

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2019

CORAM

THE HONOURABLE JUSTICE M.GOVINDARAJ

O.P.NO.522 OF 2018

1.P.Mani

2.M.Sampoornam

.. Petitioners

-vs-

1.N.Sengodan

2.S.Sampoornam

3.S.Karthikeyan

.. Respondents

Prayer: Original Petition filed under Section 11(6) of the Arbitration Conciliation Act, 1996 to appoint a sole Arbitrator, or Arbitrators for the settlement of disputes between the petitioners and the respondents in accordance with Clause 12 of the Deed of Partnership dated 20.03.1996.

For Petitioners : Mr.Rathina Asohan

For Respondents : Mr.M.S.Palanisamy

ORDER

The petitioner has filed this Original Petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996, seeking for appointment of an Arbitrator to resolve the disputes between the petitioners and the respondents in accordance with Clause 12 of the Deed of Partnership dated 20.03.1996.

2. The petitioners and respondents are Partners in respect of a business running in the name and style of M/s.M.S.Brick Works at Kolathur, Mettur Taluk, Salem District. The petitioners sought for appointment of an Arbitrator as per Clause 12 of the Partnership Deed agreement and the same reads as follows:

“12. ,f;Tl;L tpahghuj;jpd; elg;gpyhtJ
 my;yJ #uj;Jf;fspyhtJ g';;Fjhuh;fSf;Fs;
 VnjDk; mgpg;gpuha ngj';fnsh my;yJ
 kd!;jhg';fnsh Vw;gl;lhy; midtUk; g";rhaj;J
 mikj;J mth;fs; brhw;goa[k; nkYk; mth;fs;
 Kot[g; goa[k;; ele;J bfhs;s ntz;oaJ.”

3. The petitioners would state that a dispute arose between the parties due to the intervention of the third respondent, who is none other than the son of the respondents 1 and 2. The respondents, on 02.02.2018, instituted a Civil Suit in O.S.No.32 of 2018 before the Sub Court, Mettur and obtained an order of interim injunction on 03.02.2018. The petitioners filed an application under Section 8(i) of the Arbitration and Conciliation Act, 1996 (shortly "the Act") quoting Clause 12 of the Partnership Deed which provides for arbitration. Since there is no Presiding Officer for that Court, the petition filed under Section 8 of the Act could not be decided so far. Thereafter, the petitioner approached this Court for appointment of an Arbitrator.

4. Denying the averments, the respondents would contend that there is no arbitration clause between the parties and that it is only a mediation agreement.

5. The issue to be decided is as to whether Clause 12 of the Partnership Deed is an arbitration clause or not. As seen from

clause 12 of the Partnership Deed, the parties have mutually agreed that if any difference of opinion or dispute arises between the partners, all should appoint a panchayat and act as per the words and decision taken by the panchayat.

6. The learned counsel for the respondents relying on the judgment of the Gujarat High Court in **PRAVIN CHANDRA MURARJI SAVLA VS. MEGHJI MURJI SHAH AND ANOTHER [1998 (1) GLR 778]** would state that a reference made to the Madhyasthi (Mediator) cannot be held as an arbitration and it is not enforceable. He would rely on para 19 of the said judgment, which reads as under:-

"19. From the aforesaid observations of the Division Bench of the Kerala High Court it can be said that there was reference. In the present case to Padamshi Lalka Shah who was a Chartered Accountant and was appointed as a mediator "madhyasthi" and whatever statement he made or decision he gives cannot be said to be one which is an award of an Arbitrator."

7. Per contra, the case under consideration before the

Gujarat High Court was that whether reference made by one of the parties on his own would amount to referral to arbitration or not. Much reliance was placed on Section 20 of the Evidence Act. In that case, the Mediator himself addressed letter to parties claiming herself a "Madhyasthi" as to verification of accounts. There was no referral of any dispute for resolution. In that context, the Gujarat High Court observed as under:

"18. On the other hand, Mr. Y.S. Mankad, learned Advocate for respondents has very vehemently submitted before the Court that in the partnership deed itself there is an arbitration clause which provides for reference of dispute and / or differences to Arbitrators. The letter at Mark 3/1 does not describe Padamshi Lalka Shah as Arbitrator nor does it refer to a reference of dispute to arbitration, but on his own letter head he appoints himself as mediator (madhyasthi). Therefore, the decision and / or statements made by Padamshi Lalka Shah cannot be described as an award. In order to support his contention he relies upon the decision of Kerala High Court in the case of P.Narayanan Nair v. E.Achuthan Nair (AIR 1974 Kerala 51). In my opinion the aforesaid judgment does not directly deal with the question of as to

whether there is an arbitration agreement or agreement appointing a person as mediator. "

