

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.01.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.349 of 2019

Mr.S.M.R.Nagarajan

... Petitioner

vs.

Mrs.N.Navamani

... Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator in terms of Memorandum of Understanding dated 18.08.2018 to resolve the disputes between the petitioner and the respondents under the Arbitration and Conciliation Act, 1996 and to pay the costs of the proceedings.

For Petitioner : Mr.A.M.Venkatakrishnan

For Respondent : Mr.Arun Karthik Mohan

ORDER

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Mr.A.M.Venkatakrishnan, learned counsel on record for petitioner and Mr.Arun Karthik Mohan, learned counsel on record for sole respondent are before this Court.

2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) is one 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, clarity and convenience.

3. Specific prayer in instant OP is for appointment of an Arbitrator in terms of 'Memorandum of Understanding dated 18.08.2016' (hereinafter 'said MOU' for the sake of brevity and convenience) to resolve disputes that have arisen between the petitioner and the respondent.

4. Scope of instant OP is very limited in the light of Mayavati Trading principle laid down by Hon'ble Supreme Court in **Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman** reported in **(2019) 8 SCC 714** and **Duro Felguera S.A. vs. Gangavaram Port Limited** reported in **(2017) 9 SCC 729**. In **Mayavati Trading** 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)**

5. Relevant paragraphs in Duro Felguera SA 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.

6. Therefore, as already alluded to supra, instant OP turns on an extremely narrow compass and the scope is very limited. The limited scope turns on sub-section (6-A) of Section 11 of A and C Act or in other words, the scope of instant OP, is confined to examination of existence of an arbitration agreement, but that has become the bone of contention in instant OP.

7. As existence of arbitration agreement has become the bone of contention between the parties, this Court deems it appropriate to remind itself that arbitration agreement is a defined term in A and C Act vide Section 2(1)(b) read with Section 7 and these two provisions read as follows:

Section 2(1)(b) :

*'(b) "arbitration agreement" means an agreement referred to in Section 7"*

Section 7 :

*7. Arbitration Agreement.\_(1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.*

*(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

*(3) An arbitration agreement shall be in writing.*

*(4) An arbitration agreement is in writing, if it is contained in-*

*(a) a document signed by the parties*

*(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*

*(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

*(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

8. With the prefatory note set out above, this Court now proceeds to examine the fact scenario in instant case.

9. Suffice to say that said MOU was entered into between the petitioner and respondent for development and sale as housing sites of pieces of land ad-measuring (in all) 4.29 acres or thereabouts.

10. According to the petitioner in instant OP, covenant No.8 of said MOU is the arbitration agreement between the parties. Covenant No.8 of said MOU reads as follows:

'8. இந்த மனைப்பிரிவு சம்பந்தமாக ஏற்படும் அனைத்து செலவுத்தொகைகள் முழுவதும் நம்மில் 1வது பார்ட்டியைச் சேர்ந்தது. இந்த புர்ந்தூர்வு ஒப்பந்தத்தில் சொல்லப்பட்டுள்ள மனைப்பிரிவு முடிவடையும் முன்பாக நாம் இருவருக்கும் ஏதேனும் கருத்துவேறுபாடு ஏற்பட்டாலோ அல்லது இந்த ஒப்பந்த உரத்துகளின்படி நடக்க தவறினாலோ 1வது பார்ட்டி சார்பாக அவரது குமாரர் திரு.பிரேம் குமார் மற்றும் 2வது பார்ட்டி சார்பாக அவர் விரும்பும் நபர் ஒருவரின் முன்னிலையில் சுமுகமான முறையில் பேசி தீர்த்துக்கொள்ள வேண்டியது.'

