

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 01.11.2021

Orders Pronounced on : 10.11.2021

Coram:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Arb.O.P.No.10 of 2021

India Pistons Limited,  
A Company incorporated under  
the Companies Act, 1956  
having its Registered Office at  
Huzur Garden,  
Madhavaram Main Road,  
Sembiam, Chennai-600 011.

.. Petitioner

Vs.

Mr.Ganapathi Chandrasekar,  
No.4/132A, Swaminathan Nagar,  
7th Street, Kottivakkam,  
Chennai-600 041.

.. Respondent

Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint a Sole Arbitrator to resolve the dispute between the petitioner and the respondent under Clause 17 of the Agreement, dated August 28,2014.

For petitioner : Mr.Bharadwa Ramasubramanianm.R.

For respondent : M/s.Maimoona Badsha

ORDER

This Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of a Sole Arbitrator to resolve the dispute between the petitioner and the respondent under Clause 17 of the Agreement, dated August 28, 2014.

2. Brief facts which gave rise to the filing of the above Original Petition are stated hereunder:

(a) The petitioner-Company is incorporated under the Companies, Act, 1956 (for short, 'Act 1996'). The Company is in the business of manufacturing auto-parts and automobile components. The Company, apart from the score of its business operations, owns a cricket team by name India Pistons Cricket Club (for short, 'IPCC') and the IPCC plays in the divisional league within the State of Tamil Nadu.

(b) The respondent is a professional cricket player.

(c) The petitioner-Company offered employment to the respondent in the rank of Senior Executive-Finance and the offer letter was issued by the petitioner-Company to the respondent on 01.06.2006. The

respondent accepted the offer letter and thereafter, he was appointed to the position of Senior Executive--Finance in the Company's Market Sales Division at their Sembiam Plant. The terms and conditions governing the employment of the respondent, were stipulated in that offer letter. Apart from the terms and conditions referred to in the offer letter, the respondent's employment was also governed by the other Rules and Regulations of the Company.

(d) While being employed in the rank of an Executive, the respondent was permitted to play for the IPCC in the First Division Matches under the aegis of the Tamil Nadu Cricket Association.

(e) The respondent has also executed an agreement with the petitioner-Company on 28.08.2014, accepting certain conditions imposed by the Company during the subsistence of the respondent's employment with the Company. In terms of Clause 17 of the said agreement, it was also stipulated that in the event of any dispute or differences arising out of the agreement or in connection with the interpretation of the agreement, the same shall be referred for 'Arbitration' to be conducted by a sole Arbitrator, appointed by the Managing Director of the employer under the provisions of

the Arbitration and Conciliation Act, 1996.

(f) According to the petitioner-Company, the respondent had violated the terms and conditions of the agreement, dated 28.08.2014, particularly, Clause 7 of the agreement. The petitioner-Company was therefore constrained to terminate the employment of the respondent, vide letter dated 23.3.2020, with effect from 01.04.2020. The respondent thereafter approached the Special Joint Commissioner of Labour by filing an appeal in T.S.E.Appeal No.1 of 2021, under the provisions of the Tamil Nadu Shops and Establishments Act, 1947 (for short, 'Act, 1947'), assailing the order of termination.

(g) However, according to the petitioner, in the face of the arbitration agreement between the parties, the dispute not only is in relation to the termination of the employment, but it transcends beyond that, as between the parties, which could be settled only before the Arbitration Tribunal duly appointed by this Court. According to the petitioner-Company, a notice was issued to the respondent under Section 21 of the Act, 1996, on 03.03.2021.

(h) Although the respondent has not denied the existence of a

valid arbitration agreement, however, did not choose to respond positively to the notice, but called upon the petitioner-Company to withdraw the legal notice issued under the provisions of the Act, 1996. Therefore, the petitioner-Company is constrained to file the present Original Petition (for short, 'O.P') for appointment of a sole Arbitrator to resolve the dispute between the parties, in terms of Clause 17 of the agreement, dated 28.08.2014.

3. As far as the legal position is concerned, the learned counsel for the petitioner relied on the following decisions, in which, he also referred to specific paragraphs which would be a guiding factor for this Court to take a call in the matter and the same are extracted hereunder:

(i) 2021 (5) SCC 738 = 2021 SCC Online SC 207: (Bharat Sanchar Nigam Ltd. and another Vs. Nortel Networks India Pvt. Ltd): (SCC paras 30, 31, 32, 34, 35, 36 and 37):

**"30.** The amendments to Section 11 were brought in to legislatively overrule the line of judgments including *SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]*, *Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]*, *Master*

*Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , etc., which had enlarged the scope of power of the appointing authority to decide various issues at the pre-reference stage.*

**31.** Sub-section (6-A) came up for consideration in *Duro Felguera, S.A. v. Gangavaram Port Ltd.* [ (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , wherein this Court held that the legislative policy was to minimise judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence — nothing more, nothing less : (SCC pp. 759 & 765, paras 48 & 59)

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

**‘11. (6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*’

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration

agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

\* \* \*

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. *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 minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.” (emphasis in original and supplied)

32. In *Mayavati Trading (P) Ltd. v. Pradyut Deb Burman* [(2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441], a three-Judge Bench held that the scope of power of the Court under Section 11(6-A) had to be construed in the narrow sense. In para 10, it was opined as under : (SCC pp. 724-25)

“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 judgment [*United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785], 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, S.A.* [*Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] ” (emphasis in original)

34. In view of the legislative mandate contained in the amended Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimise judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold

when a preliminary objection is raised by the parties.

