



Arb O.P.(Com. Div.) No.211 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.08.2022

CORAM

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

Arb O.P.(Com. Div.) No.211 of 2022

D.Adhithan

... Petitioner

Vs

1.D.Vishvanathan

2.Vaithianathan

3.T.Rajaram

4.Thilagavathi

... Respondents

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 praying (a) to appoint an sole Arbitrator to adjudicate the dispute between the petitioner and the respondents in terms of the arbitration agreement dated 16.03.2017; (b) to award the costs of the petition; and (c) to pass such further or other orders as this Court deems fit and proper in the circumstances of the case.



WEB COPY



Arb O.P.(Com. Div.) No.211 of 2022

For Petitioner : Ms.L.Karthiga

For Respondents : Mr.V.Vadivel for R2
Ms.A.Mary for R3
Mr.M.Jaishingh for
Mr.P.Jayachandran for R4
R1 - No appearance

ORDER

This order will now dispose of the captioned matter.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the first listing on 08.06.2022 a scanned reproduction of which is as follows :



WEB COPY



Arb O.P.(Com. Div.) No.211 of 2022

Arb.O.P(Com.Div.)No.211 of 2022

Arb.O.P(Com.Div.)No.211 of 2022

M.SUNDAR, J.,

Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] has been presented in this Court on 21.04.2022 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. Captioned Arb OP is predicated on an arbitration agreement between the parties i.e., Arbitration Agreement within the meaning of Section 2(1)(h) read with Section 7 of A and C Act which is in the form of a clause/covenant in a registered partnership deed dated 16.03.2017 [hereinafter 'primary contract' for the sake of convenience, clarity and brevity]. Clause 17 of primary contract reads as follows:

'17. ARBITRATION AND CONCILIATION ACT: In case of Disputes and questions in the partnership pr this deed arising between partners or between any one of them or their legal representatives and whether during the partnership or after the partnership shall be referred to the arbitrator in accordance with the provisions of Arbitration and Conciliation Act, 1996 then in force.'



Arb O.P.(Com. Div.) No.211 of 2022

WEB COPY

Arb. O.P.(Com.Div.) No. 211 of 2022

3. Ms.L.Karthiga, learned counsel submits that arbitrable disputes erupted between the partners regarding allegation of purchase of some properties in individual names using the funds of firm, owing to which, a trigger notice dated 25.01.2022 triggering the arbitration agreement was issued by the petitioner (through counsel) to the respondents. Learned counsel submits that the first respondent alone sent a reply dated 15.02.2022 *inter alia* saying that the request for appointment of arbitrator does not arise. This has necessitated the presentation of the captioned Arb OP is learned counsel's say. Learned counsel submits that the other noticees i.e., other respondents have not responded to the trigger notice.

4. *Prima facie* case has been made out for issue of notice. Issue notice to all the four respondents returnable in a fortnight i.e., returnable by 22.06.2022. Private notice permitted,

5. List on 22.06.2022.

3. Aforementioned proceedings shall now be read as an integral part and parcel of this order. This also means that the abbreviations, short forms used therein will continue to be used in this order also for the sake of convenience and clarity.



WEB COPY

4. Post aforementioned 08.06.2022 order, as there was difficulty in completing service, the matter was placed before learned Master and service qua all four respondents is now complete.

5. Ms.L.Karthiga, learned counsel for the sole petitioner, Mr.V.Vadivel, learned counsel for second respondent, Ms.A.Mary, learned counsel for third respondent and Mr.M.Jaisingh for Mr.P.Jayachandran, learned counsel for fourth respondent are before this Court.

6. To be noted, as regards the first respondent, service has been duly effected, name of first respondent together with full/complete address as in the long and short cause titles of the captioned Arb.OP is shown in the cause list but there is no representation. Name of the first respondent called out aloud thrice in the Court and in the adjoining corridors but no response. This Court is informed that first respondent has not chosen to enter appearance through any counsel.