11. Instant OP being one under Section 11 of A and C Act is obviously predicated on aforementioned covenant No.8.

12. Pivotal and primordial contention of the respondent *inter-alia* in the form of submissions before this Court is that aforesaid covenant No.8 in said MOU does not qualify as an 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. In other words, as far as the respondent is concerned, the burden of the song qua submissions is that there is no arbitration agreement much less a valid arbitration agreement between the petitioner and the respondent. The burden of the song qua the submissions of the respondent is that no arbitration agreement exists between the petitioner and the respondent. To state with specificity in the light of fact scenario of this case, the pivotal submission of respondent is that covenant No.8 in the said MOU is not an arbitration agreement (within the meaning of A and C Act) between the petitioner and the respondent.

13. On hearing learned counsel on both sides, it unfurls in the hearing that it is not an interpretation turning on the language in which covenant No.8 is couched. It is not a matter of semantics either. It is a question of intention of the parties when they entered into said MOU. While the petitioner asserts that the intention of the petitioner (to be noted, petitioner is second party in said MOU) is to create an Arbitral Tribunal or in other words bring into existence an arbitration agreement,

the respondent averting to counter affidavit, on instructions, submits that it was never the intention of the respondent to enter into an arbitration agreement. It was pointed out that the respondent (to be noted respondent is first party in said MOU) had nominated her son, that too only to negotiate and therefore, that by itself would demonstrate that there was no intention on the part of the respondent to enter into an arbitration agreement.

14. As already alluded to supra, the lone point on which instant OP turns is examination of existence of an arbitration agreement between the parties and in the instant case to state the issue with specificity, the lone issue is whether covenant No.8 vide said MOU is an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

15. The submissions of learned counsel for petitioner can be summarized as follows:

a) Covenant No.8 may not be happily worded, but it can be construed as an arbitration agreement;

b) Without harping on technicalities, the respondent can agree for arbitration;

c) Prior to filing of instant OP, the petitioner issued two notices, both dated 05.11.2018, but the respondent did not choose to

reply to the same. Not having replied, the respondent is now estopped from making a plea regarding denial of existence of an arbitration agreement.

16. The submission made by learned counsel for respondent, which this Court has already chosen to set out consciously by describing the same as 'burden of song' qua the respondents can be summarized as thus:

a) Respondent is not on language in which covenant No.8 is couched. On the contrary, respondent is on intention of the parties. Saying so, it was emphasised that there was no intention qua said MOU to bring into existence an arbitration agreement;

b) In the absence of an arbitration agreement, an Arbitral Tribunal itself being creature of a contract cannot be thrust on the respondent;

c) Merely because the respondent had not replied to the notices prior to instant OP, it cannot be gain said that the respondent is now estopped from denying the existence of an arbitration agreement. It can at best be put against the respondent to say that there was some delay or laches on the part of the respondent, but it does not preclude the respondent from raising the plea denying the existence of the arbitration agreement.

17. This Court now proceeds to discuss the rival submissions by embarking upon the exercise of dispositive reasoning.

18. With regard to the first point raised by the petitioner, as already alluded to supra, the contention does not turn on the language in which covenant No.8 is couched. To be noted, learned counsel for petitioner very fairly submitted that covenant No.8 is not happily worded.

19. Be that as it may, it turns on whether covenant No.8 qualifies as an arbitration agreement on the teeth of respondent taking a diametrically opposite stand that there was no intention to bring into existence an arbitration agreement.

20. This takes us to what is an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Learned counsel for respondent submits that lead case in this regard is ***K.K.Modi Vs. K.N.Modi and others*** reported in (1998) 3 SCC 573. Before advertng to K.K.Modi principle, this Court deems it appropriate to record that this Court has reminded itself of the principle that judgments rendered under the old Arbitration Act, namely The Arbitration Act, 1940 (10 of 1940) should not be blindly applied to A and C Act and extreme caution should be exercised in

applying principles laid down by Hon'ble Courts under the old Arbitration Act.

