

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2021

PRONOUNCED ON : 16.04.2021

CORAM

THE HONOURABLE MR. JUSTICE P. RAJAMANICKAM

O.P. No.441 of 2020

M/s.The Waterbase Limited,
Rep. By its authorized signatory,
Mr.R.Sureshkumar
A Company registered under the
Companies Act, 1956
and having registered office at
Ananthapuram Village, Thotapalli Gudur
Mandal, Nellore District – 524344

Also at
Thapar House No.37,
Montieth Road,
Egmore, Chennai – 600 008

... Petitioner

Vs.

1.M/s.Rising Tide
Represented by its Partner
Mr.Rohan Daniel Mukherjee
Having office at
8/1 H, Diamond Harbour Road,
Kolkata – 700027

2.Rohan Daniel Mukherjee
3.Arnab Daniel Mukherjee

...Respondents

PRAYER: Original Petition is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator under Section 11 (6) of the Act to adjudicate upon the disputes that have arisen between the petitioner and respondents under the Dealership Agreement dated 21.12.2018.

For Petitioner ... M/s.M.S.Krishnan
Senior Counsel
& M/s.Anirudh Krishnan

For Respondents ... M/s.T.Sai Krishnan

ORDER

Since the Hon'ble Portfolio Judge recused, this matter is listed before me as per the standing instructions.

2. This petition has been filed under Section 11 (6) of Arbitration and Conciliation Act, 1996, (herein after referred to as 'The Act') to appoint an Arbitrator to adjudicate the disputes which arose between the petitioner and the respondents as per the dealership agreement dated 21.12.2018.

3. The averments made in the petition are in brief as follows:-

a) The petitioner is a Company engaged in the business of

manufacturing and selling of Shrimp / Prawn feed and other allied products and operates out of its factory in Nellore. The first respondent is a partnership firm, in which, the respondents 2 and 3 are partners. The petitioner and the first respondent represented by its partners viz., respondents 2 and 3 had executed a dealership agreement and a business term sheet dated 21.12.2018 and as per the said agreement, the petitioner had appointed the first respondent as its dealer to market, sell and distribute shrimp/prawn feeds in West Bengal. As per the business term sheet, the petitioner provided credit limit of Rs.6 Crores to the first respondent subject to the first respondent furnishing a Corporate Guarantee. Accordingly, the respondents 2 and 3 in their capacity as Directors of Rising Tide Sea Foods Private Limited executed an unconditional and irrevocable Corporate Guarantee dated 21.12.2018 for a sum of Rs.6,00,00,000/- in favour of the petitioner.

b) As per the aforesaid Dealership agreement, the petitioner had supplied goods to the first respondent on credit basis. Though the first respondent made payments till February 2019, thereafter failed to honour its obligations under the dealership agreement. However, based on the

personal assurances given by the respondents 2 and 3 and undertaking given by them to clear the outstanding dues, the petitioner continued to provide goods till June, 2019. The first respondent owed an outstanding amount of Rs.5,22,03,344/- to the petitioner as on 16.11.2019. Hence, the petitioner invoked the Corporate Guarantee by issuing a Notice of Invocation dated 23.11.2019 demanding payment of Rs.5,22,03,344/- towards principal amount and Rs.28,47,008/- towards the interest. On knowing the said fact, the first respondent remitted an amount of Rs.3,00,000/- to the petitioner on 21.11.2019 and Rs.5,00,000/- on 04.12.2019. However, no response was received to the notice dated 23.11.2019 which prompted the petitioner to look up the records of Rising Tide Sea Foods Private Limited on the website of the Ministry of Corporate Affairs. The petitioner was shocked to find out that the said Company was struck off by the Registrar of Companies, Kolkata and it was at this stage that the petitioner realised that the respondents had played a fraud upon the petitioner and had no intention to pay the petitioner for the goods supplied by it.

c) In this background, the petitioners had filed an application in OA.No.1136 of 2019 before this Court under Section 9 of the Act *inter*

alia praying for directions to be issued to the respondents 1 to 3 to deposit the outstanding amount of Rs.5,14,03,344/- towards admitted principal amount and a further amount of Rs.28,47,008/- towards interest. The said application came up for hearing on 03.01.2020 and this court had directed the respondents to disclose their list of movable and immovable assets. Instead of complying with the said direction of this court, the respondents filed Recall Application *inter alia* contending that the alleged Dealership Agreement and the Corporate Guarantee were forged. This Court after considering the rival submissions, by the Order dated 23.01.2020 has passed an order injunctioning the respondents from alienating the immovable assets, if any. Thereafter, the petitioner had issued a notice dated 22.02.2020 under Section 21 of the Act invoking Arbitration Clause (Clause 54) of the Dealership Agreement. Accordingly, the petitioner had suggested appointment of Hon'ble Mr.Justice S. Rajeswaran (Retd.,) as the sole Arbitrator for adjudication of the disputes between the petitioner and the respondents seeking the consent of the respondents for the same.

