IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

ORIGINAL SIDE

RESERVED ON: 03.04.2025
DELIVERED ON: 10 .04.2025

PRESENT:

THE HON'BLE MR. JUSTICE GAURANG KANTH

W.P.O. 503 OF 2024

JAGAT SINGH MANOT

VERSUS

THE MUNICIPAL COMMISSIONER, KOLKATA MUNICIPAL CORPORATION AND ORS.

Appearance:-

Mr. Anujit Mookherjee, Adv.
Mr. Harsh Tiwari, Adv.
Mr. Aurin Chakraborty, Adv.
Mr. Bhupendra Gupta, Adv.
Mr. Anwar Hossain, Adv.

.....For the Petitioner

Mr. Arif Ali, Adv.
Mr. Sarban Bhattacharjee, Adv.

....................For the Respondent nos. 6&7

Mr. Gurudas Mitra, Adv.
Ms. Piyali Sengupta, Adv.

..........................For the KMC.

JUDGMENT

Gaurang Kanth, J.

1. The petitioner in the present writ petition is challenging the letter dated 22.04.2024 issued by the Respondent No. 3 whereby they refused to de-

amalgamate the premises No. 202/4, Harish Mukherjee Road, PS Kalighat, Kolkata-700026 on the basis of the Arbitral awards and advised the petitioner to cancel the deed of exchange from the appropriate authority for effecting the de-amalgamation of the premises in question.

2. The facts leading to the present writ petition are as follows:

3. The petitioner along with his deceased wife was the co-owner of a piece and parcel of land ad-measuring about 2 cottahs, 13 chittacks (approximately) along with a three-storied building standing thereon, which was lying and situated at premises No. 220/4, Harish Mukherjee Road, PS -Kalighat, Kolkata-700 026 (**"First Premises"**).

4. The private respondent Nos. 5-11 are the owners of a piece and parcel of land ad-measuring 12 cottaha, 14 chittacks and 11 sq.ft (approximately) which was lying and situated at premises No. 120, Hazra Road, PS-Kalighat, Kolkata-700 026 (**"Second Premises"**).

5. Both the petitioner and his wife on the one side and respondent Nos. 5-11 on the other side, decided to amalgamate their plots with an intention to avail the additional FAR. Hence they entered into a registered 'Deed of Exchange' dated 26.03.2012 whereby they granted, transferred and conveyed to each other by way of exchange undivided 1/20th part or share in each of the said premises simultaneously.

6. Thereafter the petitioner and his wife along with the private respondent Nos. 5-11 jointly approached the respondent Municipal Corporation for the amalgamation of the first and second premises. The said request was

allowed and an amalgamation certificate dated 27.11.2012 was issued amalgamating the first and second premises and renumbered it as No.202/4, Harish Mukherjee Road, PS Kalighat, Kolkata 700 026 (**"premise in question"**).

7. The said premises in question was jointly mutated in the name of all the joint owners, i.e, petitioner, his wife and respondent Nos. 5-11.

8. After amalgamation of the premises, the parties jointly entered into a development agreement dated 18.11.2013 with respondent Nos. 12 &13 for the development of the amalgamated premises. The said development agreement was duly registered in accordance with law.

9. Subsequently, respondent Municipality sanctioned a building plan for the construction of a proposed new building on the said premises in question.

10. At a later stage, disputes cropped up between the parties, i.e, petitioner and his wife on one side and respondent Nos. 5-11 on the other side w.r.t the development agreement. Since there was an arbitration clause in the said development agreement dated 18.11.2013, the said disputes were referred to the Arbitral Tribunal comprising of the sole Arbitrator Mr. Dipak Chakraborty, Advocate, Calcutta High Court.

11. It is pertinent to mention that the name of respondent No. 13 was struck off by the Registrar of Companies at that point in time and hence respondent No. 13 was not party to the said arbitration. Respondent Nos. 5-11 challenged the appointment of the said sole arbitrator. Learned

Arbitrator decided the said objection against the respondent Nos. 5-11. Thereafter, they failed to participate in the said arbitration proceedings. Hence only the petitioner and respondent No. 12 participated in the arbitration proceedings.

