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Arb.O.P (Com.Div.) No.286 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2022

CORAM

THE HON'BLE Mr.JUSTICE **M.SUNDAR**

Arb.O.P (Com.Div.) No.286 of 2021

M/s.Daimler Financial Services India Pvt. Ltd.,
Represented by its Authorised Signatory
Manoj Krishnarao Bijwe
Having address at 5th Floor, Plot 8,
Baashyam Willow Square, 9 & 10,
First Street, Thiru Vika Industrial Estate,
Guindy, Chennai-600 032. Tamil Nadu, India.

... Petitioner

Vs.

1. Mr.Tarani Sen Panigrahi
QR-B/377, Koelnagar, Rourkela AB,
ChowkTaraniMandir,
Rourkela, Orissa-769014.
2. Kumudini Panigiri,
QR-B/377, Koel Nagar,
Rourkela AB, ChowkTaraniMandir,
Rourkela, Orissa-769 014.

... Respondents

Arbitration Original Petition filed under Section 11(6) of the 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 14/06/2017 in respect of contract bearing No.20133106.



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For Petitioner : Mr.M.Arunachalam

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ORDER

Captioned Arb OP has been presented in this Court on 16.11.2021.

2. Mr.M.Arunachalam, learned counsel on record for sole petitioner is before this Court, read this in conjunction with and in continuation of earlier proceedings made in the first listing of captioned Arb OP on 20.12.2021 by Hon'ble predecessor Judge, which reads as follows:

'Issue notice to the respondents returnable by 11.01.2022.

Private notice is also permitted.'

3. Pursuant to aforementioned earlier proceedings, notice was taken out to the two respondents. Case file/cause list placed before this Court demonstrates that both respondents have been duly served and 'Affidavit of Service' ('AOS') has been filed. Names of both the respondents are shown in the cause list but there is no representation though the names were called out aloud. This Court is informed that the respondents have not chosen to enter appearance through any counsel.



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4. Owing to the innocuous and simple prayer in the captioned Arb OP, this Court proceeds to dispose of the captioned Arb OP on merits.

5. Short facts are that there is a 'Loan Agreement dated 14.06.2017' between petitioner and respondents [hereinafter 'primary contract' for the sake of convenience and clarity] regarding financial assistance for purchase of a vehicle; that Clauses 83 to 85 of primary contract constitute arbitration clauses and serve as 'arbitration agreement' between petitioner and respondents i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred as 'A and C Act' for the sake of brevity; that arbitrable disputes erupted qua primary contract owing to alleged default in repayment of loan availed by respondents; that the petitioner triggered the arbitration agreement in and by a letter dated 05.12.2019; that 'Arbitral Tribunal' ['AT'] was constituted by nomination of a sole Arbitrator; that AT entered upon reference; that the respondents raised an objection *inter alia* alleging that appointment of Arbitrator is unilateral/unfair; that sole Arbitrator recused himself vide proceedings dated 22.10.2021; that owing to recusal of sole Arbitrator, captioned Arb OP has been presented in this Court.



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6. Captioned Arb OP has been presented under Section 11(6) of A and C Act. However the narrative supra will make it clear that it is essentially a prayer under Section 15(2) read with Section 14(1)(b) of A and C Act as the sole Arbitrator has withdrawn from his office, which is one of the circumstances for termination of mandate necessitating substitution.

7. Faced with the above situation learned counsel for petitioner submitted that captioned Arb OP may please be treated as one under Section 15(2) read with Section 14(1)(b) of A and C Act. Learned counsel also submitted that merely quoting a wrong provision of law will not disentitle a litigant from getting relief from a Court if a Court otherwise has powers to grant the relief. This principle is not without exception but in the case on hand, considering the innocuous and simple prayer, this request is acceded to.

8. Respondents have not chosen to come before this Court and dispute the existence of arbitration agreement between the petitioner and respondents. To be noted from the narrative supra, it will come to light that Clauses 83 to 85 of



primary contract is the arbitration agreement between the parties and the same read as follows:

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83. **Jurisdiction:** All legal action(s) and/ or proceedings arising out of/ in connection with the Loan Agreement, the Transaction Documents and the Assets, shall be brought in/ before the courts or tribunals at Chennai in India and the Borrower(s) irrevocably submit(s) himself/ herself/ itself/ themselves to the jurisdiction of such courts and tribunals. The Lender may, however, in its absolute discretion commence any legal action or proceedings arising out of (or in connection) with any of the above in any other court, tribunal or other appropriate forum, and the Borrower(s) shall not object to such jurisdiction.
84. **Governing Law:** The Facility, the Loan(s) granted in terms hereof, the Loan Agreement and the other Transaction Documents shall (unless otherwise specified in the Application or any such Transaction Document) be governed by and construed in accordance with the Laws of India.
85. **Dispute Resolution** All claims and disputes arising under or relating to this Loan Agreement are to be settled by binding arbitration in the state of Tamil Nadu, specifically Chennai or another location desired by the Lender. The arbitration shall be conducted on a confidential basis and shall be subject to the Arbitration and Conciliation Act, 1996 of India. Any decision or award as a result of any such arbitration proceeding shall be in writing and shall provide an explanation for all conclusions of law and fact and shall include the assessment of costs, expenses, and reasonable attorneys' fees. Any such arbitration shall be conducted by single arbitrator appointed by the Lender. The arbitration proceeds shall include a written record of the arbitration hearing. The parties reserve the right to object to any individual who shall be employed by or affiliated with a competing organization or entity. An award of arbitration may be confirmed in a court of competent jurisdiction.



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9. To be noted, aforementioned Clauses 83 to 85 serve as an arbitration agreement between the petitioner and respondents i.e., arbitration agreement between the petitioner and respondents i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Though captioned Arb OP is now being treated as one under Section 15(2) read with Section 14(1)(b), considering the facts and circumstances of the case principles underlying a Section 11 legal drill will apply to the case on hand. In a Section 11 legal drill which is largely controlled by sub-section (6A) thereat, it will suffice if the existence of arbitration agreement is examined. In the case on hand petitioner has demonstrated existence of arbitration agreement and the respondents have not chosen to come before this Court and dispute the same. To be noted, even earlier, going by the case file, respondents have only objected to (unilateral) nomination but have not disputed the existence of arbitration agreement.

10. Before writing the concluding/operative portion of this order, this Court deems it appropriate to remind itself of *Mayavati Trading* and *Duro Felguera* principles i.e., ratio laid down by Hon'ble Supreme Court in *Mayavati Trading Private Limited Vs. Pradyut Deb Burman* reported in (2019) 8 SCC 714 and *Duro Felguera* principle [*Duro Felguera, S.A. versus Gangavaram Port Limited*



reported in **(2017) 9 SCC 729**]. 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)

11. The above takes us to **Duro Felguera** case law, relevant Paragraphs 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*



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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. '

12. As already alluded to supra, principles underlying a Section 11 legal drill would apply to the case on hand owing to the peculiar facts and circumstances of the case on hand.

13. Therefore as there is no disputation or contestation regarding existence of arbitration agreement, Mr.Subhang Nair, Advocate, with address for service at No.8, 8th Street, Dr.Radhakrishnan Salai, Mylapore, Chennai-600 004, Mobile:95973 56421, is appointed as sole Arbitrator to enter upon reference, adjudicate the arbitrable disputes that have arisen between the petitioner and respondents qua Primary Contract i.e., Loan Agreement dated 14.06.2017. Learned Arbitrator is requested to hold sittings at 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' ('MHCAC') in accordance with the Madras High Court Arbitration Proceedings Rules 2017 and learned Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC)



(Administrative Cost and Arbitrator's Fees) Rules 2017. To be noted, arbitration agreement makes it clear that the seat is State of Tamil Nadu and more specifically Chennai. It is clearly the seat and venue, if **BGS SGS Soma** principle i.e., ratio laid down in **BGS SGS Soma JV Vs. NHPC Limited** reported in (2020) 4 SCC 234 by Hon'ble Supreme Court is applied. To be noted relevant paragraph in **BGS SGS Soma** case law is paragraph Nos.45 and 97, and the same read as follows:

'45. It was not until this Court's judgment in Indus Mobile Distribution (P) Ltd, that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, "Amendments to the Arbitration and Conciliation Act, 1996" (August, 2014) (hereinafter referred to as "the Law Commission Report, 2014"), under which Sections 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the Courts at the seat for the purpose of interim order and challenges to the award.'

'97. Given the fact that if there were a dispute between NHPC Ltd.



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and a foreign contractor, Clause 67.3(vi) would have to be read as a clause designating the “seat” of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian contractor. The arbitration clause in the present case states that “Arbitration proceedings shall be held at New Delhi/Faridabad, India...”, thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as “the Tribunal may meet”, or “may hear witnesses, experts or parties”. The expression “shall be held” also indicates that the so-called “venue” is really the “seat” of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the “seat” of the arbitration proceedings.'

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

16.03.2022

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Note: Registry to communicate this order forthwith to:

1. Mr.Subhang Nair,
Advocate,
No.8, 8th Street,
Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004.
Mobile:95973 56421.
2. The Director,
Tamil Nadu Mediation and Conciliation Centre-cum-
Ex-Officio Member,
Madras High Court, Arbitration Centre,
Chennai – 104.



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M.SUNDAR, J

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