

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 01.12.2014

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Judgment delivered on: 23.12.2014

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OMP 586/2013

N.N. OJHA

..... Petitioner

Versus

PREM MEHRA

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Puneet Aggarwal, Advocate.

For the Respondents: Mr Abhijat & Mr Rishabh Bansal, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act), whereby an injunction is sought against the respondent. The injunction sought is that the respondent ought to be restrained from creating third party interest and/or disposing of, selling or mortgaging the immovable property situate in revenue village of Satbari, Mehrauli, New Delhi, forming part of Khasra No. 1103, admeasuring 85 bighas (hereafter referred to as the property in issue).

2. Notice in this petition was issued on 03.06.2013. The notice was made returnable on 10.06.2013. Despite service, on the returnable date there was no representation on behalf of the respondent. The matter was, however, adjourned to 12.06.2013. On 12.06.2013, once again, there was no representation on behalf of the respondent. Consequently, on 12.06.2013 an order of injunction was passed qua the respondent, whereby he was

restrained from disposing of, selling, mortgaging or creating third party interest in the aforementioned property. However, on this very date, the petition was disposed of.

2.1 The respondent, thereafter, moved an application being: IA No. 11813/2013, under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (in short CPC) for recall of order dated 12.06.2013. Notice in this application was issued on 29.07.2013. The notice was made returnable on 27.09.2013. On the said date, accommodation was sought on behalf of the petitioner, which resulted in, the application, being posted for hearing on 29.10.2013. On that date, it was contended on behalf of the respondent that the respondent's son, who was present in court on 10.06.2013, had wrongly noted the next date as 14.06.2013, as against the correct date, which was 12.06.2013.

2.2 Counsel for the petitioner, while refuting this fact had contended that he would have no difficulty in the main petition being put back on board, as long as the interim order, protecting the petitioner's interest, is continued.

2.3 Accordingly, the application was allowed in those terms vide order dated 29.10.2013. The main petition was put back on board with the caveat that pending disposal of the petition, the respondent will maintain status quo as to title and possession and/or shall not create any third party interest in the property in issue. Time was also granted to the respondent to file his reply with a corresponding liberty granted to the petitioner to file a rejoinder. The record shows, that this process continued till at least July, 2014.

3. It is in this background that the pleadings in the matter got completed. The arguments in the petition were heard for the first time on 26.11.2014 and thereafter on 01.12.2014, when the judgement in the matter was

reserved.

3.1 I may only note that, during the pendency of the present petition, a separate petition under Section 11 of the Act was filed by the petitioner, on 01.11.2014. This petition is numbered as Arb. P. No. 551/2014. Another Single Judge of this court, i.e., Hon'ble Ms Justice Deepa Sharma, has issued notice in the said petition, on 10.11.2014, which is made returnable on 12.02.2015.

4. In order to adjudicate upon this petition, the following facts are required to be noticed:

4.1 The petitioner and the respondent have executed a Memorandum of Understanding dated 21.03.2005 (in short 2005 MOU). The 2005 MOU concerns the aforementioned property.

4.2 The recital to the 2005 MOU records that, one, Mr Islam, son of Manphool, resident of Village Satbari, Mehrauli and his predecessors-in-interest, have held tenancy rights prior to consolidation proceedings carried out qua the property in issue.

4.3 The recital further records that the consolidation proceedings vis-a-vis the said property took place in 1953-54.

4.4 In the recitals, there is also reference to the fact that Mr Islam and his predecessors-in-interest have been in uninterrupted possession of the property in issue since the pre-consolidation period and that they have been carrying on cultivation on the said land uninterruptedly.

4.5 It is further recorded in the recitals of the said MOU that Mr Islam had instituted a declaratory suit, before the Revenue Assistant, Delhi, in respect of his occupancy rights, in which, a restraint order was passed in October, 1991, whereby the statutory authorities have directed that he should not be dispossessed in the meanwhile.

4.6 I may only note, I was informed, during the course of the proceedings that the aforementioned order of October, 1991 continues to remain in force.

