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Arb.O.P.(Comm.Div.) No.383 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.01.2025

Pronounced on: 17.02.2025

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

Arb.O.P.(Comm.Div.) No.383 of 2024

Dr.Viswanthan Viswabaskaran

... Petitioner

vs.

Resurgen Innovations Private Limited,
Rep., by its Director,
Mr.Vikalp Joiser,
73 Ashwameg Industrial Estate
Sarkhej Bavla Road, N.H. 8A, Changodar,
Gujarat – 382213
Also at
No.1256, Tajpur-Kasindra Road,
Kasindra District Ahmedabad,
Gujarat, India.

... Respondent

PRAYER: Arbitration Original Petition filed under Sections 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator to resolve the disputes between the Petitioner and the Respondent in respect to the MOU dated 19.04.2022 and the Deed of Partnership dated 19.04.2022.



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For Petitioner : Mr.V.Ramamurthy
for Mr.M.Anbalagan

For Respondent : Mr.R.Pushkar

ORDER

This original petition has been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a sole Arbitrator to resolve the disputes between the petitioner and respondent in respect of a Memorandum of Understanding (MOU) dated 19.04.2022 and deed of partition dated 19.04.2022.

2. I have heard Mr.V.Ramamurthy for Mr.M.Anbazhagan, learned counsel for the petitioner and Mr.R.Pushkar, learned counsel for the respondent.

3. The learned counsel for the petitioner would submit that the parties



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entered into a Memorandum of Understanding and also a Deed of partnership on the same day viz.,19.04.2022. Both the MOU as well as the Deed of partnership contained separate and valid arbitration clauses and the petitioner has invoked the said Arbitration clauses and suggested names of nominees to be appointed as sole Arbitrator, in and by a notice dated 05.08.2024 under Section 21 of the Arbitration and Conciliation Act, 1996.. However, the respondent by notice dated 07.08.2024 invoking the arbitration clause in the MoU and the Partnership deed both dated 19.04.2022 nominated three names, giving an option to the respondent to choose from amongst the three names.

4. On receipt of the notice issued by the petitioner dated 07.08.2024, the respondent has also sent a reply notice dated 13.08.2024 refusing to accept the names proposed by the petitioner and stating that it is only the Courts in Ahmedabad, State of Gujarat that have jurisdiction and not the Courts in Chennai. It was also pointed out by the respondent in the said reply notice that the invocation of Section 11(6) of the Act was improper.



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Thereafter the petitioner has still chosen to prefer the above Arbitration Original Petition invoking section 11(6) of the Act.

5. The learned counsel for the petitioner would submit that though the MoU and the partnership deed was entered into only in Gujarat and the respondent also carries on business in Gujarat, part cause of action arose in Chennai, where according to the petitioner the production unit of the petitioner is situated and therefore, the learned counsel for the petitioner would submit that the petition is maintainable before this Court. Insofar as invocation of Section 11(6) of the Act, the learned counsel for the petitioner would submit that it is only a technical objection and since anyway the parties will have to go for Arbitration to resolve their disputes, invocation of a wrong provision of law should not be put against the petitioner. He would therefore pray for the petition being allowed.

6. Per contra, the learned counsel for the respondent would submit that, the entire cause of action arose only in the State of Gujarat and no part



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of cause of action has arisen within the state of Tamil Nadu, more specifically the city of Chennai as claimed by the petitioner. The learned counsel for the respondent would also submit that there is a huge difference between invocation of Section 11(5) and 11(6) of the Act, and on the preliminary objection regarding maintainability of the Original Petition under section 11(6) of the Act, the learned counsel for the respondent seeks for dismissal of the original petition itself.

7. In this regard he would place reliance of the Hon'ble Supreme Court in *Swadesh Kumar Agarwal vs Dinesh Kumar Agarwal and ors*, reported in (2022) 10 SCC 235. He would also rely on the decision of the Kerala High Court in *Tulsi Developers India Private Limited vs Doctor Appu Benny Thomas*, reported in 2021:KER:24896.

