

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.01.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.806 of 2019

1.N.Shanmugam  
2.S.Manjula

.. Petitioners

Vs.

1.M/s.Amar Prakkash Developers Private Limited  
Rep. by its Directors  
1.Mr.A.Sudhir Kumar Surana  
2.Mr.S.Aadarsh Kumar Surana  
3.Mr.S.Aashish Surana  
4.Mr.S.Kuldeep Surana  
Having Office at No.42, Rajendra Prasad Street  
Nehru Nagar, Chrompet, Chennai - 600 044.

2.M/s.Amar Prakaash Property Management  
Services Pvt. Ltd represented by its Directors  
1.Mr.A.Sudhir Kumar Surana  
2.Mr.S.Aadarsh Kumar Surana  
3.Mr.S.Aashish Surana  
4.Mr.S.Kuldeep Surana  
Having Office at No.42, Rajendra Prasad Street  
Nehru Nagar, Chrompet, Chennai - 600 044.

.. Respondents

This Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator for determining the disputes between the petitioner and the respondents which arises under the Project Promotion Construction Agreement dated 30.09.2013 entered into between the petitioner and the respondents in respect of the construction of Apartment in the name 'The Royal Castle' situated at No.91, Thirumudivakkam

Village & Panchayat, Sriperumbudur Taluk, Kancheepuram District and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioners : Ms.S.Vijayalakshmi

For Respondents : Mr.P.Dinesh Kumar

ORDER

Ms.S.Vijayalakshmi, learned counsel on record for petitioners and Mr.P.Dinesh Kumar, learned counsel on record for respondents are before this Court.

2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) has been filed *inter alia* 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 the sake of brevity with a prayer for appointment of an arbitrator.

3. The fulcrum of instant OP is an agreement captioned 'Agreement of Project Promotion and Construction dated 30.09.2013', hereinafter 'said agreement' for the sake of convenience and clarity. If said agreement is the

fulcrum, clause/covenant No.69 of said agreement is the critical component of the fulcrum, as that is the arbitration clause. In other words, 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 clause/covenant in the said agreement i.e., clause/covenant No.69, which reads as follows:

*'69.All or any disputes arising out of or relating to or concerning this Agreement including the interpretation and validity of the terms thereof, shall be referred by any party to a sole arbitrator who shall be appointed by the DEVELOPER and whose decision shall be final and binding upon the party. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in Chennai. The Purchaser hereby confirms that he/she/it shall have no objection to this appointment even if the person so appointed, as the sole Arbitrator, is an employee or advocate of the DEVELOPER or is otherwise connected to the DEVELOPER. The parties agree that no other person shall have the power to appoint the sole arbitrator. The Courts at Chennai alone and the Madrash High Court at Chennai shall have the jurisdiction.'*

4. Earlier the petitioners herein filed applications under Section 9 of A and C Act being O.A.Nos.528 to 532 of 2018 and the same came to be disposed of by a learned single Judge of this Court, vide order dated 12.02.2019, but considering the narrow scope of instant OP, it may not be necessary to dilate

further on facts.

5. Suffice to say that petitioners in instant OP have sent a notice to respondents being notice dated 04.03.2019, through their advocate, calling upon the respondents to consent for a sole arbitrator and suggesting name of three senior members of this bar. There is no dispute or disagreement that the notice has been duly received by respondents and that the respondents did not respond or reply. Therefore, instant OP has been filed.

6. Learned counsel for respondents submitted that the aforesaid notice dated 04.03.2019 does not set out what the arbitral disputes or in other words what are the arbitral disputes that have arisen qua said agreement have not been set out in this notice, is learned counsel's say. Learned counsel submitted that this is, for all practical purposes, notice within the meaning of Section 21 of A and C Act. Learned counsel submitted that Section 21 which deals with date of commencement of arbitral proceedings talks about disputes and therefore, it is imperative that the petitioners set out the arbitral disputes in the said notice. Furthering his submission in this direction, learned counsel for respondents submitted that this is no notice under Section 21 of A and C Act and therefore, instant OP cannot be maintained. Responding to this, learned

counsel for petitioners submitted that respondents have neither responded nor sent a reply to this notice and not having responded or replied, the respondents cannot now be heard to contend that the arbitral disputes have not been set out. Besides this, it was also pointed out that the arbitral disputes have been set out in the instant OP.

7. In the aforesaid backdrop, the respondents, who have not responded to the aforesaid notice dated 04.03.2019, do not now contend that the arbitral disputes set out in the instant OP do not exist. In other words, it unfurls in the hearing that the petitioners have raised some arbitral disputes and the same need adjudication.

8. Respondent not having sent a reply cannot operate as estoppel and in this view of the matter plea predicated on Section 21 of A and C Act pales into insignificance owing to the narrow scope of instant OP.

