

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20 / 08 / 2020

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

O.P.NO.1162 OF 2018
AND
O.A.NO.1132 OF 2018

Aarti Razee

.. Petitioner

Vs.

1.S.Sivagurunathan
2.R.Mennan

.. Respondents

PRAYER: Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking to appoint an independent qualified Sole Arbitrator to hear and decide the claims of the petitioner arising out of the Partnership Deed Contract dated 24.04.2000; and to direct the respondents to pay the cost of this petition.

For Petitioner : M/s.T.M.Naidu & Co.
For Respondent-1 : Mr.V.G.Guhan Murugan
For Respondent-2 : Mr.A.R.Palaniswamy

ORDER

This Original Petition is filed for appointment of Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2.The petitioner seeks to appoint an Arbitrator with regard to the disputes between the petitioner and the respondents who are partners in business pursuant to a Partnership Deed dated 24.04.2000.

3.Controverting the claim, the first respondent would contend that the application is bad for not impleading the erstwhile Partners of the Partnership and for suppressing the same. However, he would suggest for appointing a retired Judge of this Court as Sole Arbitrator.

4.The second respondent would oppose the very maintainability of the above application on the ground that he is not a party to the Partnership deed dated 24.04.2000 and the conditions incorporated in the deed would not bind him. According to him he was inducted as Partner by way of an amended Partnership Deed dated 01.10.2016, in which there is no arbitration clause to refer the matter to arbitration. Relying on the judgments

of the Hon'ble Supreme Court in ***M.R.ENGINEERS AND CONTRACTORS PVT. LTD., VS. SOM DATT BUILDERS LTD., [2009 (7) SCC 696]*** and ***A.AYYASAMY VS. A.PARAMASIVAM [CIVIL APPEAL NOS.8245-8246 OF 2016 DECIDED ON 04.10.2016]***.

5.I have gone through the materials placed before this Court.

6.Originally the Petitioner and the first respondent have commenced a construction business on commercial basis and entered into a Partnership Deed dated 24.04.2000. Clause 28 of the deed specifies resolution of disputes through Arbitration. There were induction of new partners and retirement of partners over the years in their business. As such, the second respondent was inducted as an incoming partner in the business on 1.10.2016. After his induction into partnership, an amendment was made to the partnership deed.

7.Even though the first respondent denied the averments would agree for appointment of an Arbitrator from among three names of the retired High Court Judges suggested by him to be appointed as Sole Arbitrator.

8.However, the Second respondent would resist the appointment

of Arbitrator on the ground that there is no arbitration clause in the partnership entered by him. It is an admitted fact that the Second respondent was inducted as an incoming partner upon retirement of an erstwhile partner. In effect the second respondent joined the partnership business and became a partner of the petitioner and first respondent. It is also not in dispute that he was inducted by a resolution passed by the partners. On his induction certain conditions were incorporated by way of amendment. It is natural that the quantum of investment of the incoming partner, percentage of profit sharing, his role in the business are to be carved out and such incorporation can be made by amendment. Only because the second respondent has signed only in the deed of amendment or reconstitution does not mean that he is not governed by the clauses of the original contract. In effect he is bound by the same and acquires all rights and liabilities of Partner in the Partnership business. Therefore the contentions of the second respondent is not sustainable. He is entitled to raise all the points before the Arbitrator.

9.Further as contended by him the deed of amendment of

reconstitution is not separate and distinct contract. His reliance on the judgment of *M.R.Engineers and Contractors Pvt Ltd cited supra*, will not apply to this case. In the above case a Sub Contractor sought to apply the terms and conditions entered into between the Principal and the Main Contractor into the Sub Contract. The Hon'ble Supreme Court has held the contracts between the Principal and the Contractor and the Contractor and the Sub Contractor are different and parties to the Contract are also different. Therefore the conditions of one contract cannot be read into the other. The sub-contractor was a third party and he cannot enforce the conditions of the contract entered between the Main Contractor with his Principal. Here, the Second respondent himself is a party to the Partnership Deed and he is not a third party.

10.In the judgment of *Dura Felguera, S.A. Vs Gangavaram Port Limited (2017 (9) SCC 729)* the Hon'ble Supreme Court has held that after the amendment of 2015, all that the court need to see is whether an arbitration 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 ought to be respected. In that view this court has to see as to whether there is an arbitration agreement between the parties and arbitrability of the matter. If does not fall within the excluded category of rights or actions in rem but it is between the individuals having the character of rights or actions in personam, it has to be referred to arbitration. The present case is between the individuals and as such rights in personam.

11. Therefore, I am of the considered opinion that the Applicant is entitled to get the relief sought for. Whatever legal issues the parties like to raise it can be raised before the Arbitrator.

12. Thus, this Court appoints the ***Hon'ble Mr. Justice K. Govindarajan (Retd.) residing at No.5, Justice Ramanujam Street, Malavya Avenue, Thiruvannamiyur, Chennai – 600 041, Mobile: 9444403403*** as the Sole Arbitrator, to enter upon reference and adjudicate the disputes *inter se* the parties. He may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order.

The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

13.The Original Petition is ordered accordingly, leaving the parties to bear their own costs. Consequently, connected original application is closed.

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M.GOVINDARAJ, J.

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