

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :29.01.2020

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THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.1060 of 2019

M/s. Outshiny India Pvt.Ltd.
Previously known as M/s.Outshiny India Apparels Pvt Ltd
having its office at:
No.17, Narayanappa Layout,
Ganeshnagar, Thindlu, Kodegehalli,
Bangalore.
Represented by its Director Mr.Sridhar.T .. Petitioner

Vs.

Dee Ess Engineers India Projects Pvt Ltd.
Represented by its Head - Finance, Admin & HR
Mr.Sivaprakash S.S.
No.26B/5, 5th Street,
Sidco Industrial estate,
Ambattur, Chennai. .. Respondent

Original Petition filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996, to appoint a Sole, independent and impartial Arbitrator as provided under Clause 18 of the Purchase Order dated 27.10.2017 to adjudicate and decide the disputes between the parties and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.

For Petitioner : Ms.Tanushree Arvind
for Mr.Subhang P.Nair

ORDER

Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) has been filed *inter alia* under Section 11(5) and (6) 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 and the prayer obviously is for appointment of an arbitrator.

2. Instant OP is predicated on clause 18 of purchase order dated 27.10.2017. To be noted, clause 18 of said purchase order captioned 'ARBITRATION JURISDICTION & LAW' reads as follows:

'18. ARBITRATION JURISDICTION & LAW'

If at any time, any questions, dispute or difference, whatsoever, shall arise between the Seller and the Buyer in relation to or in connection with or arising out of this Purchase Order, both parties agree to resolve the same by mutual consultation. Failing resolution by mutual consultation, either party may give to the other a notice in writing of the existence of such question(s)/dispute(s)/difference(s) and the same shall be referred to the arbitration by mutually agreed sole arbitrator, if for any reason parties could not be able to agree to nominate sole arbitrator than the appointment of arbitrator shall be made as per provisions of Arbitration and Conciliation Act 1996 by court. Award of the

Arbitrator shall be final and binding on both the parties. The Arbitration proceedings shall also be governed by the provisions of the Arbitration and Conciliation Act 1996 and the rules framed there under and read with all statutory amendments and modifications thereof. Venue for arbitration shall be at Chennai. During and/or an account of the arbitration Buyer may reject any or all of the goods/material which does not conform to the applicable requirement'.

3. Ms.Tanushree Arvind, learned counsel representing the counsel on record for petitioner submits that the aforesaid clause 18 serves as arbitration agreement between the parties, being an arbitration agreement within the meaning of Section 7 of A and C Act.

4. Before proceeding further in this matter, this Court reminds itself about the limited contours and confines of an OP under Section 11 of A and C Act as laid down by the Hon'ble Supreme Court in ***Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in (2017) 9 SCC 729 and ***Mayavati Trading Pvt. Ltd., Vs. Pradyut Deb Burman*** reported in (2019) 8 SCC 714) . The most relevant paragraphs in ***Duro Felguera, S.A. versus Gangavaram Port Limited*** 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. The most relevant paragraph in **Mayavati Trading** 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)**

6. This Court having reminded itself about the limited confines and contours of an application/petition under Section 11 of A and C Act, now proceeds to examine (*prima facie*) existence of arbitration agreement between the parties. In this regard, learned counsel for petitioner draws the attention of this Court to notices dated 17.10.2018 and 25.02.2019 issued by the petitioner to respondent. To be noted, 25.02.2019 notice can be described as the 'trigger notice', as the petitioner has referred to the aforesaid arbitration clause, nominated an arbitrator and sought concurrence of noticee/ respondent. It is submitted that thereafter it came to light that there is more than one address for the respondent/noticee and therefore, the trigger notice was reissued to the respondent/noticee to all the three addresses and this notice is dated 12.03.2019. Postal acknowledgement cards evidencing services of this reissued 12.03.2019 notice on the respondent at all three addresses have been placed before this Court and a perusal of the same reveals that respondent has been served with trigger notices dated 12.03.2019 and 25.02.2019. Learned counsel for petitioner submits that respondent has neither replied nor responded.

