

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.02.2020

DELIVERED ON: 28.02.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.643 of 2019

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O.A.Nos.773 to 775 of 2019

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A.Nos.6110 and 6111 of 2019

Chennai Container Terminal Private Limited
a Company incorporated under
the Companies Act, 1956
and having its registered office at Darabshaw House
Level -1, Narottam Morarji Road
Ballard Estate
Mumbai - 400 038

... Petitioner

VS.

The Board of Trustees for Chennai Port Trust
a body constituted under Section 5 of
the Major Port Trust Act, 1963
and having its office at
Rajaji Salai
Chennai - 600 001

... Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint the nominee Arbitrator of the Respondent in accordance with the procedure for arbitration set out in Clause 15.02 of the Licence Agreement dated 09.08.2001 entered between the Petitioner and the respondent for the purpose of adjudicating upon the dispute that

has arisen along with the arbitrator nominated by the petitioner and to award costs.

For Petitioner : Mr.Vijay Narayan
Senior Counsel
for Mr.P.Vinod Kumar

For Respondent : Mr.G.Rajagopalan
Additional Advocate General
for Mr.Richardson Wilson
of M/s.P.Wilson Associates

ORDER

This common order will dispose of instant 'Original Petition' ('OP' for the sake of brevity) as well as five applications on hand. While OP is under Section 11 of 'The Arbitration and Conciliation Act, 1996' (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for brevity, the five applications are under Section 9 of A and C Act.

1. INTRODUCTORY OVERVIEW:

1(i). At the hearing, learned counsel on both sides submitted that instant OP and five applications can be taken up together, heard out and disposed of by a common order.

1(ii). One 'Chennai Container Terminal Private Limited' ('CCTPL' for brevity) is the petitioner and 'The Board of Trustees for Chennai Port Trust' ('CPT' for brevity) is the respondent.

1(iii)Mr.Vijay Narayan, learned Senior Counsel instructed and assisted by Mr. P.Vinod Kumar and Mr.Abraham Vishal Jacob for CCTPL and

Mr.G.Rajagopalan, learned Additional Solicitor General of India, instructed by Mr.Richardson of M/s.P.Wilson and Associates on behalf of CPT, are before this Court. As already mentioned supra, learned senior counsel and learned Solicitor, on instructions, submitted that OP can be heard out along with five applications on hand. Furthermore, as already mentioned supra, instant OP is one under Section 11(6) of A and C Act and the prayer obviously is for appointment of an Arbitrator. Instant OP is predicated on Article XV of an agreement between CCTPL and CPT dated 09.08.2001 being a License Agreement for a specified period. CCTPL is running a container terminal under CPT *inter alia* on revenue sharing basis under this License Agreement.

2. Having set out a broad overview of the nature of the instant cases, which shall stand disposed of by this common order, this Court, owing to the nature of the matter, deems it appropriate to set out a brief prefatory note.

3. PREFATORY NOTE:

3(i) Konkan Railways commenced a long journey about the nature, scope and contours of exercise of powers under Section 11 of A & C Act. It started with a debate whether exercise of powers of Chief Justice under Section 11 of A and C Act is an administrative function or judicial function. It may not be necessary to trace the long and unwinding track law in this

regard took owing to introduction of Sub-section (6-A) of Section 11 on and from 23.10.2015 vide 'Amending Act 3 of 2016', which shall hereinafter be referred to as 'First Amending Act' for the sake of convenience and clarity. After wide ranging amendments to A and C Act vide first amending Act, several amendments to A and C Act were brought in by another Amending Act, namely 'Act 33 of 2019', which shall hereinafter be referred to as 'Second Amending Act'. All the provisions i.e., sections in the Second Amending Act have not taken effect as the Second Amending Act *inter alia* vide Sub-section (2) of Section 1 provides for various provisions of second amending Act to come into effect on various dates on which they are notified.

3(ii) To be noted, vide the second amending Act, more particularly Section 3 of aforesaid Sub-section (6-A) of Section 11 stands deleted, but this Section of the second amending Act is yet to be notified. This in effect means that sub-section (6-A) of Section 11 is still in the statute books and the same is operating. To be noted, post second amending Act, some of the provisions of the second amending Act have been notified by the Central Government vide S.O.3154(E) dated 30.08.2019, but Section 3 of the second amending Act has not been notified. To complete the narrative, it would be appropriate to say that provisions of second amending Act, namely

