

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.509 of 2020

1. Rajiv Kumar Agrawal Son of Late Arvind Kumar Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
2. Anjani Kumar Agrawal S/o Rajiv Kumar Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.

... .. Petitioner/s

Versus

1. Jitendra Narayan Agrawal Son of Rabindra Narayan Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
2. Meenakshi Kumari D/o Ravindra Narayan Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
3. Abha Rani W/o Rabindra Nr. Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
4. Smt Indira Rani D/o Late Bishundeo Narayan Agrawal and Wife of Rai Abhay Krishna Resident of Anand Bagh, Patna City, Patna.
5. Dr. Sanjiv Kumar Agrawal Son of Late Arvind Kumar Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
6. Mirdula Rani D/o Late Arvind Narayan Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
7. Narayan Saw Son of Late Nathuni Sah Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
8. Bijay Kumar Son of Narayan Sao Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
9. Ajay Kumar Son of Narayan Sao Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
10. Raj Kumar Son of Narayan Sao Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
11. Manoj Kumar Son of Narayan Sao Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
12. Sunil Kumar Son of Narayan Sao Resident of Mauza Begusarai, P.O., P.S. and Dist. Begusarai.
13. Raj Kumari Sharma W/o Sri Gopal Sharma Resident of Mannu Chati Road, Begusarai, Perganna Milki, P.O., P.S. and District Begusarai.
14. Divya Rani D/o Late Rabindra Narayan Agrawal Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
15. Srinath Narain S/o Jitendra Narain Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.
16. Aishani Narain D/o Jitendra Narayan Resident of Mohalla Mungeriganj, P.S. Town, P.O. and District Begusarai.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Sanjeev Ranjan
For the Respondent/s	:	Mr. P.N.Shahi, Sr. Adv
		Mr.Patanjali Rishi
		Ms. Prerna Rishi
For Respondent no.2		Mr Anshuman Singh
		Ms. Menakshi Kumari



**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV JUDGMENT

Date : - 14-12-2021

I have already heard the learned counsel for the petitioner as well as learned counsel for respondent nos. 1 and 2.

This civil miscellaneous application has been preferred by the petitioners/plaintiffs being aggrieved by the order dated 11.12.2019, passed by the learned Sub Judge-I, Begusarai in Title Suit No.188 of 1997 (Reg.No.71 of 2015), whereby the learned Sub Judge excluded the Schedule-III properties from the above-mentioned title partition suit.

The brief facts of the case is that the plaintiffs/petitioners filed Title Suit No. 188 of 1997 for seeking partition of the joint family properties set forth in Schedules-II, III, and IV appended in the plaint, and for carving out a separate *takhta* to the extent of 1/6th share in Schedule-II properties, 25% share in Schedule-III and 1/3rd share in Schedule-IV properties in favour of the petitioners/plaintiffs by appointing a survey knowing pleader commissioner. Admittedly, Schedule-III property is exclusive property of Late Bishundev Narain Agrawal, whose lineal descendants are plaintiffs and the defendants. Late Bishundev Narain Agrawal had two sons, namely, Late Rabindra Narayan



Agrawal and Late Arbind Kumar Agrawal and a daughter Indira Rani. Rabindra Narayan Agrawal had one son, namely, Jitendra Narayan Agrawal (respondent no.1) and two daughters, namely, Divya Rani and Menakshi. The other branch Arbind Kumar Agrawal is survived by the plaintiff his brother Dr. Sanjeev Agrawal and sister Mridula Rani.

It is the case of the petitioners that the partition shown with respect to the title Suit No. 60 of 1966 amongst the family members was only concerned with the shops and houses made for specific purposes. The joint family agriculture land and other properties acquired in the name of individuals of the family and forming nucleus are yet to be partitioned. Further Case of the plaintiffs/petitioners is that any private partition shown between Bishundev Narain Agrawal and his two sons is fictitious in nature and collusively created for the purpose of Ceiling income Tax or Wealth & estate duty too. Late Bishundev Narain Agrawal during his lifetime with the help of joint family business and ancestral properties added considerable movable and immovable properties and he created a Will cum Trust for some of the joint family properties. He appointed father of respondent no.1, namely, Late Rabindra Narayan Agrawal and father of petitioner no.1 Late Arbind Kumar Agrawal, executors



of the Will with solemn responsibilities to hand over certain amounts indicated in the Will to different beneficiaries and all other properties to be passed on amongst members of the joint family as joint family properties. One of the stipulations in the Will/Trust was that the Trust cum Will will not be determined for a period of 20 years from the death of the testator.