12. The learned Sole Arbitrator passed an award dated 16.02.2018 granting the following relief to the parties:

a) the cancelled development agreement dated 18.11.2013 which was registered with the Additional District Sub-Registrar, Alipore in Book No. 1, being Deed No. 00576 for the year 2014 is hereby cancelled and the claimants shall have the liberty to go for formal recording the said cancellation by way of a Deed of cancellation duly registered with the registering authority before whom the development agreement dated 18.11.2013 was earlier registered even in absence any of the parties to the said agreement together with the related power of attorney, since the said documents have already become nugatory and nonest in the eye of law.

b) The deed of Exchange dated 26.03.2012 duly registered with the Additional District Sub-Registrar, Alipore recorded in Book No. 1, Volume No. 11, Pages 3325 to 3350 being No. 02469 for the year 2012 is hereby cancelled. The claimants are at liberty to get the same formally cancelled by way of registering the deed of cancellation of the said deed of exchange before the said registering authority even in absence or any of the parties therein.

c) The respective parties shall be at liberty to separate their respective premises owned by them in the records of the KMC authority by effecting the separation of the amalgamated premises No. 202/4, Harish Mukherjee Road, Kolkata with *the respective original status and title of the two properties, by virtue of this award.*

d) *The claimants shall appoint the Respondent No. 10 as their developer to develop their separated premises No. 202/4, Harish Mukherjee Road, originally owned by the claimants, after getting the said premises separated from the amalgamated premises in terms of this award as stated hereinbefore.*

e) *The claimants and the Respondents No. 10 equally shared the arbitration expenses and the fees of the Arbitrator accordingly.*

13. Thereafter, a joint petition was filed by the parties before the learned Sole Arbitrator u/s 33(1) of the Arbitration and Conciliation Act, 1996 for rectification of the earlier award dated 16.02.2018. Hence while exercising the power vested in him u/s 33(5) read with Section 30 of the Arbitration and Conciliation Act, 1996, learned Sole Arbitrator passed an amended Award dated 05.12.2018. While passing the amended award, he modified the relief as follows:

a) *The Registered Development Agreement dated 18.11.2013 registered with the Additional District Sub-Registrar, Alipore in Book No.1, Deed No.00576 for the year 2014 which was executed by and between the parties thereto M/s Dharmick Construction Company Pvt. Ltd. being non-existence on the said date of execution in the Book of Registrar of Companies can hereby cancelled and nugatory.*

b) *The Deed of Exchange dated 26.03.2012 registered with the Additional District Sub-Registrar, Alipore recorded in Book No. 1, Volume No. II, Pages 3325 to 3350, being No. 02469 for the* *year 2012 is hereby stands nugatory and cancelled by this Amended Award.*

c) *The respective parties shall be at liberty to separate their respective premises owned by them in the records of the KMC authority by effecting the separation of the amalgamated premises No. 202/4, Harish Mukherjee Road, Kolkata with the respective original status and title of the two properties, being the premises No. 120, Hazra Road, Kolkata-700025 and 202/4, Harish Mukherjee Road, Kolkata-700025 by me in terms of this Award.*

d) *The claimants shall appoint the Respondent No. 10 therein and 9 herein as their Developer to develop their separated premises No. 202/4, Harish Mukherjee Road, originally owned by the claimants, after getting the said premises separated from the, amalgamated premises in terms of this Award as stated hereinbefore.*

e) *Maya Chatterjee who was one of the owners died on 15.9.2015 her share in the property has been already being distributed among her legal heirs being respondent Nos. 1 to 8 herein.*

f) *The claimants and respondent Nos. 1 to 9 herein equally shared the arbitration expenses and the fees of the Arbitrator accordingly.*

14. Subsequently, after the revival by the registrar of companies, the respondent No. 13 (who was not party to the earlier arbitration proceedings) filed a money suit being Suit No. 771/2022 before the Court of Civil Judge (senior Division), 4th Court at Alipore seeking, inter alia, a decree of Rs. 2,85,00,000/- along with interest. Respondent No. 13 preferred an interim application in the said suit seeking an injunction

and attachment of the said premises in question. Learned Trial Court, vide order dated 28.12.2022, allowed the said application. Against the said order dated 28.12.2022, appeals being FMAT 513/2022 and FMAT 516/2022 was preferred before this Court. Hon'ble Division Bench of this Court, with the consent of the parties, was pleased to dispose of the said appeals vide order dated 10.08.2023 by referring the parties to arbitration. The Hon'ble Division Bench appointed Hon'ble Justice (Retd) Ranjit Kumar Bag as the sole arbitrator for adjudicating the disputes between the parties arising out of the Development Agreement dated 18.11.2013.

