

**(2006) 09 PAT CK 0053**  
**In the Patna High Court**  
**Case No : Request Case No. 38 of 2005**

Namira Construction Pvt. Ltd.

APPELLANT

Vs

Fazal Imam Public Religious and Charitable Trust

RESPONDENT

**Date of Decision :** 08-09-2006

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11(6)  
Criminal Procedure Code, 1973 (CrPC) — Section 144

**Citation :** AIR 2007 Patna 32 : (2006) 4 PLJR 168

**Hon'ble Judges :** V.N. Sinha, J

**Bench :** Single Bench

**Advocate :** S.P. Singh, Krishna Kishore Sinha and Sunil Kumar Sharma No. 1, for the Appellant; Chittaranjan Sinha Ajeet Kumar, Avinash Kumar and Prakash Ranjan Sinha for Respondent No. 1, S.S. Dwivedi R.S. Dwivedi and R.K. Dubey, for the Respondent

**Final Decision :** Dismissed

## Judgement

V.N. Sinha, J.—This is an application under Sub-Section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for appointment of an Arbitrator under the Arbitration Clause 30 of the development agreement dated 2.9.2002, Annexure-1 and it has been placed before me as the nominee of Hon'ble the Chief Justice to consider the request of the applicant (builder) to appoint an Arbitrator as the other party to the agreement, dated 2.9.2002, Annexure-1, namely, the land owner (Mutwalli) declined to refer the dispute for arbitration in response to notice dated 6.9.2005, Annexure-3 vide his reply dated 10.9.2005, Annexure-A to the supplementary affidavit on the ground that agreement dated 2.9.2002 does not exist and has been superseded by another agreement signed between the parties dated 9.9.2002, Annexure-2.

2. Before considering the prayer made in the application it is necessary to advert to a few facts leading to the dispute between the parties and filing of the present case as has been submitted by them.

3. There is a Wakf property measuring 34 Kathas of land bearing Plot No. 65, Holding No. 539/345 (Old) 1067 (New), Circle No. 6, Ward No. 5, situate adjacent to Frazer Road, Patna. Mutwalli Begam Saiyeda Mehdi Imam under letter dated 01.06.2000, Annexure-15 requested the Chairman of the Bihar State Shia Wakf Board (hereinafter referred to as the Board) to permit the Wakf Estate during her life time to raise a memorial in the name of her son Fazal Imam through a builder on conversion basis in which there will be a community centre having various other facilities like hospital (charitable), Islamic School for the poor, Islamic Library, Marriage hall for Muslims etc. so that the funds may be available to the Wakf Estate to run the various charitable schemes. The Board considered the request of the Waqifa contained in letter dated 1.6.2000 and under resolution No. 7 dated 16.7.2000, Annexure-16 granted permission to the Waqifa to enter into a building agreement with the builder to raise a multistoreyed building (the memorial with Community Centre and other facilities Like Hospital (Charitable), Islamic School for the poor, Islamic Library, Marriage Hall etc.) on conversion basis and communicated the resolution enclosing the same under letter No. 470 dated 19.7.2000, Annexure-16 further requesting the Waqifa to get prepared the terms and conditions of the proposed agreement with the builder by the Board's advocate and furnish a copy of the same to the Board at the earliest. Under Letter No. 244 dated 22.02.2001, Annexure-17 the Board forwarded copy of the subsequent resolution No. 28(2) dated 02.01.2001, whereunder the Board approved the share of the Wakf Estate and the builder in the built up area of the multistoreyed building and forwarded the same to the Mutwalli requesting him to furnish draft of the agreement to be executed with the builder for development of the aforesaid Wakf property on conversion basis so that the Board may consider the terms and conditions of the agreement for its approval. Begam Saiyeda Mehdi Imam (Waqifa) and Faiz Murtaza Ali (Mutwalli) thereafter on behalf of the Wakf Estate entered into development agreement dated 2.9.2002, Annexure-1 with M/s Namira Construction Pvt. Ltd., applicant, through its one of the Directors, Mr. Seraj Anwar. The said agreement is contained in Annexure-1 and certified copy thereof is also placed on the records of this case as part of Annexure-8 series. Perusal of the said agreement indicates that with reference to the aforesaid resolution of the Board dated 16.7.2000, Annexure-16 and 02.01.2001, Annexures- 17, it was agreed between the land holders (Waqifa/ Mutwalli) and the builder that 30,000 sq.ft. out of the total built up area, will be the share of the Wakf Estate and construction will be made as per the bye-laws of Patna Regional Development Authority (hereinafter referred to as the Authority) within a period of three years and six months from the date of approval of the building plan by the Authority. Clause 30 of the agreement in case of dispute between the parties provided for Arbitration Clause to resolve the dispute between them. Subsequently, the development agreement dated 2.9.2002, Annexure-1 was placed for approval before the Wakf Board and after its approval by the Wakf Board Mutwalli Faiz Murtuaza Ali executed a Special Power of Attorney dated 9.9.2002, Annexure-2 in favour of Seraj Anwar, one of the Directors of the builder company so that the builder may take appropriate

