

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P.No.699 of 2012

1.A.C.Chellappan

2.C.Chellammai

3.C.C.Chellappan

... Petitioners

Vs.

K.A.Chellappan (Deceased)

Rep. by his legal heirs

C.Radhakrishnan

C.Amarajothi

V.Alagu

V.Solai

V.Raja Chellappan

V.Unnamalai

1.C.Radhakrishnan

2.C.Amarajothi

3.V.Alagu

4.V.Solai

5.V.Raja Chellappan

6.V.Unnamalai

7.N.Palaniappan

8.C.V.C.Chinnakaruppan

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 21.08.2006 as not valid and binding on the parties.

For Petitioners : Mr.Anantha Krushnan
for Mr.M.N.Balakrishnan

For R3 : Mr.Rahul Balaji
for M/s.R.Parthasarathy

ORDER

The award dated 21.08.2006 is the subject matter of challenge before this Court, in this Original Petition.

2.On a perusal of the award dated 21.08.2006, it is seen that, one A.C.Chellappan, C.Chellammai, C.C.Chellappan have been shown as claimants and one K.A.Chellappan has been shown as respondent and the parties had referred a dispute, with regard to retirement of partner from M/s.Paari Nilayam, Chennai, for Arbitration, for which, two Arbitrators had been appointed and the following award came to be passed.

AWARD

A dispute having arisen the claimants and the respondent in respect of Retirement Of Partner from M/S. Paari Nilayam of Chennai, Individual Property of K.A.Chellappan. The Parties have mutually agreed to have the matter settled by recourse to Arbitration Proceedings under the Arbitration and Conciliation Act, 1996.

The Parties hereto have mutually agreed to appoint the above Said Two Common Arbitrators.

The Arbitrators have carefully considered the contentions of both the parties and their arguments.

It is a Common Ground that C.Chellammai is one of the Four Partners of M/s.Paari Nilayam, Book Publishers and Sellers, Chennai-1, Which Owns the First Floor of the Building bearing corporation Door No.90, Broadway, Chennai 600 001. C.Chellappan is the First Son of K.A.Chellappan and C.C.Chellappan, Only Son of A.C.Chellappan.

At present, K.A. Chellappan is 86 years Old and his health is deteriorating. Considering the circumstances and to maintain the Peace and Harmony of the Family, we make the following award and explicitly set them out for completion on or before the Thirty First Day of August Two Thousand and Six and In Case of any clarification, the decision Of the Arbitrators shall be Final.

a) The Properties Purchased in earlier period in the respective names of the Claimants (i.e) Flat at Anna Nagar, Shop at Stinger Street and Land at Thiruvotriur belong to the Respective parties absolutely.

b) The following Savings Account, PPF Account, NSS and Fixed Deposit the names of the Respective Parties shall belong to the them who are either the Children or Wife of C.Chellappan.

(i) S.B. Account in the Name of Gandhi with ICICI Bank,	620,992/-
(ii) S.B. Account in the Name of Valli with ICICI Bank,	79,262/-
(iii) S.B. Account in the Name of Anbu with ICICI Bank,	235,863/-
(iv) S.B. Account in the Name of Anbu with SBI Bank,	43,539/-
(v) S.B. Account in the Name of C.C. Chellappan with ICICI Bank,	514,542/-
(vi) S.B. Account in the Name of C.Chellammai with Indian Bank,	259,316/-
(vii) S.B. Account in the Name of A.C. Chellappan with ICICI Bank,	26,357/-
(viii) NSS in the Name of Gandhi,	50,691/-
(ix) NSS in the Name of C.C. Chellappan,	114,905/-
NSS in the Name of A.C. Chellappan,	6,740/-
(x) NSC withdrawn by Gandhi,	30,000/-
(xi) PPF Account in the Name of C.Chellammai,	828,578/-
(xii) Fixed Deposit in the Name of C.Chellammai with State Bank of India,	123,093/-
(xiii) Unit Trust in the Name of C. Chellammai,	10,000/-
(xiv) - do - ,	5,000/-
(xv) Unit Trust in the Name of C. Gandhi Lakshmi,	10,000/-

c) Amount has to be given by K.A.Chellappan to C.Chellammai

(i) Current Account of C.Chellammai in Paari Nilayam,	12,94,632/-
(ii) 30% for Increase in valuation of the First Floor of the Building No.90, Broadway, Chennai — 1, belonging to Parri Nilayam,	10,00,000/-

d) Amount has to be given by K.A.Chellappan to A.C. Chellappan for the 20% Share of the valuation of property No.89/43, New Street, Chennai – 1 by way of Cheque bearing No.072651 Dt 23.08.2006 Drawn on City Union Bank G.T. Chennai-1,