8. For bringing out the difference between Section 11(5) and 11(6) of the Act, he would next rely on the decision of the Hon'ble Supreme Court in *Bharat Sanchar Nigam ltd and ors vs Nortel Networks India Pvt Ltd*,



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reported in (2021) 5 SCC 738, where again, the Hon'ble Supreme Court has discussed Sections 11(5) and 11(6) of the Act in great detail. He would next rely on *M/s.Kings Chariot Vs. Tarun Wadhwa* in *Arb.P. No.421 of 2024*, the decision of the Delhi High Court dated 21.05.2024, with regard to cause of action and jurisdiction Clauses insofar as Arbitration proceedings were concerned. For the same proposition, he would also rely on the decision of the Delhi High Court in *Aarka Sports Management Pvt Ltd vs Kalci Buildcon Pvt Ltd*, reported in 2020:DHC:2233.

9. Apart from drawing my attention to the principles laid down by the Hon'ble Supreme Court as well as the Kerala and Delhi High Courts in the above decisions, the learned counsel for the respondent would also take me through the documents to fortify his contentions that the entire cause of action arose only within the state of Gujarat and in this regard he would contend that admittedly the agreement as well the partnership deed were entered into only at Ahmedabad; the Firm Ceravin labs was formed at Ahmedabad to carry on proposed business in manufacturing and marketing



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of specialty ceramic tiles at Ahmedabad; registered office of the said Firm is at Ahmedabad; place of business and all books of record of the Firm are at Ahmedabad; the proposed manufacturing unit/factory of the Firm is also at Ahmedabad District and mediation between the parties for amicable settlement of disputes was also held only before the Mediation Centre at Ahmedabad. Referring to these factual circumstances, the learned counsel for the respondent would submit that even as per the closest connection test and forum convenience, the seat of arbitration can only be at Ahmedabad, which has a strongest connection to the disputes and not Chennai as contended by the learned counsel for the petitioner.

10. Further, the learned counsel for the respondent would also submit that, the respondent has also contributed substantially towards the capital of the Firm, besides incurring expenses for setting up the proposed Factory at Changodar, Ahmedabad and a mere averment in the petition that the petitioner has its production unit at Chennai without substantiating the same will not give rise to a cause of action to enable the petitioner to move the

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petition under Section 11(6), (which again is erroneous) and seek appointment of a sole Arbitrator.

11. I have carefully considered the submissions advanced by the learned counsel on either side. I have also gone through the records, including the decisions on which reliance is placed on by the learned counsel for the parties.

12. Let me first deal with the Arbitration agreement between the parties. The parties do not dispute the execution of the MoU dated 19.04.2022 and Deed of partnership dated 19.04.2022 at Ahmedabad. The arbitration clause in both the documents is identical and for the sake of reference and convenience, the same are extracted hereunder:

“Memorandum of Understanding dated 19.04.2022:

19. ARBITRATION

Both parties agree to put in all the possible efforts to resolve any issues if they arise in the future at any given point of time with mutual understanding and amicably resolve it. Even after that if the issues are not resolved then both parties agree to appoint an Arbitrator as per mutual agreement to resolve such issues and avoid any legal proceedings.



Deed of Partnership dated 19.04.2022:

53. All disputes between the partners or between the Partner and the Partnership which cannot be resolved in terms of this agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.”

13. The reading of the Arbitration clauses in the MoU as well as the Deed of partnership clearly suggests that the parties have not agreed upon procedure to be adopted by the Arbitral Tribunal, excepting for agreeing to submit the disputes for Arbitration.

14. Section 11 of the Arbitration and Conciliation Act, 1996 runs thus:

“ 11. Appointment of arbitrators.—

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days from



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the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

.....”



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15. From a reading of Section 11(5), it is seen that when there is failure to agree on a procedure for appointing an Arbitrator or Arbitrators and if the parties fail to agree on the Arbitrator within 30 days from the receipt of the request by the other party, then appointment shall be made on an Application in terms of sub section 5 in accordance with provisions of sub section 4 of Section 11. However, where parties had already agreed upon for an appointment procedure and thereafter, one of the parties fail to act as required under the procedure, then a Petition will have to be moved under Section 11(6) of Act.

16. In the present case, as already seen from the Arbitration clause that have been extracted herein above, there is no agreement with regard to the procedure to be adopted in the appointment of the Arbitrator. Therefore, in the case on hand, it clearly falls within the scope and ambit of Section 11(5) and not Section 11(6). It now remains to be seen whether the Petitioner instead of filing the O.P under section 11(5) of the Act, invoking

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Section 11(6) of the Act would be maintainable.

