned two vakalatnamas filed on behalf of three respondents and compared the same with the said MOU, which has been placed before me. Last three pages of said MOU have already been scanned and reproduced supra. The first page is as follows:

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19. The signatures in the Vakalatnamas are as follows:-

14/10/2020

In the High Court of Judicature at Madras
ORDINARY ORIGINAL CIVIL JURISDICTION

C.S.No. _____ of 20 ____
O.P.No. 60 of 2020

BETWEEN
M. SIVAPINGAM & Others
AND
J. K. DEVARAJAN & Others

Plaintiff
Petitioner
Defendant
Respondent

U/W Section 133 of the Code of Civil Procedure, 1908

the plaintiff/defendant above named do hereby request and
select M. Ramani, B. Ramani, B. Ramani, B. Ramani, B. Ramani
as their Counsel to appear for me in the above case and on my behalf to
defend and prosecute in and to the said case and to prosecute therein before and
after appeal. He/they are also authorized to appear after Counsel to act on
his/her behalf and also to accept and place at the same court and accept
ation in review judgment.

Dated at Madras this 17th day of Feb 2020

Plaintiff
Defendant

ACCEPTED | The address for service of all notices and processes is that
of the Counsel at No.

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Plaintiff
Defendant

Madras
Hansraj & Co.

No: 201- Neo Hill Law Chambers
High Court - Chennai - 104

199
1.10.19
19/12/2020

SECTION
19 FEB 2021

SECTION
19 FEB 2021

In the High Court of Judicature at Madras
ORDINARY ORIGINAL CIVIL JURISDICTION

C.S. No. _____ of 20
O.P. No. 60 of 2010

BETWEEN
M. SIVAKINGAM
AND
JAGADEESWARAR

Plaintiff
Respondent

Defendant
Respondent

1/19/ M. VISHWANATH MOHAR, MR. S. S. MOHAR, (Counsel for P.I.S.)

the plaintiff/Defendant/Respondent do hereby appoint and retain M. VISHWANATH MOHAR, MR. S. S. MOHAR, as my/our Counsel to appear for me/us in the above case and on my/our behalf to conduct and prosecute/defend the same and all proceedings therein before and after decree. He/they are also authorized to appoint other Counsel to act on my/their behalf and also to appear in the above case for the purpose of application for review/Judgement.

Dated at Madras this 17th day of Feb. 2020

M. V. Mohar
Plaintiff
Defendant

सत्यमेव जयते

ACCEPTED The address for services of all notices and process is that of the Counsel at No. 201, New Adil, Law Chambers, Chennai - 104

17/2/20

MADRAS
Narasimha & Co.

No. 201, New Adil, Law Chambers
Chennai - 104

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20. The signatures of three respondents in vakalatnamas and the said MOU on a comparison does not raise any suspicion to the naked eye. There is no ground to believe that there is any variation in the signatures in said MOU and Vakalat namas dated 17.02.2020. Most importantly, that there were commercial transactions between petitioners and respondents is not subjected to any dispute or contestation, that there were documents evidencing these commercial transactions between the petitioner and the respondents is also not subjected to any dispute or contestation as mentioned supra. Learned counsel for respondents, pressing into service **S.P.Chengalvaraya Naidu** and **Ram Chandra Singh** cases does not help the respondents for reasons already alluded to supra.

21. Though not cited by the learned counsel, I took it upon myself to bring to the notice of learned counsel an order dated 01.09.2017 in Arbitration Petition No.2 of 2017 made by Hon'ble Supreme Court in **Kores (India) Ltd Vs. Arnav International Pvt. Ltd.** This is a case where element of fraud and forgery were brought up in an application under A and C Act seeking appointment of an Arbitrator.

22. Be that as it may, a careful reading of **Kores India** case makes it clear that there are two distinct facts, which are significant in **Kores India**.

They are, the signature in the passport was not the same as one in the pages of agreement and other is that an electronic mail sent by one of the parties to the other asking for the agreement left the Court with the clear conclusion that no agreement existed.

23. Both the aforesaid significant facts are absent in the instant case, as there is no variation in the contemporary signatures as already alluded supra. With regard to the second aspect i.e., one of the parties asking for a copy of the agreement, respondents cannot dispute said MOU as respondents in collateral proceedings under Section 9 of A and C Act, had taken a stand that another MOU dated 16.10.2018 between the first petitioner and three respondents supersedes said MOU. Therefore, the burden of the song of the respondents qua fraud does not carry them any further in the instant case.

