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Arb.O.P(Com.Div) No.187 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2022

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THE HON'BLE Mr.JUSTICE M.SUNDAR

Arb.O.P(Com.Div) No.187 of 2022

Boson Infra India Private Limited,
Represented by its Director Mr.J.Vivek,
19/3 Venu Street,
Alandur, Chennai-600 016.

... Petitioner

Vs.

Star Readymix Private Limited,
Rep. by its Director Mr.Syed Hameed,
Old No.34 New No.128 Crown Court,
2nd floor, Cathedral Road,
Chennai-600 086.

... Respondent

Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a suitable person as the sole Arbitrator to decide the disputes which have arisen between the petitioner and the respondent.

For Petitioner : Mr.N.S.Amogh Simha

For Respondent : Mr.S.Surendran



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ORDER

This order will now dispose of the captioned matter.

2. Proceedings made by this Court in earlier listings on 13.04.2022, 27.04.2022 and 29.04.2022 read as follows:

'Proceedings dated 13.04.2022

Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court 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.Athiban Vijay A.K learned counsel for petitioner who is before this Court submits that the captioned Arb OP is predicated on a 'Joint Venture Agreement' dated 09.04.2019 [hereinafter 'primary contract' or 'JVA' for the sake of convenience and clarity] between the petitioner and respondent companies and more particularly clause 15 thereat [Arbitration Clause].

3. Aforementioned clause 15 of JVA reads as follows:

'15. Governing Law and Dispute Resolution

A. This agreement shall be governed, interpreted and enforced according to Laws of India. Subject to arbitration provided herein, the parties and their affiliates agree to submit to jurisdiction in such Courts at Chennai, India as may have jurisdiction over the subject matter, for the resolution of any dispute which may arise by virtue of participation in this venture.

B. The parties acknowledge that damages at law



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may be an inadequate remedy for a breach or threatened breach of this Agreement and agree that in the event of a breach or threatened breach of any provision hereof, the rights and obligations of the parties shall be enforceable by specific performance, injunction or other equitable remedy.

C. All disputes, controversies and differences of opinion arising out of or in connection with this Agreement or for the breach hereof which cannot be settled amicably by the parties hereto shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 by a sole arbitrator to be mutually appointed by the parties. In the event the parties are not able to agree on any sole arbitrator within 30 days of issue of notice invoking arbitration by any party, either party shall be entitled to make an application to the relevant Court in accordance with the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator and the arbitrator so nominated shall be deemed to be the arbitrator nominated by the defaulting party. The decision of the arbitral panel shall be final and binding on the parties. The seat and venue of arbitration shall be Chennai, India.

D. The proceedings of arbitration shall be in the English language.

E. In the event of any legal proceedings or arbitration concerning breach of this Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees and litigation costs and expenses.'

4. Adverting to the aforementioned clause 15 of JVA more particularly 15C, learned counsel submits that the aforementioned clause serves as arbitration agreement between the petitioner and respondent i.e., 'Arbitration Agreement' between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

5. Adverting to aforementioned JVA, learned counsel submits that Seat and Venue is Chennai and therefore, this Court is the



jurisdictional Court.

6. Elaborating a little, learned counsel for petitioner submits that the petitioner is in the business of providing infrastructure works including sale of ready-mix concrete and other construction materials and respondent-Company is in the business of manufacture and sale of ready-mix concrete. It is submitted that the aforementioned JVA (primary contract) was entered into on 09.04.2019 wherein the petitioner agreed to provide raw material and working capital to operate a particular plant of the respondent. It is not necessary to dilate further as this is a Section 11 legal drill.

7. Suffice to say that certain disputes arose in the course of operation of the plant inter alia turning on alleged interference. Learned counsel submits that the petitioner invoked the aforementioned arbitration agreement by issuing a trigger notice dated 02.11.2020. The respondent having received the trigger notice responded by sending a terse electronic mail dated 16.12.2020 requesting for some time to respond in detail but saying nothing about the appointment of an Arbitrator though the petitioner had suggested names of four noblemen for one of them to act as sole arbitrator. Therefore, the petitioner sent a rejoinder dated 01.09.2021 but there has been no response from the respondent thereafter necessitating the presentation of captioned Arb OP in this Court on 25.02.2022 is learned counsel's say.

