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Arb O.P.(Com. Div.) No.194 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.06.2022

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THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

Arb O.P.(Com. Div.) No.194 of 2022

M/s.Cholamandalam Investment and
Finance Company Limited
No.45, Justice Basheer Ahmed Sayeed Building
II Floor, 2nd Line Beach, Moore Street
Parrys, Chennai – 600 001.
Represented by its Authorised Signatory.

... Petitioner

Vs.

1.M/s.Chandra Construction and Supplier
Rep by its Partner
Kashipura Petrol Pump Ke Pichhe
Tyagi Nagar, Morar, Dist. Gwalior
Airtel Tower, Madhya Pradesh – 474 006.

2.Pavan Kumar Sharma
3.Mukesh Sharma

... Respondents

Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to (a) appoint a Sole Arbitrator to adjudicate the dispute arising under Loan Agreement No.XVFPGWA00002605987 dated 16.10.2018 between the petitioner and the respondents as per the Loan Agreement No.XVFPGWA00002119465



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dated 28.09.2017; (b) to direct the respondents to pay the cost of this petition, and (c) to pass such further or other order or orders as this Court deem fit and proper in the circumstances of the case.

For Petitioner : Mr.D.Pradeep Kumar

ORDER

This order will dispose of the captioned Arb.O.P.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 21.04.2022 which reads as follows :

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' has been presented in this Court 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.

2. Mr.D.Pradeep Kumar, learned counsel on record for sole petitioner submits that the captioned Arb OP is predicated on an agreement captioned 'LOAN AGREEMENT - VEHICLE FINANCE' dated 28.09.2017. To be noted, the agreement dated 28.09.2017 shall be referred to as 'primary contract' for the sake of convenience and clarity. Clauses 29 and 30 of primary contract captioned



'ARBITRATION' and 'JURISDICTION' respectively read as follows:

'29. ARBITRATION : All disputes, differences and/or claims arising out of this Agreement whether during its subsistence or there after shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole Arbitrator of an Arbitrator nominated by the Company. The award given by such Arbitrator shall be final and binding on all parties to this Agreement. In the event of an appointed arbitrator dying or being unable or unwilling to act as arbitrator for any reason, the Company, on such death of the arbitrator or his inability or unwillingness to act as arbitrator, shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the stage left by his predecessor. The venue of arbitration proceedings shall be at Chennai at the Registered Office of the Company which is presently at 'DARE HOUSE' No.2(Old No.234), NSC BOSE ROAD, PARRYS, CHENNAI-600 001 or such other place/location/city which the Company at its discretion may decide from time to time.

30. JURISDICTION: This Agreement has been accepted and executed by the Company at Chennai and all covenants, terms and conditions hereof including payments shall be observed and performed at Chennai



and Borrower and Guarantor specifically agree, subject to the arbitration clause contained herein, that Courts in Chennai alone shall have exclusive jurisdiction over any matter arising out of or concerning this Agreement.'

3. Adverting to the aforementioned clauses 29 and 30, learned counsel submits that the aforementioned clauses serve as an Arbitration Agreement between the petitioner and three respondents i.e., 'Arbitration Agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

4. Learned counsel goes on to elaborate that respondent No.1 is a partnership firm, respondent No.2 is a partner in the first respondent firm and respondent No.3 has signed as guarantor qua primary contract.

5. Learned counsel submits that arbitrable disputes erupted touching upon alleged default in repayment and vehicle finance, which is the subject matter of primary contract. It is also submitted that the aforementioned Arbitration Agreement was invoked, a sole Arbitrator was appointed by sole petitioner, who on a petition under Section 16 of A and C Act from first respondent, recused himself in and by proceedings dated 17.12.2021. This recusal has necessitated the presentation of the captioned Arb OP in this Court on 25.01.2022 is learned counsel's say.

6. Learned counsel also submits that the recusal of sole Arbitrator appointed by sole petitioner puts the clock back to Section 11(6) scenario in the light of the language in which sub-section (2) of Section 15 of A and C Act is couched. To be noted, Section 15(2) of A



and C Act reads as follows:

'15. Termination of mandate and substitution or arbitrator.-

(1).....

(2) *Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.*

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

7. *Prima facie case for issue of notice made out.*

8. *Issue notice to respondents returnable by 09.06.2022.*

Private notice permitted.

9. *List on 09.06.2022.'*

3. The short forms, short references and abbreviations used in the aforementioned earlier proceedings shall continue to be used in the instant order also for the sake of convenience and clarity.

