

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.01.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.967 of 2019

M/s.East Coast Construction and Industries Ltd
Rep. by its Chief Operating Officer
Having its Registered Office at:
Buhari Building
No.4, Moores Road
Chennai - 600 006.

.. Petitioner

Vs.

Chennai Metropolitan Water Supply and
Sewerage Board
Represented herein by its
Superintending Engineer/Executive Engineer
No.1, Pumping Station Road
Chintadripet
Chennai - 600 002.

.. Respondent

This Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator on behalf of the respondent; direct the respondent to pay costs of the petition to the petitioner; 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 Petitioner : Ms.Ami V. Kataria

For Respondent : Mr.C.Vigneswaran

ORDER

Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) has been filed 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, clarity and convenience.

2. In the light of *Mayavati Trading principle* laid down by Hon'ble Supreme Court in *Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714 and *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, the scope of instant OP is extremely narrow, as the scope of instant OP is confined examining the existence of an arbitration agreement between the parties and coming to a *prima facie* conclusion about the existence of an arbitration between the parties.

3. Before proceeding further, this Court reminds itself of the relevant paragraphs in *Mayavati Trading* and *Duro Felguera principles*. 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)**

4. 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. '*

5. In the light of *Mayavati Trading* and *Duro Felguera principles*, the task of disposing of instant OP has become fairly simple as both the learned counsel i.e., Ms.Ami V. Kataria for sole petitioner and Mr.C.Vigneswaran, legal adviser/learned Standing Counsel for sole respondent submit that there is no dispute or contestation about the existence of an arbitration agreement between the parties.

6. Both the learned counsel submit that there is an agreement dated 16.08.2010 between the parties for 'providing comprehensive water supply scheme to Nerkundram Village Panchayat-for Mettukuppam Zone, Pallavan Nagar Zone, AVK Nagar Zone and Sri Lakshmi Nagar Zone' and 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 covenant captioned 'Special Conditions of Contract' forming part of agreement dated 16.08.2010. To be noted, Arbitration clause is clause 3 captioned 'Arbitration' and the same reads as follows:

3.ARBITRATION

The procedure for arbitration will be as follows:

(a) In case of Dispute or difference arising between the Employer and Contractor relating to any matter arising out of or connected with this

agreement such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties, shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment, this shall be done in accordance with the Arbitration and Conciliation Act, 1996.

(b) DELETED

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the appointment of the Arbitrator shall be made as per the Arbitration and Conciliation Act, 1996.

(d) Arbitration proceedings shall be held at Chennai, (India) and the languages of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expense of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the Expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be born by each party itself.

(f) DELETED

(g) Performance under the contract shall continue during the arbitration proceedings and payments due to the Contractor by the Employer shall not be withheld, unless they are subject matter of the arbitration proceedings.'

7. For the purpose of completing the narrative in this order, this Court

deems it appropriate to record that learned Standing Counsel for sole respondent adverting to covenant Nos.24 and 25 captioned 'Disputes' and 'Procedure for Disputes' respectively submitted that an Engineer's decision and resolution by approaching an Adjudicator before invoking arbitration clauses is imperative. Clause 24 and 25 read as follows:

'24. Disputes

24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

25. Procedure for Disputes

25.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of the Contract.'

8. In response to this, learned counsel for respondent drew the attention of this Court to paragraphs 13 and 14 of instant OP which read as follows:

'13. In the said circumstances as the dispute continued to persist, having left with no other alternative, the Petitioner herein in an attempt to amicably resolve the dispute that had arisen with regard to the wrongful termination and illegal withheld of Retention monies, in a Pre-Arbitration procedure wrote a Letter dated 09.05.2018 [Annexure 39], to the Contract named Adjudicator and accordingly under Clause 24 & 25, requested Mr.V.Rajagopal [Adjudicator] to accord its decision within 28 days as stipulated in the Contract. As the Adjudicator expressed his inability to adjudicate the dispute, the Petitioner herein in accordance to the Dispute Clause was constrained to invoke Arbitration Clause vide its Letter dated 19.05.2018 [Annexure 40], nominating Hon'ble Justice Mr.E.Padmanabhan, Former Judge, Madras High Court as its Nominee Arbitrator.

14. The petitioner further state that in reply to the Invocation Letter, the Respondent herein on completely untenable reason, denied Arbitration vide its Letter dated 25.05.2018 [Annexure 41].'

9. In the light of undisputed facts scenario qua aforementioned paragraphs 13 and 14 of instant OP, the objection of sole respondent predicated on Clauses 24 and 25 pales into insignificance. This is the reason why, the task of disposing of instant OP has become fairly simple, as already alluded to supra.

10. One more aspect of the matter which is of relevance is, a perusal of the arbitration agreement between the parties which is in the form of a clause

in the agreement dated 16.08.2010, envisages a three member arbitral tribunal, but both the learned counsel, on instructions, from their respective clients i.e., parties to contract/instant OP submit that the size of arbitral tribunal may please be downsized and an arbitral tribunal may please be constituted by appointing a sole arbitrator.

11. As there is no disputation or contestation regarding existence of an arbitration agreement between the parties Hon'ble Tmt.Justice Prabha Sridevan (Retd.), former Judge of this Court, residing at No.7, Krishnaswamy Iyer Avenue, Luz Church Road, Mylapore, Chennai -4 [Mobile No.9444390920], is appointed as sole arbitrator. Hon'ble Arbitrator is requested to enter upon reference, adjudicate the arbitral disputes between the parties and pass an award in accordance with A and C Act. Hon'ble Arbitrator is free to fix arbitral fees.

