

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.18596 of 2012

=====

Rajendra Kamal Son of Late C.B. Singh Ex- President of Baptist Church Trust Association And President Property And Legal Affairs Committee, Baptist Union Church, Bakerganj, P.S.- Pirbahore, District- Patna. **Petitioner.**

Versus

1. A.B.M. Developers (P) Ltd. A Company Having Its Registered Office At Anand Bhawan, Punaichak, P.S. Shastri Nagar, District Patna, Through It's Director Sunil Kumar Singh Resident of 5a/41, Vivekanand Path, North Srikrishnapuri, P.S.- Shrikrishnapuri, District- Patna.
2. Baptist Church Trust Association, a Company Registered Under Indian Companies Act, Having Its Registered Office at 19e Rajniwas Marg, Civil Lines Delhi- 54, Through Its Secretary, D.B. Ghosh.
3. Rev. Moses Victor Thomas Chairman and At Present Priest In-Charge, Baptist Union Church, Bakerganj, P.S. Pirbahore, District- Patna.
4. Mani Nath Browne Son of Late C.W. Browne Secretary Baptist Union Chuech, Resident at- Bandrghat, P.S. Alamganj, District Patna..... **Respondents.**

=====

Appearance :

For the Petitioner :Mr. K.N. Choubey, Sr. Adv. with Mr.Prityush Kumar Lal, Adv.
For the Respondent/s :Mr. Rajendra Narayan, Sr. Adv, Rakesh Kumar Samarendra, Adv, Manager Sah, Adv Sanjay Kumar.

=====

CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT
Date: 06-10-2015

Heard Mr. K.N. Choubey, learned senior counsel appearing on behalf of the petitioner and Mr. Rajendra Narayan, learned senior counsel appearing on behalf of the respondent no.1 as well as learned counsel for the respondent no.2. With the consent of the parties, this writ application has been heard at length on merits at this stage itself and is being disposed of by this judgment and order.



From the records, it transpires that out of the batch of three writ applications viz C.W.J.C. No. 10417 of 2012, C.W.J.C. No. 1261 of 2013 and C.W.J.C. No. 18596 of 2012, only this writ application (C.W.J.C. No. 18596 of 2012) is surviving as the other two writ applications have been dismissed as withdrawn. The present petitioner was, however, also one of the petitioners in C.W.J.C. No. 10417 of 2012.

The petitioner is grieved by the order dated 07.09.2012 passed in Misc. Case No. 19 of 2012 arising out of the Execution Case No. 41 of 2011 whereby the learned court below has dismissed the petition filed by the petitioner along with the two more persons under Section 47 of the Code of Civil Procedure praying for setting aside the award under execution in Execution Case No. 41 of 2011.

The present application has been filed under Article 226 and 227 of the Constitution of India and the preliminary objection has been raised by the learned senior counsel for the respondent no. 1 regarding the maintainability of this application under Article 226 of the Constitution of India putting emphasis on the relief prayed in the present application and also the status of the parties impleaded as respondents herein. The reliefs sought by the petitioner in the present application have been specifically mentioned in paragraph 3 as

follows:-

(a) *Issuance of writ in the nature of certiorari quashing the order dated 07.09.2012 passed by the Sub Judge-1, Patna in Misc. Case No. 19 of 2012 in course of Execution Case No. 41 of 2011 as contained in Annexure-1.*

(b) *Issuance of a writ in the nature of mandamus directing the learned Sub Judge-1, Patna to hear the petition filed by the petitioner under Section 47 of the Code in accordance with law and pass appropriate orders on consideration of the submissions made therein and in the meantime issue an appropriate direction restraining the learned court below from delivering possession of the trust properties which is subject matter of the award in Execution Case No. 41 of 2011 which is pending under Section 36 of the Arbitration Act.*

(c) *Any other writ/writs for granting any other relief/reliefs as your lordship may deem fit in proper in the facts and circumstances of the*

case.

