

Dr.Renuka Oliver vs Arulmudi Maheswari Raj Charitable ... on 7 January, 2022

Author: Abdul Quddhose

Bench: Abdul Quddhose

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.01.2022

Coram:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.P.No.117 of 2020

Dr.Renuka Oliver

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vs.

1.Arulmudi Maheswari Raj Charitable Foundation Trust
(AMR Charitable Foundation Trust),
Registration No.1225 of 2007,
Door No.H-35, G3, Seashore Apartments,
Thiruvallur Nagar, Thiruvanmiyur,
Chennai – 600 041.

2.T.Maheswari, Trustee,
Arulmudi Maheswari Raj Charitable Foundation Trust
Door No.H-35, G3, Seashore Apartments,
Thiruvallur Nagar, Thiruvanmiyur,
Chennai – 600 041.

3.J.Ebens Nikshya

... Re

Prayer: Original Petition filed under section 11(5) of the Arbitration and Conciliation Act, 1996 seeking for the following reliefs:

(a)To appoint an Arbitrator in respect to the monetary

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<https://www.mhc.tn.gov.in/judis>

out of the Memorandum of Understanding dated 17.08.2012 and entered into between the Petitioner and the respondents.

b. To direct the respondents to pay the cost of the pe

For petitioner : Mr.J.Pravin
for M/s.P.Jesus Moris Ra

For respondents: Mr.V.Hari Babu

ORDER

This petition has been filed under section 11 of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator under a Memorandum of Understanding dated 17.08.2012 entered into between the petitioner and the respondents.

2. According to the petitioner, under the aforementioned Memorandum of Understanding, she has to be paid share out of the profits earned by the School run by them and that, she has not been paid the same and under those circumstances, she has raised the dispute. The Memorandum of Understanding dated 17.08.2012 contains an arbitration clause which is extracted hereunder:

<https://www.mhc.tn.gov.in/judis> “8.Any dispute arising out of this understanding shall be referred to arbitration as laid down by the Indian Arbitration Act.”

3. A counter has been filed by the respondents 1 & 2 stating as follows:

(a) Memorandum of Understanding dated 17.08.2012 was never acted upon between the parties.

(b) The petitioner's claim is not supported by any evidence to show that it is an arbitrable claim.

(c) The petitioner has not given the correct facts, which in otherwords, misleading the court with false facts.

(d) There is absolutely no cause of action for the claim made by the petitioner as the petitioner has not quantified her claim.

(e) The petitioner has involved herself in a fishing expedition, by making a very bald claim, not giving basic facts or basic documents in support of her claim;

(f) The Petitioner has not come to court with clean hands.

<https://www.mhc.tn.gov.in/judis>

(g) The petitioner has attempted to misuse the process of law with bald averments and has attempted to make a wrongful gain out of the same which amounts to clear abuse of process of law.

(h) The petitioner's claim is vexatious.

4. Heard Mr.J.Pravin, learned counsel representing Mr.P.Jesus Moris Ravi, learned counsel for the petitioner and Mr.V.Haribabu, learned counsel for the respondents 1 & 2.

5. Learned counsel for the petitioner drew the attention of this Court to the Memorandum of Understanding dated 17.08.2012 and in particular, he referred to the arbitration clause contained therein. He would also submit that as per the Memorandum of Understanding, the respondents have not paid the share of the petitioner in respect of income derived by the first respondent out of the School run by it. He also drew the attention of this Court to the letter dated 21.07.2019 sent by the petitioner calling upon the respondents to give consent for appointment of Mr.S.Anbalagan, an Advocate as an Arbitrator for deciding the dispute between the petitioner <https://www.mhc.tn.gov.in/judis> and the respondents.

6. Learned counsel for the petitioner would submit that ever since 2016 when the school was making profits, the respondents have not paid the share of the petitioner as per the Memorandum of Understanding dated 17.08.2012. He would submit that the claim is not barred by law of limitation as the petitioner is entitled to recover her share for the last three years even though, the petitioner had filed the present Original Petition in the year 2020.

