



Arb.O.P (Com.Div.) No.149 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 09.09.2024	PRONOUNCED ON 03.10.2024
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THE HONOURABLE MR.JUSTICE K.KUMARESH BABU

Arb.O.P (Com.Div.) No.149 of 2024

S.Sekar

...Petitioner

-vs-

1.M/s.Dharmapuri Paper Mills Pvt., Ltd.,
having regd., office at New No.96,
Luz Church Road, Mylapore,
Chennai – 600 004.
Rep., by its Managing Director M.S.Muthusamy

2.Mrs.Anupriya Ramesh

3.Mr.P.S.Ramesh Babu

...Respondents

PRAYER: Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to adjudicate upon the disputes that have arisen between the petitioner and the respondents in respect of the Memorandum of Understanding dated 07.06.2023 entered into between the petitioner and the first respondent.



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For Petitioner : Mr.J.Pothiraj

For Respondents : Ms.Tanya Kapoor for R1
Mr.Aditya Rangarajan for RR@3

ORDER

This Arbitration Original Petition had been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking to appoint a sole Arbitrator for the dispute that had been arisen between the parties arising from a Memorandum of Understanding (MoU) dated 07.06.2023

2. Heard Mr.J.Pothiraj, learned counsel for the petitioner and Ms.Tanya Kapoor, learned counsel appearing for the first respondent.

3. The learned counsel appearing for the petitioner would submit that the petitioner and the first respondent had entered into a Memorandum of Understanding (MoU), dated 07.06.2023 for purchasing the agricultural land and the paper mill measuring an extent of 38.5 acres. As per MoU, the petitioner had already paid a sum of Rs.1,56,00,000/- to the first respondent and the petitioner when demanded the execution of the sale deed by payment of the remaining amount, the first respondent had been delaying the execution of sale deed. On the other hand, the first



respondent on 06.02.2024, had terminated the MoU and refunded a sum of Rs.80,00,000/- which only represented partial payment. Hence, a notice was issued on 06.02.2024 itself by the petitioner and also called upon them to resolve the dispute or refer the matter for arbitration. Since there is no reply from the respondents, he requested this Court to appoint an Arbitrator to resolve the dispute arising between the parties.

4. Countering his arguments, Ms.Tanya Kapoor, learned counsel appearing for the first respondent would vehemently contend that no Section 21 notice had been issued by the petitioner, the notice that had been referred by the petitioner was not addressed to the first respondent but would only addressed to the named individual. She would further contend that even without waiting for 30 days period, the petitioner had approached this Court and e-filed the petition on 21.02.2024 i.e., much within the period of 30 days from the date of alleged notice under Section 21. Therefore, she would firstly submit that there was no proper notice under Section 21 issued to the first respondent and the application itself is pre-mature. She had also raised various factual aspects to support her contention. She had also relied upon the judgment of the Hon'ble Apex



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Court in the case of ***Bharat Sanchar Nigam Ltd., & Anr., Vs. Nortel Networks India Pvt. Ltd.***, reported in ***(2021) 5 SCC 738***, wherein, it had dealt with the breach of pre-arbitration requirements as envisaged. By referring to the MoU, she would submit that a similar pre-arbitration clause is also available under the MoU and without invoking the pre-arbitration clause, the petitioner cannot be said to have properly invoked the arbitration proceedings. Relying upon a subsequent judgment of the Hon'ble Apex Court in the case of ***M/s.Arif Azim Co., Ltd., vs. M/s.Aptech Ltd.***, made in Arb.Petition No.29 of 2023, dated 01.03.2024, she would submit that only after a valid notice invoking the arbitration clause, a petition could be maintainable. Therefore, she would request this Court to dismiss this petition.

5. The learned counsel appearing for the respondents 2 & 3 would submit that firstly they are not parties to the MoU, upon which the Arbitration is sought to be initiated. Without prejudice to the rights of the validity of Section 21 notice, he would contend that when they are not parties to the MoU, they are neither necessary party nor proper party in the present Arbitration Petition or also in the arbitration proceedings. It is the further contention that the third respondent had resigned from the



Directorship of the first respondent company and therefore, a petition against him would also liable to be dismissed.

