

(2019) 04 PAT CK 0018
In the Patna High Court
Case No : Request Case No. 70 Of 2018

M/s Namira Construction Pvt. Ltd	Vs	APPELLANT
M/s Fazal Imam Public Charitable And Religious Trust And Ors		RESPONDENT

Date of Decision : 01-04-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 11(6), 16
Waqf Act, 1995 — Section 6, 7, 51, 85
Code Of Criminal Procedure, 1973 — Section 144

Citation : (2019) 04 PAT CK 0018

Hon'ble Judges : Amreshwar Pratap Sahi, CJ

Bench : Single Bench

Advocate : P.K. Shahi, Sanjeev Kumar Singh, Sandeep Kumar Shahi, Y.V. Giri, S.A. Najmi, Daya Shankar Prasad

Final Decision : Dismissed

Judgement

1. This application has been moved for appointment of an Arbitrator invoking the powers of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. The basis of the claim for appointment of an Arbitrator arises out of an arbitration clause contained in the agreement dated 9th of September, 2002 stated to have been entered into between the petitioner who is a builder and the Mutwalli of a Waqf managing a Waqf property governed by the Waqf Act, 1995.
2. The arbitration sought is about the dispute arising out of a document which the petitioner alleges to be an agreement between the Waqifa of the Waqf and the petitioner alleged to have been executed on 15th of November, 2002 stating it to be in continuance of the earlier agreement dated 09.09.2002.
3. The Mutwalli of the Waqf is the opposite party and the Muslim Waqf Board is an intervenor. There is another intervenor claiming himself to be the Mutwalli in the line of succession. All the three respondents have taken a stand that the document dated 15.11.2002 was not in existence at all, the same is a void document as it has neither been signed by the Mutwalli nor the said agreement,

which envisages a fresh transaction of the Waqf property, does have any approval of the Board in terms of Section 51 of the Waqf Act, 1995. In effect, there is no agreement for arbitration in respect of the claim of the applicant negotiating the property of the Waqf through the Waqifa for which several contentions have been raised that will be dealt with hereinafter.

4. It is also the case of the respondent, particularly the Waqf Board, that there is complete ouster of all jurisdictions and proceedings in matters arising out of Waqf property that would be exclusively controlled by the provisions of the Waqf Act, 1995 and consequently no Arbitrator can be appointed for the resolution of any such dispute. The applicant will have to approach the Waqf Board in case the applicant wants to establish the rights which are being made the basis for arbitration.

5. Before the matter is proceeded with, it would be appropriate to mention about the scope and powers to be exercised under sub-section (6) of Section 11 of the 1996 Act. The issue has engaged the attention of the Apex Court in a large number of decisions including the one cited by Shri Y.V. Giri, learned senior counsel for the Muslim Waqf Board, reported in (2009) 1 SCC 267 [National Insurance Company Limited Vs. Boghara Polyfab Private Limited]. The question posed before the Court was that once there is a contract between the parties containing an arbitration agreement and the dispute raised is in respect of a claim arising out of such contract, then the dispute has to be referred to an Arbitrator. In order to answer the said question posed, the Apex Court referred to the decision of a seven Judge Bench of the Supreme Court in the case of SBP & Co. Vs. Patel Engineering Ltd., reported in (2005) 8 SCC 618 after referring to one of the earlier judgments under the Arbitration Act, 1940 in the case of Union of India Vs. Kishorilal Gupta, reported in AIR 1959 SC 1362. The Court also examined the same in the light of the provisions of Section 16 of the 1996 Act and then in Paragraphs 22 to 24 ruled as under:-

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. Vs. Patel Engg. Ltd., (2005) 8 SCC 618. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co. V. Patel Engg. Ltd.*, (2005) 8 SCC 618, that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

24. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under Section 11 of the Act or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant."

6. It is in the background of the aforesaid principles that it has to be examined as to whether the contentions advanced by the learned counsel can be resolved for either accepting or rejecting this application.

