

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.01.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.852 of 2019

Mr.Anbarasan

.. Petitioner

Vs.

G.Selvam

.. Respondent

This Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to resolve the dispute between the petitioner and the respondent as per clause 20 of Partnership Deed dated 20.07.2015 and pass such further order which is deem fit and proper in the above circumstances of the case and thus render justice.

For Petitioner : Mr.K.Balu

For Respondent : No Appearance

ORDER

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Mr.K.Balu, learned counsel on record for petitioner is before this Court.

2. Instant 'Original Petition' ('OP' for brevity) is *inter alia* under Section 11 of 'The Arbitration and Conciliation Act, 1996 (26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity and clarity and instant OP is obviously with a prayer for appointment of an arbitrator.

3. Nucleus of instant OP is a Partnership Deed dated 20.07.2015, to which the petitioner and the respondent are parties. To be noted, petitioner and respondent together constitute a partnership firm which goes by the name M/s.JDH Hydraulics. If the partnership deed is the nucleus, arbitral disputes which have arisen between petitioner and respondent is the epicenter of instant OP.

4. Learned counsel petitioner draws the attention of this Court to clause 20 of the aforesaid Partnership Deed and submits that the same is the arbitration agreement (arbitration agreement within the meaning of Section 7 of A and C Act between the parties). Clause 20 of the partnership deed reads as follows:

'20.Arbitrators & Umpires:

Any dispute relating to the partnership business or its management or to the construction of the deed shall be amicably settled unanimously. In the event the parties hereto do not agree unanimously the

disputes shall be referred to an arbitrator named by mutual agreement. The arbitrator shall be appointed by the parties hereto in accordance with a subject to the provisions of the Indian Arbitrators Act or any statutory Notifications thereof for the time being in force. The award of such arbitrators shall be final and binding on all the parties.'

5. The respondent has been duly served (albeit by resorting to substituted service as conventional modes of service did not yield result) and the name of respondent together with full/complete address has been shown in the cause list. This Court is informed that no one has entered appearance on behalf of sole respondent. Name of the respondent called out aloud thrice in Court and the adjoining corridors. No response.

6. Be that as it may, in the light of the aforesaid scenario, learned counsel for petitioner draws the attention of this Court to a notice through a lawyer dated 19.02.2018 sent by the petitioner to the respondent (duly received by the respondent on 21.02.2018). In this notice, petitioner has invoked the aforesaid clause 20 in the aforementioned Partnership Deed, which is the arbitration agreement between the parties. Most relevant paragraph is the concluding paragraph, which reads as follows:

'Our client states that our client and you have agreed to use reasonable efforts to resolve all disputes equitably and in good faith. Hence

our client have instructed us to send this notice to you before invoking the Arbitration Clause contained in Clause 20 of the said agreement. As a prelude to perform other obligations, that you settle our client share from the partnership form and confirm and ratify the partnership form. Otherwise you are at liberty to have discussion with our client any time for handing over his share from the partnership form. Hence you are hereby called upon to comply with the demands of our client made supra within 15 days from the date of the receipt of this notice. On your failure to comply with the lawful demands of our client made supra within 15 days from the date of the receipt of this notice. On your failure to comply with the lawful demands made supra, we will be constrained to invoke the Arbitration clause contained in clause 20 of the partnership agreement for its redress.'

7. Learned counsel for petitioner submits that respondent responded through advocate vide notice dated 23.03.2018, wherein the respondent has categorically agreed for arbitration proceedings. Most relevant paragraph in the reply notice is also the concluding paragraph and the same reads as follows:

'Therefore, you are hereby informed on behalf of my client that my client is always ready for Arbitration proceedings after closing a firm's account for the year of 2017-2018 i.e., after 31st March – 2018 with proper account particulars, which has to be collected by him from the Auditor Office.'

8. Adverting to the aforesaid notice and reply, learned counsel for petitioner submits that the existence of an arbitration agreement between the

parties is not in dispute and that the petitioner has been able to *prima facie* demonstrate to this Court about the existence of an arbitration agreement between the petitioner and the respondent.