***The 2019 Amendment to Section 11 :***

**35.** Section 11 has been further amended by the Arbitration and Conciliation (Amendment) Act, 2019 to promote institutionalisation of arbitration in India. The 2019 Amendment Act has deleted sub-section (6-A) in Section 11. However, the amendment to Section 11 is yet to be notified. Consequently, sub-section (6-A) continues to remain on the statute book, and governs the scope of power under Section 11 for the present. The notification giving effect to the provisions of the 2019 Amendment Act which have been brought into force, reads as:

**“MINISTRY OF LAW AND JUSTICE  
(Department of Legal Affairs)**

**NOTIFICATION**

New Delhi, 30-8-2019

**S.O. 3154(E).**—In the exercise of the powers conferred by sub-section (2) of Section 1 of the Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019), the Central Government hereby appoints 30-8-2019 as the date on which the provisions of the following sections of the said Act shall come into force:

- (1) Section 1;
- (2) Section 4 to Section 9 (both inclusive);
- (3) Section 11 to Section 13 (both inclusive);
- (4) Section 15.

[F. No. H-11018/2/2017-Admn.-III(LA)]

Dr RAJIV MANI, Jt.Secy.and Legal Adviser”

36. The reference to "Section 11" in clause (3) of the Notification dated 30-8-2019 pertains to Section 11 of the Amendment Act [and not the principal Act of 1996]. The amendment to Section 11 in the 2019 Amendment Act find place in Section 3 of the 2019 Amendment Act, which reads as:

**"3. Amendment of Section 11:--**In Section 11 of the principal Act--  
(i)-(iv) \* \* \*  
(v) sub-section (6-A) and (7) shall be omitted;"

37. After the amendment by the 2019 Amendment to Section 11 is notified, it will result in the deletion of sub-section (6-A), and the default power will be exercised by arbitral institutions designated by the Supreme Court, or the High Court, as the case may be."

(ii) 2019 (8) SCC 714 = 2019 SCC Online SC 1164 (Mayavati

Trading Private Ltd. Vs. Pradyut Deb Bhurman : (SCC para 10):

**"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 judgment [*United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , 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 v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59 [Ed. : The said paras 48 & 59 of *Duro Felguera, SA v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764, for ready reference, read as follows:

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“**11.(6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*”(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there

is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

\* \* \*

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117. 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 minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”]

(iii) 2017 (9) SCC 729 = 2017 SCC Online SC 1233 (Duro

Felguera, S.A. Vs. Gangavaram Port Limited): (SCC para 59):

"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.* [*SBP and Co. v. Patel Engg. Ltd.*, (2005) 8

SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . 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 minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

(iv) 2021 (5) SCC 671 = 2021 SCC Online SC 190 (Pravin

Electricals Private Ltd. Vs. Galaxy Infra and Engineering Private Ltd.):

(SCC paras 18, 23 and 29):

**"18.** The Bench finally concluded: (*Vidya Drolia* case [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], SCC pp. 120-21, paras 153-55):

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc. the court would force the parties to abide by the arbitration

agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading “*Who Decides Arbitrability?*” can be crystallised as under:

154.1. Ratio of the decision in *Patel Engg. Ltd. [SBP & Company v. Patel Engg. Ltd., (2005) 8 SCC 618]* on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered.”

23. However, by a process of judicial interpretation, *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has now read the “prima facie test” into Section 11(6-A) so as to bring the provisions of Sections 8(1) and 11(6)

read with Section 11(6-A) on a par. Considering that Section 11(7) and Section 37 have not been amended, an anomaly thus arises. Whereas in cases decided under Section 8, a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 is not appealable. In the light of what has been decided in *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], Parliament may need to have a re-look at Section 11(7) and Section 37 so that orders made under Sections 8 and 11 are brought on a par qua appealability as well.

29. The facts of this case remind one of *Alice in Wonderland*. In Chapter II of Lewis Carroll's classic, after little Alice had gone down the rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Carroll states "(she was so much surprised, that for the moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to come out between the parties through documentary evidence and cross-examination. Large pieces of the jigsaw puzzle that form the documentary evidence between the parties in this case remained unfilled. The emails dated 22-7-2014 and 25-7-2014 produced here for the first time as well as certain correspondence between SBPDCL and the respondent do show that there is some dealing between the appellant and the respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the

finding by CFSL together with the signing of the agreement in Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. The prima facie review spoken of in *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] can lead to only one conclusion on the facts of this case — that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same. "

4. On behalf of the respondent, a detailed counter affidavit has been filed, denying the various allegations as contained in the O.P. The learned counsel for the respondent, at the outset, submitted that the present O.P. is not maintainable, in view of the fact that already the dispute of the termination of the respondent is before the Special Joint Commissioner of Labour, under the provisions of the Act, 1947. The respondent having

availed of the statutory remedy, cannot be compelled to go before the Arbitral Tribunal.