7. For this, the background of this request for appointment of an Arbitrator has to be traversed as judicial intervention has taken place at an earlier stage which would have a direct impact on the present proceedings.

8. The applicant is a Construction Company. The property, belonging to Fazal Imam Public Charitable and Religious Trust, namely, Hassan Manzil, Frazer Road, Patna with its municipal numbers, was negotiated through an agreement for the development of the said property and land by way of construction of a memorial complex comprising of certain constructions. The then Mutwalli Mrs. Saiyada Mehdi Imam had sought permission from the Waqf Board vide her letter dated 1st of June, 2000. It may be mentioned that it is a Shia Waqf and later on at the request of the original Mutwalli Mrs. Imam, Mr. Faiz Murtaza Ali was appointed as a Mutwalli. The Waqf Board under its resolution dated 2nd January, 2001 permitted the negotiation through an agreement with a condition that the agreement should be submitted to the Board for approval.

9. This ultimately culminated in the agreement dated 2nd of September, 2002 that was superseded by the agreement dated 9th of September, 2002, whereby 45% of the built-up area of the property was to be delivered and given possession to the Waqifa/ Mutwalli and the balance of the 55% of the built-up area would belong to the developers-petitioners. This distribution was to be demarcated at the time of the approval of the building plans. This agreement dated 09.09.2002 was not submitted to the Board for approval.

10. The applicant-developers proceeded on the strength of the agreement dated 9th September, 2002 and in the year 2005 proceedings under Section 144 Cr.P.C. were initiated against the applicants alleging that the constructions were being made over Waqf property that was unauthorized but the said order of Section 144 Cr.P.C. was vacated.

11. However, having come to know that the development agreement had not been submitted before the Waqf Board, as directed, the same was submitted by the petitioners to the Waqf Board for approval. Another round of Section 144 Cr.P.C. proceedings appears to have been initiated and in between the Mutwalli of the Waqf published a notice cancelling the agreement and simultaneously another agreement with another builder was submitted to the Waqf Board. The matter appears to have been settled between the Mutwalli and the applicant and an amendment of the development agreement dated 9.9.2002 was executed on 16.11.2006, whereafter the construction proceeded.

12. As mentioned above, another builder had been introduced when the dispute was going on namely M/s Bustana Vision Pvt. Ltd., but after the matter had been settled, as indicated above, this new builder filed a title suit against the applicants. The Waqf Board thereafter issued letters and took action and ultimately passed an order to stop the constructions by the applicant describing the same to be illegal. Aggrieved by the aforesaid action of the Waqf Board and the order of the administrative authorities, the applicant-petitioner filed C.W.J.C. 15617 of 2007 [M/s Namira Construction Private Limited & Anr. Vs. The State of Bihar & Ors.].

13. The matter was contested between the parties including the Board and the

Mutwalli of the Waqf.

14. It needs to be specifically mentioned at this stage that the said entire litigation which arose out of the development agreement nowhere mentions the existence of a supplemental agreement dated 15th of November, 2002. The High Court in the said writ petition delivered its judgment on 5th of August, 2009, which is reported in 2009 (4) PLJR 203 [M/s Namira Construction Private Limited & Ors. Vs. The State of Bihar & Ors.

15. The key issue raised before the Court about the applicability of Section 51 of the Waqf Act requiring prior sanction of the Board before any alienation of a property was answered holding that the said statutory power conferred upon the Board by the Parliament to grant such sanction cannot be curtailed or fettered by any recital in the Waqf Deed or otherwise. It was accordingly held that the prior sanction of the Board was a sine qua non for giving effect to the development agreement. The reasons given are clear that the same has far reaching consequences and, therefore, it must be carried out under the superintendence of the Board to ensure that the terms and conditions of the development agreement are just, fair and beneficial to the Waqf. The argument to the contrary raised by the developers namely applicant and the Mutwalli to the contrary was rejected.

