



Arb.Appln.No.130 of 2022

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M.SUNDAR, J.,

This order will now dispose of the captioned application.

2. Read this in conjunction with and in continuation of separate order made today in Arb.O.P.No.273 of 2022 which reads as follows:

'This order will now dispose of the captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity].

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the first listing of the captioned Arb OP on 01.07.2022 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 27.04.2022 inter alia under Section 11 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 an independent sole Arbitrator.

2. Mr.S.Dhakshnamoorthy, learned counsel on record for sole petitioner submits that the captioned Arb OP is predicated on clause 13.5 in an agreement styled 'Sourcing and Distribution Agreement' dated 30.03.2019 [hereinafter 'primary contract' for the sake of convenience and clarity] which in turn based on Trade Agreement dated 30.03.2019.



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3. *Be that as it may, the aforementioned clause 13.5 reads as follows:*

'13.5 If the Dispute is not resolved within the thirty (30) Business Days period, the Dispute shall be referred to and finally resolved by arbitration in accordance with Indian Arbitration and Conciliation Act, 1996. The number of arbitrators shall be one (1) to be appointed by the Company.'

4. *Adverting to the aforementioned clause as well as clause 13.6, learned counsel submits that the Venue is Chennai. It is submitted that invoices were raised for the purchase orders placed by the respondents but respondents failed to honour the invoices within the time limit agreed upon and this broadly stated is arbitrable disputes. Learned counsel submits that the trigger notice is dated 11.03.2021. Thereafter, sole Arbitrator recused himself on 20.04.2022 owing to objections raised by the respondents. This is vide proceedings of sole Arbitrator dated 20.04.2022. This has necessitated the presentation of captioned Arb OP is learned counsel's say. Even if the captioned Arb OP is to be construed as one under Section 15(2) of A and C Act, the language in which Section 15(2) is couched makes it clear that the original procedure for appointment of arbitrator gets resuscitated when a substitution prayer is made.*

5. *Therefore, a prima facie case has been made out for issue of notice.*

6. *Issue notice to respondents returnable in a fortnight i.e., returnable by 15.07.2022. Private notice permitted.*

7. *List on 15.07.2022.'*



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3. Thereafter, it was brought to the notice of this Court that the petitioner has filed an application under Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience, clarity and brevity] being Arb Appln.No.130 of 2022. Therefore, this Section 9 application also has been tagged and listed together along with the captioned matter today but separate orders are being passed today in the Section 9 application (Arb.Appln.No.130 of 2022).

4. Reverting to the captioned Arb OP, as 01.07.2022 proceedings (extracted and reproduced supra) are to be read as an integral part and parcel of this order; short forms, abbreviations and short references used in the aforementioned 01.07.2022 proceedings shall continue to be used in the instant order also for the sake of convenience and clarity.

5. In the captioned Arb OP, Mr.S.Dakshinamoorthy, learned counsel for petitioner and Mr.S.Kamadevan, learned counsel for all the three respondents are before this Court.

6. Adverting to the aforementioned 01.07.2022 proceedings, learned counsel for the respondents very fairly submits that there is no dispute about existence of arbitration agreement. To be noted, this is no concession regarding lis as all the questions are left open. This is only a consensus between the parties regarding existence of arbitration agreement and appointment of arbitrator.

7. In this regard it is deemed appropriate to set out that scope of legal drill under Section 11 of A and C Act is confined



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to examination of existence of arbitration agreement owing to 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.'

8. Aforementioned sub-section (6A) came up for consideration before Hon'ble Supreme Court in 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 SA.'

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

9. 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.'

10. In the light of the consensus (alluded to supra), this Court proceeds to appoint a sole arbitrator.

11. Hon'ble Mr.Justice G.Rajasuria (Retd.), Former Judge, Madras High Court, residing at No.31, III Cross Street, Brindavanam, Puducherry - 605 013, Mobile No.9445000864, E-mail ID : rajasuriag@gmail.com is appointed as sole



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Arbitrator. Hon'ble sole Arbitrator is requested to enter upon reference, qua primary contract between the parties i.e., Sourcing and Distribution agreement dated 30.03.2019, adjudicate upon arbitrable disputes that have arisen between the parties, 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 Arbitrator's Fees) Rules 2017.

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

3. As an 'Arbitral Tribunal' [hereinafter 'AT' for the sake of convenience and clarity] has now been constituted, it is open to the applicant to present a copy of the aforementioned application before the Arbitrator with a request to treat the same as an application under Section 17 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity]. If such a plea is made by the applicant, though obvious, it is made clear that Hon'ble Arbitrator shall consider the application on its own merits and in accordance with law as all the questions between the parties are left open.



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4. Captioned Arbitration Application is disposed of as closed in the aforesaid manner. There shall be no order as to costs.

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