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Arb.O.P (Com.Div.) No.63 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No.63 of 2022

M/s.Etica Developers Private Limited
having office at No.24
Exotica 6th Floor
Venkatnarayana Road
T.Nagar
Chennai- 600 017
Represented by Authorized Signatory
G.Prakash

... Petitioner

Vs.

Suresh Jayaram

... Respondent

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator under clause 19 of the Joint Development Agreement dated 24.08.2018 read with clause V(14) of the Supplemental Agreement dated 12.04.2019 to adjudicate the dispute between the parties.

For Petitioner : Ms.Akshaya Ramadurai
for Mr.R.Parthasarathy



Arb.O.P (Com.Div.) No.63 of 2022

For Respondent : Ms.K.M.Valsala Kumar

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ORDER

In the captioned 'Arbitration Original Petition' ('Arb.OP' for the sake of brevity), Ms.Akshaya Ramadurai, learned counsel representing the counsel on record for sole petitioner and Ms.K.M.Valsala Kumar, learned counsel on record for lone respondent are before this Court.

2. Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 18.02.2022, which reads as follows:

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 07.02.2022 under Section 11(4) 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. Ms.Akshaya Ramadurai, learned counsel representing the counsel on record for petitioner submits that the above prayer is predicated on arbitration clauses in two agreements i.e., a Joint Development Agreement dated 24.08.2018 and Supplemental Agreement dated 12.04.2019. Learned counsel submits that arbitration clauses are clauses 19 and 14 in the Joint Development



Agreement and Supplemental Agreement respectively.

3. It is submitted by learned counsel that the arbitration clause was triggered inter-alia vide a notice dated 07.01.2022 proposing name of a former Hon'ble member of the sentence of Judges of this Court as a sole Arbitrator. This 07.01.2022 trigger notice evoked a negative response necessitating the presentation of captioned Arb OP in this Court on 07.02.2022 is learned counsel's say.

4. Learned counsel submits that broadly the arbitrable dispute inter-alia touches upon refundable deposit of Rs.2 Crores made by petitioner qua a project which is nearing completion and as the respondent is seeking an additional amount of Rs.60 Lakhs as refundable deposit. It is not necessary to dilate further on this at this prima facie stage.

5. This Court having perused the case file and in the light of the aforementioned submissions finds that prima facie case has been made out for issue of notice

6. Issue notice to respondent returnable by 10.03.2022. Private notice permitted. Private notice through electronic modes of communications (subject to proof being demonstrated) also permitted.

7. List on 10.03.2022.'

3. Both the aforementioned learned counsel submit that factual matrix



and the trajectory the matter has taken have been correctly captured in the aforementioned proceedings. The aforementioned proceedings shall be read as an integral part and parcel of this order. Short forms, abbreviations and short references used in earlier proceedings shall continue to be used in the instant order also.

4. From the submissions made at the Bar today, it comes to light that there is no dispute about the existence of arbitration agreement between the parties i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity. To put it differently, it comes to light that there is no dispute about the existence of Clauses 19 and 14 in the Joint Development Agreement (dated 24.08.2018) and Supplemental Agreement (dated 12.04.2019) respectively.

5. This Court reminds itself that a legal drill under Section 11 of A and C Act is (largely) confined to the legal perimeter statutorily drawn by sub-section (6A) of Section 11 of A and C Act. This principle was laid down by Hon'ble Supreme Court vide ratio in **Mayavati Trading** i.e.,



Mayavati Trading Private Limited Vs. Pradyut 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)

6. 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, relevant Paragraphs in ***Duro Felguera*** case law are paragraphs 47 and 59, which 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. '*

7. In the light of there being no disputation or disagreement about the existence of arbitration agreement between the petitioner and respondent, this Court deems it appropriate to appoint Hon'ble Mr.Justice N.Kirubakaran, a former Judge of this Court, residing at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai – 600 089, Mob: 94450 25454, E-mail: justice.n.kirubakaran@gmail.com, as sole Arbitrator making it clear



Arb.O.P (Com.Div.) No.63 of 2022

that all questions are left open i.e., left open for the Hon'ble Arbitrator to adjudicate upon. Hon'ble Arbitrator is requested to hold sittings in the 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC), conduct arbitration by applying the Madras High Court Arbitration Proceedings Rules 2017 and fee of the Hon'ble Arbitrator shall be governed by the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.

8. Captioned Arb OP is ordered and disposed of in aforesaid manner.

There shall be no order as to costs.

17.03.2022

Speaking/Non-speaking order

Index : Yes / No

gpa

Note:

The Registry is directed to communicate this order forthwith to

1. Hon'ble Mr.Justice N.Kirubakaran,
No.36, 2nd Cross Street,
Rayala Nagar,
Ramapuram,
Chennai – 600 089,
Mob: 94450 25454,



Arb.O.P (Com.Div.) No.63 of 2022

E-mail: justice.n.kirubakaran@gmail.com

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



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Arb.O.P (Com.Div.) No.63 of 2022

M.SUNDAR.J.,

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Arb.O.P (Com.Div.) No.63 of 2022

17.03.2022