16. Coming to the issue of the status of the agreement dated 9th September, 2002, it was held that the terms and conditions of the development agreement were open to be approved by the Board and it could do even later on keeping in view the Board's earlier resolution dated 2nd January, 2001 and in the interest of the Waqf. The Court ultimately quashed the order of the Waqf Board and the executive authorities restraining them from interfering with the construction work being carried out by the applicant-petitioner. The agreement dated 09.09.2002 that was handed over to the Waqf Board pursuant to the Court's direction dated 10th September, 2008 was to be considered and approved by the Board after making such changes that may appear to be reasonable and necessary in the interest of the Waqf. In this regard, Paragraphs 54 to 57 are extracted hereunder:-

"54. It is however, made clear that the development agreement dated 9.9.2002 and the fresh draft of the said agreement handed over by the petitioners/ Mutawalli to the Wakf Board pursuant to this Court's direction dated 10.9.2008 shall be considered by the competent authorities of the Board who shall approve the same, after making such changes which are reasonable and necessary in the interest of the Wakf, within a period of three months from today.

55. The undertakings given by the petitioners in this Court withdrawing the objectionable parts of the development agreement dated 9.9.2002 as also the undertaking that the possession of the share of the Wakf estate shall be handed over to the Fazal Imam Public Charitable & Religious Trust and only thereafter the petitioners shall hand over possession to any one else shall continue to bind

the petitioners. The Wakf however will be entitled to 45 percent of the entire built-up area as its share as provided in the development agreement dated 9.9.2002 upon due verification of the said built up area, which share shall not be less than 30,000 sq. ft. as provided in the Board's resolution dated 2.1.2001 and which as per the statement made in the general power of attorney dated 3.8.2004 executed by the Mutawalli in favour of petitioner No. 2 is stated to be 47250 sq. ft., subject to verification of the actual construction made. It is also made clear that any action pursuant to the said general power of attorney dated 3.8.2004 or otherwise of selling any part of the share of the Wakf in the built-up area shall be null and void, being contrary to the mandate of Section 51 of the Act and no effect shall be given to any such transaction of sale if entered into with respect to the 45% share in the built up area of the Wakf in question. The Wakf Board shall ensure that no part of the 45% share of the Wakf is alienated except in strict compliance with the provisions of the Wakf Act and Rules. It shall also be open to the Wakf Board to ensure that the amount of Rs. 50 lacs obtained under the agreement dated 9.9.2002 is utilized only for the purpose of the Wakf and not in any other manner by the Mutawalli.

57. The writ application is accordingly allowed with the aforesaid observations and directions."

17. A perusal of the aforesaid judgment would leave no room for doubt that the Waqf was entitled to retain 45% of the entire built-up area as its share as provided in the development agreement dated 09.09.2002. It was further held that any action taken for selling any part of the share of the Waqf in the built-up area on the strength of a general Power of Attorney or otherwise would be null and void. It was also further mandated in the judgment that the 45% share of the Waqf shall not be alienated except in strict compliance with the provisions of the Waqf Act and Rules.

18. This judgment undisputedly has become final between the parties whereby all the terms and conditions of the agreement were set at rest and the Board was directed to approve the same.

19. The question now is as to whether there is a valid agreement dated 15.11.2002 in existence and whether the same can be invoked together with the clause of arbitration contained in the agreement dated 09.09.2002.

20. Shri P.K. Shahi, learned senior counsel for the applicant has urged that in view of the provisions of Sections 6 and 7 of the Waqf Act, 1995, a Waqf or Tribunal will have no jurisdiction to entertain a dispute of the present nature and, therefore, other judicial remedies as contemplated under Chapter VIII of the Waqf Act, 1995 are not ousted including that of appointment of an Arbitrator. He submits that the bar contained in Section 85 of the Waqf Act, 1995 will not at all operate in the present set of facts, inasmuch as, this is a Developer's Agreement which contains an arbitration clause and, therefore, there is no ouster. He has further laid stress that even this question of jurisdiction to entertain the

arbitration would be within the powers of the Arbitral Tribunal keeping in view the provisions of Section 16 of the 1996 Act. He further submits that the dispute being raised about the existence of the agreement dated 15.11.2002 is itself an arbitral dispute and consequently this Court need not go any further and can refer this issue also for arbitration. He, therefore, contends that any argument being raised by the other side about the dispute of the property being controlled exclusively by the Waqf Act, 1995 is without any basis and an Arbitrator can be appointed to resolve the controversy. In short the power to appoint an arbitrator under Section 11(6) of the 1996 Act is not to adjudicate any such issue but to proceed to appoint if a document exists reciting appointment of an arbitrator.