8. While deciding the issue, the Gujarat High Court relied on the decision of a Division Bench of the Kerala High Court. In the said case, it has clearly spelt out the difference between mediation settlement and arbitration award. In a mediation, the parties, to avoid disputes in future and also with a view to maintain future relationship, commit themselves into mediation and settle the disputes between themselves, amicably. Whereas, in the case of arbitration, a dispute between the parties is referred for resolution and Arbitrator takes a decision. In para 13 of the judgment of the Division Bench of the Kerala High Court it has been observed as under:

"Even apart from the answer which we have accepted in the previous paragraph we do not think that the suit is one to enforce an award. The process of arbitration is the determination of a pre-existing dispute. Every agreement entered into for the purpose of avoiding a dispute cannot be said to be an arbitration agreement. If parties are at variance on any issue, the issue has necessarily to be settled

as between them. The process of reference to an arbitration could be agreed upon by the parties and in such cases the Arbitrator's award will be binding upon the parties to such agreement. But if it be that both the parties agree that certain service will be rendered by mediators to settle matters which are not yet in dispute between them, but such settlement is desirable to avoid disputes in future, even though the persons who are appointed as mediators are styled as Arbitrators they will not become Arbitrators within the meaning of the Act."

9. In the instant case, Clause 12 of the Partnership Deed clearly spells out that in case of difference of opinion and misunderstanding or dispute, they may constitute a Panchayat and the partners must abide themselves to the words of panchayat and their decision. It means, in the event of dispute, it will be referred to a third party and the parties will bind themselves, to the decision taken by the third party. The word "panchayat" in vernacular language in this case (TAMIL) may give different meanings. Panchayat in village is a

council for governing the affairs of the village. Likewise, the very same term may be used for seeking assistance to bring in reconciliation between the parties, where panchayatdars act as mediators. But in the instant case, it is a partnership deed in a commercial transaction. Here, the word "panchayat" will definitely mean "arbitration", as it requires to referral of dispute between the partners. It cannot be taken as a mediation clause for very many reasons. One if it is considered as a mediation clause, the parties will negotiate in the presence of a neutral facilitator. Secondly, they will settle the misunderstanding between themselves without referring the dispute to anybody. Third, in mediation process, very significantly the decision is taken by the parties themselves. In mediation, the neutral third party cannot take a binding decision compelling the parties to enforce the same. In the instant case, Clause 12 categorically states that the dispute will be referred to a panchayat and the partners will act as per their words, which means, third party takes a decision, meaning this is a case of arbitration. In that view of the matter, this Court is of the considered opinion that Clause 12 of the Partnership Deed is only an arbitration clause and any dispute can be referred to arbitration.

10. In so far as the procedure for appointment of Arbitrator is concerned, as per Section 11(5) of the Arbitration and Conciliation Act, 1996, it is incumbent on one party to the agreement who seeks arbitration, to issue notice to the other party. If the notices fails to agree for the arbitration within 30 days from the receipt of the request by one party, he/they can approach the High Court or Supreme Court, as the case may be. In the instant case, it is seen that there exists a Partnership agreement and as stated supra, there exists an arbitration clause. From the conduct of the parties in filing suit before a Civil Court, it is very clear that there exists a dispute also. The pendency of the civil suit will not be a bar for appointing an Arbitrator. The parties are conscious of the dispute even in February 2018 itself. One party has approached the Civil Court and the other party has approached this Court. Whether the petitioner in the above petition has sought for appointment of Arbitrator invoking arbitration clause or not is concerned, as seen from the records, the petitioner has not made any request for appointment of arbitrator to the other party. Even assuming that he filed a petition under Section 8 of the Arbitration and Conciliation Act, 1996, expressing his views to the appointment of Arbitrator, it came to be filed much later to the date

of filing of the present petition. The petitioner dispatched the arbitration notice dated 06.06.2018 only on 22.06.2018. Whereas, he filed the above petition on 08.06.2018 itself, that is to say, even before issuing the notice for request of appointment of Arbitrator. The matter was admitted on 27.06.2018 that is five days from the date of despatch of arbitration notice. Therefore, filing the petition without following the procedure laid down under Section 11(5) of the Arbitration and Conciliation Act, 1996, is concerned, is premature. The petitioner should have issued the notice and waited for 30 days for response from the other side. Since the above petition is filed even before issuing a notice, requesting appointment of Arbitrator and even before filing petition under Section 8 of the Arbitration and Conciliation Act, 1996, before the Civil Court, this Court is of the considered opinion that it is premature and not maintainable. Hence, this Original Petition is dismissed. However, it is open to the petitioners to approach this Court if so advised, after following the procedure for appointment of Arbitrator in terms of Section 11 of the Arbitration and Conciliation Act, 1996. No costs.

