

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.01.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.809 of 2019

1.T.Ramesh

2. Chelvi Ramesh

(Former Director)

Mithas Lab Clinical Research Foundations Pvt. Ltd.,

No.6G, River Heights

315, Valluvar Kottam High Road

Nungambakkam, Chennai - 600 034

.. Petitioners

Vs.

1. J.Jayakrishnan

2. Kamaktchi Jayakrishnan

3.Dr.Loganathan

Former Director

Mithas Lab Clinical Research Foundations Pvt. Ltd.,

No.6G, River Heights

315, Valluvar Kottam High Road

Nungambakkam, Chennai - 600 034

4. MITHAS LAB CLINICAL RESEARCH FOUNDATIONS PVT. LTD.,

No.6G, River Heights

315, Valluvar Kottam High Road

Nungambakkam, Chennai - 600 034

5. P.Anbalagan

6. M.Mythrai
7. M.Lakshmidev Amma
8. Prabha Stalin

.. Respondents

This Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to resolve the disputes arising out of Memorandum of Understanding dated 07.11.2012 between the petitioner and respondents.

For Petitioner : Mr.Vaibhav R.Venkatesh
for M/s.Nithyaesh & Vaibhav

For Respondents : Mr.S.Rajendra Kumar for R1 and R2
R3 to R8 - No appearance

ORDER

Mr.Vaibhav R.Venkatesh, learned counsel for petitioners and Mr.S.Rajendra Kumar, learned counsel on record for Respondents 1 and 2 are before this Court. With regard to Respondents 3 to 8, they have been duly served, their names together with full / complete address are shown in the cause list, but none appears. This Court is informed that no counsel has entered appearance for Respondents 3 to 8. Names of Respondents 3 to 8 called out aloud thrice in the Court and adjoining corridors, but no response.

2. Be that as it may, instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) is under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for brevity, clarity and convenience.

3. Prayer in instant OP is for appointment of an Arbitrator.

4. There are many facts in the case on hand, but in the light of stand taken by both the aforesaid learned counsel and in view of *Duro Felguera, S.A.* principle [*Duro Felguera, S.A. versus Gangavaram Port Limited* reported in (2017) 9 SCC 729] and *Mayavati Trading* case [*Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714)], which are declaratory qua law on Section 11 of A and C Act by Hon'ble Supreme Court, the task of disposal of instant OP has become fairly simple.

5. Before proceeding further, it is necessary to set out that this Court is reminded itself about *Duro Felguera, S.A.* principle being law that is declaratory in nature qua Section 11 of A and C Act. 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 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. *Duro Felguera, S.A* principle was reiterated by Hon'ble Supreme Court in *Mayavati Trading* case. 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)**

7. As already alluded to supra, in the light of aforesaid principles laid down by Hon'ble Supreme Court, viewed in the context of stand which both the learned counsel have taken today or in other words, trajectory which instant OP has taken today, the task of disposal of instant OP has become fairly simple and it is not necessary to dilate on facts. All that this Court has to look into is, existence of an arbitration agreement between the parties. This Court has *prima facie* satisfied itself about the existence of an arbitration agreement between the petitioner, respondents 1 and 2. Both the learned counsel advertent to an order made by another Hon'ble single Judge of this Court in Application No.1099 of 2014 being order dated 12.09.2016 submit that the existence of an arbitration agreement between two petitioners and Respondents 1 and 2 is not in dispute. Order dated 12.09.2016 made by Hon'ble Mr.Justice Rajiv Shakdher, reads as follows:

'1.Counsel for the parties, after some arguments, have agreed that the captioned application may be disposed of on the following agreed terms:-

(i) The disputes inter se the parties be referred to the Hon'ble Mr.Justice. S.Rajeswaran, former judge of this Court.

(ii) The captioned application may be placed before the Arbitrator, and that, the Arbitrator should treat the said application, as one which is filed under Section 17 of the Arbitration and Conciliation Act, 1996.

