

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.4 of 2022

1. Shakuntala Kumari Verma, Wife of Late Satyapal Verma @ Surendra Kumar Verma, resident of Gav Tal Akhara Road, Danapur, P.S. Danapur, District-Patna at present resident-Nakhaspind, P.O.-Begampur, P.S.-Malsalami, Patna City, Patna-9.
2. Sumit Kumar Verma, Son of Late Satyapal Verma @ Surendra Kumar Verma, resident of Gav Tal Akhara Road, Danapur, P.S. Danapur, District-Patna at present resident-Nakhaspind, P.O.-Begampur, P.S.-Malsalami, Patna City, Patna-9.
3. Amit Kumar Verma, Son of Late Satyapal Verma @ Surendra Kumar Verma, resident of Gav Tal Akhara Road, Danapur, P.S. Danapur, District-Patna at present resident-Nakhaspind, P.O.-Begampur, P.S.-Malsalami, Patna City, Patna-9.
4. Anu Verma, Daughter of Late Satyapal Verma @ Surendra Kumar Verma, resident of Gav Tal Akhara Road, Danapur, P.S. Danapur, District-Patna at present resident-Nakhaspind, P.O.-Begampur, P.S.-Malsalami, Patna City, Patna-9.

... .. Petitioner/s

Versus

1. M/s R.K. Narayan Construction a partnership firm having its office at 305 Tunna Palace, Ambedkar Path, Baily Road, P.O. B.V. College, P.S. Rupaspur, District-Patna through its partner Sri Jay Narayan Sinha, S/o Late Ram Pratap Singh, R/o Sheikhpur, Patna-14.
2. Jay Narayan Sinha, S/o Late Ram Pratap Singh, R/o Sheikhpur, Patna-14.
3. Ritesh Kumar, S/o Munshi Prasad, r/o Garbhachak, P.S. Hawai Adda, P.O. B.V. College, District-Patna.
4. Ashok Kumar, S/o Ram Jatan Singh, r/o Baruha, P.S. Gaurichok, P.O. (nipura khurd), District Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Advocate Mr. Manoj Kumar, Advocate
For the Respondent/s	:	Mr. K.N. Choubey Sr. Advocate Mr. Abhishek Kumar, Advocate Mr. Sanjay Kumar Verma, Advocate

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
ORAL JUDGMENT

Date : 15-03-2023

This application has been filed under Section 11(6) of
the Arbitration and Conciliation Act, 1996 ('Act' in short) for



appointment of an Arbitrator in terms of Clause-24 of the development agreement dated 27.02.2013, for resolution of the disputes between the parties arising out of the said agreement.

It is deemed fit and proper to extract Clause-24 of the said development agreement which reads as under:-

"यह कि किसी तरह का विवाद या मतभेद इस डेवलपर्स इस एग्रीमेन्ट के अनुसार विवाद लाभांश प्रतिशत के संबंध में निर्मित क्षेत्र के लिए भूस्वामी एवं विकासकर्ता के बीच में निष्पादित हुआ उसके लिए निष्पक्ष एवं स्वतंत्र पंच की नियुक्ति भारतीय आर्बीट्रेशन एक्ट 1940 तथा संशोधित नियम के तहत किया जायेगा।"

(underscored for emphasis)

Heard Mr. J.S. Arora, learned senior counsel appearing on behalf of the petitioners' and Mr. K.N Choubey learned senior counsel appearing on behalf of the respondents.

It is the petitioners' case that a land measuring 45 decimals situate at Mauza-Danapur, Shahjadpur, presently Sainik Colony, Danapur, appertaining to Tauzi No. Bihar Sarkar, Thana No. 21, Khata No. 780, Survey Plot No. 1092, was owned and possessed by their ancestors Jhapsi Mahto, who had two sons viz., Ram Swaroop Mahto and Chandeshwar Prasad Singh. Said Chandeshwar Prasad Singh had four sons Sri Surendra Kumar @ Satyapal Verma, Ashok Kumar, Satyendra Kumar @ Rajeev Ranjan and Ashwni Kumar.



Petitioner no. 1 is the widow of Late. Satyapal Verma whereas rest of the petitioners are their sons. It is the case of the petitioners that under a family arrangement, Late Satyapal Verma had acquired absolute right, title, interest and possession over the said land. One of the sons of Chandeshwar Prasad Singh namely, Rajiv Ranjan had filed a suit vide TPS No. 112 of 1986 against his father and others without impleading these petitioners or Late Satyapal Verma, as a party, and obtained a decree based on an alleged compromise dated 28.05.1987. When the petitioner no. 1 acquired knowledge, as regards the said decree, she filed miscellaneous case giving rise to Miscellaneous Case No. 4 of 2006, for setting aside the decree whereafter the decree passed in TPS No. 112 of 1986 was set aside and these petitioners were allowed to be impleaded as a party in the title suit.