15. However, the respondent No. 13 being the Claimant in the arbitration proceedings never filed the claim Petition before the sole arbitrator and hence finally vide minutes of meeting dated 08.01.2024, sole arbitrator terminated the said arbitration proceedings.

16. Based on the arbitration awards, the petitioner and his wife preferred an application dated 19.02.2024 before the respondent Municipal Corporation for de-amalgamation of the premises in question. Respondent No. 3 vide letter dated 22.04.2024 informed the Petitioner that the amalagamated premises could not be de-amalgamated on the basis of the minutes of 4th sitting of the Arbitral tribunal held on 08.01.2024 since the Deed of Exchange is in force and valid. The respondent No. 3 further advised the Petitioner to cancel the deed of

exchange from the appropriate authority for De-amalgamation of the premises in question.

17. Being aggrieved by the stand taken by the respondent Municipality, the petitioner preferred the present writ petition.

18. Affidavit in opposition was filed on behalf the respondent Municipal Corporation and private respondent Nos. 5-11. Petitioner filed exception to the said affidavits. Parties also filed their respective written note of argument along with the Judgments.

19. With the consent of all the parties, the matter was taken up for hearing.

Argument on behalf of the Petitioner

20. Learned Counsel for the petitioner submits that a dispute related to the cancellation of an instrument under the Specific Relief Act, 1963 is a dispute in personam and hence it is arbitrable. In order to substantiate this point, he relied upon the judgment of Hon'ble Supreme Court in ***Sushma Shivkumar Daga Vs Madhurkumar Ramkrishanji Bajaj & Ors*** reported as ***2023 SCC Online SC 1683, Asian Avenues (P) Ltd Vs Syed Shoukat Hussain*** reported as ***2024 (6) SCC 630***, and unreported judgment of Telangana High Court in ***Arb. Application No. 34/2020*** titled as ***M/s Savera Construction Pvt. Ltd Vs M/s Aditya Construction Company & Anr***. In view of the said legal position, Learned Counsel for the petitioner emphasis that the learned Sole arbitrator had validly cancelled the deed of exchange dated 26.03.2012

by way of his award dated 16.02.2018 and the amended award dated 05.12.2018.

21. Learned Counsel for the petitioner further argued that the additional award dated 05.12.2018 is a valid document in the eyes of law as the said award was drawn up in terms of Section 33 of the Arbitration and Conciliation Act, 1996.

22. Learned Counsel for the petitioner again submits that the arbitration award dated 16.02.2018 and the amended award dated 05.12.2018 has been duly registered before the District Sub Registrar, Alipore, South 24 Parganas in terms of Section 17 (c) of the Registration act, 1908. Further the said award is duly registered and stamped in terms of Schedule I-A of the Indian Stamp Act, 1899 as applicable to the State of West Bengal. Hence the respondent Municipal Corporation ought to have acted in terms of the true spirit of the said arbitral awards.

23. Learned Counsel lastly pointed out that the pendency of the civil litigation cannot be a taken as a ground for refusing the de-amalgamation of the premises in question. In order to substantiate the said point, the petitioner relied upon ***Chanda @ Sandhya Rani Chakraborty Vs Chabi Palui*** reported as ***2010 (4) CHN 231 (Cal) (DB), Miss Shova @ Kumari Shova Das Vs The Howrah Municipal Corporation & Ors 2017 SCC Online Cal 286.***

24. With these submissions, Learned Counsel for the petitioner prayed for the issuance of a writ of mandamus against the respondent Municipality

for de-amalgamating the said premises as the deed of exchange is already stands cancelled.