15,00,000/-

e) Amount has to be given by K.A. Chellappan to A.C. Chellappan for Miscellaneous claim at present, by way of Cheque bearing No.787204 Dt.23.08.2006 Drawn on Indian Bank, Esplanade, Chennai, 12,46,485/-

f) One Fourth Share of Land at Embel Road (Opposite to Chellappa Hospital) at Arimalam, (after the Common Deduction of Land Area for Prospective Road) should be given by A. Amarjothi.

g) C.Chellammai shall retire from the Firm M/s. Paari Nilayam by way of Retirement Deed.

h) The first Claimant shall execute a Release Deed in favour of K.A.Chellappan for the Land and Building bearing Corporation Door No.89/43, New Street, Chennai 600 001.

i) The Claimants shall remove their Utensils from the House at Meenakshi Puram Of Arimalam. belonging to the other Two Brothers of C.Chellapan.

The Claimants and the Respondent shall act without demur in signing of Documents, Records and Other Papers for the effective and convenient enjoyment of the Respective Parties.

1. Sd/-

(N.Palaniappa Chettiyar of Koppanapatty)

2. Sd/-

(C.V.C.C.Chinnakaruppan Chettiyar of Kothamangalam)

(Arbitrators)

We Jointly and severally do hereby confirm that we have wholeheartedly accepted all the terms of the foregoing Award and further agree and undertake to carry into effect the terms of this Award forthwith.

1. Sd/- (A.C.Chellappan)

2. Sd/- (C.Chellammai)

3. Sd/- (C.C.Chellappan)

(Claimants)

1. - Not signed -

(Respondent)

3.The above award has been put under challenge by the petitioners/claimants, before this Court.

4.Learned counsel appearing for the petitioners submitted that the alleged award dated 21.08.2006 is against law, inasmuch as two Arbitrators have been nominated, which is contrary to Section 10 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for brevity). Admittedly, the respondent in the award was hospitalized, much prior to the alleged proceedings and he died in the hospital itself. Moreover, none of the parties to the alleged award had made any claim, nor any claim statement, whatsoever, had been filed, nor the nature of dispute(s) had also been ascertained in the award. It has been recorded in the award, as if the dispute

has been adjudicated by two Arbitrators. Therefore, it is the contention of the learned counsel that the entire award is contrary to the provisions of the Act and hence, the same is liable to be set aside on all the grounds, set out in this Original Petition. The provisions of Section 34 of the Act is squarely applicable to the facts of the case, for interfering with the said award.