9. This take us to the scope of instant OP. Scope of instant OP has been set out by Hon'ble Supreme Court in *Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714). Relevant paragraph in *Mayavati Trading principle* is Paragraph 10, which 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)**

10. **Mayavati Trading principle** also reiterates **Duro Felguera principle** laid down by Hon'ble Supreme Court in **Duro Felguera, S.A. versus Gangavaram Port Limited** reported in **(2017) 9 SCC 729**. Relevant paragraphs in **Duro Felguera principle** are Paragraphs 47 and 59 and the same 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. '*

11. In the light of the aforesaid principles, this Court confines itself to examining and coming to a *prima facie* conclusion about the existence of an arbitration agreement between the parties. As already alluded to supra, the arbitral agreement between the parties in instant OP is in the form of clause/covenant in the said agreement, being clause/covenant No.69 (to be noted, clause/covenant No.69 has been extracted and reproduced supra). This Court, therefore, following **Mayavati Trading principle**, proceeds to appoint a sole arbitrator.

12. Mr.T.Mohan, Advocate, having office at No.368, New Additional Law Chambers, Madras High Court buildings, Chennai-600 104 [Mobile No.9444454309] is appointed as sole Arbitrator. Learned sole Arbitrator is requested to enter upon reference and conduct arbitration qua arbitral disputes raised as between the petitioners and the respondents in accordance with A and C Act, more particularly in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and the Madras High Court Arbitration

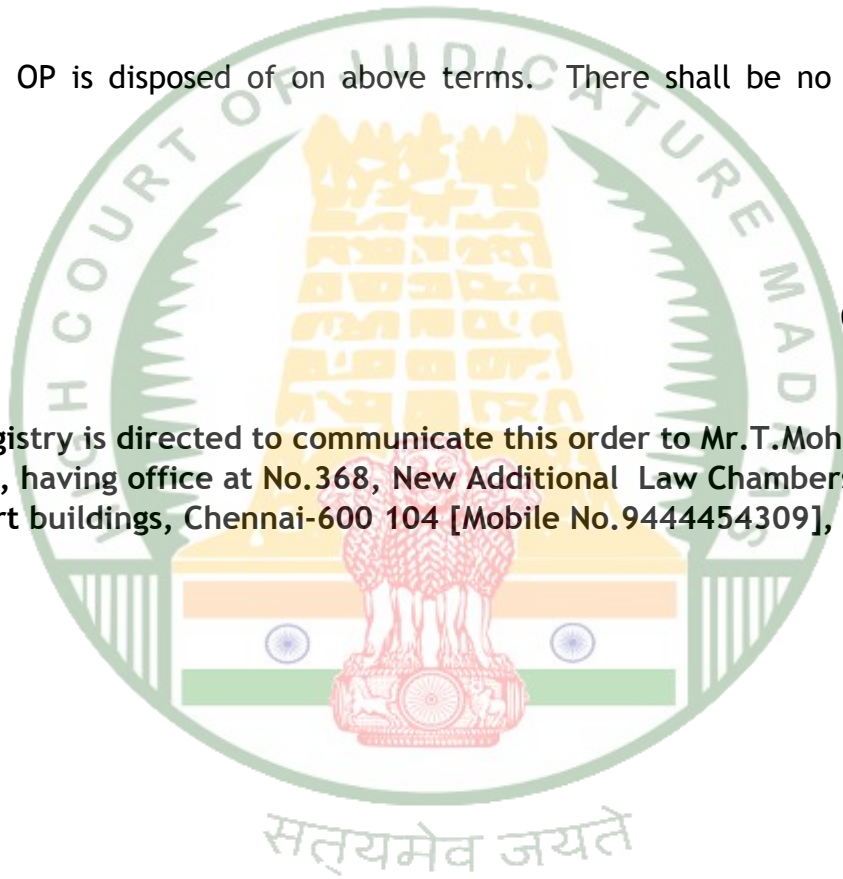
Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules, 2017, in the Madras High Court Arbitration Centre under the aegis of this Court and pass award as expeditiously as possible.

