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Arb.O.P (Com.Div.) No.11 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No.11 of 2022

&

O.A.No.694 of 2021

M/s.Radiance Realty Developers India Ltd.,
1st Floor, Old No.110, New No.111
33 Feet Road, Anna Salai, Guindy
Chennai - 600 032
Rep. by its Authorised Signatory
Mr.K.Kannadasan

... Petitioner
in Arb O.P and O.A

Vs.

1. S.Gangadharan
2. G.Vijaya

... Respondents
in Arb O.P and O.A

Prayer in Arb.O.P (Com.Div.) No.11 of 2022: Arbitration Original
Petition filed under Section 11 (6) of the Arbitration and Conciliation Act,
1996 to appoint a sole Arbitrator to adjudicate over the dispute arising out
of the MOU dated 28.03.2018 between the petitioner and respondents.

Prayer in O.A.No.694 of 2021 : Judge's summons filed under Order XIV
Rule 8 of Madras High Court Original Side Rules read with Section 9 of



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Arbitration and Conciliation Act, 1996 to grant the respondents, their son, agents or any one on their behalf be temporarily injunctioned from in any manner interfering with the General Power of Attorney dated 18.04.2018 for the schedule property in any manner until the dispute between the parties are resolved.

For Petitioner : Mr.Rahul M.Shankar
in Arb.O.P and OA

For Respondents : Mr.V.R.Appaswamee
in Arb.O.P and OA

COMMON ORDER

This common order will now dispose of the captioned two matters.

2. Captioned Arb.O.P (Com.Div.) No.11 of 2022 has been presented in this Court on 05.01.2022 under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] with a prayer for appointment of a sole Arbitrator.

3. Captioned O.A.No.694 of 2021 has been presented in this Court under Section 9 of A and C Act with a prayer for interim injunction against interference qua a General Power of Attorney dated 18.04.2018.



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4. From hereon and henceforth, in this order, for the sake of convenience, 'Arb.O.P (Com.Div.) No.11 of 2022' shall be referred to as 'Section 11 OP' and 'O.A.No.694 of 2021' shall be referred to as 'Section 9 application', both for the sake of convenience and clarity.

5. Orders made by Hon'ble predecessor Judge in Section 9 application on 02.11.2021 reads as follows:

' This Original Application has been filed seeking to grant an order of interim injunction restraining the respondents from interfering with the General Power of Attorney dated 18.04.2018 for the schedule property in any manner until the dispute between the parties are resolved.

2. It is the contention of learned counsel appearing for applicant that they have entered into Memorandum of Understanding dated 28.03.2018 for developing the subject property and the applicant has to construct the house in entire land belongs to the respondent. In fact, the respondents have received a sum of Rs.8,92,25,000/- towards sale consideration without claiming any share in the property. Pursuant to the above memorandum of understanding, they have also executed a outright sale agreement and received entire sale consideration. After receiving entire sale consideration, the entire properties have been developed and construction have been put up. Now, the respondents have suddenly



issued a legal notice dated 22.10.2021 seeking the statement of accounts and also interfering with the General Power of Attorney. The same would indicate that the respondents may take steps even to cancel the General Power of Attorney. Hence, the applicant prayed for injunction.

3. Having regard to the fact that the Memorandum of Understanding entered between the parties would indicate that the respondents herein agreed to convey an extent of 4 acres 22 cents as outright sale for the Developer and the Developer has to develop the property, sell the property and all the sale proceeds have to be received only by the Developer. Further, the agreement dated 19.04.2018 entered between the parties, in which clause 2 would indicate that the consideration as agreed in the memorandum of understanding was already received by the respondents. In pursuant to the same, the General Power of Attorney has been executed between the parties on 18.04.2018.

4. Having regard to the above fact that though the document is filed as memorandum of understanding entered between the parties, in fact, the above document may be read along with the agreement of sale, the same would indicate that the respondent having agreed to sell the property for a total consideration of Rs.8,92,25,000/-, which is said to have been received by the contractor. Such being the position, after the property has been developed and construction have been put up and it is ready for sale, now the rights of applicant if interfered by the respondents merely on the ground that the property has not been transferred legally, the



same would cause irreparable injury. Considering the fact that the applicant has made out a prima facie case and balance of convenience is in favour of the applicant, there shall be an order of interim injunction restraining the respondents in any manner interfering with the General Power of Attorney dated 18.04.2018 and the applicant shall comply the order XXXIX Rule 3 of C.P.C. by then.

*5. Notice to the respondents returnable by 22.11.2021.
Private notice is also permitted.*

6. Post the matter on 22.11.2021.'

6. In the hearing today, Mr. Rahul M Shankar, learned counsel for petitioner in Section 11 OP / sole applicant in Section 9 application and Mr. V.R. Appaswamee, learned counsel for both the respondents in Section 11 OP and in Section 9 application are before this Court. Both the learned counsel submit that the aforementioned interim order granted by the Hon'ble predecessor Judge on 02.11.2021 has been extended from time to time and is now operating.