d) In the meanwhile, the petitioner learnt that the respondents 2 and 3 held shares in a Company by the name of Matara Aquaculture West Bengal Private Limited which were not disclosed by the respondents before this

court and hence the petitioners had filed another application under Section 9 of the Act in OA.No.128 of 2020 disclosing the details of the shares held by the respondents 2 and 3 and seeking an injunction restraining the respondents from alienating the property. In the meanwhile, the respondents have sent a reply to the notice dated 22.02.2020 denying the existence of contract-documents and refused to give consent for appointment of an Arbitrator. Thereafter, the applications in OA.Nos.1136 of 2019 and 138 of 2020 were disposed of by this court by the order dated 31.07.2020 directing the respondents to furnish a Bank Guarantee and also gave liberty to the petitioner to file an affidavit before the court in the event any assets of the respondent that were not disclosed by the respondents themselves and are discovered by the petitioner and also gave liberty to file necessary application under Section 11 of the Act seeking appointment of an Arbitrator. Hence, the petitioner has filed the present petition to appoint an Arbitrator to adjudicate the disputes which arose between the petitioner and respondents.

5. The averments made in the counter affidavit filed by the respondents are in brief as follows:-

a) On or about the year 2018, the respondents were approached by the petitioner Company to deal with the feeds of the shrimps as they were already supplying to the vendors of the shrimps from whom the respondents were already obtaining/procuring their raw materials. After several discussions, it was decided that the supplies which the petitioner is already making to the dealers would be routed through the respondents and the petitioner would bill the respondents and thereafter the respondents would collect the amount from the dealers at a marginally higher price and pay the same to the petitioner. It was further agreed that to make the accounts of the respondents clear, the respondents would issue the cheques in respect of the invoices raised by the petitioner. But the petitioner would encash the said cheques only when the payment would come from the said dealers. Though the said transaction was in the nature of the commission agent, at the request of the petitioners, the transactions were designed in the nature of trading. Later the petitioner had sent an agreement naming it as dealership agreement on stamp paper issued from Tamil Nadu, and signed by the applicant/petitioner with an instruction to sign it. Upon going through the said agreement, it was observed that the terms and conditions mentioned in the said agreement was contrary to what was decided prior to making such

agreement with the respondents orally. Since the said agreement was not acceptable to the respondents, they did not sign the said agreement and asked the petitioner to make a separate agreement with acceptable terms and conditions. The copy of the said agreement which was not accepted or not signed by the respondents is still with the respondents. Though the petitioner did not send a fresh agreement containing the terms decided between the petitioner and the respondents, the petitioner started to act upon the said terms and conditions agreed orally between them and they started the business accordingly.

b) In the course of business which started in or about the beginning of the year 2019, several invoices were issued by the petitioner and several cheques were paid to the petitioner which were severally replaced on being stale and several debit notes were also issued by the respondents. Thereafter, the respondents received an application under Section 9 of the Act in OA.No.138 of 2020 which contained averments which were far from the facts. In the said application, it was portrayed that a dealership agreement was executed and there was a clause of arbitration in the said agreement. A similar application in OA.No.1136 of 2019 was already filed

by the petitioner praying for a similar relief and the same was pending before this court at that time. The respondents were surprised to see that the purported agreement which was annexed to the said application and also annexed with the earlier applicaion in OA.No.1136 of 2019 was allegedly signed by the respondents having a similar content of what was sent to the respondents for signing and the respondents refused to sign and accept such terms. The said agreement was also accompanied with an alleged term sheet and an agreement for corporate guarantee by one Private Limited Company in which the respondents 2 and 3 were Directors. After going through the said documents, it was observed that the signature of the respondents 2 and 3 put in the said documents were fraud and not actually signed by the respondents. Thereafter the said applications were heard and disposed of by this court by the order dated 31.07.2020. Feeling aggrieved, the respondents have preferred an appeal in OSA.No.240 of 2020 before the Division Bench of this court and the same is pending.

WEB COPY

c) It is denied that any dealership agreement dated 21.12.2018, at all exists, inasmuch as the documents which is being referred to in the paragraph under reply were not executed by the respondents. It is further

denied that the respondents have ever acknowledge their liability to pay to the petitioners for the goods supplied by the petitioner. Since the respondents denying the existence of the dealership agreement, business term sheet and Corporate Guarantee, they have rightly refused to give a consent for appointment of an Arbitrator. It is denied that the respondents 2 and 3 are holding any shares of Matara Aquaculture West Bengal Private Limited, as alleged in the petition. The ownership of the said shares held by the respondents was relinquished/ transferred way back on 01.04.2019. Hence, the respondents have not concealed anything as alleged in the petition. This court is not having jurisdiction to entertain this petition and therefore, the respondents prayed to dismiss this petition.