steps for commencing the building activities on the lands-in-question. The Mutwalli also filed application before the authority on 28.9.2002 for permission to erect the building on the aforesaid land together with affidavit, Indemnity Bond, sheets of drawing and money receipts as is evident from Annexure-8 series so that the Authority may consider and approve the building plan as also grant permission to commence building activities. The Authority having examined the application for permission to erect filed together with the affidavit, Indemnity Bond, Sheets of drawing and money receipts, noticed that the land-in-question is a Wakf property and sought the advice of its retained counsel who recorded his opinion on 10.6.2003 advising the authority to direct the applicant to produce the development agreement as the lands-in-question belongs to a Wakf Estate. In compliance of the instructions issued by the authority, development agreement dated 2.9.2002, Annexure-1 was produced along with the affidavit of the Mutwalli which fact, according to the applicant, is evident from the note-sheet of the Authority, as is contained along with Annexure R-17 and in this connection notes at page 357 of the brief has been referred to. After perusing the development agreement dated 2.9.2002, Annexure-1 and other connected documents, the Authority accorded its sanction to the building plan in Plan Case No. 1176 of 2002 and informed the Mutwalli about the sanction of the plan under letter dated 27.2.2004, Annexure-5. Sri Seraj Anwar had become Managing Director of the builder company with effect from 27.9.2002 as is evident from Form 32 which is part of Annexure-19, whereafter he being the Chief Executive of the building Company was alone competent to anticipate the decision of the Board of Directors in regard to the affairs of the Company and in recognition of the said fact it appears a general Power of Attorney dated 24.5.2004 was executed by Faiz Murtuza Ali Mutwalli in favour of Mr. Seraj Anwar in which it is said opposite party No. 1 has referred to the earlier agreement dated 2.9.2002, Annexure-1 and the said Power of Attorney is contained in Annexure-13.

4. Once approval of the building plan was communicated by the Authority to the Mutwalli applicant company took up the construction work over the land-in-question which continued without any hindrance until July, 2005. Thereafter, opposite party No. 1 began creating mischief and got initiated 144 Cr.P.C. proceeding at his instance and the construction work was stopped under orders of the S.D.M., Patna dated 4.8.2005. The applicant thereafter appeared before the S.D.M., Patna on 5.9.2005 who after hearing the parties including opposite party No. 1 under orders dated 30.9.2005 vacated the prohibitory order passed u/s 144 Cr.P.C. in favour of the applicant. As the applicant was being dragged in the aforesaid unwanted litigation u/s 144 of the Cr.P.C. before S.D.M., Patna, he invoked Arbitration Clause 30 of the agreement dated 2.9.2002, Annexure-1 under legal notice dated 6.9.2005, Annexure-3 and requested the Mutwalli to agree for arbitration of the dispute. The opposite party No. 1, Mutwalli, under reply dated 10.9.2005, Annexure-4, however, declined the offer to refer the dispute for arbitration, as, according to him, the agreement dated 2.9.2002, Annexure-1 stood superseded by agreement dated 9.9.2002, Annexure-2 which

was also subsequently cancelled in view of the resolutions of the Company dated 9.5.2003 nominating Mr. Anand Amrit Raj, Advocate as an Arbitrator for all disputes. As the request of the applicant to refer the dispute for arbitration was turned down by the opposite party, applicant had no option but to file the instant Request Case No. 38 of 2005 on 13.9.2005. During the course of hearing it has been submitted on behalf of the applicant that subsequent agreement dated 9.9.2002, Annexure-2 though executed by and between the parties but was never acted upon as would appear from the conduct of the parties and the various documents appended with the pleadings filed in the case, namely, the note-sheet of the Authority, Annexure-8 and R/17 as also Power of Attorney dated 24.5.2004, Annexure-13 and the sanctioned map and other documents on the basis of which there should be no difficulty for this Court to conclude that earlier agreement dated 2.9.2002, Annexure-1 is holding the field and the subsequent agreement dated 9.9.2002, Annexure-2 was never acted upon.

