

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.01.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.961 of 2019

1.Mr.M.Kamalakannan

2.Mrs.K.Mohanambal

... Petitioners

vs.

M/s.GTL Infrastructure Limited
(M/s.Chennai Network Infrastructure Limited)
City Centre, 3rd Floor, No.232, Old No.186
Purasawalkam High Road
Kellys, Chennai - 600 010

... Respondent

Original Petition filed under Section 11(6) (a) of the Arbitration and Conciliation Act, 1996 and under Order XXI Rules 2 and 3 of O.S.Rules to appoint an Arbitrator for resolving the issue of the petitioner and the respondent and to direct the respondent to pay cost of the proceedings and for the cost of the Arbitrator.

For Petitioner : Mr.K.P.Gopalakrishnan
for Mr.B.Jawahar

For Respondent : Mr.C.Sakthi Manikandan

ORDER

Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity)
under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.20 of

1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, raises a very interesting question.

2. Before embarking upon the exercise of a discussion on the rival submissions and setting out dispositive reasoning, this Court reminds itself of the scope of a OP under Section 11. Hon'ble Supreme Court has made declaratory pronouncement qua law on the scope of a OP under Section 11 of A and C Act vide *Duro Felguera* and *Mayavati Trading* principles. In other words, law laid down by Hon'ble Supreme Court regarding scope of a OP under Section 11 of A and C Act in *Duro Felguera, S.A.* [*Duro Felguera, S.A. versus Gangavaram Port Limited* reported in (2017) 9 SCC 729I] and *Mayavati Trading* [*Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 7961] are declaratory qua scope, contours and confines of a Section 11 OP. This Court reminds itself about these instructive principles laid down by Hon'ble Supreme Court before embarking upon the exercise of a discussion qua rival submissions and giving dispositive reasoning on the same. 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 Sectin 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'

'59. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.'

3. 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)**

4. This Court having reminded itself about the contours and confines of instant OP i.e., scope of instant OP, now proceeds to set out short facts shorn of unnecessary details, which are as follows:

a) Petitioners in instant OP are two in number and they are spouses;

b) Petitioners are owners of a 'property in the city of Chennai at Door No.68/2, Thirunarayana Guru Road, Choolai, Chenani - 600 112' (hereinafter 'said property' for the sake of brevity);

c) A portion of terrace admeasuring 400 sq.ft or thereabouts in said property is the subject matter of lis and therefore, the same shall hereinafter be referred to as 'demised area' for the sake of convenience and clarity;

d) First petitioner entered into a Lease Deed dated 03.03.2004 giving on lease the demised area to a company, which went by the name 'AIRCEL CELLULAR LIMITED' (hereinafter 'ACL' for brevity). This lease is for a period of 9 years i.e., 05.03.2004 to 04.03.2013 to be precise;

e) Though the aforementioned lease is for 9 years and though the monthly rent is Rs.12,000/- for first three years, Rs.13,800/- for next three years and Rs.15,870/- for the last three years, the Lease Deed was neither registered nor executed in non-judicial stamp paper of proper value qua the Indian Stamp Act, 1899 (Central Act II of 1899) (as in force in the State of Tamil Nadu). To be noted, it was executed in non-judicial stamp paper of Rs.20/-;

f) Lessee company ACL was acquired by Chennai Network Infrastructure Limited' ('CNIL' for brevity) through a scheme of arrangement by this Court, vide order dated 24.06.2010 made in C.P.Nos.103, 110 to 112 of 2010;

g) Owing to the aforesaid acquisition of ACL by CNIL, a supplementary agreement dated 04.03.2011 came to be executed and vide clause 13 of supplementary agreement, parties agreed that the principal agreement as well as the supplementary agreement will be registered before a Sub-Registrar, stamp duty and registration charges will be borne by parties in equal proportion, but this never happened. Be that as it may, 9 years lease period elapsed on 04.03.2013.

h) Thereafter, on 16.04.2015, parties realized that the demised area continues to be in possession of the petitioners and therefore, it is a case of licence and not lease (there being no transfer of possession of demised area) owing to which they decided to enter into a licence agreement instead of a Lease Deed. The parties entered into a 'licence agreement dated 16.04.2015' (hereinafter 'said licence agreement' for the sake of brevity). It may not be necessary to dilate on facts and delve on details qua covenants in the said licence agreement.

It will suffice to say that there is no dispute or contestation that this licence agreement contains an arbitration clause, the same is clause 16 of said licence agreement and this clause serves as arbitration agreement within the meaning of Section 7 of A and C Act;

i) In the interregnum, CNIL merged with 'GTL Infrastructure Limited' (hereinafter 'GTL' for brevity) through a scheme sanctioned / approved by National Company Law Board, Chennai Bench vide order dated 13.12.2017 and National Company Law Board, Mumbai Bench vide order dated 15.12.2017. Considering the narrow scope of instant OP on hand, it is not necessary to dilate on facts qua these proceedings any further.

j) Suffice to say that instant OP has been filed with a prayer for appointment of an Arbitrator for entering upon reference adjudicating upon and deciding on the aforementioned arbitral dispute between parties i.e., claim of alleged arrears of licence fee.