4.7 Continuing with the narrative, the 2005 MOU, further records, that a Memorandum of Understanding dated 06.02.1996 (in short 1996 MOU) was executed between Mr Islam and the respondent, whereby Mr Islam sold his occupancy rights to the respondent, for a total consideration of Rs. 28 lacs.

4.8 The 2005 MOU goes on to record that out of the sum of Rs. 28 lacs, the respondent had paid a sum of Rs. 1.50 lacs in cash and another sum in kind, by handing over a Maruti 800 car, which was valued at Rs. 1.5 lacs. The recitals of 2005 MOU go on to state that on such sums being paid in cash and kind, Mr Islam handed over peaceful and vacant possession of the property in issue to the respondent on 06.02.1996 and, in addition, executed a special power of attorney, Will and various other documents of even date, i.e., 06.02.1996, in favour of the respondent.

4.9 The recitals of the 2005 MOU further indicate that disputes arose between the respondent and Mr Islam, which led to the institution of Suit No. 285/1998, by Mr Islam, in this court, which on account of enhancement of pecuniary jurisdiction got transferred to the District Court at Tis Hazari, Delhi. It is also recorded in the recitals that Mr Islam has, pursuant to negotiations conducted with the respondent, agreed to settle their disputes with respect to the property in issue.

5. The MOU of 2005, thus records, that upon the respondent approaching the petitioner with a collaboration offer, the petitioner offered to acquire and develop the property in issue, in a time bound manner, with the hope that he will receive a handsome return; a representation which was backed by a personal guarantee of the respondent, with regard to the money invested.

5.1 Clause 1 of the 2005 MOU records that the petitioner would bear all expenses towards outstanding liabilities, which was to include provisioning of funds for making appropriate payments to Mr Islam, with the purpose of joint acquisition of the entire *Bhoomidari* rights in the property in issue.

5.2 Clause 2 records the mechanism for filing a joint compromise application before the District Court, in which, the suit filed by Mr Islam, at that point in time, was pending adjudication.

5.3 Clause 5 of the 2005 MOU records clearly, as indicated above, that the *bhoomidari* rights in the property in issue will be transferred jointly, in favour of the parties herein or their nominees.

5.4 Clause 6 goes on to record that expenses incurred in transferring the *bhoomidari* rights shall be borne in equal proportion. By this, I would understand, expenses incurred at the time of transfer of *bhoomidari* rights as against those which the petitioner has to incur to get the Mr Islam to agree to get the transfer completed in terms of the MOU.

5.5 Clause 8 adverts to the fact that a boundary wall had to be erected around the property in issue so that it becomes a commercially profitable venture.

5.6 Clause 10 of the 2005 MOU made a provision for exit for the petitioner herein by providing that in case the respondent was not able to acquire *bhoomidari* rights in the property in issue within six (6) months, then the petitioner would be entitled to demand return of the monies advanced, and on such a demand being made, the respondent was required to comply with the demand within a period of 30 days. The demand, however, for return of money, could not be made by the petitioner, for a period of six (6) months commencing from the date of the execution of the 2005 MOU. In other words, by adopting a very convoluted language, what

was agreed was, that the petitioner would have to give a leeway of six (6) months to the respondent to acquire *bhoomidari* rights in the property in issue, failing which, he could make a demand for return of his investment, and if such a demand was made, the respondent was to comply within a period of 30 days.

5.7 In terms of clause 11 of the 2005 MOU, the respondent, in the capacity of the power of attorney holder for his son, was required to execute a separate deed with regard to a property, located at Khasra No. 935 in Pamposh Enclave, New Delhi (in short the Pampose Enclave Property), which, apparently, was owned by his son, so as to serve as a guarantee for the investment made by the petitioner, qua the property in issue.

5.8 As per clause 12 of the 2005 MOU, the total contribution which the petitioner was required to make was a sum of Rs. 95 lacs. It is the petitioner's case that, as required, a sum of Rs. 23 lacs was paid by him to the respondent. The respondent, while accepting the fact that the sum of Rs. 23 lacs had been invested by the petitioner, indicated, that out of the said sum, Rs 20 lacs was paid to Mr Islam, while Rs. 3 lacs was spent on miscellaneous expenses.