7. It is also submitted that there is an assertion of the arbitration agreement between the parties in trigger notice and this assertion has not been denied by the respondent either by sending a reply or by coming before this Court and therefore, even on demurrer, the existence of arbitration agreement becomes indisputable in the light of Section 7(4)(b) of A and C Act.

8. In the light of the language in which it is couched and in the light of the trajectory which the trigger notices has taken as alluded to supra, this Court has no difficulty in accepting this submission.

9. As *prima facie* existence of arbitration agreement is made out, this Court proceeds to appoint Mr.K.S.Karthik Raja, Advocate, at E4, 4th Floor, 49/24, Ananthi Apts, Santhome High Road, Mylapore, Chennai - 600004, Mobile:9551083229, 9486083229, as sole arbitrator. Sole arbitrator is requested to enter upon reference and adjudicate upon the arbitrable disputes that have arisen between the parties and pass an award in accordance with A and C Act. The arbitration proceedings shall be conducted under the aegis of the Madras High Court Arbitration Centre, Chennai - 600 104, 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.

10. Instant OP disposed of on above terms. There shall be no order as to costs.

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Speaking Order/Non-Speaking Order

Index : Yes/No

Internet: Yes/No

Note:

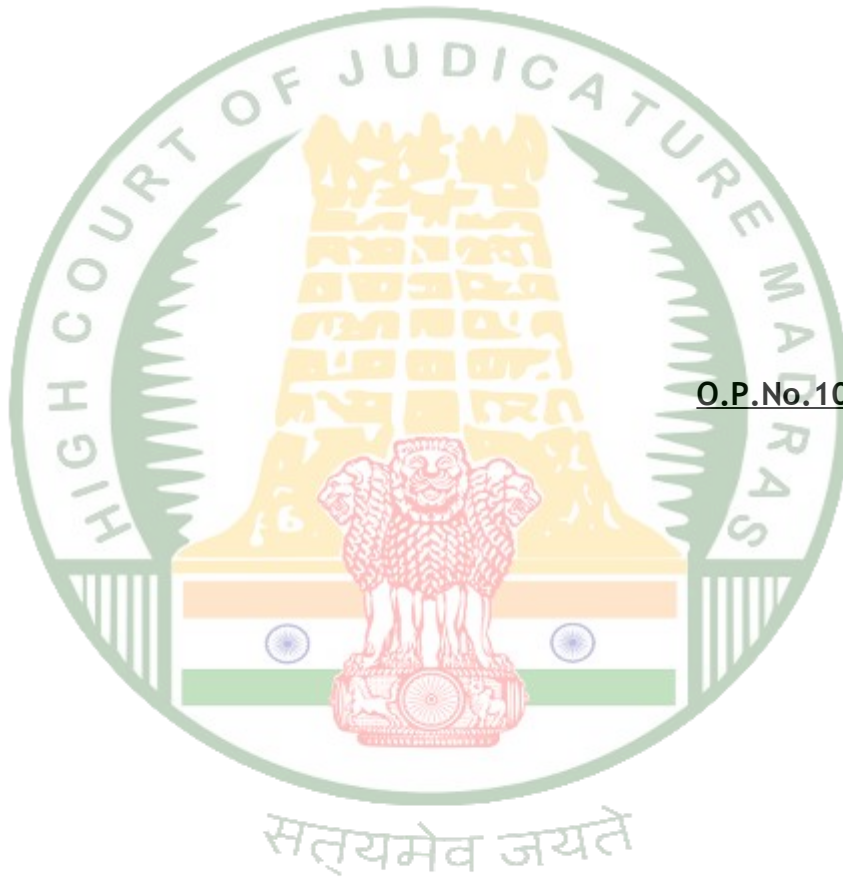
Registry is directed to communicate this order to Mr.K.S.Karthik Raja, Advocate, at E4, 4th Floor, 49/24, Ananthi Apts, Santhome High Road, Mylapore, Chennai - 600004, Mobile:9551083229, 9486083229, forthwith.



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M.SUNDAR,J.

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