21. In K.K.Modi, Clause 9 of a Memorandum of Understanding between the parties therein fell for consideration and pivotal question in K.K.Modi is whether clause 9 of MOU in that case qualifies as an arbitration agreement. Clause 9 of MOU in K.K.Modi as extracted in Paragraph 3 of said judgment reads as follows:

*"Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."*

22. This takes us to relevant paragraphs in K.K.Modi, namely Paragraphs 15 to 21, which read as follows:

*'15. The present proceedings raise two main question :*

*Question 1: Whether Clause 9 of the Memorandum of Understanding dated 24th of January, 1989 constitutes an arbitration agreement; and whether the decision of the Chairman, IFCI dated 8th December, 1995 constituted an award? and*

*Question 2: Whether Suit No. 1394/1996 is an abuse of the process of court?*

*Question No. 1:*

*16. Mustill and Boyd in their book on "Commercial Arbitration", 2nd Edition, at page 30, point out that in a complex modern State there*

is an immense variety of tribunals, differing fundamentally as regards their compositions, their functions and the sources from which their powers are derived. Dealing with tribunals whose jurisdiction is derived from consent of parties, they list, apart from arbitral tribunals, persons (not properly called Tribunals) entrusted by consent with the power to affect the legal rights of two parties inter se in a manner creating legally enforceable rights, but intended to do so by a procedure of ministerial and not a judicial, nature (for example, persons appointed by contract to value property or to certify the compliance of building works with a specification). There are also other tribunals with a consensual jurisdiction whose decisions are intended to affect the private rights of two parties inter se, but not in a manner which creates a legally enforceable remedy (for example, conciliation tribunals of local religious communities, or persons privately appointed to act as mediators between two disputing persons or groups). Mustill and Boyd have listed some of the attributes which must be present for an agreement to be considered as an arbitration agreement, though these attributes in themselves may not be sufficient. They have also listed certain other considerations which are relevant to this question, although not conclusive on the point.

17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are :

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) *The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,*

(4) *That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,*

(5) *That the judgment of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,*

(6) *The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*

18. *The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.*

19. *In Russell on Arbitration, 21st Edition, at page 37, paragraph 2-014, the question : How to distinguish between an expert determination and arbitration, has been examined. It is stated, "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words of the disputes clause. If specific words*

such as 'arbitrator', 'arbitral tribunal', 'arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive..... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately chose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert'..... An arbitral tribunal arrives at its decision on the evidence and submission of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion....."

20. The authorities thus seem to agree that while there are no conclusive tests, by and large, one can follow a set of guidelines in deciding whether the agreement is to refer an issue to an expert or whether the parties have agreed to resolve disputes through arbitration.

21. Therefore our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially

*after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and support of the agreement. There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide [Section 2 Arbitration Act 1940](#) and [Section 7 Arbitration and Conciliation Act, 1996](#)).'*

23. The last part of Paragraph 21 within parenthesis makes it clear that Hon'ble Supreme Court has categorically referred to Section 2 of old Arbitration Act and Section 7 of A and C Act. This Court notices that there is no equivalent to Section 7 in the old Act, but the principle governing what is an arbitration agreement is governed by Section 2(a) of old Act, whereas it is amplified in the new Act i.e., A and C Act vide Section 2(1)(b) read with Section 7. To be noted, Section 2(1)(b) and Section 7 have already been extracted and reproduced supra. Section 2(a) of old Act reads as follows:

*'2(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.'*

24. Another reason for this Court to be emboldened to rely on K.K.Modi principle is ***Jagdish Chander Vs. Ramesh Chander and Others*** reported in **(2007) 5 SCC 719**. Jagdish Chander case was rendered by

Hon'ble Supreme Court on 26.04.2007 under the A and C Act or in other words, under the new Act. In Jagdish Chander, when a similar issue arose, Hon'ble Supreme Court relied on K.K.Modi principle. Therefore, Hon'ble Supreme Court has clearly taken the view that K.K.Modi case rendered under the old Act (1940 Act) can be pressed into service in matters under the new Act i.e., A and C Act as far as the limited aspect which has been dealt with in instant OP is concerned. This aspect of the matter can be culled out from Paragraph 8 of Jagdish Chander case, which reads as follows:

*'8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K K Modi v. K N Modi [1998 (3) SCC 573], Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. [1999 (2) SCC 166] and Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :*

*(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such*

disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement.