7. Per contra, learned counsel for the respondents 1 & 2 would submit that the claim made by the petitioner is hopelessly barred by law of limitation. Further he would submit that the Memorandum of Understanding dated 17.08.2012 was never acted upon and infact, the petitioner was only employed under the first respondent Trust who was running the school which was also acknowledged by the petitioner. He would also submit that the petitioner has not produced any documentary evidence to prove that the Memorandum of Understanding dated 17.08.2012 was acted upon and that, <https://www.mhc.tn.gov.in/judis> she is entitled for a share in the income derived by the school run by the first respondent Trust. He also drew the attention of this Court to the letter dated 21.07.2019 sent by the petitioner to the respondents seeking the respondents' consent for appointment of Mr.Anbalagan, as Arbitrator and would submit that the claim of the petitioner was never quantified by her in her letter dated 21.07.2019.

8. According to the learned counsel for the respondents 1 & 2, the petitioner has herself admitted in her letter dated 21.07.2019 that right from the inception of the Memorandum of Understanding dated 17.08.2012, she has not received any payment from the first respondent Trust under the Memorandum of Understanding dated 17.08.2012 which will clearly indicate that the claim of the petitioner is hopelessly barred by law of limitation as the present petition filed under section 11 of the Arbitration and Conciliation Act was filed only in the year 2020, after a lapse of almost 8 years. In support of his submissions, the learned counsel for the respondents 1 & 2 relied upon the decision of the Hon'ble Supreme Court in the case of Vidya Drolia vs. Durga Trading Corporation reported in (2021) 2 SCC 1 <https://www.mhc.tn.gov.in/judis> and would submit that the question of limitation

can also be considered by the Court while dealing with an application under section 11 of the Arbitration and Conciliation Act for appointment of an Arbitrator.

9. Learned counsel for the respondents 1 & 2 would also submit that the claim of the petitioner violates the provisions of section 11 read with section 13 of the Income Tax Act as according to her, the terms and conditions of the Memorandum of Understanding dated 17.08.2012 is violative of the aforementioned provisions of the Income Tax Act and such an agreement is an invalid agreement and cannot be enforced. According to him, the said agreement is void ab initio and is invalid. He also submits that the said agreement contravenes the provisions of section 23 of the Indian Contract Act 1872 also.

Discussion:

10. Admittedly, the Memorandum of Understanding under which there exists an arbitration agreement is dated 17.08.2012. The petitioner has filed typed set of papers which includes the documents relied upon by her <https://www.mhc.tn.gov.in/judis> for the purpose of appointment of an Arbitrator under section 11 of the Arbitration and Conciliation Act.

11. Admittedly, the first claim made by the petitioner subsequent to the Memorandum of Understanding dated 17.08.2012 was by her letter dated 21.07.2019. As seen from the said letter in one of the paragraphs, the petitioner has herself admitted as follows: “However from the date of MOU till date no remuneration whatsoever has been paid to me even though there was enormous surplus from the school. I have been acting as the Secretary of the School from the very execution of the MOU.” As seen from the above, the petitioner has herself admitted that ever since the date of the Memorandum of Understanding dated 17.08.2012, the petitioner has not received any remuneration in terms of the Memorandum of Understanding dated 17.08.2012 from the first respondent.

12. This petition has been filed under section 11 of the Arbitration and Conciliation Act, in the year 2020, i.e., after a lapse of almost 8 years from the date of Memorandum of Understanding. Having admitted that the <https://www.mhc.tn.gov.in/judis> petitioner has not received any remuneration right from the inception of Memorandum of Understanding, the present petition which has been filed only in the year 2020 seeking for appointment of an Arbitrator as per the arbitration agreement contained under the Memorandum of Understanding is hopelessly barred by law of limitation.