Section 1, Sections 4 to 9, Sections 11 to 13 and 15 were notified on 30.08.2019 vide aforementioned 30.08.2019 notification. The scope of a petition under Section 11 of A and C Act, in the light of sub-section (6-A) of Section 11 of A and C Act came up for consideration before Hon'ble Supreme Court and Hon'ble Supreme Court 6 days after 30.08.2019 notification (05.09.2019 to be precise) vide *Mayavati Trading* case [*Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714)] laid down the law that is declaratory in this regard. *Mayavati Trading* principle is to the effect that a Court exercising powers under Section 11 of A and C Act would confine itself to examine about the existence of an arbitration agreement between the parties. To put it differently, the lone consideration for a Court deciding a Section 11 petition shall be *prima facie* satisfaction about existence of an arbitration agreement between the parties. To complete the narrative in this regard, this Court deems it appropriate to set out that Hon'ble Supreme Court in *Mayavati Trading* case has reiterated *Duro Felguera* principle being principle laid down by Hon'ble Supreme Court in *Duro Felguera S.A. vs. Gangavaram Port Limited* reported in (2017) 9 SCC 729.

3(iii) The other facet of the matter i.e., scope of a Section 11 petition (though it does not fall for consideration in the case on hand) would be appropriate to set out for the purpose of completing the narrative

in this regard. That facet is, when 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 / clause in agreement/contract, whether the contract / agreement in which the arbitration clause features has been sufficiently stamped and duly registered in accordance with Stamp Act and Registration Act respectively is a matter which the Court can look into while examining a Section 11 petition. This facet was laid down by Hon'ble Supreme Court in **Garware** case (**Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited** reported in **(2019) 9 SCC 209**). Therefore, to sum up the scope of a section 11 petition, it can be said that the Court would examine the existence of an arbitration agreement between the parties and the Court has to arrive at *prima facie* satisfaction about the existence of arbitration agreement between the parties and while doing so, the Court can look into the validity of a contract/agreement in the light of registration/being duly stamped when the arbitration agreement is in the form of a covenant / clause in another contract/agreement.

4. Having set out the scope of a Section 11 petition by way of this prefatory note, this Court deems it appropriate to also set out a short adumbration of case laws referred to therein for the purpose of specificity.

5. CASE LAWS QUA PREFATORY NOTE:

5(i) As would be evident from a reading of the prefatory note, the same refers to three case laws. The three case laws in chronological order are ***Duro Felguera, Mayavati Trading and Garware Wall Ropes***. Relevant paragraphs in ***Duro Felguera case [Duro Felguera S.A. vs. Gangavaram Port Limited reported in (2017) 9 SCC 729]*** are Paragraphs 47 and 59 and the same reads 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(ii) Relevant paragraph in ***Mayavati Trading case [Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman reported in (2019) 8 SCC 714]*** 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(iii) Relevant paragraph in **Garware Wall Ropes** 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).'

6. This Court having given an Introductory overview, prefatory note and case laws qua prefatory note, now proceeds to set out the factual matrix of instant case in a nutshell.

(i) The scope of a Section 11 OP is very limited or in other words, the contours and confines of a Section 11 OP being limited, short facts shorn of elaboration (without dilating on facts) will suffice.

7. SHORT FACTS SHORN OF ELABORATION RUN AS FOLLOWS:

7(i) There is a 'license agreement dated 09.08.2001' between CCTPL and CPT, which shall hereinafter be referred to as 'said licence agreement' for the sake of clarity;

7(ii) Article XV of said license agreement captioned 'DISPUTE RESOLUTION' is the arbitration clause;

7(iii) Under the said license agreement, CCTPL is operating a container terminal at the Chennai Port *inter alia* on revenue sharing basis with CPT;

7(iv) As the said license agreement was operating, disputes/discrepancies erupted between CCTPL and CPC resulting in the arbitration clause being invoked;

7 (v) As the arbitration clause was invoked, a three member Arbitral

Tribunal constituted by a former Hon'ble Chief Justice of India and two former Hon'ble Judges of this Court was constituted.

7 (vi) Hon'ble Arbitral Tribunal entered upon reference, adjudicated upon the arbitral disputes that have arisen between the parties and passed a detailed award dated 26.11.2012.

7(vii) To be noted, the aforesaid arbitral award of the Arbitral Tribunal was by 2:1 majority, but this is mentioned only for completion of facts as it has no impact on the case on hand.

7(viii) To be noted, before the Hon'ble Arbitral Tribunal, CCTPL was the claimant and CPT was the respondent. Vide the arbitral award, the Hon'ble Arbitral Tribunal granted several reliefs to CCTPL and rejected the counter claim made by CPT in its entirety.