8. Prima facie case for issue of notice made out.

9. Issue notice to sole respondent returnable in a fortnight i.e., returnable by 27.04.2022. Private notice permitted.

10. List on 27.04.2022.'



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'Proceedings dated 27.04.2022

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 13.04.2022.

2. Mr.Athiban Vijay A.K, learned counsel for sole petitioner who is before this Court submits that private notice has been served on the lone respondent. A perusal of the case file before this Court brings to light that Affidavit of Service has been filed and name of the lone respondent together with full/complete address is shown in the cause list, but there is no representation today. This Court is informed that lone respondent has not entered appearance through counsel as yet. With the intention of giving opportunity to the respondent, list this matter day-after-tomorrow.

List on 29.04.2022.'

'Proceedings dated 29.04.2022

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 27.04.2022.

2. Ms.Gayathri.R, learned counsel for sole petitioner is before this Court.

3. Mr.S.Surendran, learned counsel who is before this Court submits that he along with his senior (Mr.Thirumavalavan) with address for service at No.6, Law Chambers, High Court Building, Chennai 600 104 and other co-counsel, have filed vakalatnama in the Registry on behalf of lone respondent yesterday (28.04.2022). Registry to verify and show the name of learned counsel, if the vakalatnama is in order. Otherwise name of the lone respondent with full/complete address as in the cause list in this listing shall be



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shown in the cause list in the next listing also.

4. *List immediately after summer vacation. List on 07.06.2022.'*

3. Aforementioned proceedings made in earlier listings shall be read as an integral part and parcel of this order. It is also made clear that the abbreviations, short forms and short references used in the earlier proceedings will continue to be used in the instant order also for the sake of convenience and clarity.

4. In the hearing today, Mr.N.S.Amogh Simha, learned counsel on record for the sole petitioner-company and Mr.S.Surendran, learned counsel on record for lone respondent are before this Court.

5. Respondent has not filed a counter affidavit but adverting to earlier proceedings learned counsel for respondent submits that the possibility of settlement will be explored. Therefore, it follows as a sequitur that there is no dispute or disagreement about the existence of arbitration agreement between the petitioner and respondent i.e., existence of Clause 15 of JVA dated 09.04.2019. Hon'ble Supreme Court vide **Mayavati Trading** principle i.e., **Mayavati Trading Pvt. Ltd vs Pradyuat Deb Burman** reported in (2019) **8 SCC 714** has made it clear that a legal drill under Section 11 of A and C



Act should perambulate within the statutory perimeter of sub-section (6A) of Section 11 of A and C Act. 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. Paragraph 10 of **Mayavati Trading** principle takes us to **Duro Felguera** 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** are paragraphs Nos.47, 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.



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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.'

7. In the light of the obtaining legal position and owing to the narrative thus far, this Court proceeds to appoint Hon'ble Mr.Justice R.Balasubramanian (Retd.), Former Judge of this Court residing at No.5, Tiger Varadachari 1st Road, Kalakshetra Colony, Besant Nagar, Adyar, Chennai - 600 090 (Ph: 24465599, Mob:9444353535) as sole Arbitrator. Hon'ble Arbitrator is requested to enter upon reference, adjudicate arbitrable disputes that have arisen between the petitioner qua JVA dated 09.04.2019 and render an award. Hon'ble Arbitrator is requested to adopt 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. As



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regards the venue, Hon'ble Arbitrator is requested to hold sittings in 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) but it is open to the Hon'ble Arbitrator to hold sittings elsewhere in Chennai subject to his convenience if MHCAC halls are unavailable.

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

07.06.2022

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Note: The Registry is directed to communicate this order forthwith

To

1. The Hon'ble Mr.Justice R.Balasubramanian (Retd.),
Former Judge of this Court
No.5, Tiger Varadachari 1st Road,
Kalakshetra Colony, Besant Nagar,
Adyar, Chennai - 600 090
(Ph: 24465599, Mob:9444353535)
2. The Director,
Tamil Nadu Mediation and Conciliation Centre
-cum- Ex-Officio Member,
Madras High Court Arbitration Centre,
Chennai - 104.



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M.SUNDAR J

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