21. The contention raised on behalf of the respondents in the arguments led by Shri Y.V. Giri, learned senior counsel for the Waqf Board, Shri Sandeep Kumar Shahi for the Mutawalli and Shri Daya Shankar Prasad for the intervenor are to the effect that there is no agreement in existence, namely, the agreement dated 15.11.2002 which was produced for the first time and filed as Annexure-4 in C.W.J.C. No. 6870 of 2012 in relation to demarcation of the said property at the instance of the Mutwalli and certain individuals. In the said writ petition the applicant-petitioners raised an argument on the strength of the document dated 15.11.2002 that they had paid a sum of Rs. 50 lacs as a signing amount to the late Mutwalli which, inter alia, provided for an adjustment of 13800 sq. ft. of additional land of the commercial block area of the Fazal Imam Complex. The applicant-builders sought to impress upon the Court to bring about a change in the apportionment of the property as agreed upon earlier in the agreement dated 09.09.2002 on the strength of this document dated 15.11.2002. This was clearly declined vide order dated 5th October, 2012 passed in C.W.J.C. No. 6870 of 2012, which is extracted hereinunder:-

"By order dated 09.08.2012, this Court had directed that the entire property which comes under the Fazal Charitable Trust should be measured with the help of the District Magistrate, the Executive Engineer and the Amins of the State as well as in presence of the Amins and the representatives of the parties. The measurement took place as per the direction of this Court and a report was submitted in this Court on 26.09.2012. Thankfully, there is no dispute between the parties regarding the manner of the measurement.

This Court has already decided vide MJC No. 80 of 2010 that the parties i.e. the Waqf Estate who would receive 45 per cent of the built up area, whereas, the builder would be entitled to 55 per cent of the built up area. It may be pointed out here that the building is in three blocks. Block 'A' is a commercial area which requires to be demarcated as per the agreement between the parties made in this Court. Block 'B' is exclusively meant for the Waqf Board whereas Block 'C' is meant exclusively for the builder. There being no dispute between the parties as far as Blocks 'B' and 'C' are concerned. The only demarcation that is required is in the Block 'A'.

Counsel or the representatives of the parties will go to the chambers of Mr. Y.V.

Giri, Senior Advocate of this Court on 13.10.2012 to settle the matter. The parties may change the venue in case Mr. Giri has some difficulty. All the parties should sit together and decide the area to be allotted. The parties may bring their Engineers so that scientific division is made. The common area as well as the basement and parking will be demarcated as per the share. In case, the procedure cannot be completed on 13.10.2012, any party may mention the matter before this Court for fixing a date. The parties should not raise frivolous issues that all the property of 45 per cent should be either on the north or south side, and the adjustment should be made in the manner which should not create further dispute in the matter. However, it is clarified that neither the builder nor the Waqf Estate will be entitled to a full floor, as the value of each floor varies. Therefore, the appointment will have to be made floor-wise.

An argument has been raised on behalf of the Navira Construction Private Limited that they had paid a signing amount of Rs. 50,00,000/- to Late Mehendi Imam vide an agreement between them dated 0.09.2000. Subsequently, Late Mehendi Imam has cleared the manner in which Rs. 50,00,000/- was to be dealt with by the parties. Annexure 'C' to the counter affidavit filed on behalf of respondents 5 and 6 is the agreement between the parties. The document indicates that Late Mehendi Imam shall receive Rs. 50,00,000/- in two equal instalments of Rs. 25,00,000/- each from the builder Navira Construction Private Limited, which would be adjustable in the commercial area block of the Fazal Imam Complex.