5. It has been submitted on behalf of Opposite Party No. 1 that in terms of the permission granted by the Board in the light of the request of the Mutwallis contained in Letter dated 01.06.2000, Annexure-15 to raise a memorial in the name of Fazal Imam as also to enhance the income of the Wakf Estate the Mutwallis began to negotiate the terms of the development agreement with the proposed builders, namely, the applicant and it was agreed between them in their meeting dated 3rd August, 2002 that the Wakf Estate would be getting 45 per cent of the built up area as per the sanctioned plan and proposal to that effect was submitted by the builder to the Mutwalli Faiz Murtuja Ali under letter dated 5.8.2002, Annexure-R/20 which was accepted by the Mutwalli and evidencing the acceptance Development agreement dated 2.9.2002, Annexure-1 was signed between the applicant and the Mutwallis in which the Wakf Estate was given 30,000 sq.ft. in a separate block which was agreed to be handed over to the Wakf Estate within three and a half years failing which compensation to the tune of Rs. 1 lac 50 thousand per month was agreed to be paid to the Wakf Estate. The period of three and half years was to begin with effect from final approval of the building plan by the Authority. Grace period of six months to complete the construction was further allowed. It is further submitted that the terms of the agreement dated 2.9.2002 was not in tune with the proposal made under letter dated 5.8.2002, as such, in order to incorporate the terms contained in letter dated 5.8.2002, another development agreement dated 9th September, 2002 superseding all earlier agreement was signed between the applicant and the Mutwalli, whereunder 45 per cent of the built up area i.e. 46250 sq. ft instead of 30,000 sq. ft. was given to the Wakf Estate or in Lieu of the aforesaid built up area a sum of Rs. five crore and fifty Lacs was agreed to be paid within 12 months of the signing of the said agreement. Besides the aforesaid amount a hall measuring 6,000 sq. ft. was also agreed to be given to the Wakf Estate. Compensation at the rate of Rs. 5000/- per day was agreed to be paid to the Wakf Estate if the constructed area was not handed over to the Wakf Estate before the expiry of the grace period. Special Clause-5 of the subsequent

agreement superseded all earlier agreements made between the parties. Special Clause 4 of the subsequent, agreement dated 9.9.2002 provided for arbitration clause in case of dispute or difference between the parties arising out of the development agreement but the same was first required to be amicably settled between them and only in the event of failure to settle the same amicably dispute was to be referred for arbitration.

