

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.21086 of 2013**

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1. Rajesh Upadhyay Son Of Late Bhukhal Upadhyay Resident Of Mohalla:- Gopeshwar Nagar, P.O.:- Chapra, P.S.:- Bhawan Bazar, District- Saran
  2. Neela Kamal Devi Daughter Of Late Bhukhal Upadhyay Resident Of Mohalla:- Gopeshwar Nagar, P.O.:- Chapra, P.S.:- Bhawan Bazar, District- Saran

.... .... Petitioners

Versus

1. The State Of Bihar, Through The Executive Engineer, R.E.O. Works Division, Chapra, P.O.:- Chapra, P.S.:- Chapra Town, District- Saran
2. The Executive Engineer, R.E.O. Works Division, Chapra
3. The Director Primary Education Department, Bihar, Patna
4. The District Education Officer, Nalanda, District- Nalanda
5. The Staff Selection Commission, Bihar, Patna Through Its Chairman

.... .... Respondents

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**Appearance :**

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| For the Petitioners | : | Mr. Mahesh Narayan Parbat, Sr. Advocate<br>Mr. Sanjay Kumar Jha, Advocate<br>Mr. Praveen Prabhat, Advocate |
| For the Respondents | : | Mr. S.Raza Ahmad, Sr. Advocate<br>Mr. Anisul Haque, AC to AAG-5.                                           |

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**CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR**  
**ORAL ORDER**

11    07-03-2018                      This application has been filed to quash the order dated 02.04.2012 passed by Sub Judge-Ist, Chapra in Miscellaneous Case No.14 of 2001 whereby and whereunder the learned Sub Judge allowed the miscellaneous case and dismissed the Execution Case No.10 of 2000 as not maintainable.

2. Heard learned counsel for the petitioners and the respondents.

3.     The father of these petitioners had filed Miscellaneous Case No.25 of 1992 for appointment of arbitrator for resolving the dispute arising out of Contract Agreement No.69-



F2/78-79 between the father of the petitioners and the respondents. The said contract was entered into by the parties for construction of Ministerial and Officers Quarters at Chapra. The original applicant, i.e., the father of these petitioners completed the work within the extended time to the satisfaction of the respondent. On account of differences between the parties as regards loss caused to the father of the petitioners to the tune of Rs.1,01,000/-, an arbitrator was appointment. In the said Miscellaneous Case No.25 of 1992 the respondents filed objection on various grounds but they accepted that the work was completed by the father of these petitioners (Bhukhal Upadhyay). The respondents further asserted that payment of bills were made to the contractor after proper examination and verification of the work completed by him. The petitioner has further stated that a Miscellaneous Case No.19 of 1983 was filed earlier by their father for appointment of arbitrator and after completing arbitration proceeding the arbitrator (Superintending Engineer) filed an award in the court which was accepted and the case was disposed of on 12.11.1984. The petitioner has further stated that in the said case one Chandrama Prasad Sah was appointed as arbitrator by the learned court below who after issuing notice to the parties and inviting objections heard the matter and gave an award dated 30.07.1995 in favour of the father of the petitioners. The respondents challenged the



appointment of Sri Chandrama Prasad Sah by filing Civil Revision No.1790 of 1993 which was dismissed. After submission of award, the respondents filed objection on 28.08.1995 under Sections 30 and 33 of the Arbitration Act for setting aside the award on the ground that the contract agreement no.69 F2/78-79 was not in existence. The amount under the said agreement was already settled and paid to the contractor in full and final on 25.03.1981 and so the order of reference dated 09.06.1993 was against the provision of law due to non-fulfilment of requirement of Section 20 of the Arbitration Act.

4. The learned court below after considering the entire objections of respondents rejected the petition dated 28.08.1995 filed under Sections 30 and 33 of Arbitration Act as per order dated 11.04.2000 and award was made rule of the Court. The respondents filed MA No.85 of 2001 before this Court against the said order which was also dismissed on 03.03.2003. After disposal of objection, the petitioners being heirs of their father filed Execution Case No.10 of 2000 for execution of said award. The respondents filed objection under Section 47 and 151 of the CPC on 12.07.2001 for dismissing the Execution Case alleging that the petitioners were not entitled to proceed with the execution case on the grounds that the heirs of Bhukhal Upadhyay are entitled to proceed with execution case without any succession certificate.



The father of the petitioners had already received payment in pursuance of award passed in Miscellaneous Case No.19 of 1983. The respondents further challenged the jurisdiction of the executing Court. The petitioners filed rejoinder against the said petition which after hearing was allowed and the execution case of these petitioners was dismissed.

5. The learned counsel for the petitioner submits that the impugned order dismissing the Execution Case is illegal and without jurisdiction. The objections raised by the respondents in miscellaneous were already decided by the learned court below at the time of making the award as rule of the Court and so the present application filed by respondents challenging the award in the execution proceeding was not maintainable. The court below has further committed error in not holding with the present miscellaneous case was barred by principle of resjudicata and also bad for defect of parties as the Superintending Engineer against whom award was granted has not been made party to the proceeding. The learned counsel for the respondents on the other hand submitted that award was fraudulently obtained by the father of the petitioners and so execution case is not maintainable. The contract agreement no.F2-62/78-79 relate to construction of Hilsar Bhikhanpur link road under REO of Siwan Sub-division. The father of the petitioners by



committing fraud and forgery has obtained the award and so the court below has rightly dismissed the execution case as not maintainable.

6. The contention of learned counsel for the petitioners is that the executing court has/had no jurisdiction to entertain the objection as regards executability of the award on the ground of fraud under the provision of Section 47 of the CPC. The only remedy for the respondents is to file a regular suit for setting aside the award.

7. On perusal of Annexures-7 of supplementary affidavit filed by the petitioner no.1 on 21.11.2017, I find that the father of these petitioners filed Miscellaneous Case No.25 of 1992 and at para-2 of the application, he had stated as follows:-

“That due to certain unavoidable circumstances the executors of contract agreement no.69F 2/78-79 authorised the petitioner by registered Mokhtarnama dated 09.02.1979 to execute the works agreed between at his own expenses, to sign all relevant papers and get payments as and when billed and passed for payments by defendants.”

8. The respondents filed objection to the said application which has been filed by the petitioner as Annexue-8 wherein the respondents has admitted the fact mentioned in para-2 of Miscellaneous Case No.25 of 1992. The arbitrator after examining the entire facts has allowed the award against which the respondents filed objection under Section 30 and 33 of Arbitration Act. The learned Sub Judge as per order dated 11.04.2000 has



rejected the objection filed by the respondents and the award was made rule of the Court. The respondents have not challenged the said order before any higher authority and so it has become final. The respondents for the first time filed a petition under Section 47 read with 151 of the CPC alleging that the said award was passed on the basis of forged fabricated contract agreement. This objection which has been raised for the first time is beyond the scope of Section 47 or 151 of the CPC as the remedy for setting aside the award on the ground of fraud is to file a suit for declaration.

9. In view of the above facts, the impugned order dismissing the execution case of these petitioners is set aside and this application is allowed.

**(Sanjay Kumar, J)**

B.Kr./-

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