

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.02.2020

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

O.P.No.498 of 2018

Dr.Poongothai Balaji ... Petitioner

-Vs.-

1. A.Anbuvaran

2. A.Ezhilvaran ... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitration Award dated 14.05.2018.

For petitioner : Mr. Vineet Subramani

For Respondents : Mr. P.V. Balasubramanian

ORDER

The claimant before the arbitral Tribunal is the petitioner before this Court. The brief facts preceeding the filing of the above Original Petition is herein below narrated. The petitioner and the respondents are siblings. On 12.01.2009 the petitioner,

the respondents, their mother, grand mother and their brothers who are not parties here had entered into a memorandum of Oral Family Arrangement which was a record of an earlier oral partition that had taken place amongst themselves on 31.12.2008.

2. The properties which were the subject matter of the Family Arrangement were the properties belonging to the Grand mother and mother of the parties to these proceedings which are described as A – Schedule in the Family Arrangement and the properties of their late father, Aladi Aruna which is described as the B – Schedule to the Family Arrangement. The property which is the subject matter of the present proceedings is the 1st item of the A – Schedule property. The Family Arrangement had contemplated resolution of any dispute, difference or claims through arbitral proceedings.

3. Under the said memorandum of Family Arrangement the petitioner and the respondents were jointly allotted the 1st item

of the A – Schedule property. There was a School in the said property and the School was being maintained and run by their mother as a sole proprietor. The petitioner would contend that under the terms of the memorandum the parties had to enter into a deed of partition for more fully enjoying their respective shares in the property. Though the petitioner had requested the respondents herein to partition the said property the 2nd respondent refused to partition the same however the 1st respondent was willing for a partition. Therefore taking into account the fact that the 2nd respondent was not coming forward to comply with the terms of the memorandum of oral Family Arrangement the petitioner had initially issued a notice invoking the arbitral clause.

4. Since the 2nd respondent had not agreed to the appointment of the arbitrator the petitioner had moved this Court and the arbitrator was appointed by orders of this Court dated 30.01.2018. The claimant had contended that she had not impleaded the other siblings, their mother and grand mother

on account of the fact that the dispute was only with reference to the property which had been allotted to her and the respondents herein.

5. The 1st respondent had sent a letter to the sole arbitrator stating that he was agreeable for the said partition. The 2nd respondent however took out an objection that the property was not partible for the following reasons:

a) A School was being run on the property and was having a strength of about 2300 students and the permission for running the same had been obtained only on the strength of the property in question and therefore any transfer would be void.

b) The School had been handed over to the trust and therefore without impleading the trust no proceedings can be initiated.

c) The Accounts of both the Trust and the School are being audited together and the School is considered to be a unit of the Trust.

d) The School through the Trust had availed the loan by

mortgaging the property and therefore the Bank is the necessary party and without mortgage being redeemed there can be no partition.

6. He therefore sought for dismissal of the Claim Petition and had also filed a counter claim stating that he had settled the property at Pudupatti in the name of the petitioner only to help tide over certain financial arrangements of the 1st respondent and that despite agreeing to reconvey the same after the problem was sorted out, the petitioner had not come forward to release the property to the 2nd respondent.

7. The petitioner herein had filed a reply to the counter claim stating that the land over which the School was being run did not vest in the School or Trust and the ownership is only with the petitioner and the respondents. She would further contend that the entire loan to the bank had been settled by her and that the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, (herein after referred to as the Private

Schools Act) will not apply to the case on hand. She further contended that having settled the property in favour of the petitioner, the 2nd respondent cannot contend that the transfer was not valid. In fact the settlement in favour of the petitioner is only to give effect to the terms of the Family Arrangement in which this property has been described as Item 6 of the B – Schedule property.

8. The learned Arbitrator after perusing the pleadings and the evidence on record had framed the following issues:

"1. Whether the claimant's demand for partition of the immovable properties set out in para 3 of the memorandum of Oral Family Arrangement dated 12.01.2009 (Ex.C.1) is justified?

2. Whether the demand of the claimant in seeking direction to the respondents to execute the partition deed in terms of para 4 of the memorandum of Oral Family Arrangement dated 12.01.2009(Ex.C.1) can be ordered?

