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Arb.O.P. (Com.Div.) No.382 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.382 of 2023

M/s.Tata Capital Financial Services Limited,
having its registered office at 11th Floor, Tower – A,
Peninsula Business Park, Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400 013.
having one of its branch office at :
1st Floor, Centennial Square, No.6,
Dr.Ambedkar Salai,
Kodambakkam,
Chennai – 600 024.

Represented by its Authorised
Signatory/Power of Attorney,
Mr.Selvabalaji Rajendran

.. Petitioner

Vs.

1.M/s.Amana Associates,
Represented by its Partners,
No.5, 202 B, Ganeena Building,
Near Mini Bypass Road, Eranhilalam,
Kozhikode, Kerala – 673 006.

Also at :

M/s.Amana Associates,
46/820 I, Gokulam,
Kakad Road, Korjan UP School,
Kannur, Kerala – 670 002.



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2.Sudheesh Kumar V

3.Rajeesh

4.Gireesh C

5.Ajeesh P

.. Respondents

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint a Sole Arbitrator to adjudicate upon the differences and disputes between the parties under the said agreement dated 19.04.2022.

For Petitioner : Ms.Narmadha
for Mr.M.Arunachalam

For Respondents : No Appearance for R2 to R4
: Mr.C.Suraj for R5

ORDER

Heard the learned counsel for the petitioner and the learned counsel for the fifth respondent.

2. The first to fourth respondents have been served notice through substituted service of notice through paper publication as was ordered by this Court on an earlier occasion. The first respondent is the borrower and the second to fifth respondents are the partners of the first



respondent. Notice has been received by one of the partner. Therefore, there is a deemed service of notice on all the respondents.

3. The dispute between the petitioner and the respondents are arbitrable in terms of Clause 12 of the Loan Cum Guarantee Agreement (Channel Finance) dated 19.04.2022. The aforesaid Clause reads as under:

12.Arbitration:

If any dispute, difference or claim arises between any of the Obligors and the Lender in connection with the Facility or as to the interpretation, validity, implementation or effect of the Facility Documents or as to the rights and liabilities of the parties under these T&Cs or alleged breach of the Facility Documents or anything done or omitted to be done pursuant to the Facility Documents, the same shall be settled by arbitration by a sole arbitration to be appointed as per the procedure below and to be held at such place as agreed by the parties in Serial No.17 of Annexure 1 hereto of the Agreement.

The party invoking the arbitration (“Claimant”) shall address a notice to the other party (“Respondent”) suggesting the name of not more than three arbitrators, all of whom shall be either retired judges of the District court, High Court or the Supreme Court or a lawyer having minimum 10 years relevant experience. The Respondent shall either:

(i) Confirm in writing acceptance of one amongst the proposed names as the sole arbitrator to the claimant within period of ten (10) days from the date of notice (“Notice Period”) or

(ii) Convey Objection, if any, in writing to the



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Claimant, against the proposed names of the sole arbitrator within the said Notice Period.

However, if the Claimant does not receive any response from the respondent within the said notice period, the claimant shall be entitled to nominate any one person from amongst the proposed three names as the sole arbitrator and such arbitrator shall be deemed to be appointed by both the parties.

In the event, the respondent conveys its objection as per (ii) above then the sole arbitrator will be appointed by a Court having jurisdiction. The arbitration shall be conducted under the provisions of the Arbitration and Conciliation Act, 1996 together with its amendments, any statutory modifications or re-enactment thereof for the time being in force. The arbitration proceedings shall be conducted in English language. The award of the arbitrator shall be final and binding on all parties concerned. The cost of arbitration shall be borne by the Obligor/s.

4. The jurisdiction is prescribed in Clause 13. Same reads as under:

13.Jurisdiction.

Subject to Clause 12 above, the parties hereto agree that all disputes arising out of and/or in relation to this Agreement, shall be subject to exclusive jurisdiction of the courts/tribunals as set out in Serial No.18 of Annexure 1 hereto. The lender may, however, in its absolute discretion commence any legal action or proceedings arising out of this Agreement in any other Court, tribunal or other appropriate forum and the Obligors hereby consents to that jurisdiction.