Further case of the petitioners/plaintiffs is that the plaintiffs/petitioners have filed Title Suit No. 173 of 2012, wherein the relief sought for is that defendant no.1 Late Rabindra Narayan Agrawal had illegally determined the Will/Trust as an executor which power was exercised illegally and unlawfully as the executor has no authority to determine the Will and further relief is for rendition of accounts during the period where the executor had administered the property having large incomes from rental and agriculture.

It is pertinent to mention that the Will/Trust deed contain an arbitral clause.

I have gone through the materials available with the record, including the impugned order dated 11.12.2019, whereby the learned court below has excluded Schedule-III properties from the Title Suit No. 188 of 1997. The learned trial court has based his order on two grounds. The first ground is



that on earlier occasion his predecessor passed an order dated 21.05.1999, whereby the predecessor had removed schedule-III properties from this Title Suit No. 188 of 1997. For the sake of convenience, paragraph 4 of the impugned order is being quoted which is as follows:-

“On 21/05/99 by an unassailed order that has now attained finality the admittedly exclusive properties of late Bishundev Narain Agrawal were ordered to be removed from this partition suit 188/97. This order has remained unassailed and attained finality.”

The copy of the order dated 21.05.1999 passed by his predecessor is also annexed with the record as Annexure-6 at page 48. From perusal of the order dated 21.05.1999, it is evident that the properties in Schedule-III were not excluded. Vide that order, two petitions dated 24.07.1998; one filed on behalf of respondent no.4 and the second filed on behalf of respondent no.1 were disposed of. Respondent no.4 as well as respondent no.1 both filed two separate petitions on the same date i.e. 24.07.1998 for the stay of the further proceeding of the Title Suit No. 188 of 1997 under the provisions of Section 34 of the Indian Arbitration Act, 1940. The learned court below, after considering the provisions of Section 34 of 1940 Act and Section 8 of the Arbitration and Conciliation Act, 1996, refused



to stay the further proceedings of the case and while refusing the stay, the learned court below has been pleased to observe as follows:-

“Thus from this stipulation made in the Will aforesaid it is very much evident that the properties described in Schedule-III of the plaint is not a subject-matter of partition through the present litigation. Rather it should be referred to for arbitration. But no one has, up till now, prayed for reference of the dispute to the arbitration. Rather, the present petitions have been filed praying therein to stay the proceeding of the present suit, without making any prayer to refer to matter to arbitration, under provisions contained in section-8 of the Indian Arbitration Act of 1996, the further proceeding of the case can not be stayed on the ground that there is an arbitration clause with regard to the some properties in dispute in this case. As such both the petitions under consideration are rejected.”

The said portion of the order dated 21.05.1999 itself shows that since none of the parties made prayer to refer the matter to the arbitration, as such, the learned court below refrained from referring it for the arbitration.

The learned counsel for the petitioners has submitted that the matter could not be referred for arbitration, despite the Trust



cum Will deed having arbitral clause. The argument of learned counsel is that for referring the matter to the arbitration, “arbitration agreement” is essential within the meaning of Sections 2(1) (b) and 2(1) (h) read with Section 7 of the Arbitration and Conciliation Act, 1996. The Trust cum Will is neither signed by the trustee nor the beneficiaries. As such, the “arbitration agreement” cannot be said to be existed. He relied upon a judgment of the Hon’ble Supreme Court, reported in (2016) 8 SCC, 788 (*Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others*). Their Lordship in *Vimal Kishor Shah* (supra) observed as follows:-

“14. The basic question, which arises for consideration in this appeal, is whether a clause in a trust deed, which provides for resolving the disputes arising between the beneficiaries of the Trust through arbitration, can constitute an “arbitration agreement” within the meaning of Sections 2(1)(b) and 2 (1)(h) read with Section 7 of the Act and whether the application filed by the respondents under Section 11 of the Act can be held as maintainable?

15. Sections 2 (1) (b) and 2(1)(h) and Section 7 of the Act are relevant to examine the question involved in the case. These Sections read as under:



“2.Definitions.-(1)

(a) *

(b) **“arbitration agreement”** means an agreement referred to in section 7;

(h) **“party”** means a party to an arbitration agreement.

7. Arbitration agreement.-(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.



(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

Section 2(1)(b) defines "arbitration agreement" and stipulates that arbitration agreement means arbitration agreement referred to in Section 7 whereas Section 2(1) (h) defines the word "party" to mean a party to an arbitration agreement.