6. Heard Mr.M.S.Krishnan, learned Senior Counsel assisted by Mr.Anirudh Krishnan, the learned counsel for the petitioner and Mr.T. Sai Krishnan, learned counsel for the respondents.

WEB COPY

7. The learned Senior Counsel for the petitioner has submitted that the petitioner has sent an e-mail dated 18.12.2018 to the respondents

requesting them to send copies of the partnership deed, PAN Card, address proof, Identity proof of all partners, partnership registration certificate, authorisation for signing partners for completing the signing of the dealership agreement. He further submitted that on 19.12.2018, the petitioner has sent another e-mail stating that the revised corporate guarantee format has been forwarded and also requesting the respondents to confirm the Draft of the agreement and once Draft is confirmed, the petitioner will print the agreement on stamp paper and send to the respondents for their signatures. On receipt of the said e-mail, the respondents have sent an e-mail on 20.12.2018 itself confirming the receipt of the said e-mail with annexures. He further submitted that on the same date, the respondents have sent another e-mail requesting the petitioner to send a draft agreement and terms sheet and accordingly, the petitioner has sent a revised term sheet through e-mail on the same date and also requested the respondents to confirm the draft by next day morning so that they can get signatures from Mr.Akula.

8. The learned Senior Counsel for the petitioner has further submitted that on 21.12.2018, the respondents have sent an e-mail stating that the

agreement seems fine and instructed the petitioner to go ahead and print 2 copies of the same in stamp paper and they also stated that the petitioner can send both the copies to them and they will sign and send back one copy to the petitioner. He further submitted that they also pointed out certain changes to be made in the terms sheet and accordingly, 2 sets of dealership agreement was printed in stamp papers and sent to the respondents along with e-mail dated 21.12.2018. He further submitted that the Corporate Guarantee was also prepared and sent to the respondents requesting them to execute the same in Rs.100/- stamp paper and sent back. He further submitted that on 31.12.2018, the petitioner has sent an e-mail requesting the respondents to confirm whether they have sent the signed documents. On 31.12.2018 itself, the respondents have sent an e-mail stating that they have signed the said documents but since they have a visit plan to Chennai on 3rd January, they would handover the same to the petitioner at that time. He further submitted that on 04.01.2019, the respondents have sent a whatsapp message stating that they have come down to Chennai, at 9.30 a.m., they will come to petitioner's office to hand over the contract and to meet Mr.Akula. Accordingly, the respondents have signed in the dealership agreement, Corporate Guarantee and business term sheet and handedover

the said documents in person to the petitioner and acknowledging the same, the petitioner has sent an e-mail on 08.01.2019. He further submitted that since the respondents owed huge amount to the petitioner, the petitioner has decided to invoke the Corporate Guarantee and hence sent a notice dated 23.11.2019 by registered post. He further submitted that in the said notice, the petitioner has categorically averred that the respondents had entered into a dealership agreement dated 21.12.2018 and executed a Corporate Guarantee and term sheet. Though the respondents had received the said notice, they did not send any reply denying the allegations made in the said notice.

9. The learned Senior Counsel for the petitioner has further submitted that already the petitioner herein has filed applications in OA.No.1136 of 2019 under Section 9 of the Act to grant an injunction restraining the respondents from alienating their properties; OA.No.9720 of 2019 under Section 9 of the Act to direct the respondents to furnish a bank guarantee; OA.No.9721 of 2019 under Section 9 of the Act to direct the respondents 1 to 3 to furnish the details of their properties; OA.No.138 of 2020 under Section 9 of the Act, to grant interim injunction restraining the respondents

from alienating or creating encumbrance in respect of the shares held by them in Matara Aquaculture West Bengal Private Limited, pending disposal of the arbitral proceedings. He further submitted that in the said applications, the respondents herein have taken a similar plea that they did not execute a dealership agreement, terms sheet, agreement for Corporate Guarantee and their signatures were forged and the said documents were falsely created but the learned Single Judge by a common Order dated 31.07.2020 has rejected their contentions. He further submitted that aggrieved by the said order, the respondents herein have filed an appeal in OSA.No.240 of 2020 and the Hon'ble First Bench of this court has disposed of the said appeal by the judgment dated 15.02.2021 upholding the order of the learned Single Judge leaving the dispute for adjudication in the proceedings under Section 11 of the Act or upon a prima facie view taken therein and the matter being left for assessment of the Arbitrator.

