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Arb.O.P(Com.Div) No.156 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2022

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

Arb.O.P(Com.Div) No.156 of 2022

R.Agneeswaran

... Petitioner

Vs.

1. Yes Bank Ltd.,
Regd. Off. Yes Bank House,
Off Western Express Highway,
Santacruz East,
Mumbai-400055.
2. The Branch Manager,
Yes Bank Ltd., Madurai Branch,
Sellur Main Road, Goripalayam,
Madurai-625 002.

... Respondents

Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to decide the dispute and differences between the petitioner and the respondent in terms of Arbitration Loan Agreement NoCEL 061600801962 dated 26.03.2021.

For Petitioner : Mr.V.Janarthanan

For Respondents : Mr.R.Sreedhar



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ORDER

This order will now dispose of the captioned matter.

2. On 05.04.2022 when the matter was listed before this Court, 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 28.03.2022 under Section 11(5) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of convenience, clarity and brevity] with a prayer for appointment of a sole Arbitrator.

2. *Mr.T.Sundaravadhanan, learned counsel representing Mr.V.Janarthanan, counsel on record for petitioner submits that the captioned Arb OP is predicated on a 'loan agreement dated 26.03.2021 bearing reference No.CEL 061600801962' [hereinafter 'primary contract' for the sake of convenience and clarity] and clause 15.7 thereat.*

3. *Learned counsel submits that the entire primary contract has not been furnished to the petitioner who has taken financial assistance for purchase of an Earth Moving Equipment.*

4. *Aforementioned clause 15.7 as placed before this Court reads as follows:*

'15.7. Any notice under this Agreement shall be in writing and sent to the address stated in the Schedule. The borrower(s) shall forthwith inform the Bank of any change in his/her address. This Agreement



shall be subject to Indian Laws.

Unless the same falls within the jurisdiction of the Debts Recovery Tribunal established under the Recovery of Debts due to Banks & Financial Institution Act, 1993, any and all claims and disputes arising out of or in connection with this Agreement or its performance shall be settled by arbitration by a single Arbitrator to be appointed by the Bank. The arbitration shall be held, in the city where lending office of the Bank is situated, in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

Subject to the provisions of the Recovery of Debts due to Banks & Financial Institutions Act, 1993 and the arbitration provisions under Clause 11.7 herein, the Courts in the city where lending office of the Bank is situated shall have exclusive jurisdiction in relation to this Agreement and all matters arising in connection herewith.'

5. Learned counsel submits that the lending office is situated at Chennai and this Court has jurisdiction.

6. Be that as it may, it is further submitted by learned counsel that arbitrable disputes erupted qua primary contract, petitioner trigger/invoked the aforementioned arbitration clause in and by a notice dated 22.02.2022 and this trigger notice met with a reply dated 24.02.2022 where there is no mention about the request for appointment of an Arbitrator/invocation of arbitration clause. This has necessitated the presentation of the captioned Arb OP in this Court is learned counsel's further say.

7. Owing to the narrative thus far, prima facie case for issue of notice made out.



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*8. Issue notice to respondents returnable in three weeks i.e.,
returnable by 26.04.2022. Private notice permitted.*

9. List on 26.04.2022.

05.04.2022'

3. Before proceeding further, it is deemed appropriate to make it clear that the aforementioned 05.04.2022 proceedings 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 05.04.2022 proceedings shall continue to be used in this order also for the sake of convenience and clarity.

4. Post 05.04.2022 proceedings respondents have been duly served and the respondents have entered appearance through counsel. Mr.R.Sreedhar, learned counsel on record for respondents is before this Court and 'respondents' shall be collectively referred to as 'said Bank' for the sake of convenience and clarity. Mr.V.Janarthanan, learned counsel for the lone petitioner is before this Court.

5. Said Bank has not filed a counter affidavit but learned counsel submits that pending captioned Arb.OP an Arbitrator has been appointed by said Bank on 03.06.2022. Therefore, it follows as an indisputable sequitur



that there is no disputation or disagreement about the existence of arbitration agreement i.e., Clause 15.7 of primary contract.

6. Learned counsel for petitioner makes a request that this Court may please appoint an Arbitrator of its choice without saying anything negative about the Arbitrator appointed by said Bank. Keeping in mind **Perkins** principle i.e., **Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.**, reported in **2019 SCC Online SC 1517** and considering the facts and circumstances of this case, this Court is inclined to accede to the request of the petitioner counsel.

7. It is also to be noted that if **Punj Lloyd** principle being ratio in **Punj Lloyd Ltd., Vs. Petronet MHB Ltd.**, reported in **(2006) 2 SCC 638**, **Bharat Battery** principle being ratio in **Union of India Vs. Bharat Battery Manufacturing Co (P) Ltd.**, reported in **(2007) 7 SCC 684** and **Datar Switchgears** principle being ratio in **Datar Switchgears Ltd., Vs. Tata Finance Ltd., and another** reported in **(2000) 8 SCC 151** are applied in a little expansive plane, it can also be construed that the said Bank has waived its right to appoint an Arbitrator as trigger notice dated 22.02.2022 was replied to by said Bank on 24.02.2022, captioned Arb.OP has been presented in this Court on 28.03.2022 and no Arbitrator was appointed by said Bank



atleast until 03.06.2022. This is another reason as to why this Court is inclined to accede to the request of petitioner's counsel.

8. Be that as it may, a Section 11 legal drill should perambulate within the statutory perimeter sketched by sub-section (6A) of Section 11 thereat. This in other words is **Mayavati Trading** i.e., **Mayavati Trading Pvt. Ltd vs. Pradyut Deb Burman** reported in **(2019) 8 SCC 714**, relevant paragraph 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)

9. Paragraph 10 of **Mayavati Trading** principle takes us to **Duro Felguera** principle 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 principle 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.

.....

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.'

10. As would be evident from the narrative thus far, said Bank is obviously not entering upon any disputation or disagreement about the existence of arbitration agreement as said Bank itself has chosen to appoint an Arbitrator. This by itself draws the curtains on the captioned matter.

11. Mr.P.J.Sri Ganesh, Advocate with address for service at No.10A, 14th Avenue, Harrington Road, Chetpet, Chennai-600 031 (Mobile No.98848



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62677) is appointed as sole Arbitrator. Learned Arbitrator is requested to enter upon reference, adjudicate on arbitrable disputes arising out of primary contract between petitioner and said Bank, render an award by holding sittings at 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) in accordance with Madras High Court Arbitration Proceedings Rules 2017, fee of the learned Arbitrator shall be in accordance with the 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.

07.06.2022

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Note: The Registry is directed to communicate this order forthwith

To

1. Mr.P.J.Sri Ganesh,
Advocate,
No.10A, 14th Avenue,
Harrington Road, Chetpet,
Chennai-600 031.
(Mobile No.98848 62677)
2. The Director,
Tamil Nadu Mediation and Conciliation Centre
-cum- Ex-Officio Member,
Madras High Court Arbitration Centre,
Chennai - 104.



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