7(ix) CPT assailed the aforesaid arbitral award and sought to set aside the same by way of an application in this Court under Section 34 of A and C Act. Applications under Section 34 of A and C Act are also being assigned the nomenclature 'OPs' in this Court and therefore, challenge to arbitral award by CPT was taken on file by this Court as O.P.No.493 of 2013. After full contest, O.P.No.493 of 2013 came to be allowed by an order dated 08.01.2014.

7(x) While allowing the OP assailing the arbitral award, a Hon'ble single Judge of this Court made it clear that the award is set aside insofar

as it grant reliefs to CCTPL, but the rejection of counter claim of CPT is upheld.

7(xi) Both CCTPL and CPT carried the matter in appeal by way of intra-Court appeals to a Hon'ble Division Bench of this Court. Intra-Court appeal preferred by CCTPL was taken on file as O.S.A.No.20 of 2014 and the intra-court appeal filed by CPT was taken on file as O.S.A.No.59 of 2014. Both OSAs came to be disposed of by a common order made by a Hon'ble Division Bench of this Court.

7(xii) Hon'ble Division Bench vide aforementioned common order allowed O.S.A.No.20 of 2014 filed by CCTPL and dismissed the appeal filed by CPT. The result was, the arbitral award made by Arbitral Tribunal being arbitral award dated 26.11.2012 stood resurrected.

7(xiii) CPT carried the matter to Hon'ble Supreme Court by way of petitions for Special Leave to Appeal being Petition (s) for Special Leave to Appeal (C) No(s).30371-30372 of 2018, which came to be dismissed by Hon'ble Supreme Court on 04.02.2019. To be noted, Special Leave Petitions were dismissed by Hon'ble Supreme Court without granting leave and it was a dismissal simplicitor. Therefore, *doctrine of merger* did not come into play and suffice to say that owing to common order dated 20.03.2018 made by a Hon'ble Division Bench of this Court, the original arbitral award made

by Arbitral Tribunal being arbitral award dated 26.11.2012 now governs the parties.

7(xiv) Vide the arbitral award, as it was *inter alia* held that CCTPL is entitled to recover monies from CPT (as the counter claim of CPT stood rejected), CCTPL started adjusting monies. After a temporary lull when the award was set aside by Hon'ble single Judge in Section 34 OP, re-adjustment commenced post aforementioned order of Hon'ble Division Bench. It is submitted that setting-off recommenced in April 2018.

7(xv) In this backdrop, the question of post award interest for CCTPL erupted.

7(xvi) While according to CPT, CCTPL is not entitled to post award interest as the same has been claimed, but negated by the Hon'ble Arbitral Tribunal, according to CCTPL, it is entitled to post award interest in the light of sub-clause (b) of Sub-section (7) of Section 31 of A and C Act. In other words, it is the case of CCTPL that it is entitled to post award interest under Section 31(7)(b) of A and C Act. To be noted, the arbitral award is silent on this aspect of the matter and it has not given any direction to the contrary.

7(xvii) Contending that the aforementioned post award interest is a new/fresh arbitral dispute that has arisen between the parties, instant OP has been filed by CCTPL seeking appointment of an arbitrator, to decide on

the post award interest aspect of the matter as this would in effect decide the actual quantum of money which CCTPL is entitled to claim as set-off.

8. Having set out the factual matrix in a nutshell or in other words facts shorn of details/elaboration, to put it differently, facts that are imperative for appreciating this order, this Court now proceeds to set out rival submissions.

9. RIVAL SUBMISSIONS:

9(i) Mr.Vijay Narayan, learned senior counsel for CCTPL made submissions, summation of which is as follows:

(a) When an arbitral award is silent about the post award interest, a party is entitled to the same under Section 31(7)(b) of A and C Act as the only exception to Section 31(7)(b) is a direction otherwise in the award itself.

(b) As the proposition that 'an arbitration agreement between the parties can be invoked and Arbitral Tribunal can be constituted more than once with regard to the same agreement when different sets of arbitral disputes arise' being indisputable, there is no impediment in acceding to the prayer of CCTPL in instant OP.

(c) In an OP under Section 11 of A and C Act, the scope is limited to *prima facie* satisfaction about the existence of an

arbitration agreement and therefore, existence of an arbitration agreement not being in dispute, the prayer has to necessarily be acceded to.

9(ii) Summation of submissions made by learned Solicitor is as follows:

(a) In the arbitral award dated 26.11.2012, the claim of CCTPL for post award interest has been negatived by necessary implication as a perusal of the claim petition and issues in the award would reveal that CCTPL has asked for post award interest, but interest at the rate of 12% upto the date of award alone has been granted. In other words, it is the submission of learned senior counsel that when a larger prayer is made and a smaller relief is granted, the remaining portion of the larger relief has to necessarily be construed as being negatived and therefore, it cannot be gainsaid that the arbitral award is silent about post award interest.