(iii) Pursuant to the affidavit, dated 12.09.2016, filed by the Ms.Kamaktchi Jayakrishnan, w/o. J.Jayakrishnan, (i.e. The applicant), will be arrayed as a party to the arbitration proceedings, notwithstanding, the fact that, she is not a party to the Memorandum Of Understanding dated 07.11.2012. (in short MOU)

(iv). The civil suits filed by the respondents i.e. O.S.No.7022 and 7023 of 2014 (pending before the Assistant City Civil Judge, Chennai) and C.S.No.255 of 2014 (pending before this Court) will be withdrawn and the issues raised therein will be advanced before the learned Arbitrator.

(v). The Arbitrator will fix his own fee, and that, apart from fee payable to the Arbitrator, he will also be entitled to seek reimbursement of expenses incurred by him, albeit, on actual basis. The burden of fee and expenses will be borne equally by the parties herein.

5. Accordingly, as agreed, the application is disposed of with the following directions: सत्यमेव जयते

(i). Mr.Justice, S.Rajeswaran, former judge of this Court, is appointed as an Arbitrator.

(ii). The learned Arbitrator will dispose of the captioned application by treating it as an application under Section 17 of the 1996 Act.

(iii) Ms. Kamaktchi Jayakrishnan will be arrayed

as party to the arbitration proceedings, as per the consent given in that behalf, vide affidavit dated 12.09.2016.

(iv) Learned Arbitrator will fix his own fee.

(v) The burden of fee and expenses shall be borne equally by the parties.

(vi). The parties and their counsels, will appear before the arbitrator on 08.10.2016 at 3.00 P.M.

(vii). In case, for any reason, the aforementioned date is not convenient to the learned Arbitrator, he will have the liberty to fix another date, which is proximate to the date given above.

(viii) The civil suits filed by the respondents i.e. O.S.No.7022 and 7023 of 2014 (pending before the Assistant City Civil Judge, Chennai) and C.S.No.255 of 2014 (pending before this Court) would be withdrawn and the issue raised therein will be advanced before the learned Arbitrator.

6. The captioned application is, accordingly, disposed of.'

8. This takes us to the issue pertaining to Respondents 3 to 8. As already alluded to supra, Respondents 3 to 8 have been duly served in the instant OP. Their names have been shown in the cause list, but none appear. In the light of this being an OP under Section 11, seen in the context of definition of 'party' under Section 2(1)(h) of A and C Act, learned counsel for

petitioners fairly submitted that Respondents 3 to 8 are given up in instant OP, but with a caveat. Caveat is that the rights of the petitioners and Respondents 1 and 2 qua Respondents 3 to 8 before the Arbitral Tribunal, more particularly the rights of the parties before the Arbitral Tribunal to seek their impleadment and other reliefs shall remain preserved. This is recorded and this request is acceded to.

9. Therefore, for the purpose of clarity and specificity, it is made clear that appointment of Arbitrator in OP on hand is with regard to petitioners 1 and 2 on one side and Respondents 1 and 2 on the other side.

10. Both the learned counsel have agreed that Hon'ble Mr. Justice K.Kannan (Retd.,) (former Judge of this Court and Punjab and Haryana High Court at Chandigarh) at No.3/11, Lakshmi Colony, North Crescent Road, T.Nagar, Chennai-600 017 (Mobile : **97800 08145**, Land line : **044-2815 4145**), may please be appointed as Sole Arbitrator to constitute the Arbitral Tribunal. Both the learned counsel also submit that they have taken consent of Hon'ble Judge concerned. Therefore, this OP is disposed of appointing Hon'ble Mr. Justice K.Kannan (Retd.,) as sole Arbitrator to constitute the Arbitral Tribunal for entering upon reference and adjudicating the arbitral disputes

that are said to have arisen from and out of Memorandum of Understanding dated 07.11.2012 as between two petitioners as well as Respondents 1 and 2 and impleaded parties (if any) at the discretion of the Arbitral Tribunal in accordance with obtaining A & C Act.

Instant OP disposed of on above terms. No costs.

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Speaking order: Yes/No
Index: Yes / No
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