4. Pursuant to the aforementioned earlier order, notice has been duly served on all three respondents. It is seen that Court notice is duly served on all respondents and proof of service has been filed as part of case file. This Court is informed that the respondents have not chosen to enter appearance through counsel. There is no representation for the respondents even today.



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This means the respondents have not come before this Court and embark upon the exercise of disputation or disagreement qua existence of the arbitration agreement between the parties.

5. Aforementioned arbitration clauses i.e., Clauses 29 & 30 which serve as an arbitration agreement between the petitioner and respondents i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act, was followed by a Supplemental Agreement dated 16.10.2018 and the same stands telescoped into the primary contract is learned counsel's say. Therefore, reference to primary contract will now mean a collective reference to Loan Agreement-Vehicle Finance dated 28.09.2017 and Supplemental Agreement dated 16.10.2018.

6. Captioned Arb.O.P. is filed under Section 11 of 'A and C Act' and therefore this legal drill has to perambulate within the statutory perimeter sketched by sub-section (6A) thereat, which reads as follows :

'(6A) 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



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existence of an arbitration agreement.'

7. Aforementioned sub-section (6A) of Section 11 of A and C Act came up for consideration in the oft quoted judgment of Hon'ble Supreme Court in **Mayavati Trading Pvt. Ltd vs Pradyuat Deb Burman** reported in **(2019) 8 SCC 714**, 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 a cord 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 judgement, 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 judgement in Duro Felguera'

8. Aforementioned paragraph No.10 of **Mayavati Trading** case law takes us to **Duro Felguera** principle being ratio laid down by Hon'ble Supreme Court in **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 reads 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.'

9. This Court is of the considered view that captioned Arb.O.P has to be disposed of on merits expeditiously and it cannot be adjourned ad nauseam as respondents have been duly served but have not chosen to come before this Court. This is inter-alia owing to sub-section (13) of section 11 which reads as follows :

'(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour



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shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.'

Besides aforementioned sub-section (13), Hon'ble Supreme Court, in *Shree Vishnu Constructions Vs. The Engineer in Chief, Military Engineering Service & Ors.*, [Special Leave Petition (C) No.5306 of 2022, dated 19.05.2022] had emphasised the need for expeditious disposal of Section 11 petitions. This *Vishnu Constructions* order was directed to be marked to all Registrars General of High Courts and some of the most relevant observations in *Vishnu Constructions* are as follows :

'..... Therefore, if the arbitrators are not appointed at the earliest and the applications under Sections 11(5) and 11(6) of the Arbitration Act are kept pending for a number of years, it will defeat the object and purpose of the enactment of the Arbitration Act and it may lose the significance of an effective Alternative Dispute Resolution Mechanism. If the Commercial disputes are not resolved at the earliest, not only it would affect the commercial relations between the parties but it would also affect economy of the country. It may affect the ease of doing business in the country.'

'..... The litigant may lose the faith in the justice delivery system, which may ultimately affect not only rule of law but



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commerce and business in the country. Therefore, the applications under Sections 11(5) and 11(6) of the Arbitration Act and other applications, either for substitution and/or change of the Arbitrator have to be decided and disposed of at the earliest.'

10. As there is no disputation or disagreement about the existence of arbitration agreement and as the respondents have not chosen to come before this Court and dispute the same, this Court proceeds to appoint an Arbitrator. Ms.V.Usha Rani, Advocate, residing at No.21, Lakshmi Nagar, 2nd Main Road, Chembakkam, Chennai – 600 073, Ph.No.:98400-96812; email ID: ushy22573@yahoo.com is appointed as Sole Arbitrator. Learned Arbitrator is requested to enter upon reference, adjudicate upon the arbitral disputes that have arisen between the parties qua primary contract i.e., Loan Agreement – Vehicle Finance dated 28.09.2017 and supplemental agreement dated 16.10.2018 by holding sittings in 'Madras High Court Arbitration Centre under the aegis of this Court' ['MHCAC'], in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and learned Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.



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

16.06.2022

Index : Yes / No

Speaking order / Non-speaking orders

Note: Registry is directed to communicate a copy of this order forthwith to

1. Ms.V.Usha Rani

Advocate

No.21, Lakshmi Nagar, 2nd Main Road,
Chembakkam, Chennai – 600 073

2. The Director,

Tamil Nadu Mediation and Conciliation Centre -cum-

Ex-Officio Member,

Madras High Court Arbitration Centre,

Madras High Court,

Chennai 600 104.



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M.SUNDAR. J.,

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