(b) The arbitration agreement between the parties i.e., Article XV of said licence agreement has already been invoked with regard to the arbitral disputes, the same have been conclusively decided by the Arbitral Tribunal, carried upto Hon'ble Supreme Court via an application under Section 34 of A and C Act

before Hon'ble Single Judge and an intra-court appeal under Section 37 of A and C Act before Hon'ble Division Bench of this Court and given complete legal quietus.

(c) If it is the case of CCTPL that there was an error in the award with regard to post award interest, it was well open to CCTPL to take recourse to Section 33 of A and C Act and seek correction and interpretation of award. Not having done so, necessarily means that CCTPL has accepted the award. It cannot now contend that it is entitled to post award interest.

(d) It was pointed out that CCTPL had not taken recourse to Section 34 of A and C Act either.

(e) Once an arbitration clause is invoked with regard to arbitral disputes, once an award is passed and once the same has been given legal quietus, the arbitration agreement between the parties works itself out with regard to those arbitrable disputes and therefore, there is no arbitration agreement in existence with regard to post award interest dispute, which CCTPL is now raising.

10. To be noted, in the course of advancing aforesaid arguments, learned senior counsel for the petitioner and learned solicitor for CPT pressed into service certain case laws and those case laws would be

referred to at the relevant place while discussing the rival submissions and giving dispositive reasoning infra.

11. DISCUSSION AND DISPOSITIVE REASONING:

11(i) As would be evident from the narrative thus far under various heads, it will be clear that the instant matter throws up a very interesting debate. With regard to the trajectory which the matter has taken, there is absolutely no disputation or contestation between the parties. Therefore, the entire debate and obviously discussion on the same and dispositive reasoning turns more on interpretation than resolving disagreements.

11(ii) In an endeavour to persuade this Court that the dispute that is being raised by CCTPL now is not barred by *res judicata*, learned senior counsel for CCTPL, pressed into service a judgment of Hon'ble Supreme Court in ***Indian Oil Corporation Limited Vs. SPS Engineering Limited*** reported in **(2011) 3 SCC 507**. Specific attention of this Court was drawn to Paragraphs 14 to 16. Placing reliance on SPC Engineering, it was argued that there can be threshold consideration and rejection of a claim on the ground of *res judicata* while considering an application under Section 11 of A and C Act.

11(iii) There are three reasons as to why SPS Engineering Limited case does not come to the aid of CCTPL in instant case. The first reasons is,

SPS Engineering was rendered by Hon'ble Supreme Court on 03.02.2011, much before Sub-section (6-A) of Section 11 was brought into the statute books originally by an ordinance and subsequently by first Amending Act. To be noted, Sub-Section (6-A) of Section 11 was brought into the statute books on and from 23.10.2015 by first Amending Act. As already alluded to supra, the unwinding track and the journey which the scope of Section 11 has taken commencing from Konkan Railways makes it clear that introduction of sub-section (6-A) of Section 11 has altered the dynamics and dimensions of Section 11 proceedings. Further more, the impact of sub-section (6-A) of Section 11 on proceedings under Section 11 of A and C Act has been elucidated by Hon'ble Supreme Court in ***Duro Felguera [Duro Felguera S.A. vs. Gangavaram Port Limited]*** reported in (2017) 9 SCC 729] and in ***Mayavati Trading [Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman]*** reported in (2019) 8 SCC 714)]. Mayavati Trading principle is not only instructive, but also declaratory qua law on the point.

11(iv) The second reason is, in the considered opinion of this Court, SPC Engineering Limited is an authority for a broad proposition that there should be a distinction with regard to apparent/obvious dead claims and claims involving disputed issues of limitation. In other words, the Chief Justice or his designate (to be noted, prior to 23.10.2015, Section 11

petitions were to be heard by 'Chief Justice or designate of Chief Justice' and on and from 23.10.2015, it is High Court).

11(v) The three reasons are very interesting. SPS no doubt has held that there can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering a petition under Section 11 of A and C Act, but on a demurrer even if SPS Engineering is applied, as contended by learned Senior Counsel, absent arbitration agreement, the question of applying these principles will not arise. To be noted, this is on a demurrer and this is the first reason. It is also to be noted that learned senior counsel has contended that once an arbitration agreement is invoked and once the same has culminated in an award, which has attained finality by being carried upto Supreme Court, the arbitration agreement itself ceases to exist. This is second reason about which there will be further discussion infra on 'ceases to exist as it works itself out' aspect and suffice to say that the third reason as to why SPS Engineering does not come to the aid of CCTPL in instant case is that the scope and ambit of section 11 is confined to examination of existence of arbitration agreement.