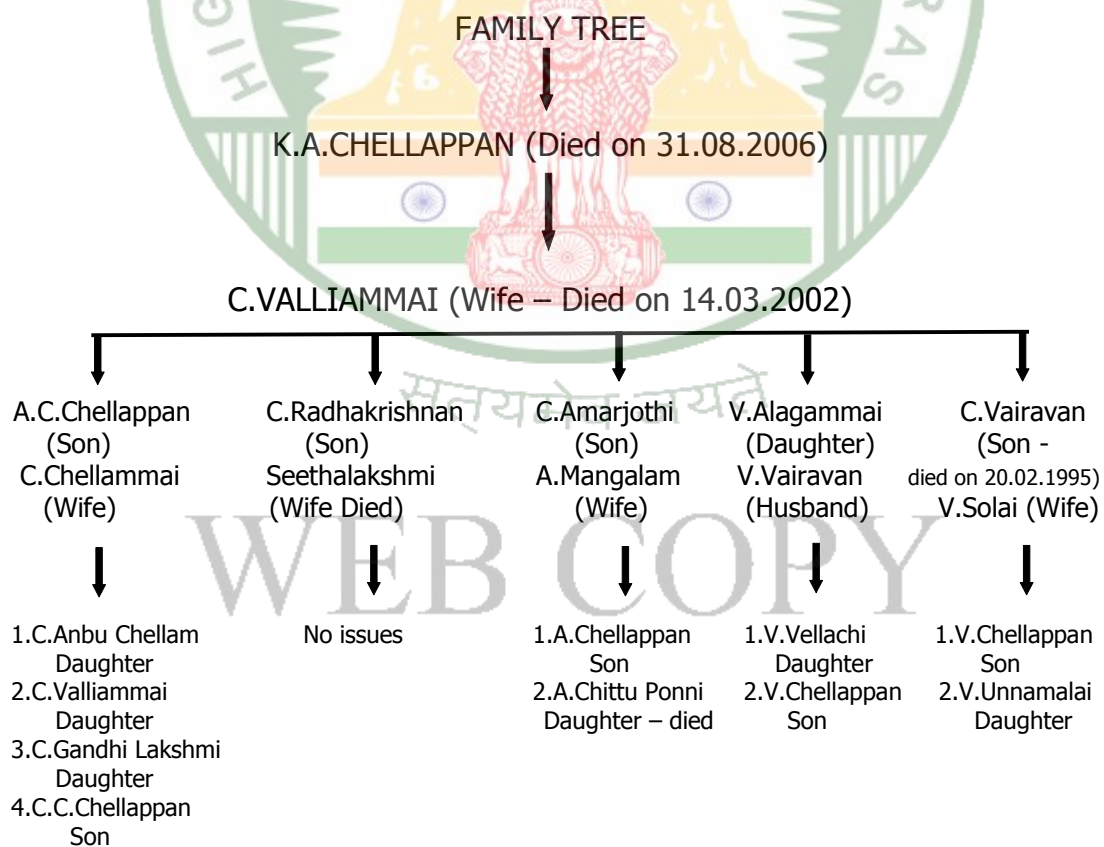
5.Per contra, learned counsel appearing for the 3rd respondent would contend that, there need not be any specific agreement between the parties to refer the matter for Arbitration, when the parties themselves have submitted before the Arbitration Tribunal and have signed in the Arbitration agreement, *inter alia*, to resolve certain disputes. The petitioners have participated in the Arbitration proceedings and now, they cannot assail the same. It is his contention that, the award dated 21.08.2006 has been acted upon, pursuant to itself, to the extent that, a deed of release has been executed by the 1st petitioner and a deed of retirement has been executed by the 2nd petitioner, both on 28.03.2006 and in favour of K.A.Chellappan. The acknowledgment for the receipt of Bank Pass Book from K.A.Chellappan also indicate that the award has been acted upon. Since, the award has been acted upon, this Original Petition under Section 34 of the Act, which has been filed after so many years, to set aside the award, cannot be entertained. Hence, it is his contention that the award cannot be set aside. It is his further contention that, merely because the Arbitral Tribunal consists of two

Arbitrators, the award cannot be challenged under Section 34 of the Act, because, even that had been done only with the acceptance of both the parties and the arbitral procedure was in accordance with agreement of the parties. In support of his submissions, he relied upon the judgment of the Hon'ble Apex Court in **Narayan Prasad Lohia v. Nikunj Kumar Lohia and others [(2002) 3 SCC 572]**. Further, it is the contention of the learned counsel that, this petition under Section 34 of the Act has been numbered after an undue delay of six years. The delay in preferring this petition itself clearly indicates that the award has been acted upon and the same has been challenged after the death of K.A.Chellappan. In support of his submissions, he relied upon a judgment of a Division Bench of the High Court of Delhi in **Delhi Development Authority v. Durga Construction Co. [2013 (139) DRJ 133 (DB)]** and also on a judgment of a single Judge of this Court, dated 16.08.2017, in the case of **R.Krishnamurthy v. R.Venkitapathy [Original Petition No.391 of 2017]**. The relevant paragraph of the judgment reported in 2013 (139) DRJ 133 (DB) (*supra*) is Para No.15, which is extracted hereunder :