24. In the light of the narrative thus far, this Court proceeds to appoint Hon'ble Mr.Justice F.M.Ibrahim Kalifulla (Retd.,) (former Hon'ble Judge of Supreme Court) at Plot No.158-B, Door No.22, Sivananda Salai, Gill Nagar, Extension Choolaimedu, Chennai-94 (Tel: 23610504), as Sole Arbitrator to constitute the Arbitral Tribunal. Hon'ble Sole Arbitrator is requested to enter upon reference and adjudicate the arbitral disputes between parties herein with regard to said MOU i.e., Memorandum of Agreement dated 06.10.2018 and pass

an order in accordance with A and C Act, Madras High Court Arbitration Proceedings Rules 2017 and Madras High Court Arbitration Centre MHCAC Administrative Act and Arbitrators Fees Rules 2017. It is made clear that questions if any regarding jurisdiction of the Arbitral Tribunal are left open and the Arbitral Tribunal would decide the same on its own merits under Section 16 of A and C Act.

Instant OP ordered on above terms. No costs.

20.02.2020

Speaking order: Yes/No

Index: Yes / No

kmi

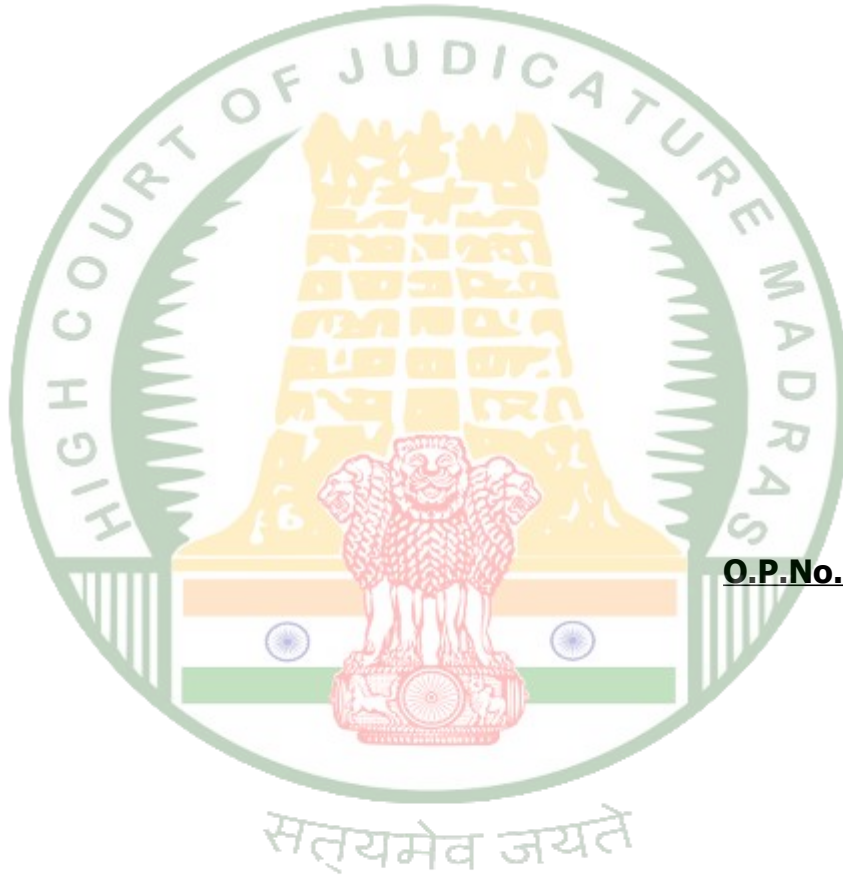
P.S.: Registry is directed to communicate this order by Special Messenger to Hon'ble Mr.Justice F.M.Ibrahim Kalifulla (Retd.),, at Plot No.158-B, Door No.22, Sivananda Salai, Gill Nagar, Extension Choolaimedu, Chennai-94 (Tel: 23610504) forthwith.

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O.P.No.60 of 2020

M.SUNDAR, J.

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O.P.No.60 of 2020

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20.02.2020