11(vi) As already alluded to supra, this case throws up an interesting debate and an equally interesting issue regarding examination of existence of arbitration agreement. The reason is Article XV captioned

'DISPUTE RESOLUTION' in said licence agreement is beyond any pale of disputation or contestation. Therefore, the existence of arbitration agreement is to be decided by resorting to a test as to whether the arbitration agreement has worked itself out qua the arbitrable dispute that has arisen. The neat question that falls for consideration can be formulated as follows:

'Whether Article XV of said licence agreement has worked itself out and therefore ceases to exist for the purpose of arbitrable dispute sought to be raised being post award interest qua arbitral award dated 26.11.2012, which has admittedly attained finality? '

11(vii) Learned senior counsel for CCTPL and learned Solicitor for CPT submitted that the aforesaid neat question as formulated is the clincher in instant case and the question is not only neat, but a nuanced nicety too. In search of a clear and categorical answer to the neat question that is the cliffhanger clincher in the instant case, it is necessary to look at the claim petition of CCTPL before Arbitral Tribunal. The prayer made by CCTPL before Hon'ble Arbitral Tribunal are 18 in number and the same have been adumbrated as Paragraphs (a) to (r) in Paragraph 16 of the claim petition. The limbs of the prayer, which are relevant with regard to the post award interest being tested, have been adumbrated as sub-paragraphs

(i) and (j) (obviously Sub-paragraphs (i) and (j) of Paragraph 16 of the claim petition) and the same read as follows:

'(i) that this Hon'ble Tribunal be pleased to order and direct the respondent to pay the claimant further interest @ 2% per month or part thereof on the sum of Rs.63,86,21,493/- (Rs.46,08,00,000/- plus Rs.17,78,21,493/-) from October 2008 till the date of payment and / or realization thereof.

(j) In the alternative and without prejudice to what is stated in prayers (e) to (i) above, the Hon'ble Tribunal is pleased to declare that the interest charged by the respondent vide their letter dated 17.12.2007 is erroneously calculated and that the respondent is not entitled to the same and accordingly a sum of Rs.20,09,08,581 together with interest @ 2% per month or part thereof from March 2008 until September 2008 as more particularly set out in the statement of claim Annexure A hereto should be refunded to the claimant.'

11(viii) This claim statement of CCTPL dated 15.09.2008 met with a counter statement containing a counter claim by CPT and the same is dated 12.01.2009. Suffice to say that CPT *inter alia* took the stand that CCTPL is not entitled to any of the 18 reliefs of prayers. Owing to the counter claim and additional counter claim, there was a rejoinder and reply to the rejoinder. It will suffice to straight away go to the issues framed by the Hon'ble Arbitral Tribunal on the basis of the aforesaid rival pleadings. The issues framed by the Hon'ble Arbitral Tribunal are 15 in number and the same have been adumbrated in Paragraph 5 of the award captioned 'ISSUES'. Most relevant issues pertaining to post award interest is Issue No.10(a),

which reads as follows:

'10(a) Whether the Claimant is entitled to return of the entire amount of Rs.63,86,21,493/- by the Respondent, together with interest thereon as claimed in the Statement of Claim?'

11(ix) Issue 10(a) has been answered in the last part of the arbitral award captioned 'AWARD : OPERATIVE PART' as well as 'Reliefs and Award'. To state with specificity, Issue No.10(a) has been answered as Point No.5 and the same reads as follows:

'(5) The Claimant is entitled to the return of the sum of Rs.63,86,21,493/- (collected by the Respondent by encashing the Bank Guarantee for Rs.46.08 Crores and compelling Claimant to deposit Rs.17,78,21,493/-) with interest at the rate of 12% from the date of realization of those sums by the Respondent till the date of the Award.'

11(x) While according to learned senior counsel for CCTPL this answer is to be construed as arbitral award being silent on post award interest, learned solicitor contends (as mentioned supra) that a large prayer was made, a part of which was acceded to and therefore, remaining part of which , which was not acceded to, has to necessarily be construed to be negated. In other words, it is learned Solicitor's specific say that it cannot be gainsaid that the award is silent about post award interest. In this regard, as a buttressing submission, it was also argued that CCTPL did not

resort to Sections 33 or 34.