7. In the aforesaid backdrop, learned counsel for respondents 2 to 4 submit in one voice that they do not dispute the existence of arbitration agreement, i.e., clause 17 of primary contract.

8. As would be evident from the narrative thus far, first respondent has not chosen to come before this Court and enter upon any disputation



regarding existence of arbitration agreement. This makes the task of disposal of captioned Arb.OP fairly simple.

9. A legal drill under Section 11 of A and C Act should perambulate within the statutory perimeter sketched by sub-section (6A) thereof 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.'

10. Aforementioned sub-section (6A) of Section 11 of A and C Act came up for consideration in oft quoted judgment of Hon'ble Supreme Court in **Mayavati Trading Pvt. Ltd vs Pradyuat Deb Burman** reported in (2019) 8 **SCC 714**, relevant paragraph 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 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'

11. 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 **Duro Felguera S.A. Vs Gangavaram Port Limited** reported in **2017 (9) SCC 729**, relevant paragraphs in **Duro Felguera** case are paragraph Nos.47 and 59 and the same reads 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



WEB COPY

intention as incorporated in Section 11(6-A) ought to be respected.'

12. Other facets of a Section 11 legal drill put in place by judicial pronouncements namely *N.N.Global* and *Nortel* principles do not come up for consideration in the case on hand as the same has not been raised by the respondents. To be noted, for completion of narrative, it is deemed appropriate to say that *N.N.Global* principle is ratio laid down by Hon'ble Supreme Court in *N.N.Global Mercantile Pvt. Ltd., Vs. Indo Unique Flame Ltd., and others* reported in *2021 SCC Online SC 13* and that turns on issue of arbitration agreement between the parties being in the form of a clause/covenant in a contract and a plea that the agreement is unstamped/insufficiently stamped and/or not registered though compulsorily registrable. Likewise, *Nortel* principle is ratio laid down by Hon'ble Supreme Court in i.e., *Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited* reported in *(2021) 5 SCC 738*, which turns on a plea of *lis* being *ex facie* barred by limitation. It is not necessary to deal with these aspects as the same do not arise in the case on hand.

13. Before writing the concluding paragraph / operative portion of the order, it is deemed appropriate for the purpose of specificity to clarify that



Arb O.P.(Com. Div.) No.211 of 2022

the stated position of the respondents is only with regard to existence of the arbitration agreement and there is no consent or concession *qua lis*. For further clarity, it is deemed appropriate to set out that all questions and all arbitrable disputes are left open for being decided by the Hon'ble Arbitrator to be appointed *infra*. To put it differently, all rights and contentions of the parties are left open.

14. In the light of narrative thus far, Hon'ble Mr.Justice K.Venkataraman (Retd.), a former Judge of this Court, residing at 'L-Block', No.125, East Anna Nagar, Chennai- 600 102. [Mobile No.: 7708895435] is appointed as sole Arbitrator. Hon'ble Arbitrator is requested to enter upon reference *qua* primary contract i.e., partnership deed dated 16.03.2017 between petitioner and respondents, adjudicate upon the arbitrable disputes that have arisen between the parties by holding sittings in the 'Madras High Court Arbitration Centre under the aegis of this Court' (MHCAC) and render an award by adopting 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.



Arb O.P.(Com. Div.) No.211 of 2022

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

26.08.2022

Index : Yes / No
Speaking order / Non-speaking order
ds

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

1.The Hon'ble Justice Mr.K.Venkataraman (Retd.,
Former Judge of Madras High Court
L-Block, No.125, East Anna Nagar
Chennai - 600 102.
[Mobile No.: 77088-95435].

2.The Director
Tamil Nadu Mediation and Conciliation Centre
cum – Ex Officio Member
Madras High Court Arbitration Centre
Madras High Court, Chennai – 600 104.



WEB COPY



Arb O.P.(Com. Div.) No.211 of 2022

M.SUNDAR. J.,

ds

Arb O.P.(Com. Div.) No.211 of 2022

26.08.2022