

O.P.No.477 of 2018

N.SATHISH KUMAR, J.

This petition has been filed under 11 (4 & 6) of the Arbitration and Conciliation Act 1996 to appoint an Arbitrator to arbitrate over the dispute of the petitioner and the respondent.

2. It is the case of the petitioner that the 5th petitioner Trust was formed through a registered Deed dated 03.10.1997 by the first petitioner/Managing Trustee, who in turn inducted the petitioners 2 to 4 as the other Trustees. The first petitioner founder trustee has obtained all the essentiality certificates for running a Medical College with 300 bedded hospital along with equipment owned by the Trust. The respondent is required only to run the Medical and Hospital and obtained letter of permission from Medical Council of India. It is his further contention that the petitioners have availed loan from the bank and bank was proposing to initiate proceedings under the SARFAESI Act to take over the Medical College to clear all the bank dues and other creditors by paying an agreed sum of money. At this stage, the petitioner was approached by the respondent for providing a possible redress on the promise of the respondent's alleged finance soundness. At the instance of the respondent, the petitioners entered

into an agreement on 20.08.2015. In pursuant to the above agreement dated 28.02.2015, the respondent was inducted as a trustee in the fifth petitioner Trust. The respondent infact agreed to infuse a sum of Rs.200 crores into the fifth petitioner trust. The amounts that were to be infused were to be used to settle the dues of Central Bank of India, Chennai and Bank of India, Chennai and remaining amounts to be utilized for the welfare of all the institutions of the trust after settling the other creditors. The said agreement was entered with the sole view to exclusively transfer the establishment and control of Annai Medical College from the petitioners 1 to 4 of Sri Devi Karumariamman Educational Trust to the respondent and their nominees. The said agreement has an express arbitration clause in Clause 26 to resolve the disputes arising from the said agreement to be resolved through a sole arbitrator. Hence, it is his contention that as per clause specifically contained in the agreement, dispute has to be referred to arbitration and hence, sought for appointment of Arbitrator as per the clause.

3. In the counter, denying the various allegations, it is the contention of the respondent that only the petitioner breached the terms agreed between the parties. The petitioner has chose to unequivocally waive the said Arbitration Agreement and had instead filed a suit in O.S.No.56 of 2016 on the file of the District Court – II, Kancheepuram.and also obtained interim Orders. According to them, the arbitration agreement cannot be

invoked now and the petitioners are not entitled to invoke the agreement in view of their subsequent conduct. Moreover, the serious issues relating to fraud also not arbitrable. Similarly, breach of Trust committed by the Trustees of a public Trust are not arbitrable and they are bound by section 92 of Code of Civil Procedure. The suit has already been filed for framing of scheme for the Trust. Hence, this petition is liable to be dismissed.

4. The learned counsel appearing for the applicant mainly submitted that the existence of the Arbitration clause in the agreement dated 20.08.2015 is not in dispute. Therefore, as per the above amendment under Section 11(6) of the Arbitration and Conciliation Act, the Court cannot go into the existence of the agreement. Once the agreement is in existence, the Court has to see only the existence of the arbitration clause and leave the preliminary issues to be decided by the Arbitrator. When the clause stipulates to arbitration, the Court has no other option but to appoint an Arbitrator to decide the issue. It is his further contention that filing of the suit by the appellant for bare injunction connected to the agreement will not amount to waiver of his right to invoke arbitration clause. It is his contention that even in the earlier proceedings in C.M.A.2343 of 2017, in the Order passed by this Court, it is clearly indicated that arbitration agreement is not at all relied upon in the suit filed by the plaintiffs and it is not connected with the suit. Such being the position, the contention of the respondent that the

applicant has waived his right has no legs to stand. In support of his contentions, he relied upon the judgment of the Apex Court in **M/s.Mayavati Trading Pvt. Ltd. Vs.Pradyuat DEB Burman** in Civil Appeal No.7023 of 2019 and **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others** reported in **2011 (5) Supreme Court Cases 532**.

