

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.02.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.805 of 2019

Batliboi Renewable Energy Solutions Pvt. Ltd.,
(Formerly known as Batliboi EnXco Pvt. Ltd.,)
Represented by Mr.Rajiv, Senior Manager (Accounts)
No.28 (N.P) Thiru-Vi-Ka Industrial Estate
Ekkaduthangal
Guindy
Chennai - 600 032

... Petitioner

vs.

M/s.Sri Vinayaga Enterprises
Represented by its Proprietor
Mr.R.Ganesan
98/315-A, P.K.S.A, Arumugam Road
Sivakasi - 626 189

... Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint any suitable person as the Sole Arbitrator for reference of the above dispute arisen between the petitioner and the respondent out of the service contract dated 15.01.2010 entered between the petitioner and respondent.

For Petitioner : Mr.M.Ganesan

For Respondent : Mr.R.Vasudevan

ORDER

Mr.M.Ganesan, learned counsel on record for petitioner and Mr.R.Vasudevan, learned counsel for respondent are before this Court.

2. Instant 'Original Petition' ('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 the sake of brevity. Instant OP being one under Section 11 of A and C Act, is obviously with a prayer for appointment of an arbitrator.

3. Instant OP is predicated on an arbitration agreement between the parties, which is in the form of a covenant/clause in an agreement dated 15.01.2010 captioned 'OPERATIONS, SERVICE, MAINTENANCE and REPAIR AGREEMENT' (hereinafter 'said agreement' for the sake of convenience and clarity). Clause 12.1 of said agreement reads as follows:

'12.1. Disputes and Arbitration: In case any disputes or differences arise between the parties on any issue or matter arising out of or connected with, in any way with this agreement, then it is hereby agreed the parties shall amicably and expeditiously resolve between themselves such disputes or differences failing which it is further agreed that the parties shall refer such disputes to arbitration and submit the same to three (3) arbitrators for resolution and the award of the

arbitrators shall be final and binding on the parties. The arbitration shall be in accordance with the Indian Arbitration and Conciliation Act, 1940 (or any statutory modification of re-enactment thereof) and the venue of arbitration shall be Chennai, Tamil Nadu.'

4. There is no dispute or contestation that aforesaid clause 12.1 of said agreement is the arbitration agreement between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

5. Instant OP has been filed, contending that the petitioner issued a notice dated 18.01.2019 invoking the arbitration agreement and the respondent has not responded though this notice invoking arbitration clause has been received on 28.01.2019.

6. Suffice to say that said agreement pertains to Operations, Service, Maintenance and Repair of Wind Turbine Generators (WTS) besides other incidental and ancillary works. Considering the limited scope of an OP under Section 11 of A and C Act, it is not necessary to dilate more on facts.

7. Notwithstanding very many averments and contentions made in the counter, learned counsel for respondent, at the hearing, raises two points opposing instant OP and those points are as follows:

- a) Said agreement is for a period of one year, the same has elapsed and therefore, arbitration agreement, which is

clause 12.1 in said agreement, has also elapsed;

b) The arbitrable claim made by the petitioner is clearly time barred as it is more than eight years old.

8. This Court very carefully considered these two objections to instant OP.

9. Learned counsel for respondent pressed into service an order made by this Court being order dated 08.09.2008, wherein a prayer for appointment of arbitrator was negatived by the then Hon'ble Chief Justice on the ground that the petitioner's claim i.e., arbitrable disputes had become stale.

10. Responding to above objections, learned counsel for petitioner pressed into service a judgment of Hon'ble Supreme Court in ***Uttarakhand Purv Sainikkalyam Nigam Ltd., Vs. Northern Coal Field Ltd.***, being an order made by Hon'ble Supreme Court on 27.11.2019. Relevant paragraph is Paragraph 9.11 and the same reads as follows:

'9.11 In view of the provisions of [Section 16](#), and the legislative policy to restrict judicial intervention at the prerule stage, the issue of limitation would require to be decided by the arbitrator.

Subsection (1) of [Section 16](#) provides that the arbitral tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. [Section 16](#)

is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the prerule stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

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

11. With regard to first objection of the counsel for respondent that the arbitration agreement also elapses on the said agreement elapsing by efflux of time, the law is very well settled that when an arbitration agreement between the parties is in the form of a covenant in a contract or agreement, the same will outlive/survive on termination/elapsing of the contract. No elaboration or elucidation is required as law is well settled in this regard and therefore, first objection is negatived.

12. This takes us to the second objection. The order made by former Hon'ble Chief Justice of this Court in *Arul Sigmani Vs. Paul Durai* dated 08.09.2010, which was pressed into service by the learned counsel for respondent, was rendered prior to 23.10.2015. On and from 23.10.2015, Sub-section (6-A) was introduced in Section 11 of A and C Act. Sub-Section

(6-A) of A and C Act reads as follows:

'6-A The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.'