It is now well settled that a writ petition under Article 226 of the Constitution of India is a remedy in public law mainly against a state or its instrumentalities or the government and governmental agencies. As a corollary thereof, all the respondents in a writ petition cannot be private persons. From the averments in the writ application and the reliefs sought therein it is transparent that the primal issue pertains to a dispute relating to title and possession over immovable property and all the respondents are private persons not discharging any public duty. On behalf of the petitioner, during the course of submission, it could not be shown that the averments made in the writ application and the reliefs therein in any manner justify invoking of extraordinary jurisdiction under Article 226. Moreover, recently a three Judge Bench of the Apex Court in ***Radhey Shyam Vs. Chhabi Nath 2015 (3) Scale 88*** has overruled the observations in ***Surya Dev Rai Vs. Ram Chander Rai 2003 (6) SCC 675*** that the distinction between the jurisdiction under Article 226 and 227 stood almost at all obliterated, and has ruled as follows:-

*“23. Thus, we are of the view that
judicial orders of civil courts are not
amenable to a writ of certiorari under
Article 226. We are also in agreement*

with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226....”

In view of the aforesaid dictum and in view of the fact that the relief in the present application has been sought against judicial order passed by the civil court, this Court comes to the conclusion that the present application can be accepted only as an application under Article 227 of the Constitution of India invoking supervisory jurisdiction of this Court and not under Article 226 of the Constitution of India invoking extraordinary writ jurisdiction of this Court. This Court, therefore, proceeds accordingly to adjudicate upon the grievances of the petitioner.

The relevant factual matrix, as apparent from the pleadings of the parties and their rival submissions, disclose that the respondent no. 2 Baptist Church Trust Association (hereinafter referred to as ‘B.C.T.A.’) had entered into a registered development agreement on 18.10.1995 with respondent no. 1 A.B.M. developers for land admeasuring 43 katha 7 dhur of plot nos. 866 and 261. However, as B.C.T.A. subsequently revoked the said development



agreement, the respondent no. 1 A.B.M. developers filed Request Case No. 22 of 2002 before the High Court for appointment of arbitrator in pursuance to the arbitration clause in the development agreement. By order dated 07.05.2004, this Court appointed an arbitrator who after hearing the parties had passed the award on 03.07.2007 upholding the validity of the development agreement and declaring that the B.C.T.A. was under legal obligation to act in accordance with the terms of the said agreement for the development of the land subject matter of the agreement.

The B.C.T.A. took recourse to Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter for brevity referred to as 'Act 1996') by filing application for setting aside the above said arbitral award. The Misc. Case No. 20 of 2007, instituted thereupon, however, was dismissed after contest by order dated 07.09.2011. The respondent no. 1 A.B.M. developers thereafter has filed the Execution Case No. 41 of 2011 before the Sub Judge-1 praying for enforcement of the award as envisaged under Section 36 of the Act 1996.

The present petitioner along with the two persons namely Rev. Moses Victor Thomas and Mani Nath Browne filed a petition under Section 47 C.P.C. in the above Execution Case No. 41 of 2011 and the Misc. Case No. 19 of 2012 was instituted thereupon. In the said petition, after tracing the history of the ownership of the



property in question which has been the subject matter of the development agreement between the B.C.T.A. and respondent no. 1 and affirmed by the award, it was mainly alleged that the B.C.T.A. had no power to sell, lease and alienate the said property in any manner including by way of development agreement. It was further alleged that the B.C.T.A. had fraudulently executed the development agreement in favour of the respondent no. 1 in clandestine manner and the award had also been obtained collusively by B.C.T.A. and the respondent no. 1. It was finally alleged that the award under execution had been obtained by fraud and collusion and was thus a nullity and upon these premises the prayer was made that the award under execution in Execution Case No. 41 of 2011 be set aside. By the impugned order, the learned court below, after hearing the parties, has dismissed the Misc. Case No. 19 of 2012.

From the perusal of the impugned order, it clearly transpires that the learned court below after considering the various provisions of the Act 1996 including its spirit, ambit and purpose has come to the conclusion that such objection to the award, at the stage of its enforcement by way of execution, is not permissible in law. Declining to entertain objection as raised by the petitioner, the learned court below has also held that the award is inherently enforceable in view of the provision of the Act 1996.