5. Having set out short facts shorn of unnecessary details, this Court now proceeds to set out the rival submissions.

6. Mr.K.P.Gopalakrishnan, learned counsel appearing on behalf of counsel on record for petitioners made submissions, which are broadly as follows:

a) In instant OP, notwithstanding very many averments in the petition, petitioners abridged the scope and limited the scope of instant OP to one seeking appointment of an arbitrator qua clause 16 of said licence agreement alone. In other words, it is made clear that instant OP shall not now stand predicated only on licence agreement dated 16.04.2015 i.e., said licence agreement and not the lease agreement and the supplementary agreement. To state with specificity instant OP is predicated on clause 16 of said lease agreement, which is admittedly an arbitration clause and which reads as follows:

'16.Any dispute or claim between the parties hereto arising out of or relating to this agreement, or its implementations and/or its effect, or the breach, termination, due to efflux of time or otherwise or invalidity thereof, either during its subsistence or after its termination, shall be referred to the arbitration of a sole arbitrator in accordance with the provisions of Arbitrations and Reconciliation Act, 1996. The Arbitration shall be held at Chennai.

b) As there is no disputation or contestation about the existence of an arbitration agreement between the parties,

there is no impediment in this Court for acceding to the prayer of the petitioners.

7. Mr.C.Sakthi Manikandan, learned counsel on record for respondent GIL made submissions summation of which is as follows:

a) A Lease Deed is compulsorily registrable under the Registration Act, as the Lease Deed dated 03.03.2004 and supplementary agreement dated 04.03.2011 have neither been registered nor executed on stamp paper of proper value, the same cannot be looked into and as a sequitur, the arbitration clause thereat can also not be taken note of. Lease Deed dated 03.03.2004, supplementary agreement dated 04.03.2011 and said license agreement dated 16.04.2015 have to be read together and therefore, the lease agreement and supplementary agreement not being registered and not being sufficiently stamped is fatal to instant OP.

b) There is a cross reference to the Lease Deed in the said Licence Agreement vide clause 6 and 23 of said Licence Agreement.

8. Having set out the rival submissions by way of summation, this Court now proceeds to discuss the rival submissions in detail and give its dispositive reasoning.

9. DISCUSSION AND DISPOSITIVE REASONING:

9(i) From the aforesaid rival submissions, one of the first points that need to be decided is whether a licence agreement is compulsorily registrable. This Court turns to Section 17 of Registration Act, 1908, which is *inter-alia* an adumbration of documents which are compulsorily registrable. A perusal of the list of documents which are compulsorily registrable, which has been adumbrated therein make leases of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent compulsorily registrable vide Section 17(1)(d), but what is of significance is, there is no mention about Licence Agreement. No contra provision has been shown to this Court. Therefore, licence agreement is not compulsorily registrable argument is accepted.

9(ii) This take us to the next question about whether the said licence agreement is sufficiently stamped. As alluded to supra, with regard to stamp duty, it is necessary to look at the the Indian Stamp Act, 1899 (Central Act II of 1899) (as in force in the State of Tamil Nadu), which shall hereinafter be referred to as 'Stamp Act' for brevity. This takes us to Schedule I of the Stamp Act. The stamp duty on an instrument, which is a Lease Deed, is set out in Clause 35, which reads as follows:

35. Lease, including an under lease or sub-lease and any agreement to led or sub-let_	
(a) where the period of lease is	One rupee for every Rs.100 or

below thirty years	part thereof of the amount of rent, fine, premium or advance, if any, payable;
(b) where the period of lease is thirty years and above and upto ninety-nine years	Four rupees for every Rs.100 or part thereof of the amount of rent, fine, premium or advance, if any, payable;
(c) where the period of lease is above ninety-nine years	[S Rupees] for every Rs.100 or part thereof of the amount of rent, fine, premium or advance, if any, payable Provided that in any case when an agreement to lease is stamped with the ad valorem stamp required for a lease and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed twenty rupees

9(iii) On the contrary, there is no specific entry or serial number regarding licence. Therefore, a licence will necessarily fall under Serial No.5(j), which is a residuary entry. Vide serial No.5(j), if an instrument has not been specifically provided for, the stamp duty is Rs.20/- and there is no dispute that said licence agreement has been executed in a non-judicial stamp paper of the value Rs.20/- (Rupees Twenty only).

9(iv) Learned counsel for respondent drew the attention of this Court to the judgment of Hon'ble Supreme Court in Garware case (***Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited*** reported in **(2019) 9 SCC 209**). The most relevant and instructive

paragraph in Garware 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(iv) While Garware principle read in the context of **Duro Felguera** as well as **Mayavati Trading** principles makes it clear that the question regarding an instrument being duly stamped (when there is an arbitration agreement (arbitration agreement within the meaning of Section 7 of A and C Act) in the form of a covenant in an instrument) clearly falls within the contours of sub-section 6-A of Section 11. In the light of facts of this case, Garware principle does not help the respondent as the petitioners have restricted instant OP to be one predicated on clause 16 of said licence agreement, which is not compulsorily registrable and which is undisputedly sufficiently stamped. As already alluded to supra, Section 17 of the Registration Act and entry 5(j) of Schedule I of Indian Stamp Act makes this position very clear.