"15. A plain reading of section 34(3) of the Act indicates that the period of limitation prescribed is with respect to making an application for setting aside an award and not in respect of further steps once such an application is made. Thus, there is no time specified in the Act, in respect of re-filing of an application under section 34 of the Act, which has been returned to remove to certain defects. Thus, in our view,

while section 34(3) of the Act does indicate the intention of the legislature to ensure that there is no undue delay in filing of an application under section 34 of the Act, the same does not provide any time limit for re-presenting the application. Any restriction with regard to the jurisdiction of the court in condoning the delay in re-filing cannot be read into the provision of section 34(3) of the Act."

6.I have perused the Award and other materials available on record. A 'Family Tree' has been submitted by the petitioners, before this Court, which has not been seriously disputed by the other side. For reference, the family tree is shown hereunder :



7.From the above, it is clear that, A.C.Chellappan (one of the sons of K.A.Chellappan), C.C.Chellappan (grandson) and C.Chellammai (daughter-in-law) alone have been made as claimants and K.A.Chellappan has been made as respondent in the award. Other legal heirs of K.A.Chellappan are not made as parties to the dispute in respect of the properties, owned by K.A.Chellappan.

8.A very reading of the award, extracted above, makes it clear that, there was no prior agreement between the parties, for reference. From the so called award, it can be seen that the matter has been referred afresh to the so called Arbitrators, as if the dispute was only with regard to the retirement of partner from M/s.Paari Nilayam, Chennai. But the fact remains that, the decision has been recorded in respect of various aspects, not only in respect of immovable properties, but, also in respect of movable properties. It is also to be noted that, K.A.Chellappan, who is said to be the respondent in the award, has not signed the so called agreement or award. The learned counsel for the petitioners pressed into service his contention, before this Court, that the said K.A.Chellappan was hospitalized at the relevant point of time and he died within a week in the hospital itself and the said contention was not disputed by the learned counsel for the 3rd respondent. It is also to be noted that, the so called award in respect of K.A.Chellappan's properties has been made only between one section of legal heirs of the said

K.A.Chellappan and the other legal heirs have not been made as parties to the dispute.

9.It is relevant to note the contention of the learned counsel appearing for the 3rd respondent that, though, there was no clear agreement between the parties, the conduct of the petitioners in signing the award itself indicates that they referred their dispute and agreed to settle the same through Arbitrators. I am unable to comprehend such contention for a simple reason that the so called award clearly indicates, as if the matter has been resolved between the parties, however, absolutely, there is no whisper, whatsoever, in the so called award, as to what was the nature of the dispute referred to, or what was the nature of claim made by the petitioners/claimants, or what was the denial by the other side, if any, but, the so called Arbitrators have simply arrived at a final decision.

10.It is to be noted that, any Award should be within the parameters of the Act. Chapter II, Section 7 of the Act deals with Arbitration agreement, which reads thus :

"7. Arbitration agreement. –

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual

or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

11.The provisions contained in the above section of the Act make it clear that, an agreement should exist between the parties to have their dispute(s) referred for Arbitration. The agreement must be in writing, or it could be by way of any correspondence, or even through electronic mode, but basically, one of the preconditions is that, there should be a valid agreement between the parties, for the matter to be referred for Arbitration. In the

given case, there is absolutely no prior agreement between the parties to refer their dispute for Arbitration and the very decision, made by the Arbitrators on the same day, in my view, cannot be a proper adjudication, and such an adjudication cannot be defined as an award under the Arbitration and Conciliation Act, 1996. Since, the parties themselves did not make any objection at the relevant point of time with regard to number of Arbitrators and originally signed the so called award, decided by the two Arbitrators, the award cannot be said to be invalid on the ground of even number of Arbitrators. In this regard, the Hon'ble Apex Court, in the judgment reported in (2002) 3 SCC 572 (*supra*), at Para No.19, has held as follows :

"19. In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the Arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the Arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with a provisions of this Part" would only arise if the composition of the Arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be

provided the agreement of the parties is in conflict with a provision of Part I which the parties cannot derogate. In other words, even if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. If there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the Arbitral Tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision."