5. The learned counsel further submitted that the petitioner-Company being arrayed as respondent in the proceedings before the Joint Commissioner of Labour, and having participated in the proceedings, has issued pre-arbitral notice under Section 21 of the Act, 1996, after a period of one year from the date of the termination of the respondent. The notice issued thus is nothing but a counter-blast to the proceedings initiated by the respondent before the Labour authority.

6. Apart from that, the learned counsel for the respondent also contended that the invocation of Arbitral Clause in the agreement, was not in good faith, but was intended to avoid the liability to pay the back-wages and to wriggle out from the consequences of the illegal termination.

7. This Court considered the submissions of the learned counsels appearing for the parties, perused the pleadings and the materials placed on record.

8. As far as the legal position as on date is concerned, after the

amendment to the Act of 1996, in 2015, particularly, with reference to insertion of sub-clause (6-A) in Section 11, the role of the Court under Section 11 is restricted to examine as to whether there is any arbitration agreement between the parties or not? The Honourable Supreme Court has held in the above decisions, that the new Legislative Policy (Amendment 2015) and purpose is essentially to minimise the Court's intervention at the stage of appointing the Arbitrator, as reflected in Section 11(6-A) of the Act.

9. It is not in dispute that there is an arbitration clause between the parties in the agreement. But the only point of opposition against invocation of the arbitration clause is the pendency of the appeal before the Special Joint Commissioner of Labour under the provisions of the Act, 1947.

10. Be that as it may, in the framework of the Scheme of the Act, 1996, it is always open to the Arbitrator to rule on his own jurisdiction and also to render a finding as to whether there is any arbitral issue open to arbitration or not. Correspondingly, it is always within the right of the respondent herein to go before the Arbitral Tribunal and raise whatever objections he may think valid and proper, as to the maintainability of the

proceedings, particularly, with reference to the pending Shop Act Appeal before the Labour Authority.

11. In terms of the legal position as prevailing today, this Court cannot conduct a detailed adjudication and pronounce as to the validity of the invocation of the arbitration clause by the parties. Such consideration is entirely to be left within the domain of the Arbitral Tribunal under the provisions of the Act, 1996.

12. The above case laws of the Honourable Supreme Court and the relevant portions which have been extracted supra, leave no iota of doubt for this Court to come to an inexorable conclusion that the objections against allowing the O.P., are to be rejected and the O.P. is liable to be allowed.

13. At this, the learned counsel for the respondent requested this Court to observe that the reference to the Arbitration under Section 11 of the Act, 1996, shall not be treated any way prejudicial to the right or claim of the respondent in the proceedings pending before the Special Joint Commissioner of Labour, Chennai, in T.S.E.Appeal No.1 of 2021.

14. This Court makes it clear that the reference to the Arbitrator

should not be construed to be affecting the statutory right of the respondent herein to avail any legal remedy open to him. It is always open to the Arbitral Tribunal (i.e. sole Arbitrator) to take into consideration the pendency of the said Appeal filed under the Act, 1947, while ruling on his jurisdiction in respect of the dispute herein.

15. In the above circumstances, the Original Petition is allowed:

(a) Mr.V.Vijay Shankar, Advocate, having office at No.67, Law Chambers, High Court buildings, Madras, (Cell No.94440 01404 and 80729 71816) is hereby appointed as Sole Arbitrator to enter upon the reference and adjudicate upon the dispute inter-se parties.

(b) The above said learned Arbitrator, shall, after issuing notice to the parties and upon hearing them, pass an order as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order.

(c) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses thereto, as per the provisions of the Act, 1996.

(d) The expenses incurred for arbitration shall be borne by the respective parties.

(e) The arbitral proceedings shall be conducted under the aegis of the Arbitration Centre of the Madras High Court, High Court Buildings, Chennai and in accordance with the Madras High Court Arbitration Rules.

(f) It is made clear that the parties are at liberty to raise preliminary objection as to the maintainability of the arbitration before the learned Arbitrator, who shall decide the issue on its validity before proceeding further with the arbitration on merits.

(g) The Arbitrator shall be required to rule on his own jurisdiction in terms of Section 16 of the Arbitration and Conciliation Act, 1996 and in case the Arbitrator takes a decision to reject the plea, he shall continue with the arbitral proceedings and make an Arbitral Award.

(h) There shall be no order as to costs in the present O.P.

Index: Yes/no

Speaking Order: Yes

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10.11.2021

V. PARTHIBAN, J

CS



Pre-delivery Order  
in Arb.O.P.No.10 of 2021

Order pronounced on 10.11.2021

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