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Arb.O.P (Com.Div.) No.182 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.04.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No.182 of 2021

Mr. Ganesh Babu

... Petitioner

Vs.

M/s. Adventures India
Represented by its Manager
3, A.E. Koil South Mada Street
Tondiarpet
Chennai 600 091

... Respondent

Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator and decide the claim of the petitioner.

For Petitioner : Ms.R.J.Radhika



ORDER

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This order will now dispose of the captioned 'Arbitration Original Petition' ['Arb.OP' for the sake of brevity].

2. This order has to be read in conjunction with and in continuation of earlier proceedings made by this Court in the listing on 23.02.2022, which reads as follows:

'Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 09.02.2022.

2. Ms.R.J.Radhika, learned counsel for sole petitioner in captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of convenience and clarity] is before this Court.

3. Lone respondent has been duly served, name of lone respondent together with full/complete address as in the cause title is shown in the cause list but there is no representation. This Court is informed that the respondent has not chosen to enter appearance through any counsel.

4. Be that as it may, in continuation of earlier proceedings made in the previous listing on 09.02.2022, a reply letter from MCX being letter dated 21.01.2022 bearing reference MCX/ISD/SA/SM/RN/402/2021-22, has been placed before this Court and a scanned reproduction of the same is as follows:



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MCX
METAL & ENERGY
Trade with Trust

By Courier

MCX/ISD/SA/SM/RN/402/2021-22

January 21, 2022

To: **Mr. Ganesh Babu**
No. 59-B, R.K.V.Avenue,
Second Street, Near Ruby Valley Phase -2,
Zameen Pallavaram, Chennai - 600 117.

Sub: Reply to your letter dated 11.01.2022 (Mr. Ganesh Babu Vs Defaulter Member M/s. Adventures India).

Dear Sir,

We are in receipt of your above letter on January 17, 2022 against the Member M/s. Adventures India seeking for appointment of Arbitrator under section 11 of the Arbitration Conciliation Act.

Without prejudice to the foregoing and right and contents of the Exchange, para-wise response to your letter under reply is as follows:-

1. At the outset, we would like to inform you with regards to your letter, post completion of the Arbitration proceedings and post receipt of the Arbitral Award dated September 17, 2014, the Exchange was not informed by you or the member about your appeal U/s 34 of Arbitration & Conciliation Act 1996, in Chennai High Court. Further, pursuant to the same, no order has been enclosed/attached in your letter for reference of the Exchange.
2. Please note that the Exchange has declared the entity M/s. Adventures India (Member id: 31470) as a defaulter on May 18, 2018.
3. The Exchange had issued a public notice dated May 21, 2018 inviting claims, if any, from clients of M/s. Adventures India, to be submitted along with relevant documents within 90 days from issuance of the public notice. In case clients do not file a claim within 90 days, the same can be submitted up to maximum limitation period of 3 years viz. on or before May 18, 2021 giving valid reason for delay.
4. However, upon scrutiny of the available records with Exchange, it is found that there was no claim received from you against M/s Adventures India at our end.
5. Since, the member has already been declared as a defaulter and the limitation period for filing of claim has lapsed, as per relevant SEBI direction you are requested to note that "the investor will be

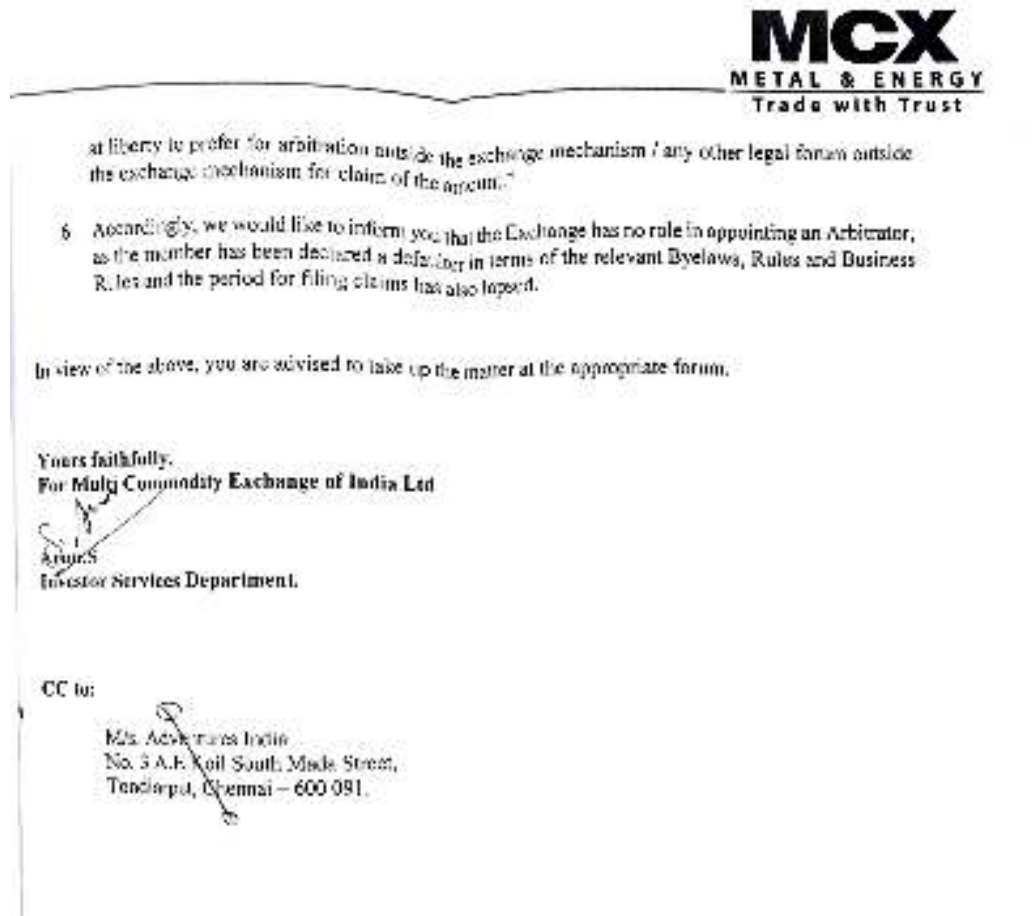
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MCX/ISD/SA/SM/RN/402/2021-22