6. In reply, the learned counsel appearing for the petitioner would submit that Section 21 notice had been issued on 06.02.2024, even though the first addressee of the notice was one Mr.M.S.Muthusamy, he was only addressed as a Managing Director of the first respondent company. Even in paragraph 1 of the said notice, it had been indicated that the first addressee was doing business of manufacturing Craft Paper under the name and style as stated above and therefore, he would contend that the notice should be deemed to be validly issued only in the name of the company and not on the individual. He would further submit that the second and third respondents are the Directors in the company, who would also be just a necessary party. They have been added as parties, only as being Directors of the first respondent. He would further submit that even though an averment is made that the third respondent had resigned from the Directorship, the affidavit had been left as 'blank', particularly in paragraph 5 as to the date on which, the third respondent had resigned. He would submit that the non-mentioning of the date and



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leaving the place of 'blank' is only with an intention to wriggle out of his responsibility as Director of the first respondent company. He would further submit that even though he had presented the application in the month of February 2024, i.e., within 30 days, he had only processed the application and even the docket of the petition would indicate that the hard copy was filed before this Court only on 21.03.2024, much beyond the period of 30 days. Therefore, he would submit that there is no merits in the arguments made by the learned counsel appearing for the respondents and pray this Court to appoint a sole Arbitrator.

7.I have considered the rival submissions made by the learned counsel appearing on either side and perused the materials placed on record.

8. The objections that have been raised by the respondents are :-

- a) that no proper section 21 notice have been issued;
- b) Even if it is assumed to be a notice of arbitration, the counsel who had issued an arbitration notice, had sought himself to be appointed as Arbitrator, which would be in violation of Section



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12 and therefore, it is not a proper notice;

c) the present petition had been filed pre-maturely i.e., without waiting for a period of 30 days;

d) the second and third respondents neither parties to the MoU and that the third respondent had resigned from the Directorship of the company. Hence, both cannot be a necessary party for this proceeding.

9.As regards to the non-issuance of proper notice under Section 21, it would be relevant to look into the notice, dated 06.02.2024. The notice dated 06.02.2024, had been addressed to one Mr.M.S.Muthusamy, Managing Director of the first respondent and two other banks. The contents of the notice as pointed out by the learned counsel appearing for the petitioner in paragraph 1 would indicate that the first of the addressee was carrying on a business of the paper industry. When analysing in that context, it is not Mr.Muthusamy, who was carrying on the business of the paper industry, but the first respondent, who had been carrying on business of the said paper industry and Mr.M.S.Muthusamy was only a Managing Director of the said company, in which the second and third respondents were Directors of the company. When that being so, the



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notice could only be presumed, as a notice that was issued to the first respondent company. It could also be seen that the first respondent pursuant to the notice that had been received by it, had filed a caveat before this Court on 19.02.2024, this itself would indicate that the first respondent had itself presumed that the notice has been issued in its name. Therefore, I disagree with the arguments of the learned counsel appearing for the respondent that no valid notice had been issued to the first respondent.

10. With regard to the second objection that has been raised by the respondent that even assuming that the valid notice under Section 21, the Advocate who issued the notice ought not to have sought for himself to be appointed as Arbitrator, as it would be violating under Section 12 of the Arbitration and Conciliation Act. I have already found that the notice is a valid notice of invocation of Arbitration proceedings. It is to be seen that the said notice had not been replied to by the first respondent. Had a reply been made, and an objection to the nomination of the Arbitrator was made, only then such a contention could be raised by the first respondent. Even though an Arbitrator is named under Section 21 notice, the party receiving the notice can refuse to accept the nomination of the



named Arbitrator in the notice and can make a suggestion of a different Arbitrator. If the parties have not agreed for naming the Arbitrator then it is always open to them to approach this Court for appointment of an Arbitrator. Since the respondents have not even replied to the notice, I am of the view that they cannot raise the said contention. The petitioner had not proceeded with the arbitration proceedings on the nomination made in their notice, but they have approached this Court for appointment of an Arbitrator. Therefore, an appointment of an Arbitrator by this Court cannot be said to prejudice the rights of the parties.