3. Whether or not any award can be made by the arbitral tribunal regarding the properties endowed in the name of the School which is a requirement under the Tamil Nadu Recognized Private Schools (Regulation) Act, 1973?

4. Whether the stand of the 2nd respondent that partition cannot be carried out regarding the schedule property as it had been mortgaged with the Indian bank (should be City Union Bank), especially in the absence of the bank being a party to the proceedings is legally correct?

5. Whether in the absence of the Trust (Aladipatti Vaithilinga Nadar Pathirakali Ammal Educational and Charitable Trust) being a party can the dispute between the parties can be settled as claimed by the claimant?

6. Whether the counter claim made by the 2nd respondent is sustainable?

7. Whether the 2nd respondent's counter claim

for direction against the claimant and 1st respondent to restore the 2nd respondent's share in item no.6 to Schedule B of family arrangement is justified?

8. Whether the 2nd respondent's counter claim for direction to the claimant and 1st respondent to execute documents so as to restore half share of land in Pudupatti Village is justified?

9. Whether parties are entitled for costs of the proceedings and if so as to who should bear the same?"

9. The learned arbitrator dismissed the claim of the petitioner herein on the ground that the property in question had been endowed to the School through the Trust and therefore considering the provisions of Section 5 (A) and Section 31 of the Private Schools Act the property in question cannot be transferred. The learned Arbitrator had proceeded to hold that the School was being administrated by the Trust and therefore the Educational agency cannot effect the transfer. The learned

arbitrator had not only found fault with the execution of the Trust deed which was filed and marked as Ex.R.4 but would also contend that the Trust was proper and necessary party to the proceedings and since the Trust was not a party to the memorandum of oral Family Arrangement the dispute could not be settled through arbitration. The learned arbitrator has held as follows:

"52.It is therefore held that no Award can be made by the Tribunal with reference to the properties endowed in the name of the School (DHSS) run by the Trust. The dispute raised before the Tribunal is also incapable of being adjudicated in the absence of the Aladipatti Vaithilinga Nadar Pathirakali Ammal Educational and Charitable Trust being a party to the dispute."

10. This observation has been made by the learned arbitrator while answering issue numbers 3 and 5 of the award. Consequently the other issues were also answered in terms of

the above issues and the claim was dismissed. The learned arbitrator had also dismissed the counter claim filed by the 2nd respondent herein.

11. Challenging the said order the petitioner is before this Court. The grounds of challenge is that the award is in conflict with the public policy of India as there is a patent illegality and the arbitrator has exceeded the scope of reference and the terms of agreement. The petitioner would also contend that the award is passed on presumptions and surmises. The application of the Private Schools Act to the dispute on hand is misconceived.

12. Mr.Vineet Subramani, learned counsel arguing on behalf of the petitioner would contend that the arbitrator has totally overlooked the various documents that have been put forward by the petitioner and also the terms of the Family Arrangement which would clearly and categorically prove that neither the School nor the Trust owned any immovable

property. The reference to the 1st item of property described in Schedule – A to the Family Arrangement was more in the form of a descriptive reference to the property in question and the learned arbitrator has misinterpreted this description to contend that the property belongs to the School.

13. He would further contend that the learned arbitrator has come to the conclusion that there is an endowment without there being any proof of the same. He would contend that an award is nothing but an over reach on the part of the learned arbitrator. He would also draw the attention of this Court to the Judgement reported in **2006 SCC OnLine Madras 655 – Times Guarantee Ltd. Vs. Branch Manager, Industrial Development Bank of India and others** in support of his contention that for a School to claim the property belongs to the School there must be a document to show that the property has been dedicated in favour of the School.

14. He would submit that the facts of that case applies squarely to the case on hand and the learned arbitrator has totally misdirected himself with reference to the ratio laid down in the above case. He would invite the attention of this Court to the various observations made by the arbitrator which would clearly show that the arbitrator has ignored the terms of the agreement which is the basis for the arbitration proceedings as well as the subsequent document which would clearly show that the property in question does not belong to the School but is the private property of the petitioner and the respondents capable of being partitioned.