11(xi) For the purpose of a sound dispositive reasoning, this Court deems it appropriate to refer to the cause of action as pleaded in the counter statement. Before referring to cause of action as pleaded in the counter statement, though obvious, this Court deems it pertinent to mention that 'cause of action' is a term/expression which has not been defined in any statute or Code and therefore, one has to turn to case laws to have clarity on what 'cause of action' is. In this view of the matter, this Court is of the considered opinion that 'cause of action' is a term/expression has not been defined, but described. It has been described by way of judicial pronouncements i.e., case laws. Though there are several case laws on this point, this Court considers two case laws in this regard will suffice and they are **Nawal Kishore** case [**Nawal Kishore Sharma v. Union of India** reported in (2014) 9 SCC 329] and **Syed Mohamed Salahuddin** [**Syed Mohamed Salahuddin and Ors. Vs. Ahmed Abdulla Ahmed Al Ghurair** reported in (2018) 6 MLJ 257]. A careful perusal of **Nawal Kishore** principle and **Syed Mohamed Salahuddin** principle leaves this Court with the view that all little fact, which can be described as 'links' in a long chain of facts do not qualify as cause of action, but every fact which has to necessarily be proved by a plaintiff / claimant to be entitled to a

decree constitutes cause of action. Relevant paragraph in **Nawal Kishore Sharma** case is paragraph 10 and the same reads as follows :

“10. In State of Rajasthan v. Swaika Properties [(1985) 3 SCC 217] , the fact was that the respondent Company having its registered office in Calcutta owned certain land on the outskirts of Jaipur City, was served with notice for acquisition of land under the Rajasthan Urban Improvement Act, 1959. Notice was duly served on the Company at its registered office in Calcutta. The Company, first appeared before the Special Court and finally the Calcutta High Court by filing a writ petition challenging the notification of acquisition. The matter ultimately came before this Court to answer a question as to whether the service of notice under Section 52(2) of the Act at the registered office of the respondent in Calcutta was an integral part of cause of action and was it sufficient to invest the Calcutta High Court with a jurisdiction to entertain the petition challenging the impugned notification. Answering the question this Court held: (Swaika Properties case [(1985) 3 SCC 217] , SCC pp. 222-23, paras 7-8)

“7. Upon these facts, we are satisfied that the cause of action neither wholly nor in part arose within the territorial limits of the Calcutta High Court and therefore the learned Single Judge had no jurisdiction to issue a rule nisi on the petition filed by the respondents under Article 226 of the Constitution or to make the ad interim ex parte prohibitory order restraining the appellants from taking any steps to take possession of the land acquired. Under sub-section (5) of Section 52 of the Act the appellants were entitled to require the respondents to surrender or deliver possession of the lands acquired forthwith and upon their failure to do so, take immediate steps to secure such possession under sub-section (6) thereof.

8. The expression ‘cause of action’ is tersely defined in Mulla’s Code of Civil Procedure:

‘The “cause of action” means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.’

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2) of the Act on the respondents at their registered office at 18-B, Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1) of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. The Notification dated 8-2-1984 issued by the State Government under Section 52(1) of the Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. It was not necessary for the respondents to plead the service of notice on them by the Special Officer, Town Planning Department, Jaipur under Section 52(2) for the grant of an appropriate writ, direction or order under Article 226 of the Constitution for quashing the notification issued by the State Government under Section 52(1) of the Act. If the respondents felt aggrieved by the acquisition of their lands situate at Jaipur and wanted to challenge the validity of the notification issued by the State Government of Rajasthan under Section 52(1) of the Act by a petition under Article 226 of the Constitution, the remedy of the respondents for the grant of such relief had to be sought by filing such a petition before the Rajasthan High Court, Jaipur Bench, where the cause of action wholly or in part arose."

11 (xii) As the claim petition is not a typical plaint in a conventional civil suit, cause of action has to be culled out and both sides agree that the same can be culled out from Paragraphs 86 to 88 of the claim petition, which read as follows:

'86. However, in complete disregard of the letter dated

13.05.2008, the respondent addressed a further letter dated 22.5.2008 to the claimant stating that the money appropriated by it and held in cash would not be considered towards the provision of the performance bank guarantee and that the Claimant should immediately furnish a further bank guarantee, failing which the same would again be construed as a further event of default under the Licence Agreement.

87. Under Article 15 of the Licence Agreement, in the event of there being any dispute arising between the parties in connection with the construction, interpretation or application of any terms or conditions of the Licence Agreement, the Claimant and the Respondent are to meet with a view to resolve such dispute or difference. In the event of the parties failing to arrive at an amicable settlement, the dispute between the parties is to be resolved by reference of such dispute to arbitration in terms of the Arbitration and Conciliation Act, 1996 with either party appointing an arbitrator each and the third arbitrator being appointed by the two arbitrators nominated by the parties. The Arbitration proceedings are to be held at Chennai.