9. In this regard i.e., with regard to *prima facie* existence of an arbitration agreement between the parties, this Court reminds itself of ***Duro Felguera principle*** reiterated in ***Mayavati Trading principle***. ***Duro Felguera principle*** was 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*** case law 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. '

10. **Mayavati Trading principle** was laid down 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** case law 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)

11. As the petitioner has been able to *prima facie* demonstrate the existence of an arbitration agreement and the respondent has not come forward to dispute or to enter upon any disputation or contestation qua the same (on the contrary, respondent vide reply notice dated 23.03.2018, has agreed for arbitration and has accepted the existence of an arbitration agreement) this Court proceeds to appoint Mr.AJ. Jawad, Advocate residing at No.5/1, Jagageevan Ram Avenue, East Coast Road, Injambakkam, Chennai -

600 115 [Mobile No.98400 87114] as sole arbitrator.

12. Learned Arbitrator is requested to enter upon reference, adjudicate upon the arbitral disputes that have arisen between the petitioner and the respondent vide the Partnership Deed dated 20.07.2015 and pass an award 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.

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

28.01.2020

Speaking/Non-Speaking order

Index : Yes/No

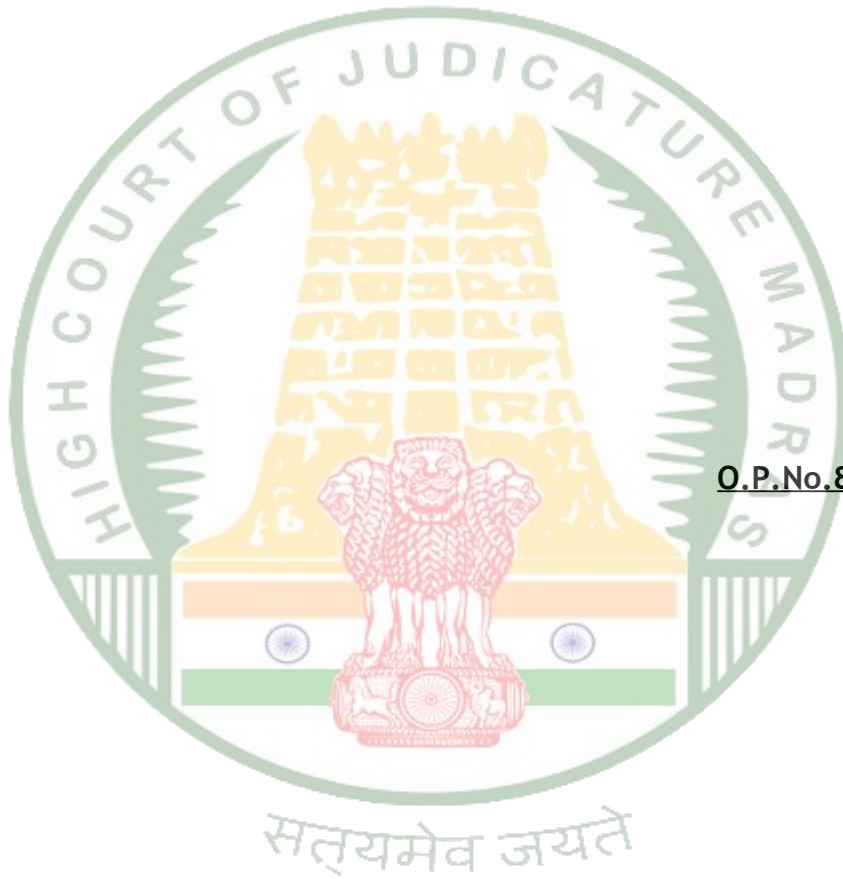
Internet: Yes/No

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Note: Registry is directed to communicate this order to Mr.AJ. Jawad, Advocate residing at No.5/1, Jagageevan Ram Avenue, East Coast Road, Injambakkam, Chennai - 600 115 [Mobile No.98400 87114], forthwith.

M.SUNDAR, J.

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