15. Per contra, Mr. P.V. Balasubramaniam, learned counsel appearing on behalf of the 2nd respondent would contend that the arbitrator has considered the intention of the parties which was to run the School on the property. The learned counsel would contend that the property in question cannot be partitioned since the very recognition of the School had been granted only on the strength of the property in question. He

would further contend that even under the Clause V of the Family Arrangement it has been clearly stated that the properties in question had been mortgaged for raising a loan for the School and the same can be transferred in favour of the future owners along with the respective liabilities and it would be the responsibility of the future owners to settle the liabilities on the land or the business allotted to them.

16. He would therefore contend that it has been the intention of the parties that the School would continue to function in the said property and on this account there cannot be a partition. He would also invite attention of this Court to the observations of the learned arbitrator with reference to the application of the Private Schools Act to the property in question. He would draw the attention of this Court to Section 5 (A) of the Private Schools Act, in which it is mandatory for the Educational agency to mention the extent of play ground available to the pupils and the adequacy of play grounds with reference to the strength of pupils in the School and the

situation and description of the buildings in which such Higher Secondary School is being run.

17. He would also invite attention of this Court to the Form II of the Act which seeks details about, Whether the lands / building is owned or rented or rent free and whether the building is owned or leased? He would contend that the arbitrator has correctly come to the conclusion that once the School has been recognized on the strength of the property and the statutory declarations have been given, the parties should maintain the property as it is and cannot seek to have it partitioned. He would reiterate the fact that once the School has been transferred to the Trust and the Trust has taken over the School there is an endowment and therefore the property cannot be the subject matter of partition.

18. By way of a rejoinder the counsel appearing for the petitioner would submit that there is absolutely no endowment in favor of the School or the Trust and further the School is no

longer being run in the premises in question but has moved to another address.

19. Heard the counsels and perused the papers. The learned arbitrator has arrived at an award primarily on the basis that there is a School running in the property and therefore there is a presumption that there is an endowment in favor of the School. I am constrained to use the word presumption since there is no document put forward to show dedication / endowment to the Trust and consequently in favor of the School. On the contrary, the Family Arrangement and all the other deeds which have been executed pursuant to the Family Arrangement clearly states that the property in question is the private property belonging originally to the mother of the petitioner and the respondents. Clause B, G, I of the Family Arrangement clearly describes the 1st item of A – Schedule as belonging to the mother and the maternal grand mother of the petitioner and the respondents. The deed further states that the parties have to effect the regular partition to give effect to

the terms of the Family Arrangement.

20. Pursuant to the above Family Arrangement the mother and grand mother have executed settlement deed in favor of the petitioner and the respondents under a settlement deed dated 11.02.2009 registered as Document No.387 /09 on the file of the Sub Assistant Registrar, Royapuram. Since the 1st item of the property had been omitted by an oversight a rectification deed came to be executed on 20.12.2010 in Document No.3951/10 on the file of the Sub Registrar, Royapuram in and by which the property in question came to be included.

21. The learned arbitrator has overlooked the trust deed which has been produced for scrutiny which clearly states that the Trust does not own any immovable property. The trust deed is of the year 2002. It is an admitted fact that till the year 2010 it was the mother who was solely responsible for the management and administration of the School. In the year

2010, she has transferred the management to the Trust which is also evidenced by her letter to the Income Tax Officer dated 03.12.2013 which has been produced by the 2nd respondent. In the said letter she has clearly stated as follows "the trustees agreed to my proposal and took over the management of DHSS with effect from 1st April 2010. At the time of take over, **DHSS does not own any immovable property.** The movable assets consists of the following."

