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Arb.O.P (Comm.Div.) No.112 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 (Comm.Div.) No.112 of 2022

M/s.Shriram City Union Finance Limited,
A Company having its Registered Office at
No.123, AngappaNaicken Street,
Chennai 600 001; And Branch Office at:
No.12, Ramaswamy Street,
T.Nagar, Chennai 600 017.
rep by its Authorised Signatory,
Mr.P.Siva Kumar

...Petitioner

Vs

1. S.Kumarudeen
S/o.Sahul Amid.

2. K.Amina,
W/o.Kumarudeen.

...Respondents

Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to decide the dispute/claim between the petitioner and the respondent in accordance with Clause 18 of the Loan Agreement dated 28.09.2018.

For Petitioner : Mr.M.Aravind Subramaniam
For Respondents : Mr.K.Sankaran
for Mr.M.Syed Ibrahim



ORDER

WEB COPY This order will dispose of the captioned 'Arbitration Original Petition' ['Arb.OP'].

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the listing on 17.03.2022, which reads as follows:

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented on 19.01.2022 purportedly under Section 11(6) 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.

2. Mr.M.Aravind Subramaniam, learned counsel for sole petitioner who is before this Court submits that the captioned Arb OP is predicated on clauses 18 and 19 of a 'loan agreement dated 28.09.2018' [hereinafter 'primary contract' for the sake of convenience and clarity].

3. Learned counsel submits that sole petitioner and two respondents are signatories/parties to primary contract. Clauses 18 and 19 of the primary contract read as follows:

'18. Arbitration and Dispute Settlement

a) Without prejudice to the Lender's right available to it under the SARFAESI Act, 2002, all disputes, differences and/or claims, arising out of this



Agreement, whether during its subsistence or thereafter, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment for the time being in force and shall be conducted by a sole arbitrator to be appointed by the Lender. The applicable law shall be Indian laws. In the event of incapacity or resignation or death of the sole arbitrator so appointed, the Lender shall be entitled to appoint another arbitrator in place of the earlier arbitrator, and the proceedings shall continue from the stage at which the predecessor had left.

b) The award given by the arbitrator shall be final and binding on the parties to this Agreement. The cost of the Arbitration shall be borne with by the party/ies, in accordance with the Award passed by the Arbitrator.

c) The venue of Arbitration shall be as specified in Schedule 1 hereto and the proceedings shall be conducted in English Language.

d) The Borrower and Guarantor hereby agree and confirm that the Lender shall be permitted to invoke the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and any amendments thereto in order to recover its dues under this Agreement from the Borrower/Guarantor.

19. Jurisdiction and Governing Law

Subject to the Arbitration Clause mentioned



above, this Agreement shall be governed and construed in accordance with the substantive laws of India and the parties hereto submit to the exclusive jurisdiction of the Courts, situate at the place as specified in schedule 1 hereto.'

4. Learned counsel submits that the aforementioned clauses 18 and 19 in primary contract serve as an arbitration agreement between the sole petitioner and two respondents i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

5. Be that as it may, adverting to the case file, learned counsel submits that 'notice invoking arbitration agreement dated 23.03.2021' [hereinafter 'trigger notice' for the sake of convenience and clarity] was issued. Arbitration was triggered and claim petition dated 06.10.2021 was filed by the petitioner but respondents filed a memo dated 27.10.2021 objecting to the nomination of sole Arbitrator, resulting in sole Arbitrator making proceedings dated 24.11.2021 recusing himself, necessitating the presentation of captioned Arb OP in this Court is learned counsel's say. This may well be a case for substitution under Section 15(2) read with Section 14(1)(b) of A and C Act, even if that be so, this Court still has jurisdiction and powers and may be treated as a case of quoting wrong provision of law is learned counsel's say.

6. Be that as it may, prima facie case made out for issue of notice.

7. Issue notice to respondents returnable in a fortnight i.e., returnable by 31.03.2022. Private notice permitted.

8. List on 31.03.2022.



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3. Thereafter, the captioned Arb.OP progressed vide listings on 31.03.2022 and 11.04.2022 but it is not necessary to extract and reproduce the proceedings in those listings as they are routine proceedings.

4. Aforementioned 17.03.2022 proceedings shall be read as an integral part and parcel of this order. Short forms, abbreviations and short references used in the aforementioned proceedings dated 17.03.2022 will continue to be used in this order also for the sake of convenience and clarity.

5. Today, Mr.M.Aravind Subramaniam, learned counsel for sole petitioner and Mr.K.Sankaran, learned counsel appearing on behalf of Mr.M.Syed Ibrahim, counsel on record for both the respondents are before this Court. From the submissions made by learned counsel on both sides, it comes to light that there is no dispute or contestation about the existence of arbitration agreement i.e., clauses 18 and 19 in the primary contract. However, it is made clear that there are disputes/contestations regarding the claim of the petitioner which has to be adjudicated upon by the Arbitrator who is to be appointed by this order.

6. The scope of a legal drill under Section 11 of A and C Act is



largely confined to examination of existence of arbitration agreement

owing to sub-section (6A) thereof. This principle has been laid down by

Hon'ble Supreme Court in oft-quoted **Mayavati Trading** case law being

Mayavati Trading Pvt. Ltd vs Pradyut Deb Burman reported in (2019) 8

SCC 714. In **Mayavati Trading** case law, relevant paragraph is paragraph

No.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 S.A.'

(underlining made by this Court to supply emphasis and highlight)

7. Aforementioned paragraph No.10 of **Mayavati Trading** case law takes us to **Duro Felguera** principle i.e., **M/s.Duro Felguera S.A. Vs M/s. Gangavaram Port Limited** reported in 2017 (9) SCC 729, relevant paragraphs in **Duro Felguera case** are paragraph Nos.47 and 59 and the same read as follows:

'47. What is the effect 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. and Boghara Polyfab. 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 Courts intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.'

8. Be that as it may, both learned counsel submit that the possibility of settlement is being explored. This order will not impede settlement talks owing to Section 30 of A and C act.

9. In the light of the narrative thus far, Hon'ble Mr.Justice G.Rajasuria (Retd.), former Hon'ble Judge of this Court, residing at No.31, III Cross, Brindavanam, Puducherry (Mob: 94450 00864) is appointed as sole Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference, adjudicate the arbitrable disputes that have arisen between the petitioner and respondent qua primary contract i.e., loan agreement



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dated 28.09.2018 by holding sittings in 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) in accordance with Madras High Court Arbitration Proceedings Rules 2017 and 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.

10. Captioned Arb.OP disposed of in the aforesaid manner. There shall be no order as to costs.

20.04.2022

Speaking order: Yes/No
Index: Yes/No
gpa/nsa

To

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

1. Hon'ble Mr.Justice G.Rajasuria (Retd.),
Former Hon'ble Judge of this Court,
No.31, III Cross, Brindavanam,
Puducherry – 605 013.
Mob: 9445000864
2. The Director
Tamil Nadu Mediation Conciliation Centre
-cum- Ex-Officio Member
Madras High Court Arbitration Centre
Chennai - 104.



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M.SUNDAR.J.,

gpa/nsa

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