As the petitioners intended to get the said 45 decimals of land developed, the opposite parties approached the petitioners to develop the said 45 decimals of land and accordingly, a registered development agreement was entered into between the petitioners and opposite parties on 27.02.2013, Clause-24 thereof contained the arbitration clause which has been extracted at the very outset in the present judgment.



It is further case of the petitioners that though they extended all support to the opposite parties, they practising fraud upon the petitioners by putting their false signatures, on the map plan presented before the Danapur Nizamat for sanction. An order of sanction of the map plan was thus fraudulently procured which fact they kept concealed from these petitioners. This prompted the petitioner no. 2 to file a complaint case being Complaint Case No. 384 of 2021 before the learned ACJM, Danapur in this regard, which is pending for inquiry under Section-203 of the Code of Criminal Procedure, 1973 against the opposite parties. The petitioners have alleged that the opposite parties are sitting idle and are not proceeding with the construction work causing great prejudice and huge financial loss to the petitioners. It has been asserted that the petitioners have been deprived of the possession of the developed area and built up area which was to be received by them as per the development agreement. The petitioners suffered huge loss because of the opposite parties neither completing nor developing the said land and despite repeated requests made to the opposites parties to pay the aforesaid amount of loss suffered by them and for cancellation of the development agreement mutually, the opposite parties



themselves started blackmailing the petitioners by demanding a sum of Rs. 1 Crore for execution of deed of cancellation of the development agreement. It is, accordingly, the case of the petitioners that serious disputes have arisen between the petitioners and opposite parties which are required to be resolved through arbitration, in terms of the arbitration agreement contained in Clause-24 of the development agreement.

It has further been stated that by invoking Clause-24 of the development agreement, the petitioners had given a legal notice to the opposite parties on 06.09.2021, for resolving the differences through Arbitration, disclosing the name of the proposed Arbitrator. The opposite parties responded to the said legal notice through their lawyer on 05.10.2021, alleging that the petitioners had not disclosed the fact regarding pendency of litigation being TPS No. 112 of 1986 at the time of execution of the development agreement though in fact those facts find mention in the development agreement itself. As the opposite parties are not ready to give consent to the proposed name of Arbitrator to arbitrate the existing dispute, Arbitrator may be appointed by this Court exercising jurisdiction under Section 11(6) of the Act, the petitioners have claimed.



A counter affidavit has been filed on behalf of opposite party no. 4, in which it has been stated that there is no denial to the development agreement dated 27.02.2013, which stipulated that the answering respondent was to construct apartments/buildings within a period of 36 months from the date of approval of the map with an extendable grace period of six months and the respondents had agreed to hand over the constructed area to the extent of 50% to the petitioners after completion of the construction and retain the remaining 50% of the developed portion. The respondents could not complete the work even after sanction of the map due to an injunction order passed by the competent court in respect of the said property in connection with Title Suit No. 112 of 1986. More than, 8 years after the execution of the agreement, the legal notice was issued to the respondents on 06.09.2021, with reference to the arbitration clause to the agreement, though no such notice was ever given earlier complaining non-discharge of their obligations under the agreement by the respondents. It has further been stated that Clause-24 of the development agreement, which contains the arbitration clause, refers only to the dispute arising between the parties in relation to percentage dividend in the constructed area of the project. Respondent no. 4



has disputed the assertion made in the present application that the map plan was got sanctioned by fraudulent means. It has been stated that the respondents could not proceed because of *status quo* order passed in Title Suit no. 112 of 1986, which is still pending.

A rejoinder has been filed on behalf of the petitioners to the said counter affidavit filed on behalf of respondent no. 4, in which it has been stated that the order of injunction was passed by the Civil Court on 29.07.2016, much after the period stipulated in the development agreement for completion of the apartments/buildings which expired prior to 26.05.2016. Further, the respondents were required to get the plan sanctioned in furtherance of the development agreement without any loss of time, but the respondents did not approach the petitioners for their approval and signatures on the map presented before the concerned authority for its sanction. The respondents were never interested to act in terms of the development agreement and only when it was revealed in 2021, that with a view to create some false evidences, the respondents with forged and fabricated signatures had presented the map before the concerned authority to fraudulently obtain sanction, the petitioners proceeded to take steps for resolution of the disputes



arising out of the said agreement because of non discharge of the obligations on the part of the respondents in terms of the development agreement.