22. The document which would clarify the fact that the School is no longer operational in the said address and that the loan in support of which the property has been mortgaged is not for the purpose of the School running in the original address, namely, in the property in question is the document list as Doc No:10 in the Type set of papers. It is seen that on 06.01.2011 the petitioner and the respondents have offered the property in question and other properties as a security for the loan which had been extended to the School. In the statement of accounts that has been produced by the 2nd respondent, particularly the

balance sheet as on 31.03.2017, it is seen that the School is functioning at No.17/8 Andiyappa Gramani Street, Royapuram, Chennai – 600013. The Type set also contains the letter dated 16.02.2018 addressed by the Bank to the School. In the said letter the bank has stated as follows:

"We wold like to inform you that the loan accounts in the name of M/s.Dhanalakshmi Higher Secondary School maintained at our branch has been repaid in full, as on date there is no liability for the said client. The property documents in respect of the loans are owned by 1.Dr.Pongothai 2.Mr.A.Anbuvanan 3.Mr.A.Ezhilvanan and 4.M/s.Dhanalakshmi Hr. Sec. School (lease hold right owner). (Details of the properties mentioned in Annexure – 1)

We are ready to deliver the said property documents and we hereby call upon to collect the documents in respect of the said properties from the branch. We also inform that all the property owners must be physically present at the time of handing over the

security document."

The annexure to this letter is also extracted herein below:

S.No	Properties Description	Name of the Property Owner
1	2697 Sq.ft. Land and 7140 Sq.ft building at No.10/18, S.No.1075/7, Velayutha Pandian Street, Old Washermanpet, Chennai.	Mr.Anbuvaran, Mr.Ezhilvaran and Dr.Pongothai.
2	2400 Sq.ft Land and 9480 Sq.ft building (Valuation for 3600 Sq.ft only) at No.1, S.No.1075/1, 1075/6, Munusamy Garden, 3 rd Lane, Old Washermanpet, Chennai.	Mr.Anbuvaran, Mr.Ezhilvaran and Dr.Pongothai.
3	4891 Sq.ft. Land and 13874 Sq.ft building at D.No.6 and 6A, S.No.1071/1, & 1071/13, Munusamy Garden, 3 rd Lane, Old Washermanpet, Chennai	Mr.Anbuvaran, Mr.Ezhilvaran and Dr.Pongothai.
4	38400 Sq.ft. Leased land and building at R.S.No.118, Block No.6, Old Door No.8, New No.17, S.No.1082/3, Andiappa Gramani Street, Royapuram, Chennai	M/s.Dhanalakshmi Hr. Sec. School (lease hold right owner).

23. A mere perusal of the above documents would clearly indicate that the School is a lease hold right owner in respect of the property at Andiappa Gramani Street, Royapuram, Chennai

and not the property which is the subject matter of the present proceedings. The letter would also indicate that the loan which has been borrowed is for putting up a 38400 sq.ft. building on the said property. This clearly confirms the statement of the counsel for the petitioner that the School is no longer being run in the property in question.

24. Be that as it may, the documents produced for the scrutiny of the arbitrator would indicate that the land in question has never vested with the School. It is not known as to how the learned arbitrator has come to the conclusion that the property has been endowed for the School when not a single document has been filed to support this contention.

25. The Honourable Supreme Court in the Judgement reported in **(2019) 8 SCC 689 – M.J.Thulasiraman and another Vs. Commissioner, Hindu Religious and Charitable Endowment Administration and another** has elaborated on the word “endow” and the connected word

"endowment" in paragraph no.18 which would read as follows:

"18.While the word "endow", and the connected word "endowment", have actually not been defined under the Act, from their usage in the Act and judgments on the subject, it is clear that they relate to the idea of giving, bequeathing or dedicating something, whether property or otherwise, for some purpose."

The learned Judges have also relied on the Judgement reported in **AIR 1966 SC 653 – M.R.Goda Rao Sahib Vs. State of Madras** where the learned Judge held that divestment is necessary in order to create an endowment. The Honourable Supreme Court had in that case observed as follows:

"4. There is no dispute that in order that there may be an endowment within the meaning of the Act, the settlor must divest himself of the property endowed. To create an endowment he must give it and if he has given it, he of course has not retained it; he has then divested himself of it. Did the settlors then divest themselves of anything? We think they did. By the instrument the

settlers certainly divested themselves of the right to receive a certain part of the income derived from the properties in question. They deprived themselves of the right to deal with the properties free of charge as absolute owners which they previously were..."