6. According to the petitioner, on 16.08.2007, a holograph letter was addressed by the respondent to the petitioner wherein he had, both assured and undertaken, as an attorney, not to sell the plot located at Pamposh Enclave, New Delhi, until he repaid the invested amount, i.e., the sum of Rs. 23 lacs received by him in terms of the 2005 MOU.

7. The record shows that on 20.10.2010, the District Court at Karkardooma disposed of the suit filed by Mr Islam vide judgement dated 20.10.2010.

7.1 By this judgement, the suit filed by Mr Islam was partly decreed, in as

much as, while the relief of declaration as sought was denied, his prayer for injunction was granted. Accordingly, the respondent herein (the original defendant in the said suit), was restrained from dispossessing Mr Islam from the aforementioned property, except in accordance with law.

7.2 I may only note that I have been informed that a Regular First Appeal bearing no. 90/2011, has been filed in this court, by Mr Islam, which is pending adjudication. The net result is that, Mr Islam's prayer for declaring 1996 MOU, as null and void, on the ground, that a fraud had been played on him, was declined.

7.3 Consequently, as things stand today, the 1996 MOU is intact, which is the reason, that the petitioner, in the first instance, was propelled to invest in the property in issue.

8. It appears parties herein maintained silence till a letter dated 31.07.2012, was written by the petitioner to the respondent. In this letter, inter alia, the petitioner adverted to the fact that he had paid a sum of Rs. 23 lacs to the respondent, in pursuance of the 2005 MOU, on the understanding, that the respondent would build a boundary wall and acquire *bhoomidari* rights from Mr Islam, by making payments to him.

8.1 The petitioner also sought to convey by this letter that, despite assurances, that the respondent would execute a mortgage deed in his favour qua the Pamposh Enclave property, the needful had not been done. Importantly, in this letter the petitioner stated that he was ready with the balance amount, as long as, the respondent was able to satisfy him, that the, money already paid was utilized in a proper manner, and that, he was ready to execute "a proper guarantee deed/ mortgage deed", in his favour.

8.2 The respondent was requested to act promptly, qua the issues raised, failing which, it was indicated, that the petitioner would take recourse to a

legal proceeding.

9. The respondent vide a return communication dated 11.08.2012, took a rather curious stand, which was that, he could not trace the 2005 MOU. The reason for loss of the said document was strangely, articulated, in the alternative. The first reason supplied was, that he may have lost the document in the process of him having to shift his residence to another place. The second reason given was, that he was not able to trace the document because there was a lapse of considerable time; I presume, between the execution of the document and the receipt of the communication.

9.1 The letter ended with the respondent seeking the copy of the 2005 MOU and the cash receipts; so as to enable him to revert in the matter.

9.2 Importantly, the execution of the 2005 MOU, the receipt of Rs. 23 lacs, and the fact that a deed had to be executed, so that some sort of guarantee could be provided to the petitioner qua the money invested, was not disputed.

10. It appears that this stand of the respondent made the petitioner jittery, which propelled him to lodge a complaint with the police on 23.01.2013. Evidently, qua this complaint, the respondent submitted his rebuttal, which is dated 16.02.2013. As things stand today, no FIR has been registered, to date, in respect of the complaint made by the petitioner to the concerned police station.

11. It appears that the petitioner, being unsure of whether a cognizable offence could be made out against the respondent, chose to institute the present proceedings, in this court, on 30.05.2013. As indicated right in the beginning, notice in this petition was issued on 03.06.2013.

SUBMISSIONS OF COUNSELS

12. In the background of the aforesaid facts, emerging from the record, it has been argued by Mr Aggarwal, learned counsel for the petitioner that there is every apprehension in the mind of the petitioner, that the respondent, is determined to renege on his obligations under the 2005 MOU, by creating, third party interest in the property in issue. Mr Aggarwal contended that, despite, the petitioner, investing a substantial sum of Rs. 23 lacs, out of the committed amount of Rs. 95 lacs, the respondent, it appears, has taken no steps to acquire *bhoomidari* rights in the property in issue. The respondent instead of acknowledging the fact that he has been remiss in discharging his obligations under the 2005 MOU, has taken the stand that the petitioner has abandoned his rights under the said MOU.