Argument of behalf of the Respondent Municipality

25. Learned Counsel for the respondent Municipality submits that the arbitration clause was available only in the Development Agreement. No arbitration clause was available in the Deed of exchange. Hence arbitration can be invoked only in respect of any dispute arising out of the aforesaid development agreement dated 18.11.2013. The award as well as amended award passed by the arbitrator cancelling the deed of exchange dated 26.03.2012, which was executed prior point in time, is without jurisdiction, nullity, nonest and not binding upon the Municipal authorities.

26. Learned Counsel further submits that an order or decree passed on any subject matter upon which the court or other authority has no jurisdiction, such order or decree can be treated as a nullity and nonest and cannot have any binding effect. The same can be questioned in any subsequent collateral proceedings. Hence the Municipality authorities are entitled to seek the proper registered documents cancelling the deed of exchange for effecting the separation in respect of the premises in question. Learned Counsel for the respondent relies on ***Bharat Coking Coal Vs Annapurna Construction*** reported as ***2003 (8) SCC 154, IOCL Vs Shree Ganesh Petroleum Rajgurunagar*** reported as ***2022 (4) SCC 463, FCI Vs Chandu Construction*** reported as ***2007 (4)SCC 697,***

Chiranjilal Shrilal Goenka (deceased) through Lrs Vs Jasjit Singh & Ors reported as ***1993 (2) SCC 507, Abbas Sayyad Vs Usman Abbas Sayyad*** reported as ***2007 (2) SCC 355, Balwant N Viswamitra & Ors Vs Yadav Sadashiv Mule (Dead) through Lrs*** reported as ***2004 (8) SCC 706 and Swarup Singh & Ors Vs UOI*** reported as ***2011 (11) SCC 198.***

27. Learned Counsel further pointed out that while referring the disputes to arbitration by the Hon'ble Division Bench, the petitioner never pointed out the existence of award dated 16.02.2018 or amended award dated 05.12.2018. Hence the petitioner willingly abandoned his alleged claim under the said award and now the petitioner cannot claim any benefit out of that.

28. Learned Counsel for the respondent Municipality again argued that the petitioner executed a deed of exchange and applied for amalgamation. Now without cancelling the said registered deed of exchange by another registered instrument under Section 17(b) of the registration Act, he cannot pray for the separation of the said properties.

29. Learned Counsel for the Municipality also emphasized that the amended award dated 05.12.2018 is beyond the scope of Section 33 of the Arbitration and Conciliation Act.

30. Learned Counsel also raised the plea of limitation as the deed of exchange was registered on 26.03.2012 and as per Schedule 59 of the Limitation Act, the learned Arbitrator cancelled the same after 5 years and hence it is barred by limitation.

31. In view of the aforesaid submission, the Learned Counsel for the respondent Municipality prayed for the dismissal of the present writ Petition.

Arguments on behalf of the private respondents

32. Learned Counsel for the private respondents adopted the arguments advanced by the Learned Counsel for the respondent Municipality. In addition to all those pleas, Learned Counsel for the private respondent challenged the locus of the petitioner to maintain the present writ petition. According to him, the petitioner and his wife were having 1/20th share in the premises in question. During the pendency of the present proceedings, the wife of the petitioner expired leaving the petitioner and her 2 sons and one daughter as her legal heirs. Petitioner vide separate gift deeds gifted his share of the property to his son Sh. Sumit Kumar Manot and hence the petitioner is left with no interest in the premises in question. In order to substantiate this point, he handed over copies of 2 gift deeds. Since the petitioner is not the owner of the property in question, he has no locus standi to maintain the present writ petition.

33. With this submission, Learned Counsel for the private respondents prays for the dismissal of the present writ petition.

Legal Analysis

34. This Court had heard the arguments advanced by the parties and carefully examined the Judgments relied on by the parties and perused the records.