5. The learned counsel appearing for the respondent submitted that though there is a dispute between the parties based on the agreement dated 20.08.2015, the entire dispute is with regard to breach of trust committed by the Trustees of the public Trust and hence, the same is not arbitrable. It is his further contention that even assuming that there is a clause in the agreement, the applicant themselves approached the Civil Court first by way of bare injunction suit. The entire pleadings indicate that primarily, the dispute is with regard to the agreement dated 20.08.2015 and legal notice is not sent by the applicant even before commencement of the civil litigation. Hence, it is his contention that the entire dispute relate to trust properties. The applicant himself has waived his right to refer the dispute to arbitration and resolved to Civil Suit. Now, after a period of two years, when they are not able to get an interim Order in the suit, they have filed the present application only to protract the proceedings. Infact, the suit has been filed to frame scheme in the Trust. Such being the position, Arbitrator cannot

be appointed. In support of his arguments, he relied upon the following judgments :

Mr.Ramasamy and another Vs.The Secretariat of the Court, International Chamber of Commerce and others reported in **2009 – 3 – L.W. 580**

Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others reported in **2016 (8) Supreme Court Cases 788.**

6. This application has been filed to appoint an Arbitrator on the basis of the agreement dated 20.08.2015. It is also relevant to refer the agreement dated 20.08.2015. The agreement was entered between the applicants as existing trustees of the Trust namely Sri Devi Karumariamman Educational Trust and the respondent and the agreement is mainly entered with the respondent to infuse Rs.200 crores towards funds for running the medical college. The petitioners availed bank loan and as they were in enormous financial strain, the petitioners were looking for a potential investor to take over the medical college to clear all the bank dues and other creditors by paying an agreed sum of money. Subsequently, the agreement was entered and the management was handed over to the respondent. No doubt Clause 26 of the Agreement relates to Arbitration clause. The Clause 26 of the Agreement reads as follows :

“26. All Disputes, controversies or differences which may arise between the parties out of or in relation to this Agreement which cannot be resolved by the parties after discussion in good faith attempting to reach an amicable solution, shall be finally settled by arbitration in Chennai, India under the Rules of the Arbitration of the Indian Arbitration and Conciliation Act, 1996 by a sole arbitrator appointed in accordance with the said Rules therein. The language of arbitration shall be English.”

Both sides have agreed with the clause 26 of the agreement. The contract is with regard to the management of the Trust and running of the medical college by the petitioners. It is also not in dispute that after some time, dispute arose between the parties with regard to running of the Trust. Hence, the applicants have instituted a suit in O.S.No.56 of 2017 for permanent injunction restraining the respondent herein from in any way associating with and interfering with the affairs of the plaintiff's institutions including Annai Medical College and Hospital established by them. Though the suit has been filed for permanent injunction, para 11 of the plaint merely indicate that the entire suit has been filed on the premise of the alleged breach of trust in infusing the promised funds by the respondent herein. Similarly, they have also passed a resolution to the newly inducted trustee, namely the respondent, from the Trust.

7. It is the further case of the applicants that in the civil suit, though filed for permanent injunction that the respondent should not interfere with the affairs of the trust, the entire suit is proceeded as if there is a breach of trust in running of the medical college in India and infusing of the promised funds. It can be seen from the pleadings in O.S.No.56 of 2017 that the primary grievance of the applicants is that there is a breach of trust by the defendant namely the respondent and he had breached the promise of the contract. However, the applicants have not chosen to invoke the arbitration clause contained in the agreement dated 20.08.2015. It is to be noted that the relief is couched in such a manner that it only relate to permanent injunction and the entire allegations lead to seeking a relief with regard to the alleged breach of trust agreed between the parties dated 20.08.2015. Therefore, when the action itself is brought before this Court in respect of the issue which is the subject matter of the Arbitration Agreement and the party has brought such an action before the Civil Court and did not show any intention to invoke the arbitration clause at the first instance, this Court is of the view that he cannot take a different stand after few years, particularly, when his attempt to get an Order through the Civil Court has failed. The injunction granted at the preliminary stage has been subsequently vacated. Thereafter, only the present application has been filed on the ground that there is an arbitration clause.

8. There is no dispute with regard to the existence of the arbitration clause. The judgments cited by the learned counsel appearing for the applicant in **M/s.Mayavati Trading Pvt. Ltd. Vs.Pradyat DEB Burman** in Civil Appeal No.7023 of 2019 passed on 11.06 the Apex Court has held that the Court has to see only the existence of the arbitration agreement and leave the other preliminary issues to be decided by the Arbitrator. In **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others** reported in **2011 (5) Supreme Court Cases 532**, the Apex Court has held that even if some of the issues or question in a mortgage suit are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. Absolutely, there is no dispute in the above proposition. In the present case also, there is no dispute with regard to the existence of the agreement. The conduct of the parties also cannot be ignored. The very dispute between the parties is with regard to the Trust and the suit is filed by the applicants on the main allegation of breach of trust which has lead to several other consequences, inclusion of certain new members as Trustees and also issuance of pre suit notice issued by the plaintiff namely the applicants also covers the entire dispute regarding the Trust properties. It is also well settled that when the dispute regarding the rights in rem are normally conducted by the Courts.