Mr. Choubey, the learned senior counsel for the petitioner, in his pyramidal submissions, has dwelt at length upon the evolution of the Baptist cult, establishment of Baptist Missionary Society (B.M.S.) for preaching and spreading the religion, the acquisition of the property by the said Society for developing infrastructure for the purpose of promotion of religion, charity and education and finally the constitution of Baptist Church Trust Association (B.C.T.A.) as a company for the purpose of management and protection of the properties of the B.M.S. The converging point of the submissions, however, has been that the B.C.T.A. has the status of being a trustee or agent of the B.M.S. and has/had no power or jurisdiction to sell or alienate or create any third party right and interest in the property of the B.M.S. and any such alienation or creation of 3rd party interest in the property of the B.M.S. by the B.C.T.A. is fettered by fraud on its power and in violation of its duties being in a fiduciary character. It has been propounded therefore that any such transaction by the B.C.T.A. including the development agreement in favour of the respondent no. 1 being vitiated by fraud is consequently a nullity in the eye of law. Bolstering his submission, the learned senior counsel has commended this Court to several decisions including the decision in the case of *A.V. Pappaiya Shastri Vs. Government of A.P. 2007 (2) P.L.J.R. S.C. 201* laying down the



principle that fraud avoids all solemn acts, and a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and nonest in the eye of law and can be questioned on this basis even in a collateral proceedings. Mr. Choubey has also pointed out that the non Baptists, after sneaking into the management of the company (B.C.T.A.), have been doing acts of plunder of the properties of the B.M.S., and has made particular reference to the orders passed by the Apex Court accepting the report of Justice R.N. Datta and issuing directions on that basis, the injunction order passed by the Delhi High Court with regard to the properties of the Baptist including the property in question and also to the directions issued by this Court in C.W.J.C. No. 3048 of 2006. The learned senior counsel has also emphasized that the power of this Court to pass order in the interest of justice is not restricted by the technicalities of law and in view of the act of patent fraud apparent from the materials on record, the interference by this Court in the impugned order is imperative in law.

Contesting the submissions on behalf of the petitioner, Mr. Rajendra Narayan, the learned senior counsel for the respondent no. 1, has candidly submitted that the parameters of the supervisory jurisdiction of this Court under Article 227 is now well settled, and in any view of the matter, the allegation of fraud in transactions relating



to immovable property is a disputed question of fact and beyond the domain of the jurisdiction of this Court under Article 227 of the Constitution of India. It has been further canvassed that the submissions on behalf of the petitioner have been based upon misconception of the distinction between a proceeding in a public fora under the established judicial system and the proceeding before a private fora like arbitration which is now governed by the provisions of the Act 1996. It has been contended that from the statement of objects and reasons of the Act 1996, the intention of the legislature to minimize the supervisory role of courts in the arbitral process and encourage resolution of dispute by alternative mode by providing fair and efficient and elaborate procedure is manifest. It has, thus, been argued that the learned court below after taking notice of the various provisions of the Act 1996 has rightly declined to entertain the objection raised by the petitioner. Placing the averments made in the pleadings and Annexures thereto, it has been submitted that the petitioner and some of his associates are in the habits of raising objection with malafide intention to disrupt the smooth management of the property and the function of B.C.T.A. and have so far remained unsuccessful. The learned senior counsel has also pointed out that the petitioner had earlier also unsuccessfully raised the question of validity of another transaction of the property (the present property in



dispute being part of the same block of land) by B.C.T.A. by filing writ application and thereafter title suits. It has, however, been submitted that at present also the T.S. No. 520 of 2007 has been filed challenging the development agreement dated 18.10.1995 and also the order under Section 34 of the Act 1996 rejecting the prayer for setting aside the award as made by B.C.T.A. It has been finally submitted that the impugned order has been passed under the scheme of the Act 1996 and there is no error of jurisdiction, illegality or material irregularity committed by the learned court below in rejecting the objection raised by the petitioner in the execution case.

The learned counsel for the respondent no. 2 B.C.T.A. has also contested the claim and relief sought for by the petitioner by questioning the right, title and interest of the petitioner in the property in question. By and large the submission on behalf of the respondent no. 2 B.C.T.A. has followed the line adopted on behalf of the respondent no. 1.