16. Section 7 defines “arbitration agreement”. It has five sub- sections:

16.1. Sub Section (1) provides that arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not.

16.2. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or it may be in the form of a separate agreement.

16.3 Sub-section (3) says that an arbitration agreement shall be in writing.

16.4. Sub- section (4) which has three clauses (a), (b) and (c) says that a document which contains an arbitration agreement is to be signed



by the parties. Clause (b) recognizes an arbitration agreement by exchange of letters, telex, telegrams or other means of telecommunication which provide a record of such agreement and clause (c) also recognizes an arbitration agreement by an exchange of statements of claim and defence in which existence of the agreement is alleged by one party and not denied by the other.

17. A reading of the aforementioned sections in juxtaposition goes to show that in order to constitute a valid, binding and enforceable arbitration agreement, the requirements contained in Section 7 have to be satisfied strictly. These requirements, apart from others, are:

(1) there has to be an agreement,

(2) it has to be in writing,

(3) parties must sign such agreement or in other words, the agreement must bear the signatures of the parties concerned and

(4) such agreement must contain an arbitration clause.

In other words, aforementioned four conditions are sine qua non for constituting a valid and enforceable arbitration agreement. Failure to satisfy any of the four conditions would render the arbitration agreement invalid and



unenforceable and, in consequence, would result in dismissal of the application filed under Section 11 of the Act at its threshold.”

Considering the law laid down by their Lordships in *Vimal Kishor Shah* (supra), which is identical to the present case in respect of non-existing of “arbitral agreement”, the matter cannot be referred for arbitration, despite existence of arbitral clause in the Trust cum Will deed and accordingly the properties in Schedule-III should not have been excluded from the suit.

In the case of *Booz Allen & Hamilton Inc.*, (2011) 5 SCC 532, the Hon’ble Supreme Court enumerated six types of cases which could not be referred to arbitration as these types of dispute are of the nature of non-arbitrable dispute. Paragraph 36 of that case is being referred which reads thus:-

“36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or



tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

In *Vimal Kishor Shah* (supra), 7th category was added. The cases relating to the trust deed under the Indian Trusts Act 1882 were also included. In paragraph no. 54 of *Vimal Kishor Shah* (supra, their Lordships has been pleased to observe as follows:-

“54. We thus add one more category of cases i.e. Category (vii), namely, cases arising out of trust deed and the Trusts Act, 1882, in the list of six categories of cases specified by this Court in para 36 at pp. 546-47 of the decision rendered in *Booz Allen & Hamilton Inc.* which as held above cannot be decided by the arbitrator(s).”

As such, the impugned order is bad in the eye of law on the two counts. First, in absence of “arbitral agreement”, the matter could not be referred to arbitration after removing the properties from Schedule-III in Title Suit No. 188 of 1997. Secondly, the nature of the case has been added as 7th category in *Vimal Kishor Shah* (supra) and has been declared as non-arbitrable dispute.

Learned counsel for the respondents has submitted that



the petitioner no.1 has himself admitted that he has filed a separate suit being Title Suit No. 173 of 2012 in respect of Schedule-III properties and in paragraph no.12 of of his plaint of Title Suit No. 173 of 2012, the plaintiff has stated that he is ready to delete the trust property from the suit being Title (Partition) Suit No.188 of 1997. Even if it is true that the petitioner no.1/plaintiff has expressed his readiness to delete the Schedule-III properties from Title Suit No. 188 of 1997, it does not mean that it should be deleted for referring it for the arbitration. That might be for consideration in Title Suit No.173 of 2012.

It may be the grievance of the respondents that the properties described in Schedule-III of Title Suit No. 188 of 1997 are directly and substantially involved in Title Suit No. 173 of 2012. In that situation, the court below, after taking the recourse of Section 10 of the Code of Civil Procedure, may stay the subsequent suit if it is satisfied that the ingredients of section 10 of the Code of Civil Procedure are fulfilled in all respects, but it does not mean that the Schedule-III properties should be removed from Title Suit No. 188 of 1997.

With these observations, the impugned order dated 11.12.2019 is set aside. Civil Miscellaneous application is



allowed.

The impugned order itself shows that on earlier occasion this Court has observed for expeditious disposal of the case, accordingly, the court below shall take every endeavour to dispose of the case as expeditiously as possible.

(Nawneet Kumar Pandey, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	25.11.2021
Uploading Date	16.12.2021
Transmission Date	