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

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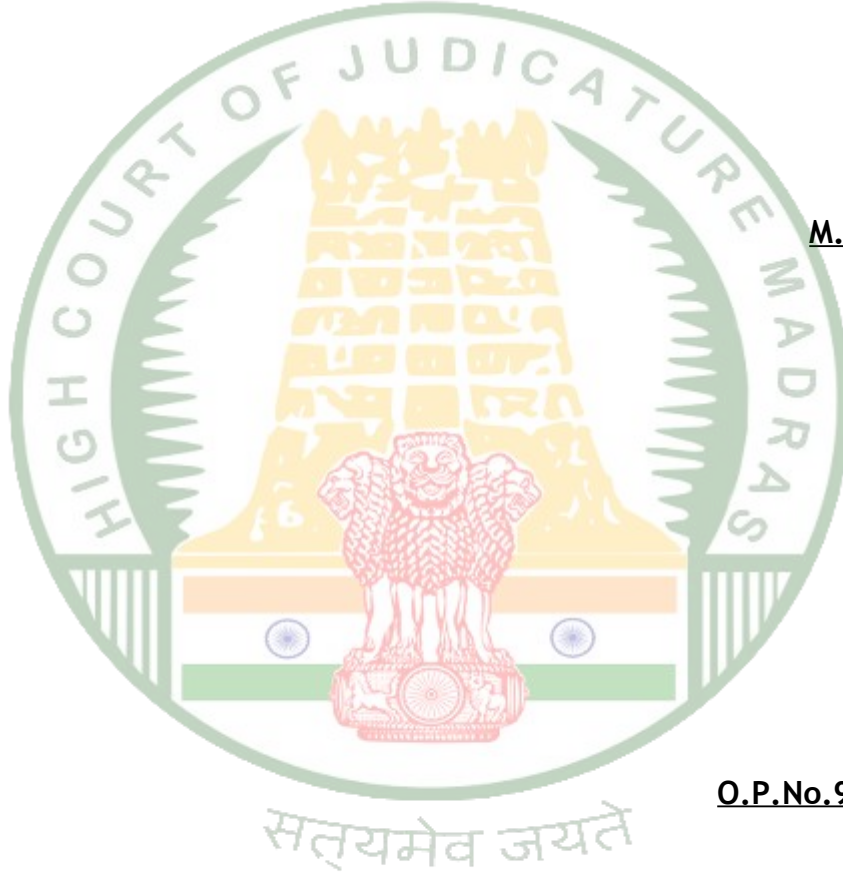
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Speaking/Non-Speaking order

Index : Yes/No
Internet: Yes/No

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Note: Registry is directed to communicate this order to Hon'ble Tmt.Justice Prabha Sridevan, No.7, Krishnaswamy Iyer Avenue, Luz Church Road, Mylapore, Chennai -4 [Mobile No.9444390920], forthwith.

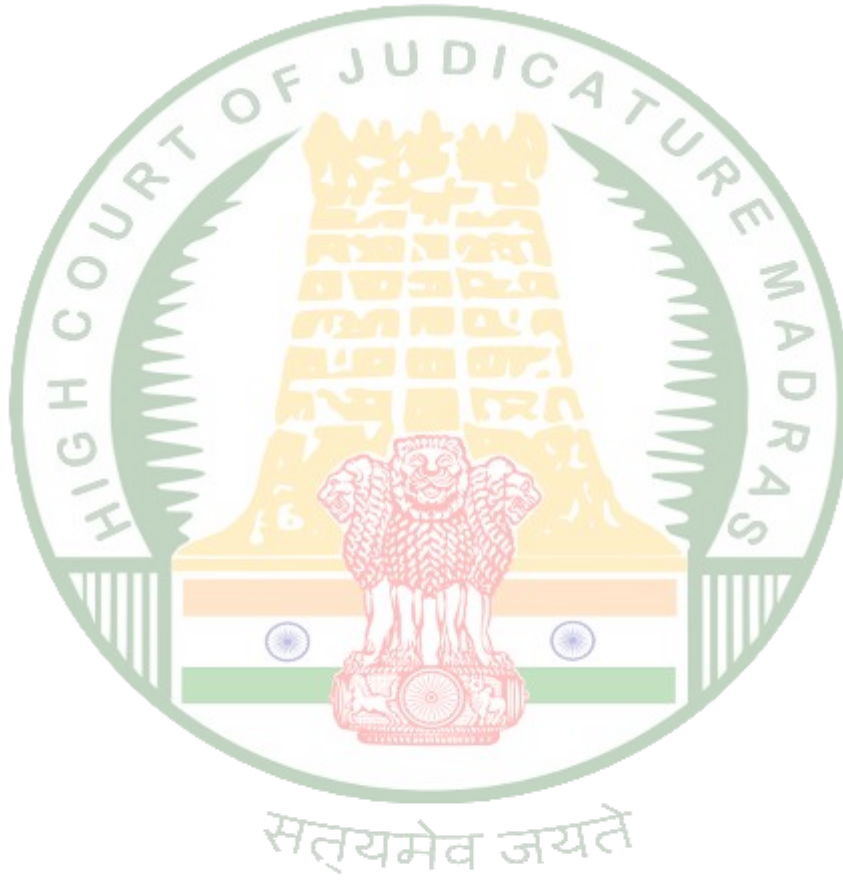


M.SUNDAR, J.
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