10. The learned Senior Counsel for the petitioner has further submitted that as per Section 16 (1) of the Act, the Arbitral Tribunal itself is having jurisdiction to decide on any objections with respect to existence or validity of the Arbitration agreement. He further submitted that if any

decision is taken by the Arbitral Tribunal with regard to the existence or validity of the Arbitration agreement as per Section 16 (6) of the Act, the aggrieved party may make an application under Section 34 of the Act to set aside the said arbitral award. He further submitted that as per Section 5 of the Act, the interference by the court for the arbitral proceedings is very minimal and as such, the question as to 'existence of the arbitration agreement' cannot be decided by the court. He further submitted that the Hon'ble The Chief Justice or the Judge designated while appointing arbitrator under Section 11 of the Act are discharging only administrative duty and hence, they cannot decide the question with regard to the existence of the Arbitration Agreement. He further submitted that after signing in the dealership agreement, terms sheet and Corporate Guarantee, only with a view to avoid arbitration proceedings, the respondents have taken a false plea as if they have not signed in the said documents and therefore, he prayed to allow this petition.

WEB COPY

11. Per contra, the learned counsel for the respondents has submitted that the communications exchanged between the parties would clearly show that for entering a dealership agreement with the petitioner, several rounds

of talks went on. He further submitted that the said communications also would show that the petitioner Company imposed several terms and conditions for executing a dealership agreement, whereas the respondents did not agree certain terms and conditions and finally, the petitioner Company had prepared a draft dealership agreement and sent to the respondents for approval and the respondents also approved the said draft dealership agreement but while typing the said dealership agreement on stamp paper, the petitioner, had cleverly introduced certain clauses including Arbitration clause and hence, the respondents did not sign in the said dealership agreement.

12. The learned counsel for the respondents has further submitted that since the petitioner has not prepared the dealership agreement, as per oral agreement and also in accordance with the draft dealership agreement, the respondents did not sign in the said dealership agreement and they also did not send back the same to the petitioner and they themselves keeping the said agreement. However, the petitioner started to send the goods as per the oral agreement originally entered and the respondents also continued their business with the petitioner only as per the said oral agreement. He

further submitted that the respondents have not signed in the alleged dealership agreement, terms sheet and Corporate Guarantee. He further submitted that the petitioner has forged the signatures of the respondents and falsely created the aforesaid documents only with a view to get an award from an arbitrator without filing regular suit.

13. The learned counsel for the respondents has further submitted that in the alleged dealership agreement, it is stated that the right to distribute the produce will cover the State of West Bengal alone where as the invoices produced by the respondents would show that the products were supplied to the area situated outside the State of West Bengal also and therefore, it is clear that the alleged dealership agreement dated 21.12.2018 is a fabricated document.

14. The learned counsel for the respondents has further submitted that a simple comparison of the alleged signatures found in the aforesaid documents with the signatures found in the partnership agreement would clearly show that the signatures found in the aforesaid documents were

forged by the petitioner. He further submitted that the communications exchanged between the parties also would show that the respondents have not executed the alleged terms sheet and the Corporate Guarantee. He further submitted that the respondents have served a notice on the learned counsel for the petitioner on 04.02.2020 to produce the Original of the Corporate Guarantee dated 21.12.2018, but so far, the petitioner has not produced the said document and therefore, an adverse inference has to be drawn against the petitioner.

15. The learned counsel for the respondents has further submitted that merely because Section 16 of the New Act permits the Arbitrator to decide the question of existence of the Arbitration Agreement, it does not necessarily follow that at the stage of considering the petition under Section 11 of the Act, the Chief Justice or his designate cannot decide the question as to the existence of the Arbitration clause.

WEB COPY

16. The learned counsel for the respondents has further submitted that the Hon'ble First Bench of this court while disposing of OSA.No.240

of 2020 gave liberty to the respondents to raise objection with regard to the existence of arbitration agreement in the proceedings initiated under Section 11 of the Act and therefore, the respondents are entitled to raise a question with regard to the existence of arbitration agreement and therefore, he prayed to adjudicate the question as to the existence of arbitration agreement.

17. The learned counsel for the respondents has further submitted that since the respondents are seriously disputing the existence of arbitration agreement and they are denying their signatures in the alleged dealership agreement, the matter cannot be referred to arbitrator and that being so, the arbitrator cannot be appointed and therefore, he prayed to dismiss this petition.

18. The learned counsel for the respondents, in support of his contentions relied upon the decision in :-

Wellington Associates Ltd. vs Mr. Kirit Mehta (2000) 4 SCC

272.