9. It has been settled by the Apex Court in **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others** reported in **2011 (5) Supreme Court Cases 532**. In **Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others** reported in **2016 (8) Supreme Court Cases 788** the Apex Court in para 61 has held that the dispute relating to the Trust and beneficiaries arising out of the Trust Deed and the Trust Act are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. Hence, the application filed by the respondents under section 11 of the Act is not maintainable on the ground that the dispute specified therein are not capable of being referred to private arbitration in respect of Trust matters.

10. It is further to be noted that the very invocation of the Civil Court jurisdiction by the applicants at the first instance despite there is a clause for reference in the agreement clearly indicate that they do not have any intention to refer the dispute to Sole Arbitrator. Since the nature of dispute is not between two individuals and relate to the affairs of the Trust. Once the party has brought the dispute to the Civil Court and failed to invoke the clause of Arbitration, they cannot take advantage of the Arbitration clause contained in the agreement once again to stall the civil proceedings, particularly when they failed to obtain favourable Order at the earlier instance in the Civil Court and in fact, the interim Order granted by the trial Court was

vacated in C.M.A.2343 of 2017. The entire pleadings in the above suit is with regard to the Trust Agreement and mismanagement of the Trust and failure to infuse sufficient funds by the respondent. Thereafter, the injunctions obtained by the applicant have been dismissed. It is also relevant to note that O.S.78 of 1997 has already been filed by the respondent before the Principal District Court, Kancheepuram under section 92 of Code of Civil Procedure for framing necessary scheme in the Trust for better administration of the educational institutions of the Trust. Such being the position, when the applicants themselves have not shown any interest to refer the dispute at the first instance. Particularly, when they moved the Civil Court as early as in the year 2017, filing such an application after two years, that too, after when they failed to get the favourable Orders, their conduct is nothing but waiving of their rights.

11. In **Mr.Ramasamy and another Vs.The Secretariat of the Court, International Chamber of Commerce and others** reported in **2009 – 3 – L.W. 580** this Court in para 47 to 51, has held as follows :

“47. Thus it is clear that the defendants 6 and 10 themselves, have taken recourse to civil suit, company petitions and police complaints against the plaintiffs herein and various other persons. If the defendants 6 and 10 had been faithful to the arbitration agreement, they should have invoked the arbitration clause at the earliest. But they had taken recourse to

several other forums including about half a dozen police complaints. Very serious allegations of cheating, breach of trust, criminal conspiracy, falsification of accounts, fabrication of documents have been made in those complaints. While the allegation of fraud is the foundation for the criminal complaints, the allegation of misrepresentation is the basis for the arbitration proceedings. The first strike, of taking recourse to other forums and other proceedings was made only by the defendants 6 and 10 and not by the plaintiffs. Both parties are now plunged into a series of litigation, in which the same evidence would be used.

48. The concept of holding the parties to their bargain and driving them to arbitration is based on the principle of one-stop adjudication. If the parties are already engaged in gorilla warfare at several locations in the battle field, asking them to submit to arbitration, in addition to those proceedings, would not serve the purpose for which an arbitration clause is provided for. Arbitration is devised as an alternative dispute resolution mechanism and not as an additional dispute resolution mechanism. Therefore I am of the opinion that the defendants 6 and 10 have made the arbitration agreement (or clause) inoperative by resorting to a series of litigation before various fora.

49. An argument was raised by the learned Senior counsel for defendants 6 and 10 that the company petitions filed by his clients are only statutory remedies availed by them and that it would not amount to abandonment. As a matter of fact, there were 2 company petitions, one filed by defendants 6

and 10 and another filed by defendant-2, under [sections 397](#) and [398, Companies Act, 1956](#). These company petitions have now been disposed of by the Company Law Board, by a common order dated 13-8-2008. Both company petitions related to the alleged oppression and mismanagement of the affairs of the Joint Venture company.