5. In the aforesaid agreement, there is a deviation to Clause 12 and

13. They reads as under:-



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16	Deviation from T&Cs, if any	1.Clause 23 ARBITRATION shall stand amended as under “In case of any dispute, difference or claim arises between any of the Obligors and the lender in connection with the Facility, the same shall be settled as per arbitration process as set out in the Facility Documents”
17	Place of Arbitration	Chennai
18	Jurisdiction	Chennai

6. The petitioner had also issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 on 22.03.2023 in accordance with the above agreement. The petitioner has nominated two Advocates and one among whom was one Retired Judge, to be appointed as the sole Arbitrator with the consent to resolve the dispute between the parties.

7. The learned counsel for the fifth respondent submits that the unilateral Clause for appointing an Arbitrator cannot be foisted on the respondents. That apart, it is submitted that there is no cause of action for arbitration and therefore this Arbitration Original Petition is liable to be dismissed.

8. The learned counsel for the fifth respondent has drawn attention to the decision of the Hon'ble Supreme Court in ***Ravi Ranjan Developers***



Private Limited Vs. Aditya Kumar Chatterjee reported in 2022 SCC

Online SC 568, wherein, the Hon'ble Supreme Court has held that parties cannot be confer jurisdiction on a court which inherently lacks jurisdiction. Specifically, a reference was made to Para 48 from the said judgement, which reads as under:

48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of the A&C Act, before appointing an Arbitrator.

9. That apart, the learned counsel for the fifth respondent would drawn attention to the decision of the Hon'ble Supreme Court in

Lombardi Engineering Vs. Uttarakhand Jal Vidyut Nigam Limited



[2023 SCC Online SC 1422].

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10. It is submitted that the terms of contract are standard and therefore the Clause 12 and 13 of the Loan cum Guarantee Agreement (Channel Finance) is not binding.

11. The learned counsel for the fifth respondent has further drawn attention to the decision of the Hon'ble Supreme Court of Canada in ***Uber Technologies Vs. Heller*** [2020 SCC 16] and that of the decision of the United States District Court for the Western District of Michigan in ***Vegter Vs. Forecast Fin.Corp.*** [2007 WL 4178947].

12. Though the learned counsel for the fifth respondent has relied on the three mentioned decisions above, I am of the view the objection of the fifth respondent has to be overruled as the law on the subject has been settled by the Hon'ble Supreme Court in ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited*** [2017 7 SCC 310], wherein, the Hon'ble Supreme Court has held the sitting of arbitrator akin to jurisdiction of this Court. This issue was also considered by this Court.

13. The decision of the Hon'ble Supreme Court in ***Ravi Ranjan Developers Private Limited Vs. Aditya Kumar Chatterjee*** applies to the facts peculiar to the case therein. The Clause there contemplated



resolution of dispute through arbitration and that the sitting of the Arbitral Tribunal was agreed at Kolkata.

14. There the jurisdiction of the District Court at Muzaffarpur was invoked under Section 9 of the Arbitration and Conciliation Act, 1996.

15. Therefore, the respondent moved an application before the Calcutta High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. It was in this background the Hon'ble Supreme Court has given its ruling ***Ravi Ranjan Developers Private Limited Vs. Aditya Kumar Chatterjee*** reported in 2022 SCC Online SC 568.

16. Therefore, the decision referred in the above case cannot be applied to the facts of the case. Under these circumstances, Court is inclined to allow this Original Petition for appointing an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

17. The parties are at liberty to workout the venue for Arbitration at Kerala.



18. The Court is inclined to pass the following order:-

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(i) **Mrs.Hema Muralikrishnan, Advocate, having office at No.164, Lingi Chetty Street, Parrys, Chennai – 600 001, Mobile No.8939067123**, is appointed as an Arbitrator to enter upon reference and adjudicate / resolve the *inter se* dispute between the parties.

(ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

(iii) The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act,



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1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

19. The Original Petition is allowed with the above observations, leaving the parties to bear their own costs.

20. Since the Court has appointed an Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

12.12.2023

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No



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C.SARAVANAN, J.

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