19. According to the petitioner, as per the terms and conditions of the oral agreement between the parties, the petitioner has prepared a draft dealership agreement and sent to the respondents to confirm the same. Its further case is that the respondents, after confirming the said draft, have send back with an e-mail dated 21.12.2018 requesting to go ahead and print two copies of the agreement in a stamp paper and send to them and they will sign and send back one copy. Accordingly, the petitioner has typed the dealership agreement in two copies on stamp papers and after signing in the said two copies of the dealership agreement, the petitioner has sent back the said two copies to the respondents. Its further case is that after accepting the said dealership agreement, the respondents have signed in one of the copies and handed it over to the petitioner in person by retaining another copy. It is their further case that the respondents have signed in terms sheet and Corporate Guarantee and they handed over the said documents also to the petitioner in person.

20. The case of the respondents is that they did not sign in the alleged dealership agreement dated 21.12.2018, terms sheet and Corporate Guarantee and that the signatures found in the said documents were forged by the petitioner.

21. A perusal of the typed set of papers filed by the respondents would show that at page No.55, a copy of the e-mail sent by the petitioner dated 20.12.2018 is enclosed. In the said e-mail, the petitioner has stated that

“As discussed, if you can confirm the draft by tomorrow morning, we will be able to get the agreement signed from Mr.Akula by tomorrow, since he is travelling from this weekend.”

22. At page No.95, a copy of the e-mail sent by the respondents dated 21.12.2018 is enclosed. In the said e-mail, it is stated as follows:

“Dear Mr.Achutan,

The agreement seems fine. Go ahead and print 2 copies of the same in stamp paper. You can post us both

copies we will sign them and post one back to you.

Also, I require you to add two thing in the terms sheet.

First, where it is mentioned “The company may, during the courtse f the year, introduce schemes, withdraw some offers etc. These will be communicated from time to time and will be binding regrdless of the terms set out here”. It should go on to mention. For the sake of clarification, TWL can not withdraw the volume and target incentives that the dealer has already achieved as per the conditions listed below.

Second, in point 9, which is business development expenditure, it is written in the end of the point “Time his will be in volume and target incentives”. This is incorrect as it is beyond the mentioned volume and target incentive and should be changed to say. This is beyond volume and target incentives.

You can make the above changes and we can proceed with the term sheet as well. All else seems fine.

Thanks.

Arnab.”

23. A perusal of the aforesaid e-mails shows that the respondents have accepted the terms and conditions mentioned in the dealership agreement and they made a request to go ahead and print two copies of the same in stamp papers. They also stated that the petitioner can send both the copies to them and they will sign and send back one copy to the petitioner. It is also clear that in so far as the term sheet is concerned, they made a request to make certain changes.

24. Page No.96 of the typed set of papers shows that the petitioner has sent a reply through e-mail dated 21.12.2018 as follows:-

“Thanks for the confirmation Mr.Arnab, we will include those two points.

Please confirm if both the partners will be signing the Dealership agreement or if only one will be signing, so that we can and print the agreement and send to you for your signatures. Also note that we would need an authorisation in favour of the signing partner if all the partners are not signing.

Further, please share the original partnership deed also, since the supplemental deed you have shared mentions that the “All other terms and conditions governing the

partnership shall remain the same” and only the name change and change of partners have been recorded in this deed. The terms of partnership and the powers of partners etc., are not covered in this.

Please share the details of the company giving the Corporate Guarantee also so that we can compete that bit too.

Thanks and Regards,

Achuthan R. “

25. A reading of the aforesaid message would show that the petitioner has informed the respondents that they will include the changes pointed out by the respondents in the previous e-mail and also made a request to confirm that both the partners will sign in the dealership agreement and if only one will be signing, another partner shall give authorisation to him.

26. Page No.99 shows that the first respondent firm has sent a copy of the letter of authorization by nominating one of the partners to sign all the papers.

27. Page No.100 shows that the petitioner has sent an e-mail on 27.12.2018 requesting the respondents to sign the Corporate Guarantee on Rs.100/- stamp paper and affix the common seal of the Company and send to them. They also stated that they will be able to complete the dealership process only after receipt of the signed agreement, Board Resolution and Corporate Guarantee.

28. Page No.101 of the typed set of paper shows that the respondents have sent a Board Resolution of the Company M/s.Rising Tide Sea Food Export Private Limited stating that a resolution has been passed to provide a Corporate Guarantee for M/s.Rising Tide in favour of the petitioner Company.

29. Page No.102 of the typed set of paper shows that the petitioner has sent an e-mail on 31.12.2018 requesting the respondents to confirm whether they have sent the signed documents.