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5. To be noted, same short forms and short abbreviations used in the previous proceedings will continue to be used in the present and ensuing proceedings also.

6. In the captioned matter, an arbitration agreement between petitioner and respondent is in the form of a Clause i.e., Clause 22 in an application form qua 'Trade and Commodity Market'. This Clause 22 is bundled along with Clause Nos.21 and 23 under one caption



'DISPUTE RESOLUTION' and the same read as follows:

'DISPUTE RESOLUTION'

21. The Member shall co-operate in redressing grievances of the client in respect of all transactions routed through it.

22. The client and the member shall refer any claims and/or disputes with respect to deposits, margin money, etc., To arbitration as per the Rules, Byelaws and Business Rules of the Exchanges where the trade is executed and circulars/notices issued there under as may be in force from time to time.

23. The client/Member understands that the instructions issued by an authorized representative for dispute resolution, if any, of the client/Member shall be binding on the client/Member in accordance with the letter authorizing the said representative to deal on behalf of the said client/Member.'

7. From the case file, it comes to light that the aforementioned arbitration Clause has been triggered and award dated 17.09.2014 has been made qua MCX. This award has been assailed in this Court under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] vide O.P.No.182 of 2015 and this Court in and by order dated 21.07.2020 has allowed Section 34 application setting aside the award dated 17.09.2014. Post the aforesaid order, petitioner has issued a letter dated 10.07.2021 to the respondent saying that there should be re-arbitration. This letter reads as follows:



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From,

Date: 10.07.2021

Mr GANESH BABU
NO. 59-B, R. K. V. AVENUE,
SECOND STREET, NEAR RUBY VALLEY PHASE-2,
ZAMEEN PALLAVARAM,
CHENNAI-600117.

To,

M/s. ADVENTURES INDIA
3, A.E. KOIL SOUTH MADA STREET
TONDIARPET
CHENNAI 600 091.

Also at :

NO.76, KODAMBAKKAM HIGH ROAD
T.NAGAR, CHENNAI – 600 091.

Subject: Request for appointment of Arbitrator

Ref: OP No. 182 of 2015 against Arbitration Matter No. MCX/ARB/ 1683 A/14 –

Order dated 21.07.2020 of the Hon'ble High Court of Madras –

Mr.GaneshBabu Vs. M/s.Adventures India

Sir,

We had already been referred to arbitration as per the bye laws and business rules of MCX in Arbitration Matter No. MCX/ARB/ 1683A/14 and the same was decided against me wherein my arbitration application for recovery of a sum of Rs.99,000/- (Rupees Nine Lakhs and ninety thousand only) was rejected vide award dated 17.09.2014.

Aggrieved by the same, an original petition was filed in OP No. 182 of 2015 before the Hon'ble High Court of Madras and the Hon'ble High Court of Madras



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was pleased to allow the Original Petition setting aside the award dated 17.09.2014.

In view of the aforesaid judgment of the Hon'ble High Court, Madras, wherein the award was set aside, *inter-alia*, on the ground of patent illegality, our claim, as reflected in the Notice invoking Arbitration No. MCX/ARB/ 1683A/14 still subsists. In view of the same, we wish to get our claim dated 25.03.2014, which was submitted to arbitration re-adjudicated by an Arbitral Tribunal.

In view of the decision of the Hon'ble Supreme Court of India in the case of *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, reported in 2019 SCC Online 1517, no party to an arbitration agreement can unilaterally appoint a sole arbitrator. Therefore, the arbitration agreements which allow for you to unilaterally appoint a sole arbitrator would have to be read in light of the aforesaid pronouncement of Law by the Hon'ble Supreme Court.