50. The order passed by the Company Law Board dated 13-8-2008 discloses that the entire dispute before the Board revolved only around the Joint Venture Agreement. It is stated in paragraph-3 of the order of the CLB that all the contentious issues primarily arising on account of the alleged breach of the terms of the JVA dated 30-1-2004 are common to C.P.No.65 of 2005 as well as C.P. No.76 of 2005. In paragraph-16 of its order, the CLB has enlisted the reasons on account of which disputes arose between the parties. Non fulfillment of the terms and conditions of the JVA is one of the reasons cited there. In the same paragraph (16), at page 38 of its order, the Company Law Board has elicited in a nutshell the nature of the dispute in the following words:-

The whole of the controversies have spurred out of the JVA dated 30-1-2004. KCP (D-10) is accusing ORE (D-2) of non fulfillment of the terms and conditions of the JVA, whereas the latter is finding fault with KCP for having grossly violated the provisions of the JVA

51. It is in the above context that the CLB pointed out in the later portion of paragraph 16 of its order (at page 41) that none of the complaints made as regards violation of contractual rights derived from the JVA can be agitated in a

proceeding under [section 397](#) of the Act and that therefore the grievances of KCP or ORE on account of the purported breach of the terms of the JVA are not amenable to the jurisdiction of CLB. After saying so, the CLB also noted the existence of clause 22 of the JVA for dispute resolution.”

Here, in this case also, the plaintiffs have not shown any interest at the first instance. Their conduct clearly indicate that they have waived their right. Considering the nature of the dispute between the parties, particularly, when the entire dispute relate to the trust properties, I am of the view that such a dispute is not arbitrable. Only the Civil Court can go into the issue of framing appropriate scheme for better administration of the Trust properties. Whether the removal of the Trustees are necessary or required for better administration of the trust also can be gone into by the Civil Court and not by the Arbitrator. In view of the above, this Court do not find any merits in this application.

12. Accordingly, this application is dismissed.

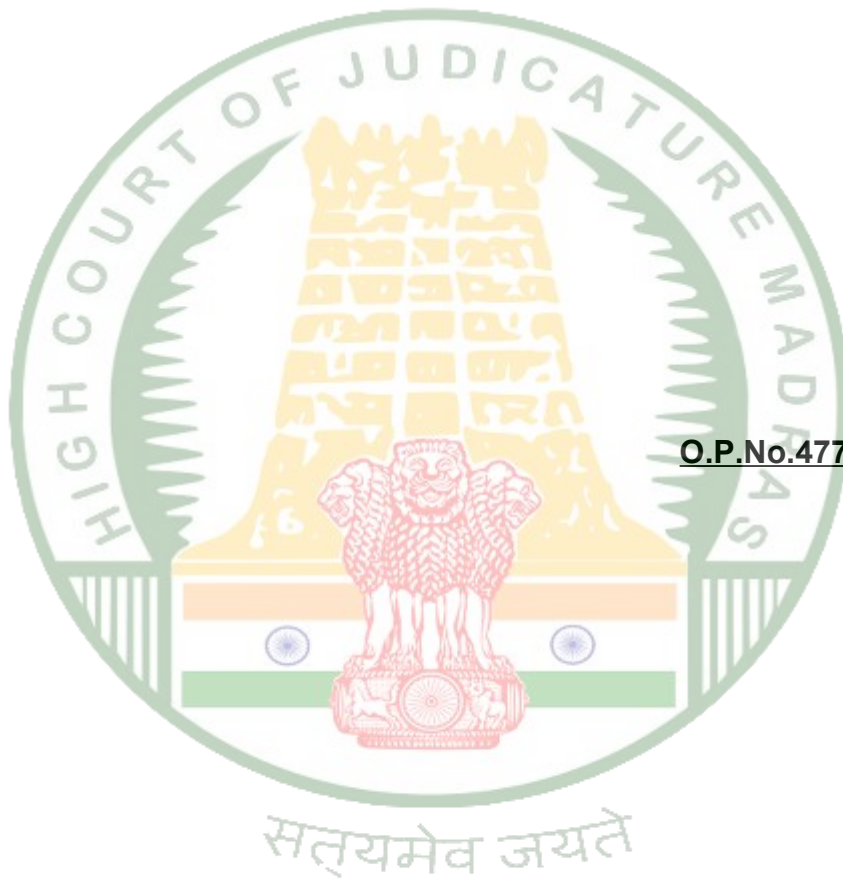
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