Learned Counsel appearing on behalf of the Board disputes this document and submits that the document has been produced for the first time in this Court. It has been argued that the builder ought to have produced this document before the Bench that was hearing this matter and before whom a decision was taken that 45 per cent of the built up block would come within the share of the Waqf in question and 55 per cent would be the share of the builder.

The question has been tested in Contempt application being MJC No. 80 of 2010. Both parties have filed their affidavits. The affidavit on behalf of the petitioner filed on 22.2.2010 indicates the manner in which the allotment of shares was to be made. The affidavit filed on behalf of Opposite Party No. 1 indicates that the total built up area of Block-A is 50861 sq. ft., Block-B is 22479 sq. ft., Block-C is 30381 sq. ft., the total built up area is 103721 sq. ft. (subject to the physical verification). The trust share is 45 per cent of the total built up area. Similarly, it is said that Block-A is equal to 24195 sq. ft., Block-B is 22479, total area is 46674 sq. Ft. The builder share is 55 per cent of the total area. Block-C is 30381 sq. ft., total building area of Block-A is 26666 sq. ft. Whatever be the measurement mentioned in the two affidavits, that is now subject to the final measurement made under this Court's order. It is clear that the builder would be entitled to 55 per cent of the share and no more. The opposite parties ought to have brought the document of so called adjustment to the attention of the Court hearing the contempt application. No change can be made by this Court beyond

the agreed apportionment accepted and made before the Court by the parties.

Thus, this Court is not in favour of passing any order with respect to considering the issues raised on behalf of the builder that he would be entitled to adjustment of Rs. 50 lakhs, which was paid as a signing amount.

This matter will be listed under the heading 'for admission' for further hearing on 05th November, 2012 at 2:15 P.M.

In the meantime, the parties would also submit the outcome of the meeting which is to take place between the counsels for the parties in this case for the purposes of apportionment of shares."

The aforesaid writ petition appears to have been consigned as infructuous on 29.11.2017.

22. Later on, some investigation was carried out under the orders passed by the said Court but the fact of the matter is that the request of the applicant for re-adjusting the allocated area was specifically declined and the above quoted order does not appear to have been challenged.

23. The learned counsel, therefore, contend that the absence of the agreement dated 15.11.2002 being mentioned in the entire litigation before this Court that culminated in the earlier judgment dated 05.08.2009 containing a clear prohibition on any further alienation of the 45% share without approval of the Board, and then a specific decline by this Court as referred to hereinabove on the issue, leaves no room for doubt that the document dated 15.11.2002 for the first time after 10 years surfaced in the writ petitions that were filed in the year 2012 where for the first time the applicant took a plea of the existence of such a document. The document, therefore, has no legal or valid force or even an existence not only because of the clear suspicious circumstances but also because of the fact that the said document has no approval of the Waqf Board in terms of Section 51 of the Waqf Act, 1995 which issue stands settled between the parties in the judgment dated 05.08.2009. It is, therefore, urged that the document is a void document which cannot be enforced and if the same does not have a legal existence then this issue can be decided in these proceedings on the aforesaid facts that have emerged to decline the appointment of an Arbitrator in accordance with law as propounded by the Apex Court and referred to hereinabove.

24. The following judgments have been relied on by the learned counsel for the parties to substantiate their submissions:

1. (2000) 4 SCC 406 [Allahabad Bank Vs. Canara Bank and another]
2. (2005) 8 SCC 618 [SBP & Co. Vs. Patel Engineering Ltd. and another].
3. AIR 2009 Rajasthan 150 [Anjuman A. Burhani v. Daudi Bohra Jamaet, Registered Society and Anr].

4. AIR 2009 Allahabad 62 [Maulvi Abdul Rahman Siyai Vs. Sardar Maqbool Hasan and Ors].
5. 2009 (4) PLJR 203 [M/s Namira Construction Private Limited Vs. The State of Bihar and Ors].
6. AIR 2010 (7) SC 1059 [Board of Wakf, West Bengal Vs. Anis Fatma Begum & Anr].
7. (2015) 17 SCC 65 [Lal Shah Baba Dargah Trust Vs. Magnum Developers and others]
8. (2016) 8 SCC 788 [Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others]
9. (2016) 10 SCC 386 [A. Ayyasamy Vs. A. Paramasivam and others]
10. (2017) 14 SCC 561 [Rajasthan Wakf Board Vs. Devki Nandan Pathak and others].