*For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.*

*(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.'*

25. Above extract presents Section 7 of A and C Act by dissecting Section 7 into components and constituents, which go to make arbitration agreement. As far as the determinants qua an arbitration agreement, the most instructive paragraph is paragraph 17 of K.K.Modi case, which has already been extracted and reproduced supra. A perusal of Paragraph 17 of K K Modi case reveals that six determinants have been adumbrated therein and Hon'ble Supreme Court has held that those six determinants would go to constitute an arbitration agreement. In the instant case, from covenant No.8 of said MOU(supra) and from the stated position of the parties, who are at loggerheads qua intention to create an arbitration agreement, it is clear that there is no contemplation to create a Tribunal whose decision will be binding as there is nothing in covenant No. 8 to show that an Arbitral Tribunal vested with jurisdiction to decide on the rights of the parties, much less substantive rights of parties being determined by an arbitral Tribunal has been created by parties. Furthermore, as the respondent has nominated her son to act on her behalf (that too only for negotiation and not adjudication) even on a demurrer it is clear that there is no intention to create an impartial Tribunal, which can function in a judicial manner.

26. In this regard, Section 12(5) of A and C Act and Serial 9 of Schedule 7 to A and C Act are of relevance. Section 12(5) of A and C Act and Serial No.9 of Schedule 7 to A and C Act read as follows:

*'Section 12 (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.'*

*'Serial No.9 of Seventh Schedule: The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company. There is nothing in covenant No.8 to show that the position of the Tribunal is intended to be enforceable in law and there is obviously nothing to demonstrate about reference to the Tribunal.'*

27. In sum and substance or in other words, crux and gravamen of legal point on hand is that arbitration agreement is a creature of contract. In other words, it is not a creature of a statute. Arbitration agreement being a private Tribunal and a creature of contract, the intention of parties gains immense significance and it is virtually sacrosanct and non-negotiable. In the instant case, the petitioner is unable to demonstrate that there was any intention on the part of the respondent to create a private Tribunal of this nature. After all, in a contract there should not only be consensus, but there should be consensus ad-idem.

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28. This takes us to the point which relates to petitioner's emphasis that the respondent can be compelled to agree for arbitration. As a sequel to the previous disposition or in other words, as a corollary to the previous dispositive reasoning, it unfurls as a sequitur that no party can be

compelled to enter into a contract. The Court cannot re-write a contract either. The Court cannot bring into existence an arbitration agreement, which is otherwise not in existence between the parties, much less in a petition under Section 11 of A and C Act as the scope of a Section 11 petition is limited to testing the existence of an arbitration agreement.

29. This takes us to the last submission regarding estoppel. Considering the well established constituents and concomitants which constitute estoppel principle, this Court is left with the considered view that it is only a submission in desperation as merely because the respondent has not sent a reply to trigger notices i.e., notices sent prior to instant OP, it cannot be put against the respondent to say that the respondent is estopped from raising the contention of denial of existence of an arbitration agreement.

30. Before concluding this order, for the purpose of highlighting with clarity and specificity, this Court deems it appropriate to also extract most relevant parts of the rival pleadings, petitioner's pleading qua existence of an arbitration agreement is contained in Paragraph 11 of the petition, which reads as follows:

*'11. The petitioner submits that it was mutually agreed by the petitioner and respondent that in the event of any dispute arising out of the above Memorandum of Understanding or in the*

*event of either of the parties failing to fulfil their part of the obligation, the aggrieved party shall get the disputes redressed through Mr.N.Prem Kumar, son of the respondent, the second respondent herein, as one of the Arbitrator on behalf of the respondent and any arbitrator nominated by the petitioner on behalf of the petitioner. '*

31. The respondent's denial of existence of an arbitration agreement is articulated in Paragraphs 5 and 6 of the counter affidavit, which read as follows:

*'5. I state that the petition filed by the petitioner seeking appointment of an arbitrator is per se not maintainable as there exists no arbitration agreement between the Petitioner and the Respondent in terms of the MoU dated 18.08.2016. I state that terms of the MoU, does not, in any manner, indicate an intention on the part of the parties to refer their disputes to an arbitral tribunal for adjudication. Therefore, in the absence of an arbitration clause in the MoU the purported disputes between the Petitioner and the Respondent cannot be referred to arbitration and the Petitioner cannot seek the appointment of an arbitrator.*

*6. I humbly submit that the apparent reliance sought to be placed by the Petitioner on Clause 8 of the MoU, as allegedly constituting an arbitration agreement, is wholly misplaced inasmuch as what is contemplated therein is only a procedure to facilitate amicable resolution and not arbitration.'*

32. As all the three points raised qua the sole issue for determination, namely examining the existence of an arbitration agreement fail qua the petitioner, this Court is left with the considered view that there

is nothing to demonstrate that an arbitration agreement exists between the parties.

33. Absent arbitration agreement between the parties, there can be no constitution of Arbitral Tribunal and therefore, a petition under Section 11 with a prayer for appointment of an arbitrator has to necessarily fail.

34. Considering the nature of the matter and considering the nature of the submissions which were made at the bar, this Court refrains itself from imposing costs.

Instant OP is dismissed. Though obvious, it is made clear that dismissal of this OP will not come in the way of parties approaching a Civil Court or any other Fora available in law and if they choose to do so, such civil Court/fora shall adjudicate upon the dispute between parties uninfluenced by / untrammelled by observations made in this order as they are for the limited purpose of disposal of instant OP.

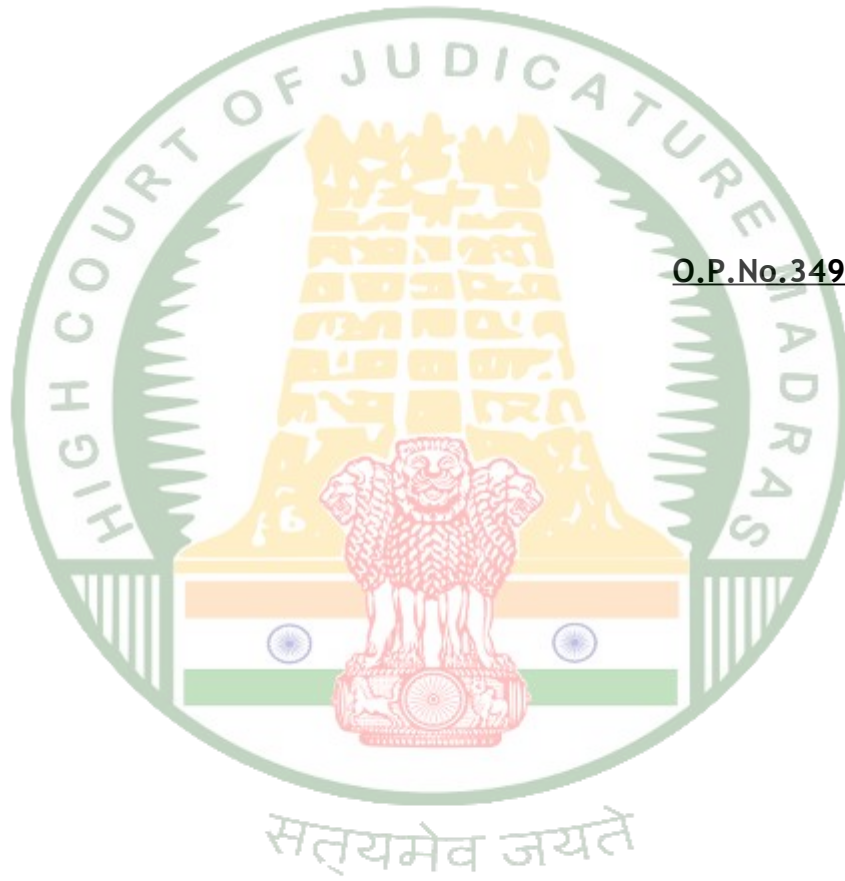
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