12.1 It was contended by Mr Aggarwal, that the first hint which the petitioner received, of the dishonest intentions of the respondent with regard to his wanting to renege on his obligations, was when, on 11.08.2012, the respondent sought copies of the 2005 MOU and the cash receipts. Mr Aggarwal submitted that this hint got firmed up into a reality (that petitioner's right under the 2005 MOU could get impacted), when in response to the complaint lodged by the petitioner, on 23.01.2013, with the police, the respondent, in his reply dated 16.02.2013, took the stand that the petitioner, had withdrawn himself from the 2005 MOU, and that, he had not agreed to create a mortgage in the Pamposh Enclave property, so as to guarantee the return of investment made by the petitioner.

12.2 Mr Aggarwal, thus submitted, that having regard to this fact, the present proceedings were instituted and, therefore, it could not be said that the petitioner had approached the court, beyond the prescribed period of limitation. The learned counsel submitted that until 16.02.2013 the

respondent had not taken the stand that he would not consummate the transaction, which formed the subject matter of the 2005 MOU.

12.3 The contention was that the action instituted was within time and, therefore, the prayers sought could not be declined on the ground of limitation or even delay and laches.

13. Mr Abhijat, on the other hand, who appeared for the respondent, submitted that the petition was liable to be dismissed on the following grounds:

(i) That the petitioner had instituted the present action after an inordinate delay of nearly eight (8) years, and consequently, as was evident, had abandoned his rights both under the main agreement as well as the arbitration agreement, which was contained in clause 14 of the 2005 MOU. The petitioner under clause 10 of the 2005 MOU was entitled to seek return of his investments, if *Bhoomidari* rights were not transferred from Mr Islam in favour of the parties herein. Therefore, according to Mr Abhijat, the limitation would commence in the case upon the expiry of six (6) months, from the date of execution of the 2005 MOU.

(i)(a) In other words, the contention was that the period of limitation, in this case, if specific performance was sought, would be three years, and that, the said period of limitation had expired long ago.

(ii) In so far as the letter dated 16.08.2007 was concerned, it was submitted that the said letter did not bear the signatures of the respondent, and therefore, it could not be relied upon by the petitioner, for the purposes of extension of limitation.

(iii) In any event, even if the said letter was taken into account, even then, the petition, was barred by limitation and, therefore, being a dead claim, the petition ought to be rejected.

(iv) The petition ought to be dismissed, as presently there is no dispute obtaining between the parties. This argument was pivoted on the earlier submission, that the petitioner, had abandoned his claim by not seeking to enforce his rights, all these years, under the 2005 MOU.

(v) For grant of injunction, the court will have to examine whether the petitioner fulfilled the trinity test, which is; firstly, whether the petitioner had been able to make out a prima facie case; secondly, whether the balance of convenience was in his favour; and lastly, whether refusal to grant the relief prayed for would cause irreparable injury to the petitioner. It was contended that the petitioner had failed to establish a case, which would fulfil any of the three tests articulated above.

13.1 In support of his submissions, the learned counsel for the respondent relied upon the following judgements:

Adhunik Steels Ltd. vs Orissa Manganese & Minerals Pvt. Ltd. AIR 2007 SC 2563; Transmission Corporation of A.P. Ltd vs Lanco Kondapalli Power (P) Ltd. (2006) 1 SCC 540; Ashok Kumar & Anr. vs SBI Officers Association (Delhi Circle) & Anr. 201 (2013) DLT 433; the judgement dated 22.08.2008, in Arb. A. 415/2006, titled: M/s D.C.M. Ltd. vs M/s R.K. Towers (India) Pvt. Ltd.; and lastly, the judgement dated 07.03.2011 in Arb. P. 256/2010, titled: Satish Kumar Bakshi vs Kohli Realtors Pvt. Ltd.

REASONS

14. Having heard the learned counsels for the parties and perused the record, what is not disputed is as follows:

- (i) That the 1996 MOU was in fact executed between the respondent and one, Mr Islam qua the property in issue.
- (ii) In a suit filed by Mr Islam a judgement has been delivered on 20.10.2010, whereby the respondent has been restrained from evicting Mr

Islam from the property except by taking recourse to the due process of law.