In view of the same, we hereby suggest the names of the following eminent persons to be appointed as an Arbitrator to adjudicate the subsisting claims, subject to your concurrence:

1. Mr. R.Ravi, Advocate
No.206 C, VenkatesanSalai
Periyar Nagar
Chennai 600 082.
2. Mr. Navneen Kumar Murthi, Advocate
No.S2, 2nd Floor, Singapore Plaza, No.164 LinghiChetty Street
Chennai - 600 001.

Please let me know about your choice at the earliest.

Sincerely,

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8. Before embarking upon the exercise of considering the



captioned matter, the following inputs are imperative:

(a) Whether the order of this Court dated 21.07.2020 in O.P.No.182 of 2015 was carried in an appeal or it has been given quietus/attained finality?

(b) Petitioner's claim dated 25.03.2014 is not before this Court. It is necessary a copy of the claim has to be placed before this Court for appreciation of the matter (ideally this should have been filed when the captioned Arb OP was presented.).

9. Faced with the above situation, learned counsel requests for time to ascertain the aforementioned factual details and revert to this Court. Request acceded to.

10. List three weeks hence. List on 16.03.2022.'

To be noted, there were two listings thereafter one on 16.03.2022 and 23.03.2022 and the proceedings made in those listings are as follows:

'Proceedings dated 16.03.2022

Matter mentioned at half past one.

2. Learned counsel for petitioner requests for a short accommodation. Request acceded to.

List one week hence. List on 23.03.2022.'

'Proceedings dated 23.03.2022

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 23.03.2022, more particularly paragraph No.8 thereat.

2. Adverting to aforementioned earlier proceedings,



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Ms.R.J.Radhika, learned counsel submits that order dated 21.07.2020 in O.P.No.182 of 2015 has not been carried in appeal and has been given quietus but with regard to 25.03.2014 claim, learned counsel requests for some more time. Request acceded to.

3. List a fortnight hence. List on 06.04.2022.'

3. Short forms/abbreviations used in aforementioned earlier proceedings will continue to be used in the instant order also.

4. The aforesaid proceedings are telltale qua the trajectory the matter has taken as well as the crux and gravamen of the re-arbitration that is now being sought [obviously on the **McDermott** principle (**McDermott International Inc.V. Burn Standard Co. Ltd., and Ors.** reported in (2006) **11 SCC 181**)] pursuant to my order dated 21.07.2020 in O.P.No.182 of 2015]. When the applicant approached the MCX for re-arbitration, response was vide a letter dated 21.01.2022, which has been scanned and reproduced in aforementioned earlier proceedings dated 23.02.2022.

5. Ms.R.J.Radhika, learned counsel for petitioner submits that the procedure agreed for appointment of Arbitrator has failed and therefore, this is a typical case under sub-section (6) of Section 11 of A and C Act.



6. The lone respondent in the captioned Arb.OP has been duly served vide Court notice and private notice. Name of the lone respondent together with full/complete address as in the cause title has also been duly shown in the cause list, but there is no representation. This Court is informed that no counsel has entered appearance for the lone respondent. Learned counsel for petitioner also submits that no endorsement (noted) has been taken from her by any one for filing vakalatnama on behalf of the respondent.

7. This takes this Court to scope of a legal drill under Section 11 of A and C Act. The scope of a legal drill under Section 11 of A and C Act is very limited and perimeter for the limited land scape is drawn by subsection (6A) thereat. This perimeter broadly confines the legal drill to examination of existence of arbitration agreement. This principle has been laid down by Hon'ble Supreme Court in **Mayavati Trading** case law {**Mayavati Trading Private Limited Vs. Pradyuat Deb Burman** reported in **(2019) 8 SCC 714**}. Relevant paragraph in **Mayavati Trading** case law 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)*

8. Aforementioned paragraph 10 of **Mayavati Trading** case law takes this Court to **Duro Felguera** principle [**Duro Felguera, S.A. versus Gangavaram Port Limited** reported in (2017) 9 SCC 729]. To be noted, relevant Paragraphs in **Duro Felguera** case law are paragraphs 47 and 59, which read as follows:

'47. What is the effects 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.** (supra) and **Boghara Polyfab** (supra). 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 Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in [Section 11](#) (6A) ought to be respected. '

9. In the light of the narrative thus far, this Court has no difficulty in coming to the conclusion that there is no dispute or disagreement about the existence of arbitration agreement between the parties. Therefore, this Court proceeds to appoint Mr.G.Surayanarayanan, Advocate, having address for service at 107 Law Chambers, High Court, Chennai - 600 104 [Mob: 97909 17003] as sole Arbitrator. Learned sole Arbitrator is requested to enter upon reference, conduct arbitration and make an award by holding sittings in 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) as per Madras High Court Arbitration Proceedings Rules 2017 and fee of the learned Sole Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.



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

06.04.2022

gpa

To

Note: The Registry is directed to communicate this order forthwith to

1. Mr.G.Surayanarayanan,
Advocate,
107 Law Chambers,
High Court,
Chennai - 600 104
Mob: 97909 17003
2. The Director
Tamil Nadu Mediation Conciliation Centre
-cum- Ex-Officio Member
Madras High Court Arbitration Centre
Chennai - 104.



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M.SUNDAR.J.,
gpa

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