13. The Hon'ble Supreme Court in the case of Vidya Drolia vs. Durga Trading Corporation reported in (2021) 2 SCC 1 has laid down the scope of Judicial enquiry under section 11 of the Arbitration and Conciliation Act. The Hon'ble Supreme Court has propounded a prima facie test by holding the Court must not refer the parties to arbitration if they find prima facie that no valid arbitration agreement exists or when the agreement has been rendered invalid and that on rare occasions, it could consider the non-arbitrability contentions. The Hon'ble Supreme Court underlined that the court findings on invalidity or otherwise must be based on summary presentation of documents rather than on an extensive appreciation of evidence. The Hon'ble Supreme Court held that the courts are empowered to decide the question of limitation under section 11 of the Arbitration and

<https://www.mhc.tn.gov.in/judis> Conciliation Act when the claims are ex facie time barred and dead.

14. In the present case also, as observed earlier, ex-facie, the claim made by the petitioner is time barred as even according to the petitioner, as seen from her letter dated 21.07.2019, she has not been paid remuneration under the Memorandum of Understanding dated 17.08.2012 right from the inception of Memorandum of Understanding.

15. The relevant paragraphs of the decision of the Hon'ble Supreme in Vidya Drolia vs. Durga Trading Corporation reported in (2021) 2 SCC 1 are extracted hereunder:

“147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute “hands off” approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of <https://www.mhc.tn.gov.in/judis> competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.

148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are <https://www.mhc.tn.gov.in/judis> ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first

decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

152. Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in <https://www.mhc.tn.gov.in/judis> favour of one-stop adjudication.”

16. Insofar as the second contention raised by the learned counsel for the respondents 1 & 2 that the very agreement namely Memorandum of Understanding dated 17.08.2012 violates the provisions of section 11 and 13 of the Income Tax Act are concerned, there is substance for the following reasons:

A Trust registered under section 12AA of the Income Tax Act must necessarily utilise 85% of the income derived by it for charitable purposes and under section 13(2) of the Income Tax Act, it cannot apply its income for the purpose of benefit of its managerial persons or the Trustees. The subject Trust namely the first respondent herein is admittedly registered under Section 12AA of the Income Tax Act. Therefore, the Memorandum of Understanding dated 17.08.2012 violates the provisions of section 13(2) of the Income Tax Act as the terms and conditions for sharing of profits mentioned therein is in violation of the said provision under the Income Tax Act.

17. Section 23 of the Indian Contract Act makes it clear that when the <https://www.mhc.tn.gov.in/judis> consideration and objects of the contract are unlawful, the contract is void. In the case on hand, the very contract where there is an arbitration agreement namely Memorandum of Understanding dated 17.08.2012, its objects and consideration are unlawful in view of the reasons stated supra and therefore, the said contract itself is void ab initio and cannot be acted upon.

18. In another decision of the Hon'ble Supreme Court in the case of BSNL vs. Nortel Networks (India) (P) Ltd., reported in (2021) 5 SCC 738, the Hon'ble Supreme Court held that ex-facie time barred substantive claims are not to be referred to arbitration by Court. The Hon'ble Supreme Court held that while exercising jurisdiction under Section 11 as the Judicial forum, the court may exercise the prima facie test to screen and knockdown ex-facie meritless, frivolous and dishonest litigation. At the referral stage, the court can interfere only when it is manifest that the claims are ex-facie time barred or dead or there is no subsisting dispute.

19. In the case on hand also, ex-facie the claim made by the petitioner <https://www.mhc.tn.gov.in/judis> is time barred as the claim has been made by the petitioner only in the year 2019 by her letter dated 21.07.2019 without quantifying her claim and having admitted that ever since the date of Memorandum of Understanding dated 17.08.2012, she has not been paid her

remuneration for which, the application under section 11 of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator was filed only in the year 2020, after a lapse of almost 8 years from the date of Memorandum of Understanding dated 17.08.2012.

20. For the foregoing reasons, this Court is of the considered view that there is absolutely no merit in this petition and a vexatious claim has been made by the petitioner vide letter dated 21.07.2019 which is hopelessly barred by law of limitation as the Memorandum of Understanding is dated 17.08.2012.

21. In the result, this Original Petition is dismissed.

07.01.2022 nl <https://www.mhc.tn.gov.in/judis> ABDUL QUDDHOSE, J nl 07.01.2022
<https://www.mhc.tn.gov.in/judis>