It is manifest from the pleadings and submissions on behalf of the parties that the respondent no. 2 B.C.T.A. has executed a registered deed of development agreement dated 18.10.1995 for the land in question in favour of the respondent no. 1. The dispute arose between the respondent no. 1 and respondent no. 2 after the revocation of the development agreement by the respondent no. 2, and



as the agreement contained an arbitration clause, a Request Case No. 22 of 2002 was filed by the respondent no. 1 under Section 11 of the Act 1996 before this Court. It is also apparent from the averments made in the counter affidavit and Annexure R/10 thereto that Smt. Ruby John wife of the petitioner along with the five other persons filed a petition for impleading them as respondents in Request No. 22 of 2002 but the same was turned down and eventually this Court allowed the request case and appointed the arbitrator. In accordance with the provisions of the Act 1996, the award has been passed on 03.07.2007 upholding the development agreement and discarding the revocation of the said agreement by the respondent no. 2 B.C.T.A. The award has further declared the entitlement of the respondent no. 1 for development of the land in accordance with the agreement. It also appears from the records that the respondent no. 2 B.C.T.A. filed the petition under Section 34 of the Act 1996 praying for setting aside the award but after hearing the parties, the learned court below dismissed the said objection on 07.09.2011. The respondent no. 1 thereafter has filed Execution Case No. 41 of 2011 before the learned court below for enforcement of the award under Section 36 of the Act 1996. At this juncture, the petitioner filed objection under Section 47 of the Civil Procedure Code, instituted as Misc. Case No. 19 of 2012, praying for setting aside the award on the ground that the respondent



no.2 B.C.T.A. had fraudulently and collusively executed the development agreement with regard to the property of the Baptist Missionary Society and therefore the sale was a nullity and consequently the award upholding the said development agreement is also a nullity. The submission on behalf of the petitioner is that the power of a court is referable to the actual power and mention of a particular provision in the petition would not restrict the executing court from exercising its jurisdiction in the interest of justice under the other provisions including Order 21 Rule 97, 99(2) and 101 C.P.C but in the present case, the learned court below has committed error of jurisdiction in dismissing the petition filed by the petitioner on the ground that such objection is not permissible in law.

There is no dispute on the above proposition of law that the power of the court is referable to its actual power but in view of the conclusion by learned court as apparent from the impugned order that no objection to the executability of the award, by taking recourse to the provisions of the Civil Procedure Code can be raised, it would be seemly to examine whether the proceeding under Section 36 of the Act , 1996 for enforcement of the award is proprio vigore a proceeding under the Code of Civil Procedure so as to attract the general law procedure including the provisions under Section 47 or under Order 21 Rule 97 to 101 C.P.C.



Before coming into force of the Act, 1996, the law relating to domestic arbitration was contained in the Arbitration Act, 1940. Section 14 of this Act provided for making of award and filing the said award in court and Section 17 provided the power of the court either to set aside the award or to pronounce judgment according to award and after the judgment so pronounced a decree was to follow. Section 41 of the said Act dealt with the procedure and power of the court and made the provisions of Civil Procedure Code to be applicable to all proceedings before the court and to all appeals under the said Act. By the said Act the provisions contained in Section (a) to (f) of section 104 of the Civil Procedure Code, dealing with arbitration proceeding, were also deleted. The present Act 1996 has repealed and replaced the Arbitration Act , 1940 and Section 5 of this Act, 1996 has clearly barred judicial intervention except as provided in its Part-I. Further Section 19 has explicitly enshrined that the arbitral tribunal shall not be bound by the Code of Civil Procedure. There is thus noticeable departure in the Act, 1996 to the applicability of the Civil Procedure Code in arbitration proceeding which was earlier there by virtue of Section 41 of the Arbitration Act, 1940. After providing for termination of the arbitral proceeding in Section 32, the provision for setting aside the award has been made under Section 34 of the Act, 1996 and thereafter the finality to the arbitral



award has been attached in Section 35. The procedure for enforcement of an arbitral award has been envisaged under Section 36 of the Act, 1996 which provides that “the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court”.