Respondent no. 4 has replied to the rejoinder filed on behalf of the petitioners by filing a reply on 16.11.2022, wherein, it has been stated that the petitioners has made a false statement. Though it is true that the answering opposite party was aware of the TPS No. 112 of 1986 but was not aware of the dispute as regards share of the petitioners in the subjected property as was declared by the petitioners, in saying that Miscellaneous Case No. 04 of 2006 culminated in quashment of the order passed in title suit with confirming the share of these petitioners as was stated in the development agreement; factum of which was known to the answering respondents by way of surprise. It has also been stated that Clause-12 of the agreement speaks for completion of work and the handing over the owner's share was to take place within 36 months after sanctioning of map from any authorized institution. Since during the relevant period, the State Government in the Department of Urban Development and Housing Department had imposed ban on the sanction of the maps and cleared the decks for house map approval in the State Capital and its adjoining areas, only after



August-2015, therefore, the respondents could not get the map sanctioned. After lifting of the ban, process for sanctioning of the map was initiated which was sanctioned only on 06.06.2016. As per the agreement, the work was to be completed within three years of sanctioning of the map i.e. up to 05.06.2019 but during that period the order of injunction was passed in the suit on 29.07.2016 because of which the development of land and further construction could not be taken up. Therefore, according to respondent no. 4, there stood no dispute, rather situation, as such is of the own making of these petitioners.

Supplementary affidavit has been filed on behalf of the petitioners responding to the reply filed on behalf of the respondent no. 4. It has been asserted, as regards order of injunction passed in the Title Suit No. 112 of 1986, that respondent no. 4 did not take any step for seeking leave of the Court for getting the map plan sanctioned or the development of the project in terms of the development agreement in question which depicts lack of bonafide on the part of the respondents. It has also been stated that the order of injunction remained in force only for six months in the light of a Supreme Court's decision.

Mr. J.S. Arora, learned senior counsel appearing on



behalf of the petitioners has argued that since a dispute has arisen between the petitioners and the respondents arising out of the development agreement between them, a copy of which has been brought on record by way of Annexure-1 to this writ application, this Court, in the facts and circumstances, as disclosed in the pleadings should order for appointment of sole Arbitrator in exercise of powers conferred under Section 11(6) of the Act. He has further submitted that despite notice, the respondents have not agreed for appointment of Arbitrator which has given petitioners a cause of action of by approaching this Court invoking Clause-24 of the development agreement for appointment of an Arbitrator.

Mr. K.N. Choubey, learned senior counsel appearing on behalf of the respondents has on the other hand submitted that the dispute which is being raised by the petitioners is not covered by Clause-24 of the development agreement, which is arbitration clause. He has further submitted that only such dispute between the parties which is in relation to percentage dividend in the constructed area of the project is arbitrable under said clause. He has further submitted that the petitioners are attempting to bring such disputes into arbitration which are not covered by the arbitration clause. He has submitted that the



petitioners are complaining against the respondents that they have not developed the land, constructed the apartments and buildings in terms of the agreement, such such disputes are not covered by the Arbitration Clause-24 of the development agreement. He has submitted that till date there is no dispute as regards percentage of dividend in the constructed area of the project, between the parties, and therefore, this application deserves to be dismissed.

Mr. J.S. Arora, learned senior counsel appearing on behalf of the petitioners has responded to the submissions made by Mr. Choubey. He has submitted that the court while exercising power under Section-11(6) of the Act, is required to infer the intention of the parties, from the arbitration clause of the agreement for resolution of the dispute through the process of arbitration. He has submitted that it is clear from clause-24 of the development agreement that it stipulates that in the event of any dispute between them in respect of subject matter of the contract, such dispute shall be referred to arbitration. He has argued that the main objective of the development agreement was to develop the land by constructing apartments and buildings thereon by which builder (opposite parties) and apportionment of their respective shares by failing in their



obligation to construct the apartments, the respondents have denied the rights accrued to the petitioners of getting their shares after construction of the apartments and buildings and therefore the dispute which has been raised is covered by Clause-24 of the development agreement. He has relied upon Supreme Court's decision in the case of **Babanrao Rajaram Pund Vs. Samarth Builders and Developers, (AIR 2022 SC 4161)**. Reliance has also been placed on the Supreme Court's decision in the case of **Sanjiv Prakash Vs. Seema Kukreja and Others** reported in **(2021) 9 SCC 732** and in the case of **Duro Felguera Vs. Gangavaram Port Limited** reported in **(2017) 9 SCC 729**. He has submitted that the Courts need to see as to whether arbitration agreement exist or not. According to him, as the arbitration agreement exists in the present case, the Court should appoint an Arbitrator in exercise of jurisdiction under Section-11(6) of the Act.

After having perused the rival pleadings on record, and considering the rival submissions made on behalf of the parties, in my opinion, the only question which requires consideration in the present case is as to whether the nature of dispute raised by the petitioners in the present Request Case can be treated to be a dispute which the parties to the development agreement had



agreed to be resolved through the process of Arbitration. There is no gainsaying that exercising jurisdiction under Section-11(6) of the Act for appointment of an Arbitrator cannot travel beyond the scope of the arbitration clause which is Clause-24 of the development agreement in the present case.