35. Learned Counsel for the private respondents raised an objection qua the maintainability of the present writ petition alleging that the petitioner gifted his share of the property to his son and hence he has no locus standi to maintain the present writ petition. This position is disputed by the Learned Counsel for the petitioner and submitted that as per his instruction, the petitioner is still retaining a small portion of the premises. The private respondents raised this objection for the first time at the time of argument. No such objection was raised in their Affidavit in opposition. Hence no opportunity was given to the petitioner to confront with the said allegations. Be that as it may, there is no dispute to the fact that at the time of filing of the present writ petition, the petitioner had the locus standi to maintain the present writ petition. Since the private respondents raised the objection qua the locus of the petitioner to maintain the present writ petition during the course of the arguments, this Court is not inclined to entertain the said plea at this stage.

36. Before adverting to the facts of the present case, this Court deems it appropriate to examine the legal provisions relating to the transfer of immovable properties by way of exchange and cancellation of an exchange deed.

Transfer of Property Act, 1882

37. Chapter VI of the Transfer of Property Act, 1882 deals with 'Exchanges'. As per Section 118 of the said Act, Exchange means *"When two persons mutually transfer the ownership of one thing for the ownership of another,*

neither thing or both things being money only, the transaction is called an "exchange". Section 118 further says that "*A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale*". How a sale is to be effected is explained in Section 54. As per Section 54, transfer of a tangible immovable property whose value is more than hundred rupees can be transferred only by way of a registered instrument.

38. Hence from the combined reading of all these provisions makes it clear that two or more persons can mutually transfer the ownership of an immovable property with the ownership of another immovable property by way of a registered instrument.

<u>Specific Relief Act, 1963</u>

39. Chapter V of the Specific Relief Act, 1963 deals with cancellation of an instrument. Section 31 of the Specific Relief Act, 1963, reads as follows:

> *When cancellation may be ordered. — (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.*
>
> *(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy*

of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

40. In view of Section 31 (1) of the Specific Relief Act, 1963, an instrument can be cancelled only under 2 circumstances:

(i) If the said instrument is void or voidable against the person concerned.

(ii) When both parties mutually agree to cancel the deed.

In the first case, the person concerned needs to sue to have the said instrument adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

Limitation Act, 1963

41. As per entry 59 of the Limitation Act, the time limit prescribed for the cancellation of an instrument is 3 years from the date of knowledge.

42. This being the basic law relating to the transfer of an immovable property by way of exchange, this Court now proceeds to examine the facts of the present case.

43. In the present case vide registered deed of exchange dated 26.03.2012 entered between the petitioner and his wife on one side and respondent Nos. 5-11 on the other side, they granted, transferred and conveyed to each other by way of exchange undivided 1/20th part or share in each of the said premises simultaneously.

44. Hence by virtue of the said exchange deed, petitioner, his wife and respondent Nos. 5-11, all of them became co-owners of the said premises in question. In order to strengthen the said transaction further, the parties jointly approached the respondent Corporation for amalgamation of their separate properties. Based on the said exchange deed, the respondent Corporation amalgamated the first and second premises and issued amalgamation certificate dated 27.11.2022 and renumbered the premises in question as property No.202/4, Harish Mukherjee Road, PS Kalighat, Kolkata 700 026.

45. Hence the Deed of exchange is a valid legal document which creates rights in favour of the parties involved therein. The said document can be cancelled only in accordance with Section 31 of the Specific Relief Act within the time frame as prescribed in the Limitation Act.

46. In the present case, the parties approached the Arbitral Tribunal by invoking an arbitration clause in the Development Agreement dated 18.11.2013. During the said procedure, the learned Sole Arbitrator initially cancelled the Development Agreement dated 18.11.2013 and Deed of exchange dated 26.03.2012 and granted liberty to the petitioner to approach the registering authority for the formal recording of the said registration. Subsequently, vide amended arbitration award dated 05.12.2018, the learned Sole Arbitrator amended the said award by invoking Section 33 of the Arbitration and Conciliation Act, 1996 whereby the liberty granted to the petitioner for approaching the

Registering Authority for the formal recording of the said cancellation was omitted. The parties were again relegated to Arbitration by the Hon'ble Division bench of this Court, without realizing that the parties had already adjudicated their disputes before the Arbitral Tribunal. None of the parties deems it appropriate to point out the factum of Award dated 16.02.2018 or amended award dated 05.12.2018 to the Hon'ble Division bench. Learned Sole Arbitrator terminated the said second arbitration as the Claimant in the said proceedings never filed any Claim Petition therein.