25. In order to appreciate the rival contentions, I may refer to the agreement dated 9th September, 2002, the terms and conditions whereof in respect of apportionment of property have been confirmed by this Court and remains undisputed without referring to or even noticing the second agreement dated 15.11.2002. The said agreement in Paragraph 1 of the special clauses reads as under:-

"SPECIAL CLAUSES TO THIS AGREEMENT

1. That the developer has paid a sum of Rupees Twenty Five Lacs to the Waqifa/Mutawalli as the signing money for this agreement. The developer hereby also agrees that he shall make another payment of Rupees Twenty Five Lacs within forty five days of signing this agreement, failing which this agreement is deemed to have lapsed and the signing amount shall be forfeited."

26. The aforesaid clause mentions the transaction as "signing money" for the agreement and not in exchange of any area of the apportioned property which already stands defined in the said agreement as 45% to the Waqf and 55% to the Developer. There is, therefore, no agreement at all for transferring additional property of the Waqf under the agreement dated 09.09.2002 on payment of Rs. 50 lacs that was partly paid to the Waqifa/Mutawalli as "signing money". The word "signing money" may be something which may have the shape of a premium or an offer or a tribute payment like a Salami or a Nazar or may partake the character of a consideration taken for just signing the document of agreement, but the same cannot be construed in any way to mean a consideration for transfer of additional property of the Waqf over and above the apportioned shares or in deviation thereof. Thus, in my opinion, the agreement dated 09.09.2002 as per the above quoted Clause (1) vis-à-vis the sum of Rs. 50 lacs as "signing money" cannot be construed to be allowing the parties to deviate from the apportionment of the property as agreed upon. Further, this was

impermissible in view of the binding nature of the decision between the parties culminating in the judgment dated 05.08.2009. It is the Waqf Board that has the power to assess as to whether any such agreement should be allowed to be entered into or not. The Board was never apprised of any such intention and the only agreement which appears to have been approved by the Board in respect of the apportioned area finally is that which is contained in the agreement dated 09.09.2002.

27. The next clause which requires consideration is Clause 4 i.e. extracted hereinunder:-

"SPECIAL CLAUSES TO THIS

AGREEMENT

4. That in case of any dispute or difference between the parties arising out of the relating to this Development Agreement, the same shall be amicably settled. If they fail the same shall be referred to the Arbitrators according to the provisions of arbitration act."

28. The said agreement for an arbitration is clearly confined in the case of any dispute or difference between the parties relating to the agreement dated 09.09.2002 only.

29. There is no clause in the agreement for altering the apportionment which as stated above has now become final with the judgment dated 05.08.2009 where the High Court was never informed of any such agreement dated 15.11.2002.

30. Then comes the disputed agreement, the existence whereof has been challenged by the opposite parties as being a void document and otherwise also an invalid agreement as it does not have either the sanction of the Board or of this Court finally settling the shares between the parties. The terms and conditions of this document in its entirety which is on a 100/- rupee non-judicial stamp is extracted hereinunder:-

"This is in continuation/ furtherance of the Agreement dated 09.09.2002 entered into between Fazal Imam Public Charitable and Religious Trust, Hassan Manzil, Frazer Road, P.S.- Kotwali, Patna and M/s Namira Construction Pvt. Ltd. having its office at 305, Sukriti Apartment, S.P. Verma Road, Patna 1 (Smt. Sayeda Mehdi Imam-Waqifa) agree that I have received Rs. 50 lakhs in total (Rs. 25 lakhs+Rs. 25 lakhs) from the Builder/Namira Construction which is adjustable in the commercial area/block of the Fazal Imam Complex, Frazer Road, Patna. I (Smt. Sayeda Mehdi Imam-Waqifa) further agree that M/s Namira Construction Pvt. Ltd. through its Director Mr. Seraj Anwar will be entitled to 13800 sq. Ft. built area from the Trust share after completion of Fazal Imam Complex and handing over the Trust share/area to the Trust in the commercial area/block of the Trust. The entitlement of 13800 sq. Ft. of Namira Construction in the Trust commercial area/block is on account of Rs. 50 lakhs paid to me as stated above And rest of the commercial area of Trust share will be used only to generate

