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Arb O.P(Com.Div.)No.206 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.07.2022

CORAM

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

Arb O.P(Com.Div.)No.206 of 2022

Shankar Karikar
No.24, Bawa Road
Alwarpet, Chennai-600 018
Represented by his Power Agent
Mr.A.Rajkumar

... Petitioner

vs.

1. Karpagam
2. Praveen Jeeva
3. Harini
4. Chithra
5. Ashwin Krishnaraj
6. Monisha Prakash

... Respondents

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to

(a) Appoint an Arbitral Tribunal in accordance with the provisions of the Arbitration and Conciliation Act, 1996 to adjudicate upon the disputes/differences between the petitioner and the respondent under the contract.

(b) Direct the respondent to pay the costs of this proceeding.



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For Petitioner : Mr.Arun Karthik Mohan

For Respondents : Ms.Vidyashree
representing Ms.P.T.Ramadevi
for R1 to R3
Mr.V.S.Rishwanth, for R4 to R6

ORDER

Proceedings made by this Court in the listing of the captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] on 07.06.2022 reads as follows:

'Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 28.04.2022 which reads as follows:

'When the matter was taken up, Ms.Ashwini Vaidialingam, learned counsel for petitioner submits that post presentation of captioned Arb.OP in this Court on 30.03.2022, there has been some communication from some of the respondents necessitating filing of an additional typed set of papers. Learned counsel submits that additional typed set of papers has been filed in the Registry today. Learned counsel requests for time to bring it on Board.

2.List immediately after summer vacation. List on 07.06.2022.'



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2.Today Mr.Arun Karthik Mohan, learned counsel on record for the petitioner who is before this Court submits that reply to the trigger notice [trigger notice dated 11.02.2022] being reply dated 31.03.2022 from respondents 4 to 6 [through counsel] has since been filed and brought on Board by way of additional typed set of papers which is before this Court.

3.Be that as it may, learned counsel submits that the captioned Arb.OP has been presented in this Court on 30.03.2022 under Section 11 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/constitution of an Arbitral Tribunal.

4.It is submitted that the nucleus of the captioned matter is a 'Joint Venture Agreement' ('JVA' for the sake of brevity) dated 16.02.2012 between the petitioner and one Mr.V.K.Prakash (hereinafter 'Primary Contract' for the sake of clarity) to develop land admeasuring 45000 sq.ft or thereabouts in Puducherry (belonging to Mr.V.K.Prakash) inter alia by putting up residential apartments therein. It is submitted that the construction has been completed but the said Mr.V.K.Prakash died on 12.02.2021. Thereafter, the petitioner is facing difficulty in carrying the primary contract to its logical end owing to dissensions and disagreements between the legal heirs of late Mr.V.K.Prakash. Owing to unfortunate demise of Mr.V.K.Prakash, notice was issued to all his legal heirs. This course was adopted owing to



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Section 40 of A and C Act is the learned counsel's say. This notice dated 11.02.2022 shall hereinafter be referred to as 'trigger notice' for the sake of convenience.

5.As alluded to supra, the aforementioned trigger notice met with a reply dated 31.03.2022 [reply through counsel from respondents 4 to 6]. There is no response or reply from respondents 1 to 3 is learned counsel's say.

6.Learned counsel draws the attention of this Court to Clause 17 of Primary Contract which reads as follows:

'17. In the event of any dispute arising between the Parties or as the case may be which could not be resolved mutually in respect of the interpretation, operation, enforcement of the terms of this agreement or in any manner related to performance of the respective obligation to the parties herein the same shall be referred to a Sole Arbitrator.'

7.The aforementioned clause 17 of the Primary Contract serves as an arbitration agreement i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is the learned counsel's further say.

8.It is also pointed out that in the aforementioned reply dated 31.03.2022, respondents 4 to 6 have not disputed the existence of the arbitration agreement vide unnumbered paragraph 2 of the reply.

9.In the light of the narrative thus far, prima facie case for issuance of notice made out. Issue notice to the respondents returnable by a fortnight i.e., returnable by 21.06.2022. Private



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notice is also permitted.

List on 21.06.2022.'

