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M/S TECHMAN SHELTERS PVT. LTD.

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Trideep Pais Mr. Shivam
Sharma & Mr. Rakesh Mishra,
Advocates.

SH. VIJAY CHOUDHARY

Through: Mr. Abhay Kumar, Advocate.

OMP No.318/2009

M/S TECHMAN SHELTERS PVT. LTD.

....Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Trideep Pais Mr. Shivam
Sharma & Mr. Rakesh Mishra.

SH. SANJEEV SINGH & OTHERS

... Respondents

Through: Mr. Abhay Kumar, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

RAJIV SAHAI ENDLAW, J.

1. These petitions, both under Section 9 of the Arbitration and Conciliation Act, 1996 are in respect of two agreements, informed to be identical, and entail the same questions of law and fact. Vide

order dated 10.06.2009 in these petitions, after hearing the counsel for the parties, this court was pleased to direct the parties to maintain the status quo with respect to title and possession of the property subject matter of the petitions in terms of the report of the Court Commissioner appointed on that date. The Commission has been executed and the Court Commissioner has filed the report in this court.

2. The respondents have not filed any reply to these petitions. The counsel for the respondent has urged that as per the agreement, the parties prior to arbitration are required to approach the named persons for mediation and the parties had further undertaken not to approach the Court but to resolve the disputes through mediation as aforesaid and only if the mediation fails, the matter was agreed to be submitted for conciliation or arbitration under the Arbitration and Conciliation Act, 1996.

3. Counsel for the respondent has contended that there is no averment whatsoever in the petition of the petitioner having approached the mediators aforesaid or of the mediation having failed and since the arbitration agreement was to come into effect thereafter only, even this petition is not maintainable without process of mediation being followed.

4. It is also contended that these petitions are not maintainable for the reason of the petitioner having filed the application under Section 9 of the Act for the same reliefs as claimed in these petitions before the Court of the Civil Judge, Delhi.

5. The petitioners had prior to the institution of this petition

instituted a suit in the Court of the Civil Judge, Delhi for declaration and permanent injunction inter alia with respect to their rights in the same properties. The respondents on being served with the notice of the said suit filed an application under Section 8 of the Act in the suit. Thereafter, the petitioner herein filed an application under Section 9 of the Act in the same suit.

6. During the pendency of the aforesaid proceedings, these petitions came to be filed and the disclosure of the previous proceedings was made in the petition and in fact, the counsel for the respondent also has made a submissions on the basis of the copies of the pleadings in the suit aforesaid filed along with the petition. Senior Counsel for the petitioner has pointed out that in fact prior to approaching this Court, the petitioner had already applied to the Court of the Civil Judge, Delhi for withdrawal of the application preferred under Section 9 in the suit. It is fairly stated that the said application in the suit was misguided and the remedy of the petitioner was by way of an independent OMP as has now been preferred. Counsel for the respondent has contended that the application for withdrawal of application under Section 9 in the suit was also pending as on the date of the institution of these petitions.

7. In my view, the petitioner would not be disentitled from maintaining these petitions for the reason of having filed Section 9 application in the suit before the Civil Judge. In view of the arbitration agreement between the parties, the suit in any case was barred and not maintainable and thus the question of preferring the Section 9 application therein did not arise. Therefore, the earlier proceedings do not come in the way of the petitioner.

8. As far as other contention of the respondent is concerned, though there is some ambiguity in the arbitration agreement i.e whether the same constitutes an agreement for arbitration or not but in view of the pleadings of the respondents in the previous proceedings aforesaid and on which reliance is placed in this Court also, the respondents have within the meaning of Section 7 (4) (c) of the Act admitted the existence of the arbitration agreement. Senior counsel for the petitioner also drawn attention to the application under Section 8 preferred by the respondents, wherein, the respondents have stated that a serious dispute had arisen between the parties, they ought to be referred for arbitration as per the agreement and the petitioner herein had abused the process of the Court by instituting the suit.

9. The clause aforesaid on which reliance is placed by the respondent in my view does not bar a petition under Section 9 of the Act. Even if the arbitration is agreed to be preceeded by mediation, the fact remains that the parties had agreed to arbitration. Once such an agreement exists, the Court would be empowered under Section 9 and any party entitled to a relief under Section 9 would be entitled to approach the Court. Merely because the parties had agreed to preceed arbitration with mediation cannot prohibit the remedies available to them in law and the clause in the agreement prohibiting the parties from approaching the Court till mediation, is found to be against public policy. The interim measures to which a party may be entitled to, may become infructuous if the filing of the petition under Section 9 has to be deferred during mediation. The parties had not agreed to any time schedule also for mediation.

10. The senior counsel for the petitioner has in this regard also

cited M.K. Shah Engineers & Contractors Vs. State of Madhya Pradesh (1999) 2 SCC 594. The Supreme Court held that the steps preceeding the coming into operation of the arbitration clause, though essential are capable of being waived.

11. The counsel for the respondent has also urged that till now the petitioner has not approached the agreed mediators and if the petitioner still approaches the mediators, the need for arbitration may not arise. On enquiry, it is informed that the respondents have also not approached the mediators till date. The dispute between the parties are pending since long. From the conduct of the respondents of having not taken any steps for mediation and of applying under Section 8 of the Act, the respondents are deemed to have waived mediation as a precursor to arbitration. In any case, if the parties feel the need for approaching the mediators, the parties would still be entitled to do so.

12. The Senior Counsel for the petitioner has also urged that para 16 of the order dated 10.06.2009 is ambiguous and may lead to further disputes. The petitioner had agreed to at its own cost raise construction on the land/property of the respondents; in lieu thereof the built up area was agreed to be shared by the parties; the petitioner had also advanced some monies to the respondents which were agreed to be refunded by respondents on completion of construction. Attention is invited to Clauses 10 & 11 of the agreement between the parties, wherein, the respondents have agreed not to sell, use, mortgage, lease or convey their entitlement of the built up area in the property until the refund of the monies to the petitioner. Counsel for the respondent has controverted the same by drawing attention to Clause 19 of the agreement,

whereunder, the respondents are entitled to compensation from the petitioner for delay in construction. It is contended that the petitioner delayed the construction and hence, the respondents are entitled to compensation and thus, no monies are refundable by the respondents to the petitioner. However, all that is to be the subject matter of the arbitration and the respondents cannot decide for themselves that the delays were occasioned owing to the petitioner or the amount of compensation due to them or for no refund being due to the petitioner for this reason.

13. The parties having contracted that the respondents shall not sell their entitlement of the built up area also till settlement of the dues of the petitioner, till the same is done and which can be done only in arbitration, the respondents are not entitled to sell any portion of their entitlement also of the built up area of the property.

14. Accordingly, these petitions are disposed of directing both the parties to maintain status quo qua title, possession and use for the properties subject matter of these petitions, in terms of the report of the Local Commissioner. No order as to costs.

15. Senior Counsel for the petitioner has expressed apprehension of breach of the said order. Considering the locality and nature of disputes the SHO concerned is directed to ensure compliance of the order.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 9th, 2009
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