6. Having executed the subsequent agreement dated 9.9.2002, Annexure-2 the Mutwalli opposite party No. 1 executed special Power of Attorney dated 9.9.2002 Clause 5 and 6 whereof authorized the developers to take all necessary steps for execution of the development agreement. Invoking the aforesaid two Clauses of the agreement the developer filed application before the Authority on 23rd October, 2002 initiating the process for approval of the building plan. In this connection, reference has also been made to Annexure-R/17 at page 340 of the brief. It is further case of opposite party No. 1 that the applicant failed to comply the terms of the development agreement dated 9.9.2002 when he failed to make payment of Rs. 25 lacs and, accordingly, opposite party No. 1 asked the applicant under letter dated 17.2.2003, Annexure-R/5 to show-cause as to why the development agreement dated 9.9.2002 be not taken as lapsed for failure to pay the aforesaid amount. Under Letter dated 3rd June, 2003, Annexure-7 at page 219 of the brief Sri Seraj Anwar with reference to paragraph 7 of the development agreement dated 9.9.2002 informed the Waqifa and the Mutwalli that they have already invested huge sum in the project and they are not interested in the transfer/purchase of the 45 per cent of the total built up area, the share of the Waqifa/Mutwalli, in their favour, on payment of Rs. five crore and fifty lacs within 12 months of the signing of the said agreement and, accordingly, the Waqifa/Mutwalli are free to negotiate or enter into any other agreement for sale of their share of the built up area. Opposite Party No. 1 has also relied on the opinion of the learned Counsel for the Authority dated 10th June, 2003 to submit that till date of the opinion neither the copy of the development agreement nor the Power of Attorney executed by the Mutwalli was filed before the Authority which, according to opposite party No. 1, was filed by Sri Seraj Anwar on 31.12.2003 along with letter dated 31.12.2003, Annexure-R/16 at page 338 of the brief. With reference to the said letter it was specifically submitted that the Mutwalli neither filed the development agreement nor Power of Attorney in compliance of the instruction of the Authority in terms of the opinion of the Learned Counsel for the Authority as those documents were filed by Sri Seraj Anwar himself and he can better explain the filing of the superseded agreement dated 2.9.2002 before the Authority on 31.12.2003 in response to notice of the Authority dated 27th December, 2003, Annexure-R/17. With reference to letter of Mr. Seraj Anwar, the Managing Director of the applicant, dated 3.6.2003, Annexure-7 at page 219 of the brief it is submitted that all along the parties proceeded on the footing that agreement dated 2.9.2002 was superseded by subsequent agreement dated 9.9.2002 and thus there is no occasion for this Court to proceed and make appointment of the Arbitrator in

terms of the superseded agreement dated 2.9.2002, Annexure-1. It is further submitted in this connection that once the applicant under the aforesaid letter dated 3.6.2003, Annexure-7 declined to purchase 45 per cent share of the Waqifa/Mutwalli, another general Power of Attorney, Annexure-8 at page 220 of the brief was executed by the Mutwalli in favour of M/S Seraj Anwar and Shoab Hassan authorizing them to book flats/shops and offices falling within the share of the Wakf Estate to the extent of 12,000 sq. ft. out of the 45 per cent total share of 46,200 sq. ft. and receive money on its behalf and submit weekly report. Recitals of the aforesaid general Power of Attorney also indicate that the share of the Wakf Estate out of the total built up area is to the extent of 46,250 sq.ft. which is corresponding to the area given to the Wakf Estate in the subsequent agreement dated 9.9.2002 and not the earlier agreement dated 2.9.2002, Annexure-1. As regards Power of Attorney, dated 24.5.2004, Annexure-13 it is submitted that reference in the said Power of Attorney to the earlier agreement dated 2.9.2002, Annexure-1 shall not bind the opposite party No. 1 as he is not a signatory to the said Power of Attorney.

7. In the background of the aforesaid facts it is submitted on behalf of Opposite Party No. 1 with reference to the judgment of the Hon"ble Supreme Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, that the nominee of the Chief Justice has to apply his own mind as regards the existence of the Arbitration Clause in the agreement and if he is satisfied that there exists a valid arbitration clause which has not been acted upon by the parties then only a reference is required to be made. In this connection, he has further relied on another judgment of the Hon"ble Supreme Court in the case of Rodemadan India Limited v. International Trade Expo Centre Limited reported in 2006(3) SC 484. According to him, the applicant desired to invoke arbitration clause in the agreement dated 2.9.2002 which stood superseded under subsequent agreement dated 9.9.2002, as such, the prayer of the applicant to appoint the Arbitrator in terms of superseded agreement was rightly refused by opposite party No. 1 and should not be entertained by this Court and the parties be relegated to the Civil Court for seeking their relief after establishing as to which of the two agreements is holding the field or both have been superseded by yet another agreement.

8. Opposite Party No. 2 who was impleaded under orders of this Court dated 23.6.2006, has also submitted that not only the first agreement dated 2.9.2002, Annexure-1 was superseded by the subsequent agreement dated 9.9.2002, Annexure-2 but the subsequent agreement dated 9.9.2002 has also been cancelled and now the building contract has been awarded to Opposite Party No. 2, as such, neither of the two agreements are subsisting and this Court should not proceed to make appointment of any Arbitrator to adjudicate the dispute between the parties.