It is thus clear that it is only for the limited purpose of its enforcement that a deeming fiction has been created by the words “as if it were a decree by the court”. The extent of this deeming fiction came up for consideration before the apex court in the case of ***Paramjeet Singh Patheja Vs. ICDS Ltd. , (2006) 13 SCC 322*** wherein it has been ruled as follows:

21. The words ‘Court’ , ‘adjudication’ and ‘suit’ conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaintiff and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, arbitration is not adjudication and, therefore, an award is not a decree.

23. The words ‘decision’ and ‘Civil Court’ unambiguously rule out an award by arbitrators.

28. It is settled by decisions of this Court that the

43. For the foregoing discussions we hold:

(ii) $x x$

(iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression “decree” in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and hold that there are essential conditions for a “decree”:

(b) That the suit must start with a plaint and

culminate in a decree, and

(c) That the adjudication must be formal and final and must be given by a civil or revenue court.

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a “decree” for the purpose of Section 9(2) of the Insolvency Act.

(vi) x.

(vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted.

.....

(viii) x.

The aforesaid dictum is further reinforced by a later decision of the apex court in ***Fuerst Day Lawson Ltd Vs Jindal Exports Ltd., 2011(8) SCC 333*** where primal issue for consideration

was as to whether the provisions of the Act 1996 constituted a complete Code for matters arising out of an arbitration proceeding, the making of award and the enforcement of award and all other jurisdictions including the letters patent jurisdiction of the High Court stood excluded. It has been laid down as follows.

“...89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act 1996, which consolidates, amends, and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it “ a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are

not permissible to be done”. In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded...”

(emphasis supplied)

The inevitable conclusion which follows in view of the aforesaid authoritative enunciations of law is that a proceeding before the civil court under Section 36 of the Act 1996 for the enforcement of an arbitral award is a proceeding under the said Act and not a proceeding under the Civil Procedure Code. As a necessary corollary, the resort to the provisions of the Civil Procedure Code for raising objections having the propensity to annihilate the award, which has been brought before the civil court only for the purpose of enforcement, is clearly excluded. The main submission on behalf of the petitioner that the civil court, at the stage of enforcement of the award, can invoke its jurisdiction, inherent or otherwise provided in the Civil Procedure Code and exercisable in the proceeding for execution of a decree, to examine the legality and validity of the award, is therefore held to be not tenable. A new avenue dehors the provisions of Act, 1996 to challenge the award cannot be permitted at



the stage of its enforcement before the civil court in view of the express exclusion of judicial intervention under general law procedure as envisaged in Section 5 of the Act, 1996. This Court therefore, comes to the conclusion that the provisions of Section 47 or Order 21 Rule 97 to 101 C.P.C. have no application to a proceeding under Section 36 of the Act, 1996 instituted for enforcement of an arbitral award. The learned court below has correctly appreciated the law in this regard and has committed no error in declining the prayer of the petitioner and dismissing the Miscellaneous Case No.19 /2012.

The learned senior counsel for the parties, have argued at length on the legality and propriety of the transactions of land made by B.C.T.A., and also the award passed on the basis of the registered development agreement executed by B.C.T.A. in favour of the respondent no.1. However, in the aforesaid view of the matter that the prayer to annul the award raised at the stage of its enforcement under Section 36 of the Act, 1996 under the provisions of Civil Procedure Code cannot be entertained by the court, this Court refrains from proceeding to express opinion on this controversy. It is pertinent to notice here that in the supplementary affidavit filed on 06.11.2012, the petitioner has stated in paragraph-4 that the T.S.No.520/2006 pending in the court of Sub Judge, Patna, challenging the award has been filed by the Baptist Congregation including the petitioner who is one of the

plaintiffs therein. Manifestly, therefore, the petitioner has already taken recourse to the legal remedy available to him in accordance with law against the award in question.

For the aforesaid reasons and discussions, the present writ application under Article 227 of the Constitution of India is dismissed. However, it is observed that this Court has not gone into the merits of the claim of the petitioner, and the right of the petitioner for redressal of his grievances in accordance with law shall not be prejudiced by this judgment and order.

(V. Nath, J.)

Devendra/Nitesh

U			
---	--	--	--