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Arb.O.P (Com.Div).No.256 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.02.2022

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div).No.256 of 2021

M/s.Shiram City Union Finance Limited
No.13, 3rd Floor Meenakshi Towers,
Opposite Ramakrishnan School Ground
G.N.Shetty Road, Rajamannar Street
T.Nagar, Chennai – 600 017.
Land Mark (Ramakrishna School Ground)
Represented by its Asst. Vice President
Mr.Selvakumar.

... Petitioner

vs.

1.Sri Balaji Handlooms
Rep by its Proprietor M.V.Balaji
No.7, Patel Road, Perambur
Chennai – 600 011.

2.M.V.Balaji
No.36/1, 1st Street, Thangavel Pillai Thottam
Korukkupet, Washermanpet
Chennai – 600 021.

3.Mohana.B
No.36/1, 1st Street, Thangavel Pillai Thottam
Korukkupet, Washermanpet
Chennai – 600 021.

... Respondents



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Prayer:

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Arbitration Original Petition filed under Section 11(6) of Arbitration and Conciliation Act, 1996 to appoint a sole arbitrator to adjudicate upon the differences and disputes between the parties under the said agreement dated 31.08.2018 in respect of contract bearing No. RSTNGTF1809040006.

For Petitioner : Mr.M.Arunachalam

For Respondents : No Appearance

ORDER

Captioned Arb O.P has been presented in this Court on 10.11.2021 *inter alia* under Section 11(6) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, convenience and clarity, with a prayer for appointment of a sole arbitrator.

2.Mr.M.Arunachalam, learned counsel for the petitioner who is before this Court submits that the captioned Arb O.P is predicated on an agreement dated 31.08.2018 captioned 'ENTERPRISE FINANCE AGREEMENT' (said contract) for the sake of convenience and clarity.



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Learned counsel submits that clauses 18 and 19 of the said contract serves as Arbitration Agreement between the parties. Clauses 18 and 19 of the said contract read as follows:

'18.Arbitration and Dispute Settlement

a) Without prejudice to the Lender's right available to it under the SARFAESI Act, 2002, all disputes, differences and/or claims, arising out of this Agreement, whether during its subsistence or thereafter, shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment for the time being in force and shall be conducted by a sole arbitrator to be appointed by the Lender. The applicable law shall be Indian laws. In the event of incapacity or resignation or death of the sole arbitrator so appointed, the Lender shall be entitled to appoint another arbitrator in place of the earlier arbitrator, and the proceedings shall continue from the stage at which the predecessor had left.

b) The award given by the arbitrator shall be final and binding on the parties to this Agreement. The cost of the Arbitration shall be borne with by the Party/ies, in accordance with the Award passed by the Arbitrator.

c) The venue of Arbitration shall be as specified in Schedule I hereto and the proceedings shall be conducted in English language.



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d) The Borrower and Guarantor hereby agree and confirm that the Lender shall be permitted to invoke the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and any amendments thereto in order to recover its dues under this Agreement from the Borrower/Guarantor.

19.Jurisdiction and Governing Law

Subject to the Arbitration Clause mentioned above, this Agreement shall be governed and construed in accordance with the substantive laws of India and the parties hereto submit to the exclusive jurisdiction of the Courts situate at the place as specified in Schedule 1 hereto.'

3.To put it differently, it is the submission of learned counsel for petitioner that the aforementioned two clauses in the said contract serve as Arbitration Agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) 'read with' ('r/w' for brevity) Section 7 of A and C Act.

4.Learned counsel submits that the trigger notice is dated 10.07.2020 but it may not be necessary to dilate much on this as the sole



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Arbitrator (a member of the bar) was nominated, the sole arbitrator entered upon reference, commenced sittings but on an application being moved by the respondents *inter alia* under Sections 12, 13 and 14 of A and C Act r/w Fifth Schedule to A and C Act, the sole Arbitrator made an order dated 08.10.2021 recusing herself. This has necessitated the presentation of captioned Arb O.P in this Court on 10.11.2021, is learned counsel's say.

5.All the three respondents in the captioned Arb O.P have been duly served, they have entered appearance through a counsel and the name of the counsel is also duly shown in the cause list but they have not chosen to come before this Court inspite of adequate and ample opportunity being given to the respondents. In this regard, the proceedings made in the previous listing on 22.02.2022 are relevant and the same reads as follows:

'Mr.M.Arunachalam, learned counsel for the lone petitioner is before this Court but there is no representation for the respondents, though the respondents have entered appearance through a counsel and name of the counsel is duly shown in the cause list.

2.To be noted, there are three respondents in captioned Arb O.P. Registry to verify if any learned counsel has/have entered



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appearance on behalf of respondents and do the needful in the next listing if there is appearance.

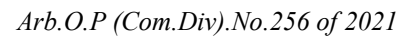
3.This Court, with the intention of giving opportunity to the respondents directs the Registry to list this matter again.

List day after tomorrow. List on 24.02.2022.'

6.The position is no different today. In other words, there is no representation for the three respondents though the name of learned counsel through whom the three respondents have entered appearance is duly shown in the cause list and inspite of the name being called out.

7.Narrative thus far means that the respondents have not come before this Court to oppose the prayer in the captioned Arb O.P.

8.A careful perusal of the aforementioned application moved by the respondents before the erstwhile sole Arbitrator *inter alia* under Sections 12, 13 and 14 of the A and C Act r/w Fifth Schedule to A and C Act makes it clear that the respondents have not disputed the existence of the Arbitration Agreement between the parties i.e., Clauses 18 and 19 of said contract. Only the nomination i.e., choice of the sole Arbitrator had been



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'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'

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SCC 729, the same principle was reiterated and 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."

11.In Arbitration matters i.e., ADR (Alternate Dispute Resolution)



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expeditious resolution is of immense significance and therefore, this Court deems it appropriate to appoint an Arbitrator as it is satisfied on analysis of the captioned Arb O.P on merits that there is no dispute or disagreement about the existence of arbitration agreement between the parties.

12.Before doing that i.e., appointing an arbitrator, it is made clear that the question as to whether a litigant can seek substitution of Arbitrator in cases of this nature is left open to be decided in a case where there is legal tussle in this regard and where resolving such a legal tussle becomes imperative for deciding the matter. In this case, as alluded supra, the respondents have not come before this Court to oppose the prayer in the captioned Arb O.P and this Court on independent examination of the case file is satisfied that there is no dispute regarding existence of arbitration agreement.

13.Therefore, Mr.P.Ganesan, District Judge (Retd.), residing at No.778, Judges Colony, Kakithapuram 4th Street, S.Kolathur, Kovilambakkam, Chennai – 600 117. [Mobile: 96000 45571 / 96000



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45570] is appointed as sole Arbitrator. Learned sole arbitrator is requested to enter upon reference, adjudicate the arbitrable disputes that have arisen between the petitioner and the respondents 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), Rules 2017.

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

24.02.2022

Speaking/Non-speaking order

Index : Yes / No

Internet : Yes / No

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

1.Mr.P.Ganesan, District Judge (Retd.,)
No.778, Judges Colony,
Kakithapuram 4th Street,
S.Kolathur, Kovilambakkam,
Chennai – 600 117.
[Mobile: 96000 45571 / 96000 45570]



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



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