13. To be noted, though there is an amendment Act, which proposed deletion of sub-section (6-A), that particular provision of the amending Act, which deals with removal/deletion of sub-section (6-A) has not been notified though some other sections of amending Act were notified on 30.08.2019. To be noted, this amendment Act amending A and C Act is Act 33 of 2019, Section 3 of this amendment Act is the provision regarding deletion of sub-section (6-A) of Section 11 of A and C Act, but Section 3 of amendment Act has not been notified though some other provisions of amendment Act were notified on 30.08.2019. In this regard, Sub-section (2) of Section 1 of amendment Act is of significance as provision of amendment Act take effect only on being notified. Post 30.08.2019, on 05.09.2019 Hon'ble Supreme Court rendered a judgment in Mayavati Trading Principle [*Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714]. 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)*

14. To be noted, in *Mayavati Trading* case, *Duro Felguera* principle laid down by Hon'ble Supreme Court in *Duro Felguera S.A. vs. Gangavaram Port Limited* reported in (2017) 9 SCC 729 was reiterated. Relevant paragraphs in *Duro Felguera* 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)*

15. In the light of change of statutory position, post 23.10.2015, **Arul Sigamani** principle pressed into service by learned counsel for respondent does not come to the aid of the respondent in the instant case.

16. In the light of *Duro Felguera* and *Mayavati Trading* principles, petitions under Section 11 of the instant nature have to be looked into with a hood and entering upon the exercise of examining whether there is existence of an arbitration agreement between the parties and arriving at a *prima facie* satisfaction about the existence of arbitration agreement between the parties is the limited contours of instant OP. If the Court is *prima facie* satisfied about the existence of an arbitration agreement between the parties, prayer for appointment of arbitrator in a Section 11 OP has to necessarily be answered in the affirmative. In other words, issues such as whether arbitrable claims have become stale/time barred do not come within the domain of this Court in a petition under Section 11 of A and C Act. It is for the Arbitral Tribunal to decide the same, more particularly in the light of Section 16 of A and C Act as held by Hon'ble

Supreme Court in *Uttarakhand Purv Sainikkalyam Nigam Ltd.*, case which was pressed into service by learned counsel for petitioner. To be noted, relevant paragraph in *Uttarakhand Purv Sainikkalyam Nigam Ltd.*, case has been extracted and reproduced supra.

17. Therefore, this Court proceeds to appoint Mr.Thriyambak Kannan, Advocate, at No.9, Third Floor, Vijay Apartments, No.4/7, 1st Main Road, CIT Colony, Mylapore, Chennai - 4 (Mob: 9884624563), as sole arbitrator. Sole arbitrator is requested to enter upon reference qua arbitral disputes that have arisen between the parties with regard to said agreement (dated 15.01.2010), adjudicate upon the same including the issue regarding limitation, if any 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 Arbitration Centre under the aegis of this Court.

Instant OP disposed of on above terms. No costs.

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Speaking order: Yes

Index: Yes

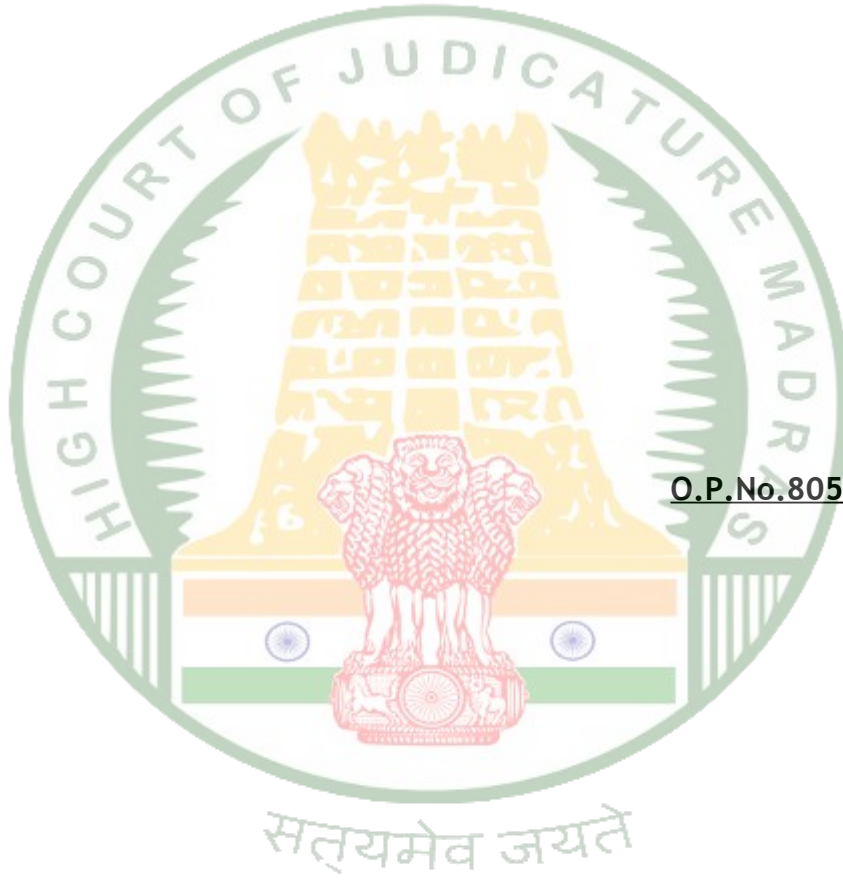
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Note: Registry is directed to communicate this order to Mr.Thriyambak Kannan, Advocate, at No.9, Third Floor, Vijay Apartments, No.4/7, 1st Main Road, CIT Colony, Mylapore, Chennai - 4 (Mob: 9884624563)

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M.SUNDAR.J.,

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