12. Absolutely, there is no dispute with regard to the above aspect.

But, the fact remains that, in this case, the parties had in fact, recorded certain decisions, particularly, when one of the parties i.e., the respondent K.A.Chellappan, was in hospital and has never signed the so called agreement

or award. While that being the position, such an award cannot be construed as a legal one. Though, it is the contention of the learned counsel for the 3rd respondent that the award has been given effect to, by execution of a release deed and a retirement deed in favour of K.A.Chellappan, both on 28.03.2006, i.e., within two days from the alleged award, it is to be noted that, those documents are only unregistered documents and the question as to whether such documents will have a legal effect or will affect the rights of the parties, has to be tested independently, taking into consideration all the provisions of law, governing the Registration Act, and other aspects.

13. Be that as it may, whether the parties have acted upon such award or not, is immaterial at this stage, to decide the validity of the so called award, when the so called award, passed by two Arbitrators, itself, is an utter violation of the Act and the same certainly falls within the mischief of violation of fundamental policies of India, and is also illegal. Therefore, such an award cannot be given legal sanctity. Having regard to the fact that, one of the parties to the alleged decision was in hospital at the relevant point of time and did not sign the agreement, it cannot be said that a consensus was reached between the parties to refer their dispute for decision by two Arbitrators. Hence, this Court has no hesitation to hold that the so called award is liable to be set aside. For all the reasons as narrated above, I am of the view that such an award is necessarily to be set aside.

N. SATHISH KUMAR, J.

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In the result, this Original Petition is allowed and the so called award dated 21.08.2006 is set aside. No costs.

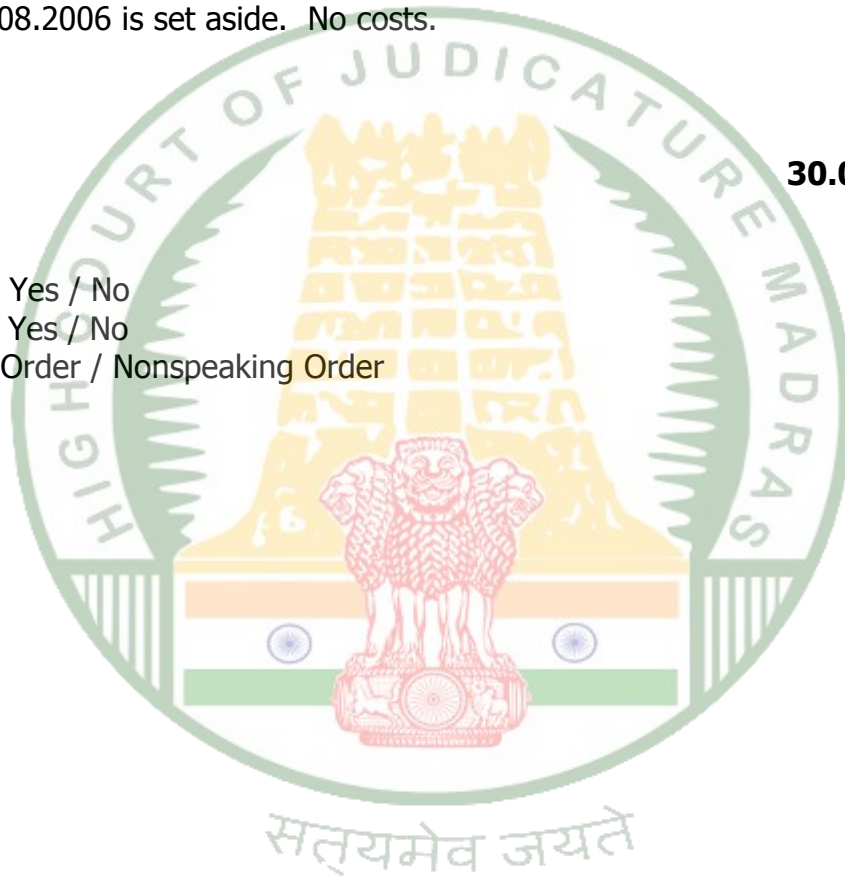
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Internet : Yes / No

Speaking Order / Nonspeaking Order

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