9(v) Now that Garware principle does not help the respondent in the instant case owing to the peculiar facts and circumstances of case on hand, this Court shall follow ***Duro Felguera*** principle reiterated by Hon'ble Supreme Court in Mayavati Trading case law, which has already been alluded to supra.

9(vi) There is one other aspect of the matter (though not projected) which this Court reminds itself about and that question pertains to an arbitration clause in a lease deed or in other words, the question as to whether arbitration agreement qua a lease or in other words whether disputes arising out of a lease deed are arbitrable is one which a larger Bench of Hon'ble Supreme Court is in seizin of, as Himangni case (***Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia*** reported in (2017) 10 SCC 706) has been referred to a larger Bench vide ***Vidya Drolia & Ors. Vs. Durga Trading Corporation*** reported in 2019 SCCOnline SC 358. However, in the instant case, as the petitioners have abridged the scope of instant OP to one predicated on an arbitration clause in said licence agreement alone and not the lease deed, it may not be necessary to advert to these aspects of the matter any further detail in this order.

9(vii) This Court, therefore, proceeds to appoint Mr.M.Senthil Kumaran, Advocate, Flat No.A, Jayam Villa, No.11, East Circular Road, Mandaveli, Chennai-28 (Mobile No.7550111110) as sole arbitrator to enter upon reference qua said licence agreement i.e., licence agreement dated 16.04.2015 and decide the arbitrable issues between the parties and pass an award. While entering upon reference and conducting arbitration, learned sole arbitrator shall bear in mind the observations made by this Court in this order.

Instant OP disposed of on above terms.

24.01.2020

Speaking order: Yes/No

Index: Yes/No

gpa

Note: Registry is directed to communicate this order to Mr.M.Senthil Kumaran, Advocate, Flat No.A, Jayam Villa, No.11, East Circular Road, Mandaveli, Chennai-28 (Mobile No.7550111110) forthwith

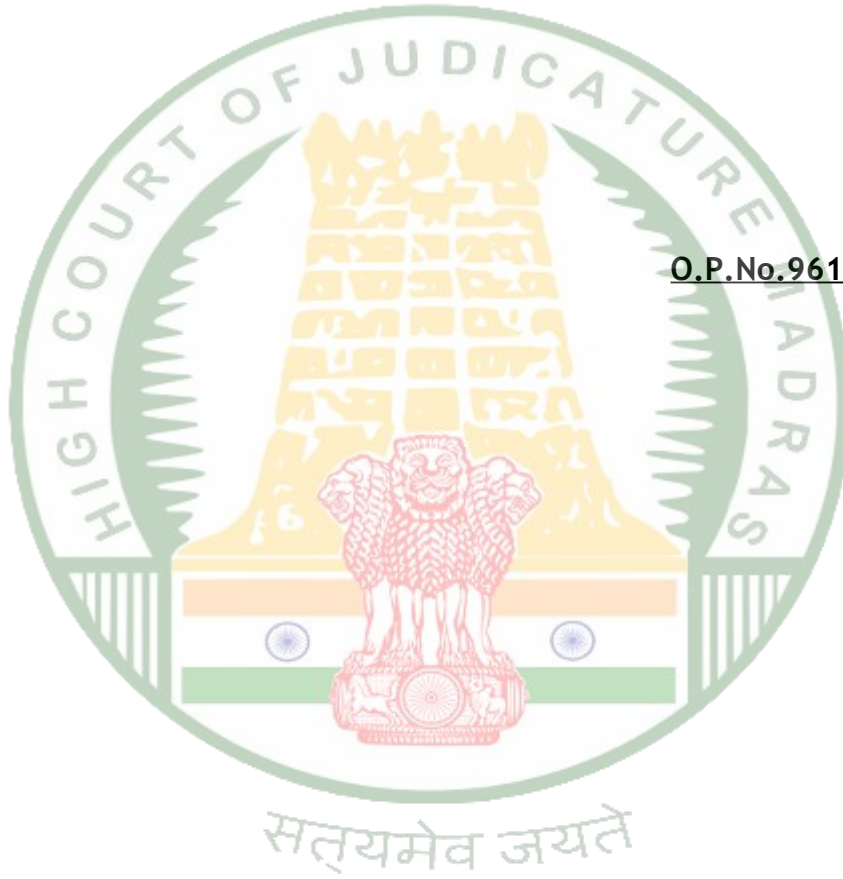
सत्यमेव जयते

WEB COPY

O.P.No.961 of 2019

M.SUNDAR.J.,

gpa



O.P.No.961 of 2019

WEB COPY

24.01.2020