funds/revenue for fulfillment of the aims and objectives of the Trust/Waqf as per terms and conditions of the Scheme of Management of Trust/Waqf. This is made and signed on 15th day of November, 2002 and will come into effect only after completion of Fazal Imam Complex and handing over its share to the Trust/Waqf by the Builder."

31. In essence, this is not a mere development agreement but also a transfer of interest of the Waqf property to the extent of 13800 sq. ft. built-up area for a consideration of Rs. 50 lacs describing it to be adjustable in the commercial area of the complex. It also recites that it is in continuance of the agreement dated 09.09.2002.

32. It is surprising that if this agreement did exist or was in contemplation which substantially alters the proportion of adjustment of the built-up area likely to reduce the share of the Waqf, then why was the same not presented either before the Board for approval or before this Court when the matter was being decided on 5th August, 2009. It is, therefore, obvious from the conduct of the applicant that such a document was never professed to be in existence either before the Board or before this Court and it was brought to the notice of the High Court for the first time in the year 2012 after almost 10 years when the demarcation dispute was being considered by a learned Single Judge in C.W.J.C. No. 6870 of 2012. Upon having noticed the same, the Court ruled on 5th October, 2012 that such a claim of the applicant has to be rejected and there is nothing on record to indicate that the order dated 5th October, 2012 was ever challenged. The suspicion and the doubt about the conduct of the applicant, therefore, stands confirmed that the applicant did not choose to raise any plea for the enforcement of any rights for ten years which is being claimed through the document dated 15.11.2002 by describing it to be a continuance of the earlier agreement. It is evident that the earlier agreement did not contemplate any deviation and as observed above nor was there any deviation permissible after the judgment dated 5th August, 2009 that stands confirmed with the order dated 5th October, 2012 which remains unchallenged.

33. The applicant, therefore, now appears to have grown wiser by raking up this dispute of an additional share under the garb of the so-called agreement dated 15.11.2002, which is not a registered agreement as it purports to transfer immovable property in exchange of a consideration of Rs. 50 lacs. The document, therefore, is neither a valid or a legal document nor is it a contractual agreement that can be legally acknowledged under the provisions of the Transfer of Property Act as it is clearly with regard to immovable property. The said agreement does not have the approval of the Board as discussed hereinabove. The legality of the document, therefore, has not been established and the conduct of the applicant in producing it after 10 years virtually amounts to a new attempt to commence a fresh dispute with regard to the share of the property that already stood concluded by judicial interventions on two occasions.

34. This is, therefore, a case with peculiar facts which have to be taken notice of

in order to understand the authority of this Court to proceed with the matter in the light of the principles laid down by the Apex Court in the judgments referred to hereinabove. There is no doubt that this High Court is the appropriate High Court and there is also no doubt that an arbitration clause exists in respect of the development agreement dated 09.09.2002. The applicant and the Mutwalli of the Waqf Property are party to the said agreement. However, there is nothing to establish that an arbitration agreement in the present case relating to the document dated 15.11.2002 exists, inasmuch as, the arbitration clause can exist only if there is an existence of a valid and legal agreement. The Mutwalli denies having knowledge of the document dated 15.11.2002 and does not contain his signature. In absence of approval of the Board, which fact remains undisputed, in respect of the document dated 15.11.2002, there is no fact in issue which requires to be traversed or adjudicated.

35. Section 51 of the 1995 Act reads as under:-

"51. Alienation of waqf property without sanction of Board to be void- (1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board:

Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013.

(1-A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void ab initio.

