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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 578/2010 & I.A. Nos. 13338/2010, 10196/2011,
11787 and 11787/2011

MOHD ASLAM

..... Petitioner

Through: Mr. S.K. Bhalla, Advocate.

versus

ABDUL SALAM @ BHAIYAN & ANR

..... Respondents

Through: Mr. M.B. Singh, Advocate.

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✓ O.M.P. 19/2011

ABDUL SALAM @ BHAIYAN

..... Petitioner

Through: Mr. M.B. Singh, Advocate.

versus

SAEED AHMAD & ORS

..... Respondents

Through: Mr. S.K. Bhalla, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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21.10.2011

**O.M.P. 578/2010 & I.A. Nos. 13338/2010, 10196/2011, 11787/2011,
and 11788/2011**

1. This is a petition, captioned as one under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ('the Act'), seeking two alternative

reliefs. It is prayed that arbitration proceedings commenced by Respondent No. 2, who was appointed as an Arbitrator by Respondent No. 1 to adjudicate the disputes and differences between the Petitioner and Respondent, should be withdrawn and assigned to some other independent Arbitrator nominated by the Court. The alternative prayer is that the arbitration proceedings initiated on the basis of purported agreement to sell dated 16th May 1986 should be quashed on the grounds of delay and laches and abuse of process of law.

2. Invoking an arbitration clause contained in the agreement to sell entered into between the parties, Respondent No. 1 nominated Respondent No. 2 to act as an Arbitrator. The explanation given by Respondent No. 1 for waiting more than 24 years to invoke the said clause is that there was some litigation concerning half of the property in question between the Petitioner and some third parties in which there was an interim order. The litigation ended with an order passed by the Supreme Court in 2010. It was only thereafter that Respondent No. 1 could invoke the arbitration clause.

3. The contention of the Petitioner, on the other hand, is that the invocation

of the arbitration clause was barred by laches. Reliance is placed on the decision of this Court in *Blue Dart Express Ltd. v. Sangam Property 152 (2008) DLT 599*. A separate ground urged is that purported agreement to sell dated 16th May 1986 was itself a forged and fabricated document. Therefore, any arbitral proceedings commenced on the basis of a clause in the said agreement would be *non est* and vitiated. Reliance is placed on the decisions in *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. AIR 2007 SC 1376* and *Shikha Arora v. DSSSB 179 (2011) DLT 568*.

4. Counsel for the Petitioner is unable to point out any specific provision in the Act which permits a party to seek the removal of the Arbitrator by filing an application directly in the High Court. Section 14 (2) contemplates an application to the Court only where a controversy arises whether the mandate of the Arbitrator has terminated on account of his being *de jure* or *de facto* unable to perform his functions or where he fails to act without undue delay. On the facts of the present case, the said provision cannot be invoked. The challenge is not regarding the *de jure* or *de facto* inability of the Arbitrator to perform his functions but whether at all he should be

appointed.

5. Section 13 (2) of the Act permits a party who intends to challenge the appointment of the Arbitrator to send a written statement of reasons for the challenge, within 15 days after becoming aware of the constitution of the Tribunal, to the Arbitral Tribunal itself. In other words, the challenge to the validity of the appointment of an Arbitrator, who has not been appointed by the order of the Court under 11 (6) of the Act, has to be made in the first instance before the Arbitral Tribunal itself. What should happen if the Arbitral Tribunal rejects such challenge is provided under Section 13 (4) of the Act. Where upon a challenge unless the Arbitrator who is challenged withdraws from office, it is the Arbitral Tribunal that should decide on such challenge. The legal position in this regards has been explained in *Dharam Prakash v. Union of India 2007 (1) Arb. LR 308 (Del) (DB)* and *Bharat Heavy Electricals Ltd. v. C N Garg 2000 (3) Arb. LR 674 (Del) (DB)*.

6. Likewise, under Section 16 of the Act the challenge to the validity of an arbitration agreement has also to be raised only before the Tribunal. That

provision itself spells out the consequence where the Tribunal either accepts or rejects such challenge. On neither of the grounds urged in the present petition does the Act envisage a party directly approaching the High Court with an application seeking the removal of an Arbitrator who has entered upon reference.

7. For the aforementioned reasons, this Court holds that the present petition seeking the reliefs as noticed hereinbefore is not maintainable in this Court. The Petitioner should first file an application before the learned Arbitrator raising the challenge in terms of Section 13 (2) of the Act.

8. In the present case, the Arbitrator nominated by Respondent No. 1, i.e., Respondent No. 2, entered upon reference and issued notices to the parties on 14th September 2010. The present petition was filed on 28th September 2010. While directing notice to issue in the petition on 1st October 2010, this Court stayed the arbitral proceedings initiated by Respondent No. 1. Consequently, although the period of limitation under Section 13 (2) of the Act is 15 days, in view of the pendency of the present petition in this Court it

is directed that if the Petitioner approaches the learned Arbitral Tribunal with an appropriate application within a period of two weeks from today, the delay in the Petitioner filing such application before the Arbitrator shall stand condoned. In other words, if an application challenging the appointment of Arbitrator is filed within two weeks, the learned Arbitrator will dispose of such application in accordance with law on merits and will not reject it on the ground of the delay in making such application.

9. With the above directions and observations, the interim order dated 1st October 2010 is vacated and the petition and all applications are disposed of.

O.M.P. 19/2011

10. This is a petition under Section 9 of the Act. Considering the fact that the Arbitrator has already entered upon reference, it is open to the Petitioner to approach the learned Arbitrator for appropriate interim directions in accordance with law.

11. O.M.P. No. 19 of 2011 is accordingly disposed of.

12. The originals of any of the documents filed in these proceedings can be

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returned to counsel for the respective parties subject to their being replaced by copies certified to be true by the respective Advocates.

13. A copy of this order be given dasti to learned counsel for the parties under signature of the Court Master.



S. MURALIDHAR, J

OCTOBER 21, 2011

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