9. In reply learned Counsel for the applicant with reference to Letter of the Managing Director Sri Seraj Anwar dated 3.6.2003, Annexure-7 has submitted with reference to paragraph 3 of the Reply filed on behalf of the petitioner dated

23.6.2006 that Letter head of the Company with signature of the Managing Director, Sri Seraj Anwar appears to have been mis-used by one of the Directors of the Company, who was in possession of the blank letter head of the Company with signature of the Managing Director, Sri Seraj Anwar given to him with clear instruction to use the letter head as and when the Managing Director is away from the headquarter, but it appears that the Director who has now become hostile to the Company has used the same only with a view to harm the interest of the Company and the statements made in the letter dated 3.6.2003 are not correct as it refers to the agreement dated 9.9.2002, which was never acted upon between the parties and should not be relied upon by this Court. It is further submitted that the subsequent agreement dated 9.9.2002, Annexure-2 was never placed before the Wakf Board and in the circumstances could not have superseded the earlier agreement dated 2.9.2002, Annexure-1 between the parties as the contents of the earlier agreement dated 2.9.2002 had the approval of the Wakf Board which is apparent from perusal of the resolutions of the Board dated 16.7.2000 and 2.1.2001 annexed with the pleadings as Annexures-16 and 17 and in view of the aforesaid legal position applicant invoked the Arbitration Clause 30 of the agreement dated 2.9.2002, Annexure-1, which was not responded to by the Mutwalli, as is evident from reply dated 10th September, 2005, Annexure-4 and in the light of the said fact this Court should proceed and make appointment of the Arbitrator.

10. Having heard counsel for the parties and having perused the pleadings filed by them together with the documents annexed thereto, I am of the view that the development agreement dated 2.9.2002, Annexure-1 was executed by and between the applicant and the opposite party No. 1 after grant of permission by the Wakf Board as is evident from the two resolutions of the Board dated 16.7.2000 and 02.01.2001, Annexures- 16 and 17 but from perusal of those resolutions, it does not appear that the terms and contents of the agreement dated 2.9.2002, Annexure-1 executed by and between the parties was ever approved by the Wakf Board. Permission to execute agreement shall necessarily include permission to revise the agreement already executed between the parties. No statutory provision of the Wakf Act, 1995 has been brought to my notice whereunder the parties to the earlier agreement are precluded from signing the subsequent agreement dated 9.9.2002, Annexure-2 superseding the earlier agreement. In terms of the special Clause-5 of the subsequent agreement dated 9.9.2002, Annexure-2 all the earlier agreement made between the parties were superseded. In the subsequent agreement dated 9.9.2002, Annexure-2 the Wakf Estate has been given 45 per cent of the total built up area i.e. 46,250 sq.ft. which is much more than 30,000 sq.ft. which was given to the Wakf Estate in the earlier agreement dated 2.9.2002, Annexure-1. From the contents of the subsequent agreement dated 9.9.2002, Annexure-2 it appears that the same was executed by and between the parties only with a view to give effect to the proposal of the builder, contained in the letter dated 5.8.2002, Annexure-R/20. From perusal of the application form for permission to erect the building-in-

question and other connected documents including the note-sheet of the authority as contained in Annexure-8 series and letter dated 31.12.2003, Annexure-R/16 of the Managing Director Sri Seraj Anwar addressed to the Assistant Engineer of the authority in response to the notice dated 27.12.2003, it is difficult for this Court to conclude that the building agreement was filed before the authority by opposite party No. 1 as from letter dated 31.12.2003, Annexure-R/16 it is evident that the compliance of the notice dated 27.12.2003 was made by Sri Seraj Anwar, Managing Director and not by the Mutwalli and in the circumstances, if he chose to file the superseded agreement dated 2.9.2002, Annexure-1 then he could not be allowed to take advantage of filing the superseded agreement dated 2.9.2002, Annexure-1.

11. In view of the discussion made above, there is no difficulty to conclude that the earlier agreement dated 2.9.2002, Annexure-1 stood superseded when the subsequent agreement dated 9.9.2002, Annexure-2 was signed by and between the parties. In the circumstances, the applicant was not justified in requesting opposite party No. 1 to refer the dispute for adjudication by the Arbitrator in terms of the superseded agreement dated 2.9.2002, Annexure-1 and I do not see any illegality in the rejection of the said request under letter dated 10.9.2005, Annexure-A, which is, accordingly, upheld and the request case is dismissed.