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Arb O.P.(Com. Div.) No.218 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.06.2022

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

Arb O.P.(Com. Div.) No.218 of 2022

M/s.GK Green Power Limited
(Formerly M/s.TCS Textiles Pvt. Ltd.)
Rep. by its Authorised Representative
Mr.A.Muralikrishnan
No.6/21, College Road
1st Cross Street
Tiruppur – 641 602.

... Petitioner

Vs.

M/s.Suzlon Global Services Ltd.
Rep by its Designated Representative
Mr.Bhaskar
No.1055/18, Gowtham Centre (Near Anna Statue)
2nd Floor, Avinashi Road
Coimbatore.

Also at :
No.104, 1st Floor, Delta Wing
Raheja Towers
No.177, Anna Salai
Chennai – 600 002.

... Respondent

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 praying to appoint an Arbitrator in terms of the Agreement dated 10.03.2013, to render an award by adjudicating upon the disputes that have arisen between the petitioner and the respondent.



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Arb O.P.(Com. Div.) No.218 of 2022

For Petitioner : Mr.D.Prasanna

ORDER

This order will now 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 06.06.2022, 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 23.03.2022 inter alia under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' [hereinafter 'A and C Act' for the sake of brevity, convenience and clarity].

2. *Mr.V.Jai Bharath, learned counsel representing Mr.D.Prasanna, learned counsel on record for the petitioner submits that the captioned Arb OP is predicated on an agreement captioned 'OPERATION AND MANAGEMENT AGREEMENT (SERVICES ONLY)' dated 10.03.2013 and clause 14 thereat captioned 'DISPUTE RESOLUTION' more particularly, clause 14.2 is the arbitration clause between the parties being Arbitration Agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.*

3. *Adverting to a notice dated 30.10.2021 issued by the*



petitioner through its counsel to respondent/noticee, learned counsel submits that they had suggested three names and made a specific request for nomination of arbitrator or give consent. Learned counsel adverting to a reply dated 11.11.2021 from the respondent submits that it is in the nature of interim reply as it says 'holding response' which is terse and it is silent about the petitioner's request for consent/choosing one of the three names suggested as arbitrator. Learned counsel submits, on instructions, that nothing further has happened thereafter, necessitating the presentation of the captioned Arb OP in this Court on 23.03.2022. This submission is recorded.

4. Prima facie case for issue of notice has been made out.

5. Issue notice to respondent returnable in a fortnight i.e., returnable by 20.06.2022. Private notice permitted.

6. List on 20.06.2022.'

3. Lone respondent in the captioned Arb.O.P. has been duly served through Court and through private notice. This is evident from the case file before this Court. To be noted, name of lone respondent together with full/complete address is duly shown in the cause list. There is no representation for lone respondent. There is nothing before this Court to demonstrate that the lone respondent has entered appearance through any counsel. Learned counsel for petitioner also confirms that no counsel has taken noted endorsement from him.



Arb O.P.(Com. Div.) No.218 of 2022

WEB COPY

4. This Court deems it appropriate to dispose of the captioned Arb.OP on merits as the lone respondent has not come before this Court to dispute the existence of arbitration agreement between the parties. The reasons are three-fold and they are as follows :

(i) Sub-section (13) of Section 11 of A and C Act 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 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.

To be noted, respondent has been duly served on 13.06.2022. Therefore, this is an endeavour to dispose of the captioned Arb.OP within 60 days from the date of service on the respondent as per the mandate of Sub-section (13) of Section 11 of A and C Act.

(ii) Hon'ble Supreme Court, in and by an order dated 19.05.2022 in Special Leave Petition (C) No.5306 of 2022 [**Shree Vishnu Constructions**



Vs. The Engineer in Chief, Military Engineering Service & Ors., / has emphasised the need for disposing of applications under Section 11 at the earliest. Hon'ble Supreme Court has observed that keeping Section 11 petitions [which kick-start the ADR mechanism] pending would lead to the object and purpose of A and C Act losing its significance. To be noted, most relevant portions of ***Shree Vishnu Constructions*** order 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 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.'



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Hon'ble Supreme Court has also directed a copy of ***Shree Vishnu Constructions*** order to be circulated to Registrars General of all High Courts for being placed before respective Hon'ble The Chief Justices.

(iii) The scope of a legal drill under Section 11 is very limited and it 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 existence of an arbitration agreement.'

5. Aforementioned sub-section (6A) of Section 11 of A and C Act came up for consideration in the oft quoted ***Mayavati Trading Pvt. Ltd vs Pradyut Deb Burman case*** reported in ***(2019) 8 SCC 714***. Relevant paragraph ***Mayavati Trading case law*** 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'

6. 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 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.



Arb O.P.(Com. Div.) No.218 of 2022

WEB COPY

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 case on hand, the respondent has not chosen to come before this Court and dispute the existence of arbitration agreement between the parties. To put it differently, existence of Clause 14.2 of Operation and Management Agreement (Services Only) dated 10.03.2013, which has been placed before this Court i.e., arbitration clause which serves as arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act remains undisputed.

8. In the light of narrative thus far, this Court proceeds to appoint Hon'ble Mr.Justice K.Venkataraman (Retd.), Former Judge of this Court, residing at L-Block, No.125, East Anna Nagar, Chennai – 600 102, Ph.No.77088-95435 as Sole Arbitrator. Hon'ble Arbitrator is requested to enter upon reference, adjudicate qua arbitral disputes that have arisen between the parties qua 'Operation and Management Agreement (Services Only)' dated 10.03.2013, by holding sittings in 'Madras High Court Arbitration Centre under the aegis of this Court' ['MHCAC'], in accordance



Arb O.P.(Com. Div.) No.218 of 2022

WEB COPY

with the Madras High Court Arbitration Proceedings Rules, 2017 and Hon'ble Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

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

20.06.2022

Index : Yes / No

Interneer : Yes / No

Speaking order / Non-speaking order

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

1.Hon'ble Mr.Justice K.Venkataraman (Retd.),
Former Judge of this Court,
L-Block, No.125, East Anna Nagar,
Chennai – 600 102.

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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Arb O.P.(Com. Div.) No.218 of 2022

M.SUNDAR. J.,

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Arb O.P.(Com. Div.) No.218 of 2022

20.06.2022