I find force in the submission made by Mr. Choubey, learned senior counsel appearing on behalf of the respondents that the arbitration clause refers only to the disputes arising between the parties in relation to the percentage dividend in the constructed areas of the project. As on date there is no dispute between the parties, as regards, the percentage dividend in the constructed areas. Under the development agreement, the respondents are required to hand over constructed area to the extent of 50% to the petitioners after completion of the construction and retain remaining 50 per cent of the developed portion. It is amply clear from Clause-24 that dispute on the point of their respective shares in the constructed area was agreed upon to be arbitrable. Much emphasis has been given by Mr. J.S. Arora, learned senior counsel on the Supreme Court's decision in the case of **Babnrao Rajaram Pund (supra)**. In the said case, a question had arisen as to whether Clause-18 of the agreement in the said case constituted a valid arbitration



clause for the purpose of invoking powers conferred under Section-11(6) of the Act or not. Clause-18 of the agreement which was subject matter of discussion in the case of **Babanrao Rajaram Pund (supra)**, reads as under:-

"5. It is pertinent to mention at this juncture that Clause 18 of the development agreement, purported to be an "arbitration clause", reads as follows:

"18. All the disputes or differences arising between the parties hereto as to the interpretation of this Agreement or any covenants or conditions thereof or as to the rights, duties, or liabilities of any part hereunder or as to any act, matter, or thing arising out of or relating to or under this Agreement (even though the Agreement may have been terminated), the same shall be referred to arbitration of a sole arbitrator mutually appointed, failing which, two arbitrators, one to be appointed by each party to dispute or difference and these two Arbitrators will appoint a third Arbitrator and the Arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any re-enactment thereof."

The Supreme Court dealing with Clause-18 of the agreement, held in paragraph no. 23 as under:-

"24. We are, therefore, of the firm opinion that the High Court fell in error in holding that the appellant's application under Section 11 was not maintainable for want of a valid arbitration clause. We find that Clause 18 luminously discloses the intention and obligation of the parties to be bound by the decision of the tribunal, even though the words "final and binding" are not expressly incorporated therein. It can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the disputes to arbitration. In the absence of specific exclusion of any of the attributes of an arbitration agreement, the respondents' plea of non-existence of a valid arbitration clause, is seemingly an afterthought."

It is noteworthy that Mr. Arora has submitted that deficiency of words in agreement which otherwise fortifies the



intention of the parties to arbitrate their disputes cannot legitimize the annulment of Arbitration clause and this Court should adopt a pragmatic approach while interpreting or construing an arbitration agreement or arbitration clause. There cannot be quarrel with the legal principle underlying the submissions advanced by Mr. J.S. Arora to the aforesaid effect. However, the Court, exercising jurisdiction under Section-11(6) of the Act is firstly required to see the nature of dispute which the parties intended to resolve through the process of Arbitration. On reading of Clause-24 of the development agreement, in my view, it is manifest that the dispute in relation to the percentage dividend in the constructed area of the project, could only be referred for Arbitration in accordance with the arbitration agreement. Failure on the part of the builder to construct the apartments and buildings by developing the land in the facts and circumstances as noted above, in my opinion is not within the scope of Clause-24 of the development agreement.

Similarly, in the case of **Sanjiv Prakash (supra)**, the Arbitration clause of the agreement read as under:-

3.12. The arbitration clause was set out in Clause 16 which reads as follows:

“LEGAL DISPUTES

16.1. In the event of any dispute between the shareholders arising in connection with this agreement (a legal dispute), they shall use all reasonable endeavours to resolve the



matter on an amicable basis. If any Shareholder serves formal written notice on any other Shareholder that a legal dispute has arisen and the relevant shareholders are unable to resolve the dispute within a period of thirty (30) days from the service of such notice, then the dispute shall be referred to the Managing Director of the senior management company identified by Reuters as having responsibility for India (the Reuters Managing Director) and the Chairman of the Company. No recourse to arbitration under this agreement shall take place unless and until such procedure has been followed.

ARBITRATION

16.2. If the Reuters Managing Director and the Chairman of the Company shall have been unable to resolve any legal dispute referred to them under Clause 16.1 within thirty (30) days, that dispute shall, at the request of any Shareholder, be referred to and finally settled by arbitration under and in accordance with the Rules of the London Court of International Arbitration by one or more arbitrators appointed in accordance with those Rules. The place of arbitration shall be London and the terms of this Clause 16.2 shall be governed by and construed in accordance with English law. The language of the arbitration proceedings shall be English.”

As has been noted hereinabove, in my opinion, the nature of dispute, do not lie within the four walls of arbitrable disputes in terms of Clause-24 of the development agreement.

This application is accordingly dismissed.

(Chakradhari Sharan Singh, ACJ)

ranjan/-

AFR/NAFR	
CAV DATE	NA
Uploading Date	
Transmission Date	NA