26. Ultimately, the Honorable Supreme Court had upheld the endowment since there was a valid document in form of rock inscription to show the endowment.

27. In another Judgement reported in **(2000) 4 SCC 146 – Shiromani Gurdwara Prabandhak Committee, Amritsar Vs. Som Nath Dass and others**, the Honourable Supreme Court has described "Endowment" as follows:

"Endowment is when donor parts with his property for it being used for a public purpose and its entrustment is to a person or group of person in trust for carrying out the objective of such entrustment. Once endowment is made, it is final and it is irrevocable. It is the onerous duty of the persons entrusted with such endowment, to carry out the objectives of this entrustment. They may

appoint a manager in the absence of any indication in the trust or get it appointed through Court."

28. In a Judgement of a Division Bench of this Court reported in **2003-1-L.W.386 - Sri Arthanareeswarar of Tiruchengode by its present Executive Officer, Sri Sabapathy Vs. T.M.Muthuswamy Padayachi, etc and others**, which was a case of a dedication in favour of the diety being granted in respect of the properties being treated as a private property and which had been partitioned among heirs. The Division Bench has held that in order to decide as to whether there has been a dedication of a property it has to be determined on the basis of evidence. The Bench has observed as follows:

"The question whether there has been a dedication of a certain property to a temple is a question of fact to be determined on the basis of the evidence produced in each case. When the property in question has always been treated as private property and has already been

partitioned among the heirs, it was held that the circumstantial evidence indicates that there was no dedication.

34. Ultimately it boils down to finding out whether the following criteria are satisfied - that is to say whether -

- (i) the properties in respect of which the endowment is made are designated with precision;*
- (ii) the object or purpose of dedication is clearly indicated;*
- (iii) the founder has clearly and unambiguously expressed his intention to create an endowment and effectively divested himself of all beneficial interest in the endowed property."*

29. The facts of this case are similar to the facts of the above cases. Though the School has been functional much prior to the creation of the Trust or the Family Arrangement or the transfer to the Trust, the property over which it was being run has always been treated as the private property of the owners.

30. Considering the fact that the School is no longer being run in the property in question in view of the address given in the tax returns of the School as well as the letter of the bank the learned arbitrator's observation that there is an endowment to the School is a patent illegality and the learned arbitrator has exceeded the terms of the agreement between the parties as well as the evidence on record.

31. The arbitrator has merely based his entire award on the counter filed by the 2nd respondent and overlooked the fact that not a shred of evidence have been put forward by the 2nd respondent to prove that there is an endowment in favour of either the trust or the School. Section 31 of the Private Schools Act would apply only in a case where the property belongs to the School.

32. The learned arbitrator has also overlooked the original reply given by the 2nd respondent to the notice invoking the

arbitration clause where his defense was that the property is not partible since the mortgage loan had not been settled and that the Pudhupatti property had to be transferred in his favour. It is only after the claim statement had been filed that the 2nd respondent had come forward with an objection totally contrary to the written agreement and the other evidence on record. Considering the fact that the learned arbitrator has exceeded the reference and the award suffers from a patent illegality the award dated 14.05.2018 is set aside. The Original Petition is allowed. There shall be no order as to costs.