30. Page No.103 of the typed set of paper shows that on 31.12.2018, the respondents have sent a reply through e-mail which read thus:-

“We have signed it and since we have a visit planned to Chennai on the 3rd of January, we could hand it over to you at that point.

Best regards,

Rohan Mukherjee”

31. A perusal of the aforeaid e-mail shows that the respondents have admitted that they have signed in the documents and they will handover the said documents to the petitioner in person on 03.01.2019.

32. Page No.104 shows that on receipt of the aforesaid e-mail, the petitioner has sent an e-mail dated 31.12.2018 requesting the respondents to send a scanned copy of the agreement, revised Board Resolution and the Corporate Guarantee.

33. Page No.135 shows that on 04.01.2019, the respondents have sent a whatsapp message stating that they are coming down to petitioner's office at 09.30 a.m., to hand over the contract and meet Mr.Akula.

34. Page No.136 of the typed set of paper shows that the petitioner has sent an e-mail on 08.01.2019 which reads thus:-

“Dear Mr.Rohan,

Thanks for handing over the documents.

However it is observed that one signature is missing on the last page in the Corporate guarantee.

We need that to be signed.

Further, we would also need a Board Resolution from the Company to confirm the value of the Corporate Guarantee.

Thanks and Regards

Achuthan. R”

WEB COPY

35. A reading of the aforesaid e-mail shows that the respondents have handed over the signed documents in person in the petitioner's office at

Chennai. Further, the petitioner has found that one signature was missing on the last page in the Corporate Guarantee and also made a request to send a Board Resolution to confirm the value of the Corporate Guarantee.

36. Page No.137 shows that on 09.01.2019, the respondents have sent an e-mail requesting the petitioner to mail it back to them and they will do the needful. They also stated that they will attach the necessary board resolution. In the said e-mail, the respondents have not stated that they have not handedover the documents to the petitioner in person. On the other hand, they have requested the petitioner to send back the document which is missing the signature alone.

37. At page No.138, a copy of the e-mail dated 10.01.2019 sent by the petitioner is enclosed. In the said e-mail, it is stated that the petitioner has sent the Corporate Guarantee for affixing the missing signature and common seal and also made a request to send the Board Resolution including the value of the Corporate Guarantee that is provided.

38. At page No.139, a copy of the e-mail dated 17.01.2019 is enclosed.

A perusal of the said e-mail shows that the petitioner has requested the respondents to send the Corporate Guarantee with signatures completed and common seal affixed; Board Resolution for approval of value of Corporate Guarantee; Authorisation letter and other related documents.

39. Page No.140 shows that the respondents have sent an e-mail dated 17.01.2019 in response to the e-mail sent by the petitioner dated 17.01.2019. In the said e-mail, the respondents have apologised for the delay and they assured that the petitioner will get all the necessary documents on the next day.

40. At page No.143, a copy of the e-mail dated 24.01.2019 sent by the respondents is enclosed. A perusal of the said e-mail shows that the respondents have sent back the required documents and they undertook that they will furnish the track number on the next day.

41. Page No.144 shows that on 25.01.2019, the respondents have sent another e-mail. The said e-mail shows that the respondents have sent back the aforesaid documents through speed post and also furnished the tracking number.

42. The respondents in their counter statement have not disputed the aforesaid communications. Therefore, this court is of the view that prima facie the petitioner has established the execution of the dealership agreement dated 21.12.2018, terms sheet and Corporate Guarantee.

43. The contention of the respondents is that the bare comparison of the alleged signatures found in the said documents with the signatures found in their partnership deed would clearly show that the signatures found in the aforesaid documents were not signed by them. At this juncture, it would be relevant to refer to the decision of the Hon'ble Supreme Court in ***VISA International Ltd., Vs. Continental Resources (USA) Ltd., (2009) 2 SCC 55*** in paragraph No.16 as follows:

“16. The Court is required to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties and the surrounding circumstances.”

44. From the aforesaid decision, it is clear that the court can decide the existence of an agreement for arbitration by taking into consideration the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. In this case, as already pointed out that the correspondence exchanged between the parties through e-mails would prima facie show that the respondents have executed the impugned dealership agreement, terms sheet and agreement of Corporate Guarantee. Therefore, merely because the signatures found in the aforesaid documents are not having similarity with the signatures found in the partnership deed, we cannot jumped to the conclusion that the respondents have not signed in the dealership agreement. They may have purposely signed in the said documents by changing the pattern of their signatures or they may have subsequently changed the pattern of their

signatures. However, it is open to the Arbitral Tribunal to decide the said issue also.