47. Learned Counsel for the respondents raised various objections regarding the legality of the arbitration award dated 16.02.2018 and amended award dated 05.12.2018. The main thrust of his argument is that the Award dated 16.02.2018 and amended award dated 05.12.2018 are passed by the learned Sole Arbitrator without jurisdiction and hence it can be treated as a nullity and nonest and cannot have any binding effect on any third party and the same can be questioned in any subsequent collateral proceedings.

48. This Court is conscious of the fact that it is not exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. Learned Sole Arbitrator passed the award dated 16.02.2018 and amended award dated 05.12.2018. The said award was never challenged by the parties and it attained finality. In the second round of arbitration also, the learned sole Arbitrator terminated the proceedings noting that the

interest of the parties were taken care of by these awards. In the present proceedings this Court is not called upon to examine the legality of the said award passed by the learned Sole Arbitrator and in view of the same, this Court is refrained from making any observation regarding the legality of the said arbitration award dated 16.02.2018 and amended award dated 05.12.2018.

49. Learned Counsel for the petitioner cited various judgments to substantiate that the disputes between the parties were arbitrable in nature and hence the arbitration proceedings and awards passed therein are legal in character having binding effect. This Court is in respectful agreement with all the said judicial pronouncements and hence not intended to delve much on the said issue.

50. Be that as it may, the only question to be answered by this Court at this stage in the present proceedings is whether the award passed by the learned Sole Arbitrator is binding on the respondent Municipal Corporation or not. If the said award passed by the learned Sole Arbitrator is judgment in rem, then it is applicable to the respondent Municipality as well. But if it is judgment in personam, then it will be binding on the parties to the dispute only.

51. A judgment in rem is one pronounced upon the status of some particular person or thing and which binds all persons in the world. A judgment in rem is conclusive not only against the parties to it but also against the entire world. The Hon'ble Supreme Court in ***State of Bihar v. Radha***

Krishna Singh, reported as ***AIR 1983 SC 684*** explained it further with examples by observing that "*It is well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial, or guardianship, or other similar proceedings, is admissible in all cases whether such judgments are inter parties or not*"

52. A judgment in personam is an ordinary judgment between parties in cases of contract, tort or crime. The rights and liabilities of the parties to the suit are determined in such judgments. These judgments bind only the parties or privies to the suit. It does not bind the entire world. A judgment in personam is only conclusive between the parties and privies. A judgment given in a contractual dispute is judgment in personam.

53. This Court is also guided by the law laid down by the Hon'ble Supreme Court in ***Decan Paper Mills Company Ltd Vs Regency Mahavir Properties Ors*** reported as ***2021 (4) SCC 786***. In this case, the Hon'ble Supreme Court was examining the issue of whether the dispute involving the cancellation of written agreements are arbitrable or not in view of Section 31 of the Specific Relief Act, the Hon'ble Supreme Court held as follows:

> *"Judged by these authorities, it is clear that the proceeding under Section 31 is with reference to specific persons and not with reference to all who may be concerned with the property underlying the instrument or ''all the world". Clearly, the cancellation of the instrument under Section 31 is as between the parties to the action and their privies and not against all persons generally. As the instrument that is cancelled is to be delivered to*

> *the plaintiff in the cancellation suit. A Judgment delivered under Section 31 does not bind all persons claiming an interest in the property inconsistent with the Judgment, even though pronounced in their absence."*

54. Otherwise also it is the petitioner's own case that the dispute between the parties were dispute in personam and hence it is arbitrable in nature.

55. In view of the detailed discussions herein above, this Court is of the considered view that the decision rendered by the Arbitral Tribunal vide award dated 16.02.2018 and 05.12.2018 are judgment in personam arising out of private dispute and it is not binding on a third party. The respondent Corporation being a third party to the said Arbitral awards, this Court finds no infirmity or illegality in the stand taken by the respondent Corporation.

56. In view thereof, the present writ Petition is dismissed.

(Gaurang Kanth, J.)

SAKIL P.A.