88. As a result of the protracted attempts to amicably settle the disputes through consultation, meetings appointment of a joint committee, and the decisions of the committee constituted at the suggestion of the Respondent itself being negated by the Respondent, and the opinion of the distinguished legal expert requested by the respondent itself being ignored, the claimant by its letter dated 04.06.08 invoked the jurisdiction of this Hon'ble Tribunal under article 15.02 of the Licence Agreement with respect to the disputes concerning ((i) non-transshipment traffic volumes, (ii) the appropriation of the amount of Rs.46.08 Crores by the respondent by way of invocation of the performance bank guarantee No.GTEBOM030058, (iii) the 'without prejudice' deposit of Rs.17.78

Crores under the cover the claimant's letter dated 24.03.2008 (iv) the furnishing of any further performance bank guarantees or any further attempt to appropriate any amounts on the basis that the claimant has not complied with the requirements for non-transshipment traffic (v) All issues connected with or arising from (i) to (v) above. The claimant vide the said letter nominated Justice R.Jayasimha Babu, retired Judge of the Madras High Court as Arbitrator and called upon the Respondent to forthwith appoint an arbitrator in accordance with the provisions of Clause 15.02(a) of the Licence Agreement within a period of 30 days from the date of receipt of the said letter. The said notice of arbitration was served on the respondents on 4.6.2008. The Respondent nominated Justice S.A.Kader, retired Judge of the Madras High Court as Arbitrator by its letter dated 1.07.2008.'

11(xiii) Considering the prayers in the claim petition, denial of the same, issues (i) and (j), issue No.10(a) and the finding returned in the arbitral award captioned 'OPERATIVE PART AS WELL AS Reliefs and Award', it is clear that post award interest forms part of cause of action qua the arbitral dispute, which has already been raised, decided and given legal quietus. As post award interest is certainly a claim that CCTPL has made, disputed, issues framed, verdict returned and given quietus, this Court has no hesitation in holding that it is not a new arbitrable dispute that has arisen.

11(xiv) This takes us to the question as to whether an arbitration agreement gets extinguished or in otherwords, whether an arbitration agreement works itself out when the same is invoked with regard to certain

arbitral disputes and award passed therein has attained finality. To state with specificity, the question is, in such a situation whether it is to be construed that the arbitration agreement between the parties worked itself out and whether it ceased to exist insofar as the arbitral disputes raised and concluded as an award, which has attained finality is concerned.

11(xv) Arbitration agreement is defined in Section 2(1)(b) read with Section 7 of A and C Act. Therefore, if agreement is a family, arbitration agreement is a species. According to Black's law dictionary, there is distinction between a contract and an agreement and agreement in Black's law dictionary reads as follows:

'Agreement. (15c) 1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. 2. The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance. UCC § 1-201(b)(3).

"The term 'agreement', although frequently used as synonymous with the word 'contract', is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term 'agreement' would include any arrangement between the two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement in this sense; but it would not be a

contract, because it would neither be intended to create, nor would it in fact create, any legal obligation between the parties to it. Further, even an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement, is ... not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation". 2 Stephen's Commentaries on the Laws of England 5 (L.Crispin Warmington ed., 21st ed. 1950)

"An agreement, as the Courts have said, 'is nothing more than a manifestation of mutual assent' by two or more parties legally competent persons to one another. Agreement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property". 1 Samuel Williston, A Treatise on the Law of Contracts § 2, at 6 (Walter H.E.Jaeger ed., 3d ed. 1957).'

11(xvi) An arbitration agreement is a special covenant of an agreement. In other words, it is an agreement for a special purpose and that special purpose is parties to agreement agreeing to submit themselves to arbitration either all or some of the disputes which may arise between them in respect of a defined legal relationship irrespective of whether such legal relationship is contractual or not. Therefore, arbitration agreement is an agreement which creates a private Tribunal to which parties to arbitration agreement submit to all or some of the disputes which may arise in a defined legal relationship between them. Arbitral Tribunal therefore is

a creature of a contract and it is not a creature of a Statute. It is a private Tribunal in the 'Alternate Dispute Resolution' ('ADR' for brevity) regime. Therefore, when arbitration agreement is an important ADR process, further scheme of the Act makes it clear that limited judicial interference is another pillar of arbitration as an ADR. This comes out clearly in Section 5 of A and C Act. Therefore, an arbitration agreement is something akin to a special purpose vehicle in a defined legal relationship between parties. That special purpose is parties submitting to arbitrable disputes arising out of such relationship and resolution of the same by a private Tribunal. If this special purpose is achieved, it is axiomatic that the agreement will work itself out, as the purpose is not only special, but specific and the same has been achieved. As this Court has come to the conclusion that arbitration agreement has worked itself out owing to which it ceases to exit, the sequitur is, there is no existing arbitration agreement as of today as between the parties qua the arbitrable dispute (post award interest), which is being sought to be raised. In the light of scope of Section 11, prayer in instant OP cannot be acceded to.