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17. The Hon'ble Supreme Court in *Swadesh Kumar Agarwal*' case (referred herein supra) held that there is a clear distinction between Section 11(5) and 11(6) of the Act and where there is no written agreement between the parties regarding procedure for appointment of an Arbitrator, then the parties will be at liberty to agree on a procedure with mutual consent and/or agreement, the dispute can be referred to a sole arbitrator/arbitrators, appointed by mutual consent. However, when there is a failure of any such agreement then Section 11(5) of the Act would stand attracted. In no uncertain terms, the Hon'ble Supreme Court held that in such a situation the Application for appointment of an Arbitrator or Arbitrators shall be maintainable under Section 11(5) of the Act and not under Section 11(6) of the Act and in fact at paragraph No.7.2 also held that the Application filed under Section 11(6) shall not be maintainable. Therefore, applying the ratio of the Hon'ble Supreme Court, the petition filed invoking Section 11(6) in the facts and circumstances of the given case is clearly not maintainable. In

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view of the law laid down by the Apex Court, it is not open to the petitioner to contend that it is only a technical objection. In fact even in the reply notice, the respondent has clearly brought it to the notice of the Petitioner that Section 11 (5) cannot be invoked. However, despite the same, the petitioner has not chosen to make amendments.

18. Even otherwise, relating to the objection regarding the jurisdiction of this Court to entertain the Section 11 petition, having gone through the records and also the admitted position that the MoU as well the Partnership deed were entered into only at Ahmedabad, the partnership Firm has its registered office at Ahmedabad and the proposed production unit is also being set up at Changodar, Gujarat, I am unable to countenance the submission of the petitioner that part cause of action arose within the state of Tamil Nadu, moreso, the city of Chennai. Infact, though specific averment has been made in the petition under Section 11(6), when the respondent in his counter has categorically denied the self serving claim of the petitioner that part cause of action has arisen in Chennai, no documents



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were also produced from the side of the petitioner to substantiate the statement in the petition under Section 11(6) that part cause of action arose in Chennai where the production unit of the petitioner is housed. Even from this angle, I am unable to countenance the submission for the petitioner that part cause of action arose in Chennai. Therefore, Section 11 petition is not maintainable before this Court. In this regard the decisions of the Delhi High Court in *M/s.Kings Chariot* (referred herein supra) are also looked into.

19. The Delhi High Court in both these decisions, relying on the decision of the Hon'ble Supreme Court in *Indus Mobile Distribution Private Limited vs Datawind Innovations Pvt Ltd and others*, reported in (2017) 7 SCC 678 held that, Section 20 recognises autonomy of the parties to choose a neutral seat of Arbitration, where no part of cause of action arose, but however once the seat is determined, the Court of that place will have exclusive jurisdiction to regulate the arbitration proceedings arising out of the agreement between the parties.



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20. The Delhi High Court further held that, when the parties have not determined the seat of parties then the seat of arbitration shall be decided by the Arbitral Tribunal under section 20(2) of the Arbitration and Conciliation Act, 1996 and the competent Court to entertain an Application under section 11 of the Act would be the Court “ as defined under Section 2(1)(e) of the Act r/w sections 16 to 20 of the Code of Civil Procedure”. In the said case, the parties under the Arbitration agreement have not agreed upon the seat of Arbitration and therefore, the same has to be determined by the Arbitral Tribunal under Section 20(2) of the Act. Consequently, the Courts with the meaning of Section 2(1)(e) of the Act r/w section 16 to 20 of the Code of Civil Procedure would be the competent Court to entertain an Application under Section 11 of the Act. This Court lacks territorial jurisdiction as this Court is neither the seat of Arbitration nor the Court within whose jurisdiction the cause of action arose. Further the respondent also, admittedly is having its place of business only at Ahmedabad, Gujarat where the Agreement as well as the Partnership deed was also signed and in



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the absence of any documents substantiating that part cause of action arose within the city of Chennai, I am not inclined to accept the submissions of the learned counsel for the petitioner.

21. In view of the above, I proceed to hold that this Court also does not have the jurisdiction to entertain the Section 11 petition in line with Section 16 to 20 of the Code of Civil Procedure and therefore, there is no merit in this Original Petition, consequently even on this ground, this Arbitration Original Petition is liable to be dismissed.

22. In fine, this Petition is dismissed. There shall be no order as to costs.

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Internet : Yes / No



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P.B.BALAJI, J.,

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Pre-delivery Judgment in
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