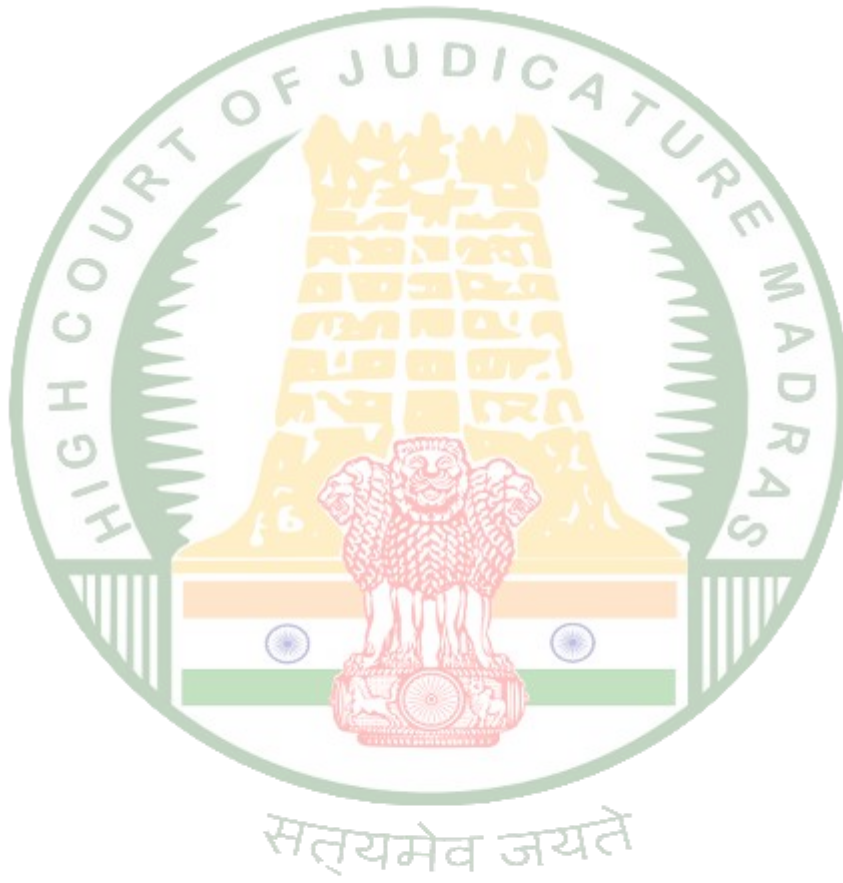
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Speaking order / Non speaking order

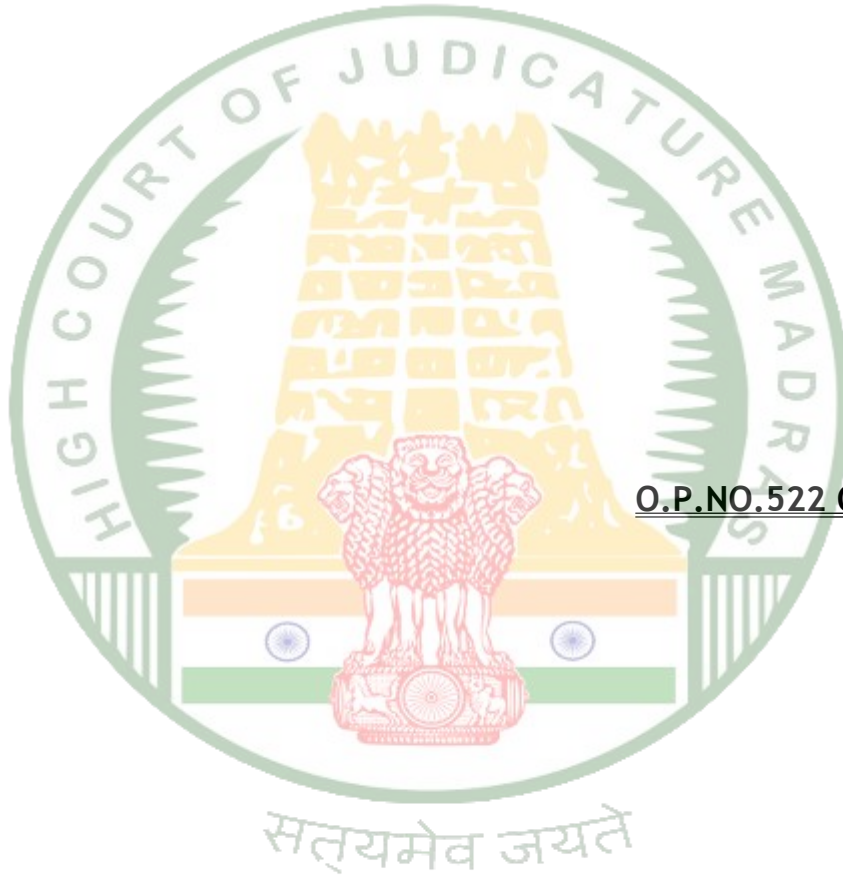
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M.GOVINDARAJ, J.

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O.P.NO.522 OF 2018

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22.01.2019