Provided that in case the Board is satisfied that any waqf property may be developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two-third of the total membership of the Board:

Provided further that nothing contained in this sub-section shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:

Provided also that-

(a) the acquisition shall not be in contravention of the Places of Worship (Special Provisions) Act, 1991 (42 of 1991);

(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;

(c) no alternative land is available which shall be considered as more or less

suitable for that purpose; and

(d) to safeguard adequately the interest and objective of the waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property."

36. The document dated 15.11.2002 sought to be relied on cannot be enforced in the absence of a valid and legal sanction, inasmuch as, an alienation of the nature sought would be void ab initio in terms of Section 51 of the 1995 Act.

37. In my opinion, and in view of the conclusions drawn hereinabove, once the agreement dated 15.11.2002 does not have a valid and legal existence, the proceedings undertaken under Section 11(6) of the 1996 Act can go into this issue which is purely legal, as the existence of a legally valid agreement is a sine qua non in order to apply the arbitration clause. In the instant case, it is through this indirect method of the creation of an agreement dated 15.11.2002 that the arbitration clause is being invoked that exists in the agreement dated 09.09.2002 which is the only valid development agreement. Thus, in my opinion, the applicant cannot invoke the arbitration clause on the strength of a document which does not have a valid and legal existence. There is, therefore, no arbitration clause available that can be invoked for the purpose of appointing an Arbitrator.

38. Coming to the issue advanced about the applicability of the Waqf Act, 1995, the contention of Shri P.K. Shahi, learned counsel for the applicant that only such matters can be taken up before the Waqf Tribunal that fall within Section 6 and Section 7 read with the provisions of Chapter 8 of the Waqf Act. There cannot be any dispute with the aforesaid proposition, but looking to the aims and objects of the Waqf Act, as amended in the year 2013, there is a complete control provided therein in respect of the properties of the Waqf. In the instant case, the applicant is virtually seeking enforcement of the transfer of 13800 sq. ft. of land for exchange of a consideration of Rs. 50 lacs. This obviously involves the transfer of Waqf property and, therefore, if the applicant is aggrieved claiming that 13800 sq. ft. of land is not Waqf property and stands transferred to him then in that event the ouster of the Waqf Act, 1995 cannot be inferred. To the contrary in view of Section 85 of the Waqf Act, 1995, the Arbitrator cannot be conferred with authority to decide any such dispute as involved herein in the absence of a valid and legal agreement, and consequently the powers of Section 11(6) cannot be invoked for the said purpose.

39. As per the guidelines enunciated by the Apex Court in the case of National Insurance Company Limited (supra), a Chief Justice is bound to decide the issues indicated in Paragraph 22.1 of the reported decision extracted hereinabove which includes the existence of an arbitration agreement. On the peculiar undisputed facts of this case namely:

(a) The final judgment of this Court dated 05.08.2009 imposing prohibition on any transaction of the 45% share without approval of the Board.

(b) The order dated 5th of October, 2012 that remains unchallenged which petition was ultimately consigned as infructuous on the statement of counsel.

(c) There being no approval to the document dated 15.11.2002 by the Board in terms of Section 51 of the Waqf Act, 1995, and

(d) The conduct of the applicant in not disclosing the document dated 15.11.2002 throughout the proceedings, the same being binding between the parties as well as necessary to construe the existence of the arbitration clause, cannot be ignored as these facts do not require adjudication. The applicant has not been able to dispute the same. There is therefore no legal and valid existence of the document dated 15.11.2002 as a lawful agreement to invoke the arbitral jurisdiction in view of the aforesaid facts.

40. The powers under Section 11(6) is to authorize the exercise of jurisdiction of an arbitrator but not where there is a judicial verdict as involved presently coupled with the non-fulfilment of a statutory requirement to establish the existence of a lawful agreement. The applicant by virtue of the above circumstances is incapacitated from invoking the powers under Section 11(6) of the 1996 Act.

41. In the background aforesaid, I do not find the application to be maintainable for all the aforesaid reasons, which is accordingly rejected.