11.The next objection that had been raised by the respondent is that no pre-arbitration proceedings had been conducted for appointment of an Arbitrator. The relevant clause under the MoU reads as thus:-

12.Dispute Resolution:-

If any dispute arises inter alia in respect of the validity, interpretation, implementation, enforcement or alleged breach of any provision of this Understanding (or the subject matter of this Understanding), or regarding a question arising out of or in connection with this Understanding (a Dispute) between the Purchaser and the Seller (Disputing Parties), the Disputing Parties shall



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attempt to amicably resolve such Dispute.

If the Dispute is not resolved through such discussions within 30 (thirty) Business Days, then such Dispute shall be referred to and resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 ("Arbitration Act") and shall be submitted to arbitration before a sole arbitrator mutually agreed by the Parties.

12.A reading of the above clause would show that if any dispute arises between the parties, then the said dispute should be resolved firstly by an attempt to amicably resolve the dispute and if the dispute is not resolved through discussion within 30 days, then it can be referred to an Arbitrator, which would be mutually agreed by the parties.

13.A perusal of the notice of termination, which had been issued by the first respondent, dated 06.02.2024, it could be seen that attempts to resolve the dispute had been attempted and only thereafter on the allegation of delay on the part of the petitioner, the first respondent had terminated the MoU and had refunded the amount for a sum of Rs.80,00,000/- through RTGS. Hence, the contention of the first respondent that there was no pre-arbitration resolution cannot be



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countenanced.

14.The next objection was that the present petition is pre-mature. A notice under Section 21 had been issued on 06.02.2024, admittedly the said notice had not been replied by the respondents. It is admitted by the learned counsel appearing for the petitioner that an e-filing had been made within a period of 30 days, but the hard copy had been filed before this Court much later than the period of 30 days. It is his contention that had the notice been replied and there was a mutual agreement on an Arbitrator to be appointed then the petitioner would not have pressed this petition. On the other hand, the first respondent had filed a Caveat as early as on 19.02.2024, in anticipation of this petition, pursuant to the notice dated 06.02.2024. In view of the specific statements made by the learned counsel appearing for the petitioner that they would not have initiated the present petition, had a reply been received within the period specified, he would not have proceeded with and also considering the fact that no reply was forthcoming from the first respondent, I am of the view that a filing of the petition within the period of 30 days would not prejudice the respondent, even though the said e-filing was within the



period of 30 days, the admission of the petition was only on 02.02.2024, which is very much beyond the period of 30 days. Hence, the said contention is also rejected.

15.The next objection raised by the learned counsel appearing for the second and third respondents is that they are not parties to the MoU and the third respondent had resigned from the Directorship of the company. The MoU had been entered to by the first respondent, admittedly at that point of time, the respondents 2 & 3 were Directors in the first respondent company. It is not their case that on the date of entering the MoU, they were not the Directors and therefore, MoU had been entered upon by the company through its Managing Director, the respondents 2 & 3 who are directors, are also bound by the MoU. It is not their case that the Managing Director representing the company, had unilaterally without their consent had entered the MoU. As rightly pointed out by the learned counsel appearing for the petitioner that even though in the counter affidavit it had been pleaded that the third respondent resigned, he had not indicated the date on which he resigned. Even though the averments in the counter affidavit shows that the attempt



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had been made to state that the particular date on which the third respondent resigned, the space had been left as 'blank' without indicating the date. Therefore this Court is not able to countenance the objections raised by the learned counsel appearing for the second and third respondents.

16.In fine, the objections raised by the respondents are all rejected and in such an event, I am inclined to appoint an Arbitrator who would be a retired Judge of this Court for arbitrating the dispute between the parties. In such circumstances, this Court appoints ***Hon'ble Mr.Justice R.Pongiappan***, Cell No.9443643366, as a sole Arbitrator to enter upon the dispute between the petitioner and the respondents.

17.The learned Sole Arbitrator is entitled to fix his fees as per the Schedule-IV to the Act. This Court further requests the learned Sole Arbitrator to endeavour to decide the dispute as expeditiously as possible.

18.In fine, the Arbitration Original Petition is ordered accordingly.



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Pre-Delivery Order in
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