13. OP is disposed of on above terms. There shall be no order as to costs.

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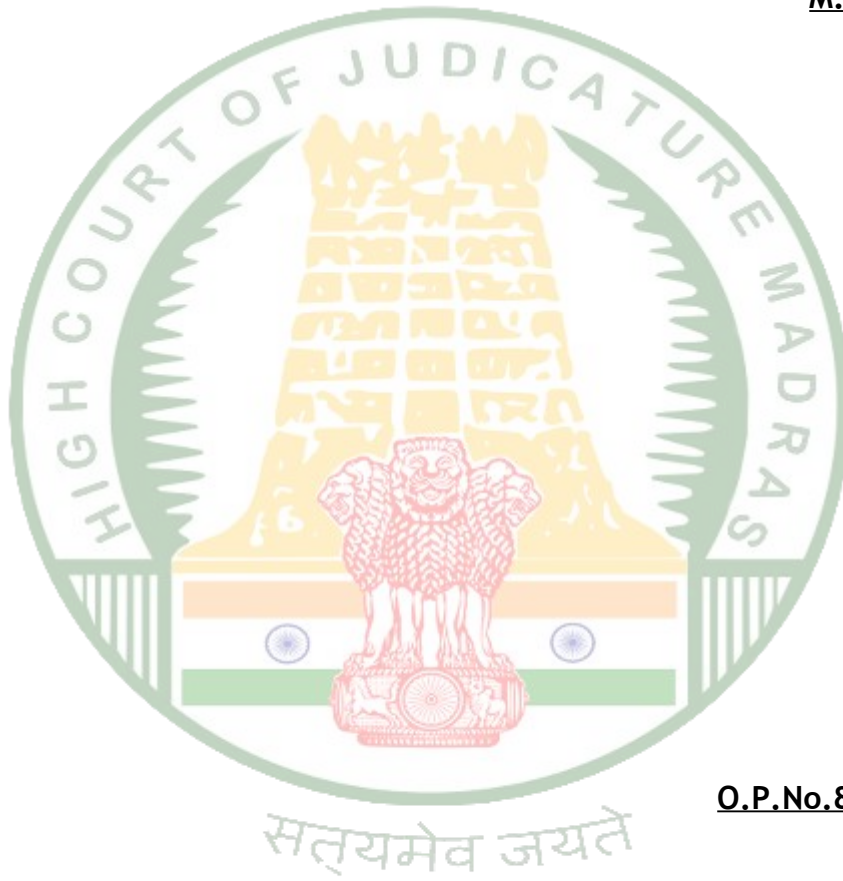
**Note:** Registry is directed to communicate this order to Mr.T.Mohan, Advocate, having office at No.368, New Additional Law Chambers, Madras High Court buildings, Chennai-600 104 [Mobile No.9444454309], forthwith



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M.SUNDAR, J.

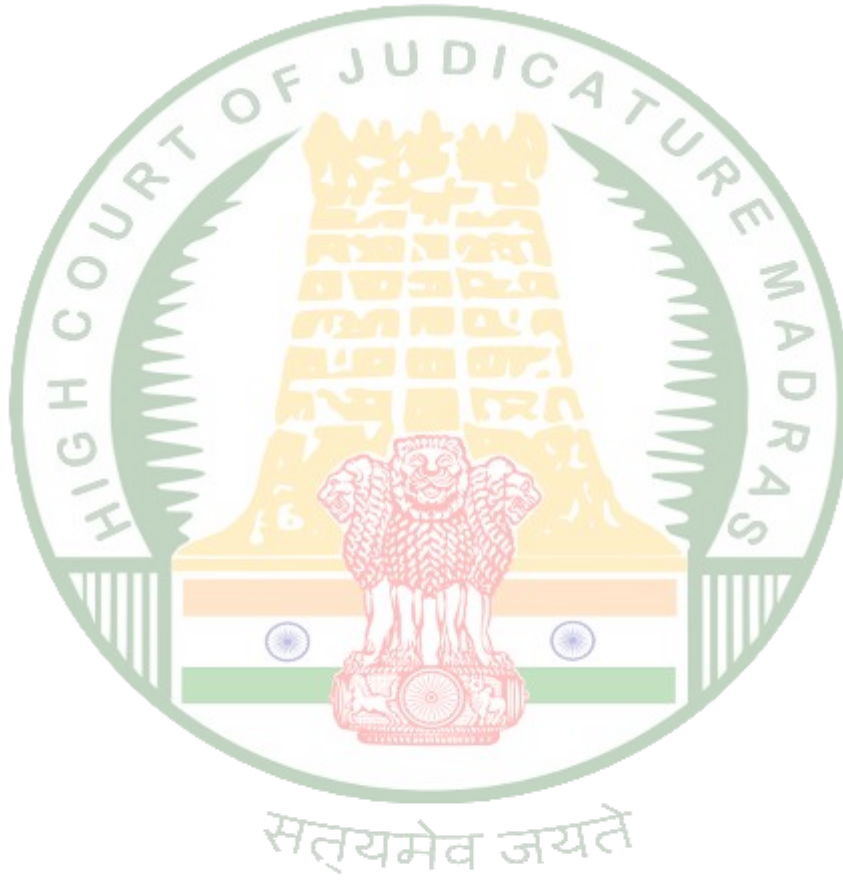
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