7. Be that as it may, both learned counsel also submit that the parties are exploring the possibility of a settlement, more importantly there is no



disputation or contestation about the existence of arbitration agreement between the parties. To be noted, arbitration agreement between the parties is in the form of a clause (clause 15) in a 'Memorandum of Understanding' ['MOU'] dated 28.03.2018 and this clause 15 in the MOU reads as follows:

'15. Any dispute, controversy or claims arising out of or relating to this MoU shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. The arbitral tribunal shall be composed of a sole arbitrator mutually appointed by the parties. The place of arbitration shall be at Chennai and any award whether interim or final, shall be made, and shall be deemed for all purposes between the parties to be made, in Chennai. The arbitral procedure shall be conducted in English Language and any award or awards shall be rendered in English. The procedural law of the arbitration shall be Indian law. The award of the arbitral Tribunal shall be final and conclusive and binding upon the parties.'

8. As there is no dispute or contestation regarding the existence of arbitration agreement, this Court deems it appropriate to dispose of Section 11 OP (this Court takes note of sub-section (13) of Section 11 of A and C Act) by appointing a sole Arbitrator.



9. To be noted, perimeter of a legal drill under Section 11 of A and C

Act is ingrained / drawn in by sub-section (6A) thereat i.e., it is largely confined to examination of existence of arbitration agreement. This principle has been laid down by Hon'ble Supreme Court in **Mayavati Trading** case law [**Mayavati Trading Private Limited Vs. Pradyuat Deb Burman** reported in (2019) 8 SCC 714], relevant paragraph in **Mayavati Trading** case law 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)

10. Aforementioned paragraph 10 of **Mayavati Trading** case law takes this Court to **Duro Felguera** principle [**Duro Felguera, S.A. versus**



Gangavaram Port Limited reported in (2017) 9 SCC 729]. To be noted,

most relevant Paragraphs in **Duro Felguera** case law are paragraphs 47, 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. '

11. To be noted, the parties exploring the possibility of a settlement will not be impeded by this order in any manner as even post constitution of AT i.e., appointment of Arbitrator, settlement can be encouraged under Section 30 of the A and C Act. Let the parties pursue the settlement talks and try to give a closure to the matter.

12. One other aspect of the matter which this Court takes note of is,



constitution of AT will not come in the way of the interim order (granted by

Hon'ble predecessor Judge and now operating) being extended as sub-

section (3) of Section 9 is a bar for entertaining an application but not for

continuing an order in the light of ***Arcelor Mittal Nippon Steel India Ltd.***

Vs. Essar Bulk Terminal Ltd. reported in ***2021 SCC OnLine SC 718.***

Relevant paragraph in ***Arcelor Mittal Nippon Steel India Ltd.*** case is

Paragraph 62 and the same reads as follows:

'62. Sub-section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition. If the Court finds that circumstance exist, which may not render the remedy provided under Section 17 efficacious.'

13. In the light of the narrative thus far, the following order is passed:

(i) Hon'ble Mr.Justice N.Authinathan (Retd.), a former Judge of this Court residing at No.37, A-Block, Lakshmi Nivas, Marshalls Road, Egmore, Chennai- 8, (Ph: 2999 6122, Mob: 9445508822) is appointed as sole Arbitrator.

(ii) Hon'ble sole Arbitrator is requested to enter upon



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reference qua arbitrable disputes that have arisen between the petitioner and respondent qua MOU dated 28.03.2018, adjudicate upon the same and make an award by holding sittings in the 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) and conduct arbitration in accordance with the Madras High Court Arbitration Proceedings Rules 2017. Fee of the Hon'ble Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017;

(iii) The parties are free to proceed with settlement talks and they can always take recourse to Section 30 of A and C Act before Hon'ble Arbitrator;

(iv) Interim order already granted by Hon'ble predecessor Judge on 02.11.2021 in Section 9 application (O.A.No.694 of 2021) which has been extracted and reproduced elsewhere supra in this order shall continue to operate for a period of eight weeks from today i.e., upto 15.06.2022 or till the first sitting of



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the Hon'ble Arbitrator whichever is later;

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(v) It is open to the parties to approach the Hon'ble Arbitrator under Section 17 of A and C Act for the same or any other interim orders if the need arises and if such a course is adopted, Hon'ble Arbitrator shall deal with the same on its own merits and in accordance with law notwithstanding this judicial order.

14. Captioned Arb.OP and captioned application are disposed of in the aforesaid manner by this common order. There shall be no order as to costs.

20.04.2022

Speaking/Non-speaking order

Index : Yes / No

gpa/nsa

Note: The Registry is directed to communicate this order forthwith to

1. Mr.Justice N.Authinathan (Retd.),
No.37, A-Block, Lakshmi Nivas,
Marshalls Road,
Egmore, Chennai- 8,
Ph: 2999 6122, Mob: 9445508822



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M.SUNDAR.J.,

gpa/nsa

2. The Director
Tamil Nadu Mediation Conciliation Centre
-cum- Ex-Officio Member
Madras High Court Arbitration Centre
Chennai - 104.

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