11(xvii) Before parting with this case, there is one other aspect of the matter, which is deemed relevant by this Court. That aspect of the matter turns on the agreement of CCTPL predicated on Section 31(7)(b) pertaining to post award interest. 31(7)(b) introduced into Statute book on

23.10.2015. The arbitral award itself was made much prior to this date as the arbitral award is dated 26.11.2012.

12. CONCLUSION:

Owing to all that have been set out supra, this Court has no hesitation in coming to the conclusion that petitioner CCTPL has not been able to demonstrate *prima facie* existence of arbitration agreement qua arbitral disputes sought to be raised (post award interest) and therefore, the prayer in instant OP cannot be acceded to. Absent arbitration agreement prayer in Section 11 petition not being acceded to, it follows as a sequitur that all section 9 applications have no legs to stand as it is the stated position of CCTPL that they are pre-arbitral Section 9 petitions.

13. DECISION:

O.P.No.643 of 2019 is dismissed. O.A.Nos.773 to 775 of 2019, A.Nos.6110 and 6111 of 2019 are dismissed owing to there being no arbitration agreement. Considering the nature of the matter, parties are left to bear their respective costs.

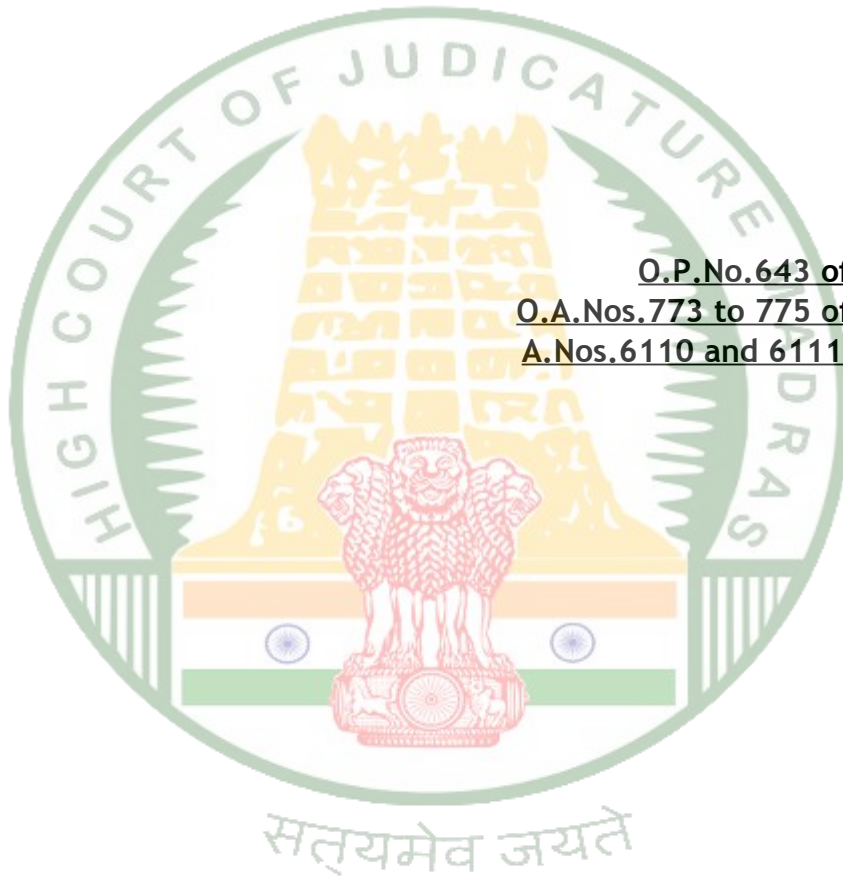
Speaking order: Yes
Index: Yes/No
gpa

28.02.2020

O.P.No.643 of 2019

M.SUNDAR.J.,

gpa



O.P.No.643 of 2019 &
O.A.Nos.773 to 775 of 2019 &
A.Nos.6110 and 6111 of 2019

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