2. Aforementioned proceedings dated 07.06.2022 shall now be read as an integral part and parcel of this order. The short forms, abbreviations and short references used in the aforementioned proceedings will continue to be used in the instant order for the sake of convenience and clarity.

3. To be noted, after 07.06.2022 there had been listings on 21.06.2022, 28.06.2022 and 05.07.2022 but the proceedings made in these listings may not be of much significance for disposal of the captioned Arb OP in and by this order. Suffice to say that post 07.06.2022 proceedings, all the respondents have been duly served and Ms.Vidyashree, learned counsel representing the counsel on record for respondents 1 to 3 and Mr.V.S.Rishwanth, learned counsel for respondents 4 to 6 are before this Court. Mr.Arun Karthik Mohan, learned counsel for the petitioner is before this Court.

4. Both the aforementioned learned counsel for respondents very fairly



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submit that there is no dispute or disagreement about the existence of Arbitration Agreement between the parties i.e., clause 17 of primary contract. To be noted, primary contract is a reference to JVA i.e., Joint Venture Agreement dated 16.02.2012 between Late V.K.Prakash and the petitioner. The respondents are the legal heirs of Late V.K.Prakash. All this is captured in the previous proceedings dated 07.06.2022 and therefore, this Court deems it appropriate to not to dilate further on these aspects of the matter.

5. Adverting to arbitrable disputes, this Court is informed that construction/development is complete and issue centers around allocation of developed property more particularly petitioner's rights in developed property. This Court makes it clear that no opinion or view is expressed on the same in this order as both would be in the domain of Hon'ble Arbitrator to be appointed by this Court infra in this order.

6. Before writing the operative portion of this Court, this Court deems it appropriate to remind itself of oft-quoted **Mayavati Trading** case law [**Mayavati Trading Pvt. Ltd vs Pradyut Deb Burman** reported in (2019) 8 SCC 714]. To be noted relevant paragraph in **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 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 S.A.'

(underlining made by this Court to supply emphasis and highlight)

7. Aforementioned paragraph No.10 of **Mayavati Trading** case law takes this Court to **Duro Felguera** principle i.e., **Duro Felguera S.A. Vs Gangavaram Port Limited** reported in **2017 (9) SCC 729**, relevant paragraphs in **Duro Felguera** case law are paragraph 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.'

8. To put it in simple terms, the aforementioned ***Mayavati Trading*** and ***Duro Felguera*** principles are to the effect that a Section 11 legal drill should perambulate within the statutory perimeter sketched by sub-section (6A) of Section 11 of A and C Act. This in other words means that in a Section 11 legal drill the existence of Arbitration Agreement between the parties is the paramount consideration. In the case on hand, there is no dispute or disagreement about the same. To be noted, it is nobody's case that *lis* is *ex facie* barred by limitation i.e., ***Nortel*** principle [***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited*** reported in



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(2021) 5 SCC 738]. This does not mean that limitation should not be raised by parties before Hon'ble Arbitrator. If either of the parties raise limitation plea before Hon'ble Arbitrator, the same will be considered by Hon'ble Arbitrator on its own merits and in accordance with law. This is only to say that *Nortel* principle is not attracted as there is no *ex facie* barred by limitation plea.

9. In the light of the narrative thus far, Hon'ble Mr.Justice N.Kirubakaran (Retd), a former Hon'ble Judge of Madras High Court, with address for service at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai-600 089, Mobile: 94450 25454 (email: justice.n.kirubakaran@gmail.com) is appointed as sole Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference, qua primary contract i.e., Joint Venture Agreement dated 16.02.2012, adjudicate upon arbitrable disputes that have arisen between the parties and render an Arbitral Award by holding sittings in the 'Madras High Court Arbitration Centre under the aegis of this Court' (MHCAC) as per Madras High Court Arbitration Proceedings Rules 2017 and fee of Hon'ble sole Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and



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Arbitrator's Fees) Rules 2017.

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

12.07.2022

Speaking/Non-speaking order
Index : Yes / No

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

1. Hon'ble Mr.Justice N.Kirubakaran(Retd.),
Former Hon'ble Judge of Madras High Court
No.36, 2nd Cross Street, Rayala Nagar,
Ramapuram, Chennai-600 089.
Mobile: 94450 25454 (email: justice.n.kirubakaran@gmail.com)
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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