45. In ***Swiss Timing Limited vs. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677***, the respondent therein contended that the petitioner therein had engaged in corrupt, fraudulent, collusive, coercive practice in connection with the agreement and hence the criminal case has been registered against the petitioner and after investigation, a charge sheet also has been filed and that being so, the matter cannot be referred to arbitration. The Hon'ble Supreme Court rejecting the contention of the respondent, has observed in paragraph Nos.28,29 and 30 as follows:-

“28. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract void,

necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.

29. *In the present case, it is pleaded that the manner in which the contract was made between the Petitioner and the Respondent was investigated by the CBI. As a part of the investigation, the CBI had seized all the original documents and the record from the office of the Respondent. After investigation, the criminal case CC No. 22 of 2011 has been registered, as noticed earlier. It is claimed that in the event the Chairman of the Organising Committee and the other officials who manipulated the grant of contract in favour of the Respondent are found guilty in the criminal trial, no*

amount would be payable to the Petitioner. Therefore, it would be appropriate to await the decision of the criminal proceedings before the arbitral tribunal is constituted to go into the alleged disputes between the parties. I am unable to accept the aforesaid submission made by the learned Counsel for the Respondents, for the reasons stated in the previous paragraphs. The balance of convenience is tilted more in favour of permitting the arbitration proceedings to continue rather than to bring the same to a grinding halt.

30. I must also notice here that the defence of the contract being void is now-a-days taken routinely along with the other usual grounds, to avoid/delay reference to arbitration. In my opinion, such ground needs to be summarily rejected unless there is clear indication that the defence has a reasonable chance of success. In the present case, the plea was never taken till the present petition was filed in this Court. Earlier, the Respondents were only impressing upon the Petitioners to supply certain information. Therefore, it would be appropriate, let the Arbitral Tribunal examine whether there is any substance in the plea of fraud now sought to be raised by the Respondents.”

46. In this case, the respondents have stated in their counter that they reserved their rights to take appropriate legal action against the petitioner for forging their signatures. But it appears that so far they have not taken any criminal action against the petitioner. Even if any criminal action is taken by the respondents alleging that their signatures were forged by the petitioner, that would not be a bar for referring the matter for arbitration in view of the aforesaid decision of the Hon'ble Supreme Court.

47. In ***Kvaerner Cementation India Limited v. Bajranglal Agarwal and Another.***, (2012) 5 SCC 214, a three Judge Bench of the Hon'ble Supreme Court in paragraph Nos.3, 4 and 5 has observed as follows:-

“3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral tribunal to rule on its own jurisdiction including ruling on any objection with

respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. A bare reading of Section 16 makes it explicitly clear that the arbitral tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.

5. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The Petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.”

48. From the aforesaid decision, it is clear that in view of Section 16 of the Act, the Arbitral Tribunal has a power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of subsections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. It is also clear that the party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.”

49. In ***Wellington Associates Ltd., Vs. Mr.Kirit Mehta*** (cited supra), it was held that merely because Section 16 of the Act permits the Arbitrator to decide the question of existence of the arbitration agreement, it does not necessarily follow that at the stage of considering the application under Section 11 of the Act, the Chief Justice or his designate cannot decide the question as to the existence of the arbitration clause. In that case, in the

arbitration clause, it was not specifically stated that the disputes shall be referred to arbitration. On the contrary, it was stated as "may be referred". Taking into consideration the using of the word 'May', the Hon'ble Supreme Court has held that the fresh consent for the arbitration was necessary, but in this case in the arbitration clause, no such word is used. Further as held by the three Judges Bench of the Hon'ble Supreme Court in ***Kvaerner Cementation India Limited v. Bajranglal Agarwal and Another.***, (cited supra), as per Section 16 of the Act, the Arbitral Tribunal itself has a power to rule on its own jurisdiction including ruling on any objection with regard to the existence or validity of the Arbitration agreement and the same is amenable for appeal under Section 34 of the Act.

50. In ***Konkan Railway Corporation Ltd. And Another Vs. Rani Construction Pvt. Ltd ., (Appeal (civil) 5880-5889 of 1997 dated 30.01.2002)***, a Constitutional Bench of the Hon'ble Supreme Court has held as follows:-

*“ As we see it, the only function of the Chief Justice or his designate under **Section 11** is to fill the gap left by a party to the*

arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.

It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator's independence or impartiality. In that event it would be open to that party to challenge the arbitrator under [Section 12](#), adopting the procedure under [Section 13](#). There is no reason whatever to conclude that the grounds for challenge under [Section 13](#) are not available only because the arbitrator has been nominated by the Chief Justice or his designate under [Section 11](#). It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. [Section 16](#) provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the

arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

51. From the aforesaid decision, it is clear that even if the Arbitral Tribunal is improperly constituted and without jurisdiction, it is always open to the aggrieved party to request the Arbitral Tribunal to rule on its jurisdiction. Under Section 16 of the Act, the Arbitral Tribunal may rule *"on any objections with respect to the existence or validity of the arbitration agreement"*. Therefore, there would be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by the court.

