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Arb O.P.(Com. Div.)No.208 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.02.2022

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

Arb O.P.(Com. Div.)No.208 of 2021

M/s.CBRE SOUTH ASIA PRIVATE LIMITED,
Registered Office at PTI Building,
Ground Floor, 4 Parliament Street,
New Delhi 110001.
Rep by its Senior General Manager-Project Management.

... Petitioner

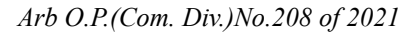
vs.

M/s.BEAUTY ETOILE PRIVATE LIMITED,
Corporate Office at No.74,
Fagun Towers, 9th Floor, Ethiraj Salai,
Egmore, Chennai 600 008

Also at:
THE ACE, No.1, Corporation Road,
Seevaram, Perungudi,
Chennai 600 096.

... Respondent

Arbitration Original Petition filed under Section 11(4)(a) read with 11(6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator as per the Clause 7.3 read with Clause 9 in General Conditions in the particular conditions of the Service Agreement with Contract No.CHN/RDC/2018/003 entered between the petitioner and the respondent



For petitioner : Mr.S.Mahesh Kumar
For respondent : Mr.PV.Balasubramanian
for M/s.BFS Legal (Law Firm)

Mr.S.Mahesh Kumar, learned counsel on record for the sole petitioner and Mr.P.V.Balasubramaniam of M/s.BFS Legal (Law Firm) on behalf of the lone respondent are before this Virtual Court.

2. In the previous proceedings made in the earlier listing on 02.12.2021, learned counsel for respondent sought time to file counter affidavit but today, learned counsel for respondent submits that he has since taken instructions and he consents for appointment of a sole arbitrator.

3. There is no disputation or disagreement between the two counsel before this Court that the arbitration agreement between the parties being arbitration agreement under Section 2(1)(b) read with Section 7 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall



Arb O.P.(Com. Div.)No.208 of 2021

WEB COPY

hereinafter be referred to as 'A and C Act' for the sake of brevity, is in the form of a Clause in a contract between the parties which goes by the caption 'PROJECT MANAGEMENT CONSULTANCY SERVICE AGREEMENT'. There is also no dispute or disagreement that the arbitration agreement is vide Clause 7.3 and reproduction of the same is as follows:-

7.3 ARBITRATION

7.3.01 If the mediation fails, with the agreement of the parties, the Mediator will record those facts that the parties have agreed. All other matters in dispute will be referred to an Arbitrator, who will be allowed access to the recorded and agreed facts only. The Mediator's role will cease on the appointment of the Arbitrator. He will not be available to appear as a witness in the arbitration, or to provide any additional evidence obtained during the mediation.

7.3.02 The arbitration will be conducted in accordance with the rules stipulated in the Particular Conditions in force at the effective date of the agreement on the basis

PMC Services Agreement



Page 14 | 15

that the parties agree to waive their rights to any form of appeal, insofar as such waiver can validly be made.

4. To be noted, the aforementioned clause 7.3 has to be read in conjunction with a set of conditions captioned 'PARTICULAR CONDITIONS' and clause 9 therein reads as follows:



Arb O.P.(Com. Div.)No.208 of 2021

WEB COPY

9. ARBITRATION- Clause 7.3.02

9.1 Both parties agree to co-operate and to conduct in good faith such discussions and negotiations as may be necessary to amicably resolve any dispute which may arise between them.

9.2 In the event that the said dispute/s or mediations are not settled in terms of Clause 35.1 within 14 days of the arising thereof, the same shall be referred to and finally resolved by arbitration and determined by arbitration in accordance with the Arbitration and Conciliation Act, 1996 or any amendment thereof.

9.3 The Tribunal shall comprise of 3 (three) arbitrators. The Service Provider and the Client shall each appoint one arbitrator each, and the third, presiding arbitrator shall be appointed by the two arbitrators.

9.4 The venue of arbitration shall only be Chennai and the language used in the arbitral proceedings shall be English.

9.5 The arbitral award shall be in writing and shall be final and binding on each party and shall be enforceable in any court of competent jurisdiction. None of the Parties shall be entitled to commence or maintain any action in a court of law upon any Dispute arising out of or relating to or in connection with this Agreement (infringement of IPR excepted), except for the enforcement of an arbitral award or as permitted under the Arbitration and Conciliation Act, 1996.

9.6 pending the submission to arbitration and thereafter, till the Tribunal renders its award or decision, the Parties shall, except in the event of termination of this Agreement or in the event of any interim order/award is granted under the aforementioned Act, continue to perform their obligations under this Agreement.

5. The arbitral disputes have been captured in paragraph Nos.7 and 8 of the petition i.e., captioned Arb OP. It may not be necessary to dilate much on the same, as it will now be in the domain of the Arbitral Tribunal (AT) to be constituted. Suffice to say that it is the case of the petitioner that there was deficiency qua work done by the respondent which includes delay and the same remains unaddressed inspite of being put on notice. The respondent



seriously disputes this allegation. This inter alia is the bone of contention in a nutshell.

6. Reverting to the captioned Arb OP, the same is a petition under Section 11(4)(a) read with Section 11(6) of A and C Act.

7. This Court remains itself of ***Duro Felguera principle*** in ***M/s.Duro Felguera S.A. Vs M/s. Gangavaram Port Limited*** reported in **2017 (9) SCC 729** and ***Mayavathi Trading case*** in ***Mayavathi Trading Pvt. Ltd vs Pradyuat Deb Burman*** reported in **2019 (8) SCC 714**. The 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 intention as incorporated in Section 11(6-A) ought to be respected.”

8. In **Mayavathi Trading case**, the 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'

9. The sequitur to the aforesaid principle is this Court will now look



Arb O.P.(Com. Div.)No.208 of 2021

into the existence of the arbitration agreement between the parties. In this case, there is no dispute or disagreement about the same as clause 7.3 of the said agreement and clause 9 of the 'Particular Conditions' (extracted and reproduced supra) operate as arbitration agreement and their existence (within the meaning of Subsection 6-A of Section 11 of the A and C Act) is not in dispute.

10.Learned counsel on both sides also agree that it would serve the purpose if a member of the bar is appointed as sole arbitrator to embark upon the exercise of adjudicating the arbitral dispute between the parties.

11.In the light of the narrative thus far, Mr.Sharath Chandran, Advocate, having office at 'Gokulam', No.3, Gopala Menon Street, Vepery, Chennai – 600 007 [Mobile : 9884445442] is appointed as sole arbitrator. Learned counsel who is appointed as sole arbitrator is requested to enter upon reference and conduct arbitration at the Madras High Court Arbitration Center in accordance with 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),



Arb O.P.(Com. Div.)No.208 of 2021

Rules 2017.

12.Registry is directed to forward a copy of this order to learned arbitrator forthwith as also to the Registrar of Madras High Court Arbitration Centre under the aegis of this Court.

13.Though obvious, it is made clear that all questions particularly arbitral disputes that have arisen as between the parties are left open to be decided by sole arbitrator who now constitutes the Arbitral Tribunal.

Captioned Arbitration OP is ordered in the above terms. There shall be no order as to costs.

09.02.2022

Speaking/Non-speaking order

Index : Yes / No

Internet : Yes / No

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Arb O.P.(Com. Div.)No.208 of 2021

M.SUNDAR. J

pgp/nsa

Arb O.P.(Com. Div.)No.208 of 2021

09.02.2022