IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.02.2020

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THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.1038 of 2019

M/s.Fine Automotive & Industrial Radiators Pvt. Ltd.,
Represented by its Managing Director
Having registered office at No.67, PIPDIC Road
7th Cross, Sedharapet, Puducherry ... Petitioner

vs.

1.Bharath Sanchar Nigam Ltd.,
Represented by its Principal General Manager
Puducherry Telecom District Office
Having office at Rangapillai Street
Puducherry – 605 001

2. The Accounts Officer (CMTS)
Office of the General Manager
Bharath Sanchar Nigam Ltd.,
Rangapillai Street, Puducherry – 605 001 ... Respondents

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint a sole Arbitrator to arbitrate upon the disputes between the petitioner and the respondent and for costs of this petition.

For Petitioner : Mr.D.Bharatha Chakravarthy
Assisted by Ms.Gopika Nambiyar

For Respondents : Mr.K.R.Ramesh Kumar

ORDER

Mr.D.Bharatha Chakravarthy, learned counsel assisted by Ms.Gopika Nambiyar, on behalf of petitioner and Mr.K.R.Ramesh Kumar, learned counsel for both the respondents are before this Court.

2. Instant 'Original Petition' ('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 the sake of brevity and the prayer obviously is for appointment of an arbitrator. Therefore, short facts shorn of details will suffice.

3. Suffice to say that the petitioner had taken a post-paid mobile telephone connection from the respondent telecom service provider and the telephone number is 9443267185.

4. The aforesaid connection was taken in the year 2003.

5. The petitioner is a company and this Court is informed that Managing Director of the petitioner company has been using the aforesaid mobile telephone. It is the case of the petitioner that Managing Director travelled to Middle East (Dubai) some time in November 2015 (from

02.11.2015 to 07.11.2015 to be precise). The aforesaid telephone connection was used in Dubai i.e., International Roaming Services. Thereafter, the bill raised by the respondents was disputed by the petitioner saying that it is not commensurate with the usage and it is excessive. This is the lis between the parties (in a nutshell).

6. Though very many averments have been made in the petition and in the counter or in other words in the pleadings, after some hearing, this Court directed the respondents to produce the agreement between the parties, as arbitration itself and more particularly, Arbitral Tribunal is a creature of contract between the parties. Pursuant to aforesaid direction, learned counsel for respondents has produced the terms and conditions on which above said mobile connection was given to the petitioner, besides a Licence Agreement for Cellular Mobile Telephone Service, being an agreement between the 'Department of Telecommunications' (DOT), Government of India and 'Bharath Sanchar Nigam Ltd.,' ('BSNL' for brevity).

7. Relevant covenant in the contract i.e., terms and conditions between the parties are Clauses 9 and 11.4. Clause 9 of the Contract captioned 'DISPUTE RESOLUTION' reads as follows:

' ***9.DISPUTE RESOLUTION***

In case of any dispute, the matter will be referred to the sole *arbitration of Chief General Manager Telecom, BSNL of the concerned area or his nominee and will be governed as under Provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment there of or any rules made thereof, customer will have No objection in any such appointment that arbitrator so appointed is employee of the BSNL.*

'**Clause 11.4 of the contract reads as follows:**

11.4 The scope of the cellular services is governed by the Statutory Guidelines issues by the Telecom Regulatory Authorities & Govt. of India within the parameters of License Agreement executed with Ministry of Communications, Government of India. The cellular phone services are governed by the Telegraph Act, 1885 and the Indian Telegraph Rules, 1951 framed under the same act, as amended from time to time and the customer shall abide by them.'

8. A perusal of Clause 11.4 takes us to the aforementioned Licence Agreement between DOT and BSNL. Relevant clauses in the Licence Agreement are Clauses 12 and 16.3. Clause 12 captioned 'DISPUTES SETTLEMENT' reads as follows:

' **12. DISPUTES SETTLEMENT**

'12.1. As per provisions of Telecom Regulatory Authority of India Act, 1997 as amended from time to time, disputes, if any, between:

i) The LICENSEE and a Group of Consumers, and

ii) the Licensee and LICENSOR,

shall be settled in Telecom Disputes Settlement and Appellate Tribunal, if such dispute arises out of or connected with the provisions of the license agreement.'

'**Clause 16.3 reads as follows:**

16.3. The Statutory provisions and the rules made under Indian Telegraph Act, 1885 or Indian Wireless Telegraphy Act, 1933 shall govern this Licence agreement. Any order passed under these statutes shall be binding on the licensee.'

9. In the light of the aforesaid covenants, which operate as an arbitration agreement between the parties being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act, the disputes have to necessarily be resolved by an Arbitrator. Though this relates to Section 7B of the Telegraph Act, 1885, much water has flown under the bridge in instant matter and it is agreed that in this case, considering the trajectory, as an exception, a neutral arbitrator can be appointed. This makes the task of disposal of instant OP fairly simple as in any event, the scope of OP is extremely narrow in the light of ***Duro Felguera*** principle and Mayavati Trading Principle. ***Duro Felguera*** principle has been laid down by Hon'ble Supreme Court vide ***Duro Felguera S.A. vs. Gangavaram Port Limited*** reported in ***(2017) 9 SCC 729***. Relevant paragraphs in ***Duro Felguera*** case law 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. '

(underlining made by this Court to supply emphasis and highlight)

10. *Mayavati Trading* principle has been laid down by Hon'ble Supreme Court vide ***Mayavati Trading Pvt. Ltd., Vs. Pradyuat 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. In the light of ***Duro Felguera*** and ***Mayavati Trading*** principles, all that this Court has to look into in instant OP is to examine the existence of an arbitration agreement between the parties being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. There is no disputation or contestation in this regard. There is unanimity (albeit as an exception) for appointment of a neutral arbitrator. Therefore, Mr.M.Sricharan Rangarajan, Advocate, at New No.20A, Luz Avenue, 5th Street, Mylapore, Chennai-600 004 (Telephone No: 24987863) is appointed as sole Arbitrator. Learned Arbitrator is requested to enter upon reference qua the arbitral disputes that have arisen between the parties, adjudicate upon the same 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 Arbitration Centre under the aegis of this Court.

Instant OP disposed of on above terms. No costs.

14.02.2020

Speaking order: Yes/No
Index: Yes/No
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Note: Registry is directed to communicate this order to Mr.M.Sricharan Rangarajan, Advocate, at New No.20A, Luz Avenue, 5th Street, Mylapore, Chennai-600 004 (Telephone No: 24987863) forthwith.

M.SUNDAR.J.,

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