WEB COPY

52. The Hon'ble First Bench of this Court while disposing of OSA.No.240 of 2020 has held that it is elementary that when an objection

is taken regarding the physical existence of an arbitral agreement, such issue has to be somewhat gone into before the order for reference may be made.

53. In this case as already pointed out that the correspondence exchanged between the parties through e-mails would prima facie show that the respondents have executed a dealership agreement dated 21.12.2018. In the said dealership agreement, there is a clause for arbitration (clause 54) which reads thus :

“54. Arbitration – Any disputes, differences or question which may arise at any time hereafter between TWL and the Dealer touching the true construction of this Agreement or the rights and liabilities of the parties hereto, or to the operation of this Agreement, such dispute or difference shall be referred by either party to arbitration by an arbitrator to be appointed jointly by both parties, under the provisions of the Indian Arbitration and Conciliation Act, 1995, as amended from time to time. For the time being in force or any other act passed in substitution thereof or modification thereof, and for the time being in force, and

the provisions shall apply to such arbitration accordingly.

The venue of arbitration shall be Chennai."

54. From the aforesaid clause, it is clear that any disputes arise between the parties touching the dealership, the matter shall be referred to Arbitration. Therefore, this court is inclined to allow this petition.

55. In the result, this petition is allowed. No costs. The Hon'ble Mr. Justice S. Rajeswaran (Retd.,) is appointed as Sole Arbitrator to arbitrate all the disputes between the parties. The learned Arbitrator has to conduct the proceedings after giving notice to both the parties and pass an award at early. Further, the Arbitrator can fix his fee as per the Madras High Court Arbitration Rules and the said fee has to be paid by both the parties equally.

16.04.2021

Index: Yes/No
Speaking/Non-speaking Order
gv

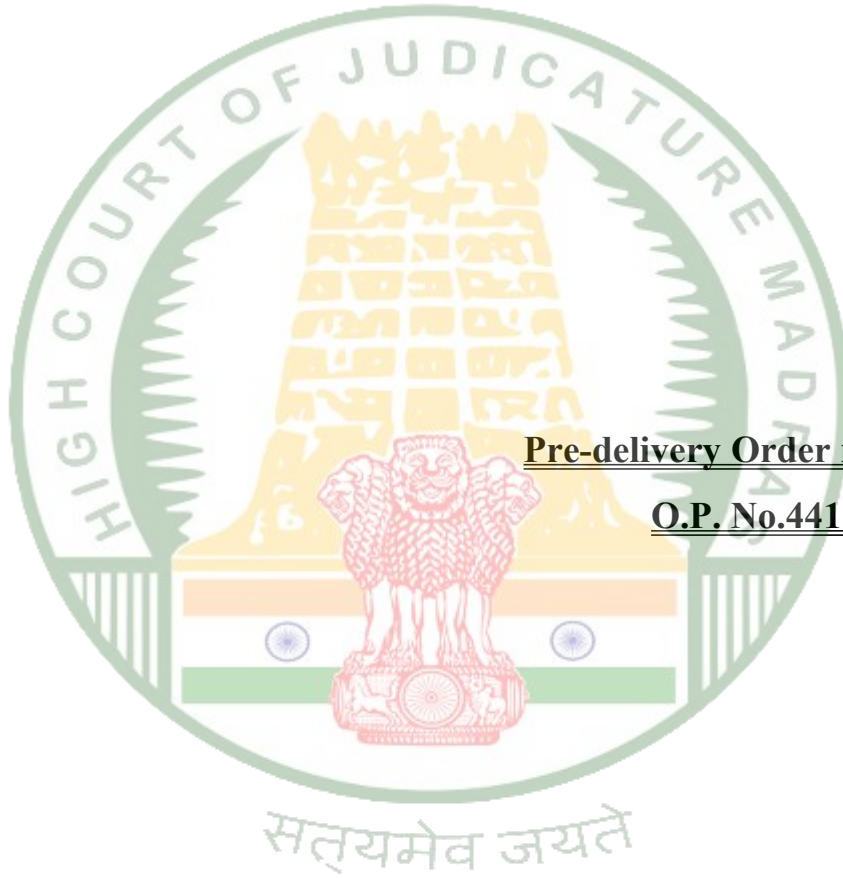
To
The Sub-Assistant Registrar,
Original Side-I
High Court, Madras.



WEB COPY

P. RAJAMANICKAM,J.

gv



Pre-delivery Order made in
O.P. No.441 of 2020

WEB COPY

16.04.2021