11.02.2020

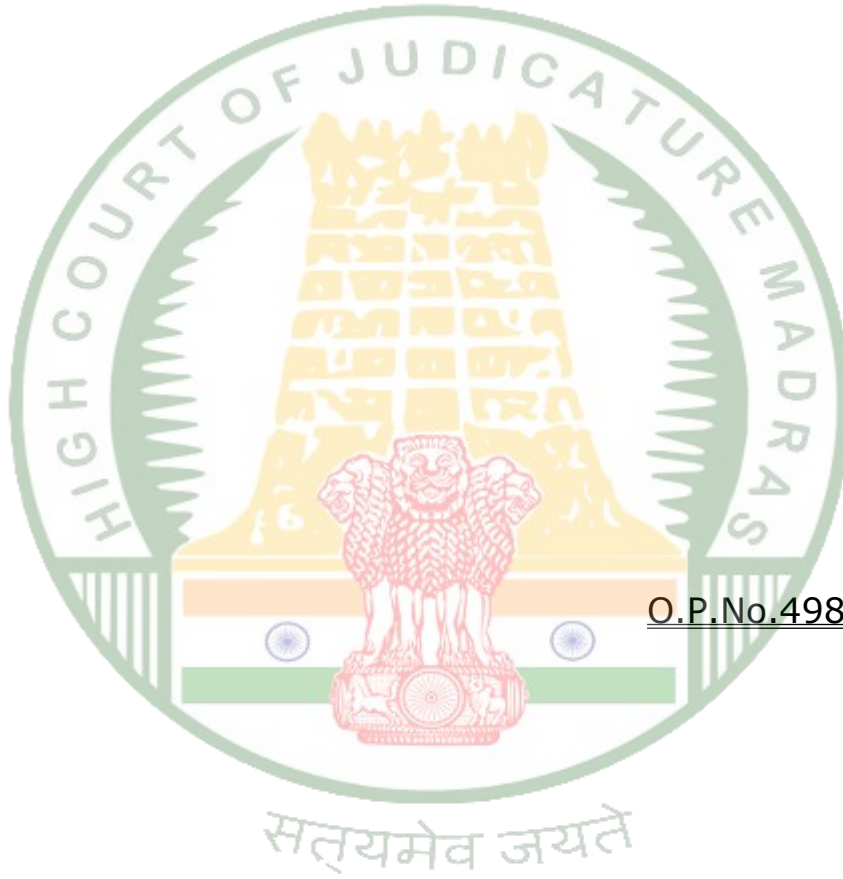
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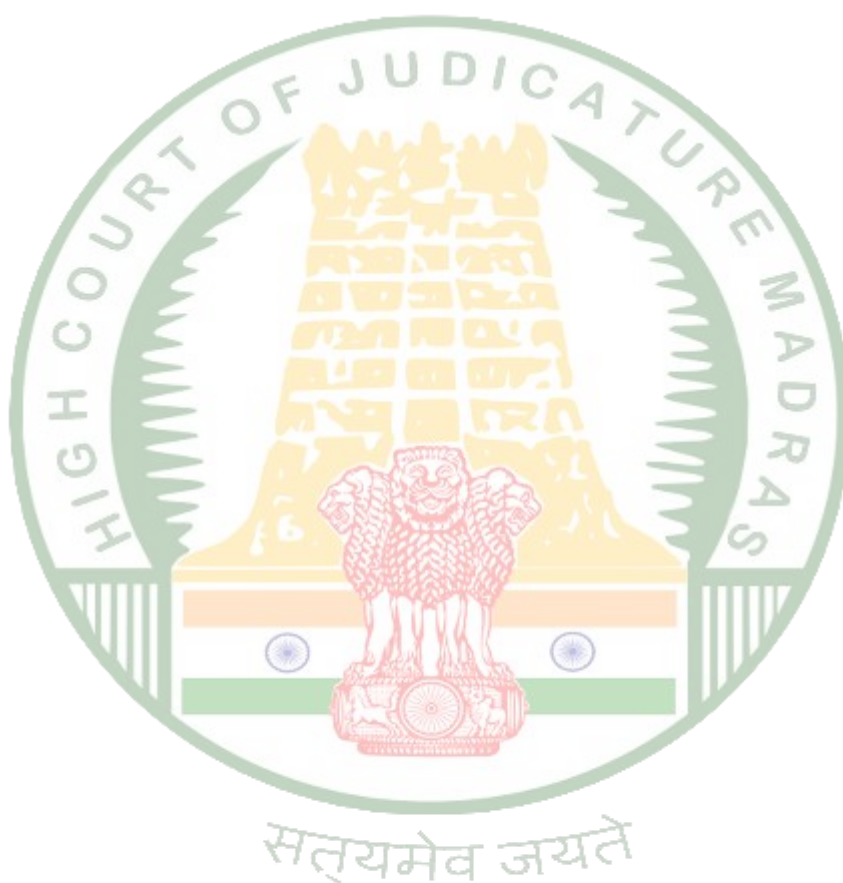
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