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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: **21.04.2022**

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THE HONOURABLE MR.JUSTICE M.SUNDAR

Arb. O.P. (Com.Div.) No.108 of 2022

Reinforced Earth India Private Ltd.,
rep. by its Authorised Signatory
Samprathi Sreehari,
E-11, Block B 1 Extension,
Mohan Co-operative Industrial Estate,
New Delhi - 110 044.

... Petitioner

Vs.

Pink City Expressway Pvt. Ltd., (PCEPL)
Having its registered office at
4th Floor, Chennai City Centre,
#10 and 11, Dr.Radhakrishnan Salai,
Mylapore, Chennai,
Tamil Nadu - 600 004.

also at
3rd and 4th Floor, Raheja Square,
Sector 1, Imt Manesar Industrial,
Gurgaon, Haryana - 122 050.

... Respondent

Petition filed under Sections 11(4)(a) and 11 (6) of The Arbitration and Conciliation Act, 1996 praying to appoint an arbitrator to adjudicate the disputes between the petitioner and the respondent in terms of Clause 16 of the agreement dated 29.10.2009 and direct the respondent to pay costs.



For Petitioner : Mr.S.Adarsh

For Respondent : Mr.K.Jayaraman

ORDER

This order will now dispose of captioned Arb OP.

2. Mr.S.Adarsh, learned counsel for sole petitioner and Mr.K.Jayaraman, learned counsel for lone respondent are before this Court.

3. When the captioned Arb OP was first listed in the Admission Board on 15.03.2022, the following proceedings were made:

'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 22.02.2022 inter alia 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 an Arbitrator.

2. Mr.Adarsh.S, learned counsel on record for petitioner who is before this Court submits that captioned Arb OP is predicated on clause 16 of 'an agreement dated 29.10.2009' [page No.2 of the typed set of papers] [hereinafter 'primary agreement' for the sake of



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convenience and clarity].

3. Learned counsel submits that primary agreement is between the petitioner and the respondent, it is for construction of reinforced Earth wall work/certain other structures in a National High Way, primary agreement ran into rough weather as according to the learned counsel, the petitioner had performed his obligations under primary agreement but respondent did not pay the consideration. At this prima facie stage, considering the fact that this is a Section 11 petition, suffice to say that broadly stated, this is the arbitrable dispute that has erupted between the parties qua primary agreement.

4. This Court is informed that a trigger notice dated 12.10.2020 (page No.106 of the typed set of papers) was issued, the same has been duly received by the respondent but it has evoked neither a reply nor a response, necessitating the presentation of captioned Arb OP on 22.02.2022 in this Court (as already alluded to supra).

5. In the light of the narrative thus far, issue notice to the respondent returnable in three weeks i.e., returnable by 05.04.2022. Private notice permitted. Private notice through all electronic modes of communications (subject to proof being demonstrated) also permitted.

6. List on 05.04.2022.'



4. Both aforementioned learned counsel submit that the trajectory/crux and gravamen of the matter has been correctly captured in the above proceedings. However, this Court is informed that post primary agreement i.e., post 29.10.2009 agreement, there have been two amendment agreements, one dated 07.09.2010 and another dated 24.11.2011 (first amendment agreement and second amendment agreement respectively). Therefore, reference to 'primary agreement' in this order from hereon and henceforth shall be a collective reference of 29.10.2009 agreement, 07.09.2010 first amendment agreement and 24.11.2011 second amendment agreement and 29.10.2009 agreement shall be referred to as mother agreement for the sake of clarity.

5. The other short forms and abbreviations used in the proceedings made in the earlier listing on 15.03.2022 will continue to be used in this order also for the sake of convenience and clarity.

6. Clauses 16 and 23 of the primary agreement (to be



noted clauses 16 and 23 in 29.10.2009 mother agreement) serve as arbitration agreement between the parties and the same read as follows:

'16.DISPUTE RESOLUTION:

The parties hereto shall make every reasonable effort to settle amicably between themselves any dispute or difference arising out of this Agreement within a reasonable period of 30 days. In the event they being unable to settle such dispute the same shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 to be referred to the adjudication of a committee of three arbitrators. The committee shall be composed of one arbitrator to be nominated by each party and the two arbitrators shall jointly appoint a third arbitrator, who will act as Chairman of the committee of three arbitrators. The decision of the majority of arbitrators shall be final and binding on both parties.

23. JURISDICTION:

Any suit or proceedings relating to or arising out of this contract agreement shall be instituted in the Courts of Law at Chennai shall have jurisdiction to determine the same.'

7. To put it differently, aforementioned clauses 16 and 23 in the primary agreement serve as arbitration agreement between the parties i.e., arbitration agreement within the meaning of sub-section



2(1)(b) of Section 7 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity].

8. Though the *lis* i.e., arbitrable disputes that have erupted *qua* primary agreement are subject to serious contestation by respondent (to be noted, a thumbnail sketch of *lis* has been captured in paragraph 3 of 15.03.2022 proceedings), there is no disputation about the existence of arbitration agreement between the parties.

9. Owing to sub-section (6A) of Section 11 of A and C Act, a legal drill under Section 11 is largely confined to examination of existence of arbitration agreement. This principle has been laid down by Hon'ble Supreme Court in the oft-quoted ***Mayavati Trading case law*** i.e., ***Mayavati Trading Pvt. Ltd., 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.'

10. Aforementioned paragraph 10 of **Mayavati Trading** case law takes us to **Duro Felguera** case law i.e., **Duro Felguera Vs. Gangavaram Port Ltd.,** reported in **(2017) 9 SCC 729,** relevant paragraphs in **Duro Felguera** are paragraphs 47 and 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*



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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. In the light of there being no dispute regarding existence of arbitration agreement between the parties, this Court proceeds to appoint a sole arbitrator. To be noted, arbitration agreement provides for a three member Arbitral Tribunal but considering the value of the claim and the nature of the dispute, the Arbitral Tribunal is downsized (by consent) and a sole arbitrator is appointed.

12. Before writing the operative portion of this order, it is deemed appropriate to record the position that both learned counsel submitted that the parties are exploring the possibility of settlement. It is well open to the parties to continue before the sole arbitrator also their endeavour as Section 30 of A and C Act aid the same.

13. As there is no dispute about the existence of arbitration agreement, Mr.A.J.Jawad, Advocate, No.5/1, Jagajeevan Ram Avenue, East Coast Road, Injambakkam, Chennai - 600 115



(Mobile No.9840087114) is appointed as sole arbitrator. Learned sole arbitrator is requested to enter upon reference, adjudicate the disputes that have arisen between the petitioner and respondent *qua* aforementioned primary agreement and render an award. The arbitration shall be conducted in the Arbitration and Conciliation Centre under the aegis of this Court (MHCAC) in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

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

21.04.2022

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P.S.: Registry to communicate a copy of this order to

1. Mr.A.J.Jawad,
Advocate,
No.5/1, Jagajeevan Ram Avenue,
East Coast Road, Injambakkam, Chennai - 600 115.
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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