(iii) By that very judgement, that is, judgement dated 20.10.2010, Mr Islam's allegation that the 1996 MOU was executed by employment of fraud upon him by the respondent, has been rejected.

(iv) That Mr Islam has preferred an appeal being: RA No. 90/2013, qua the judgement dated 20.10.2010, which is pending adjudication, before this court.

(v) The order of the Revenue Court of October, 1991, passed in favour of Mr Islam, continues to be operable.

(vi) That the 2005 MOU, executed between the petitioner and the respondent vis-a-vis the very same land, is also the subject matter of the 1996 MOU.

(vii) That in pursuance of the 2005 MOU, petitioner has invested a sum of Rs. 23 lacs for securing rights, in the property in issue.

(viii) As per the 2005 MOU, after transfer of rights in the property in issue, from Mr Islam (albeit jointly, in favour of the petitioner and the respondent), the property in issue is to be developed.

(ix) The petitioner has placed on record three communications, which, ostensibly, have been exchanged between him and the respondent. These being: letter dated 16.08.2007, 31.07.2012 and 11.08.2012. While the respondent has accepted the existence of letters dated 31.07.2012 and 11.08.2012, he has denied having tendered the letter dated 16.08.2007.

(x) The factum of lodgement of a police complaint, on 23.01.2013, by the petitioner and, the response which the respondent, shot off on 16.02.2013, is also not denied by the parties herein.

15. The analysis of the aforesaid would demonstrate that the petitioner has invested a substantial amount, equivalent to sum of Rs. 23 lacs, out of

the total agreed amount of Rs 95 lacs in the property in issue, with the hope that the respondent would acquire *bhoomidari* rights from Mr Islam by arriving at a settlement with him; despite the fact that even at the time when the 2005 MOU was executed, Mr Islam's suit no. 285/1998 was pending adjudication.

15.1 This latter part is, as indicated above, mentioned in the recitals contained in the 2005 MOU. Therefore, necessarily, parties had taken into account the fact that the 2005 MOU could get consummated only upon the respondent being able to bring to an end his disputes with Mr Islam, which emanated from the 1996 MOU executed between him and Mr Islam. That the dispute has not come to an end is a fact, which is staring the parties in the face; though for the moment, the respondent's claim that the 1996 MOU is legal and valid, has been sustained by the District Court. The final result of which would be only known after the appeal pending in this court is disposed; which in turn is based on an assumption that the matter is not carried further in appeal by the aggrieved party.

15.2 Therefore, it cannot be said that 2005 MOU is a dead letter. If it is not so, then merely because there was no correspondence on the issue, it could not be said that the petitioner had abandoned his rights under the 2005 MOU. Had the petitioner tried to agitate his rights, he would have met with the answer that the respondent's litigation with Mr Islam was still, pending adjudication. It would be trite to say that in case of an immovable property time is not of the essence unless the parties chose to make time an essence of the contract. A plain reading of the 2005 MOU would show that the time was not of the essence as parties herein were cognizant of the fact that disputes with Mr Islam obtained, which required settlement before they could proceed further in terms of the said MOU. *Prima facie*, therefore,

according to me, the petitioner's rights under the 2005 MOU, are alive.

15.3 It is not even the case of the respondent that at any stage he had refused performance of his obligation under the contract and, therefore, time vis-a-vis the petitioner started ticking from that date onwards. As a matter of fact, even as recent as 11.08.2012, the respondent did not take the stand that he would not want to comply with the obligations undertaken under the 2005 MOU. The respondent only asked for copies of the 2005 MOU and the cash receipts of payments made. This was despite the fact that the petitioner, in his letter of 31.07.2012 (to which the respondent had replied vide letter dated 11.08.2012), had taken the stand that he had paid him Rs. 23 lacs and was ready to pay the balance, provided it was demonstrated that the money invested, had been utilized for the purpose it was taken.

16. Therefore, in my view, the submission of Mr Abhijat that there is no dispute, much less an arbitrable dispute obtaining between the parties, is an untenable submission in the facts of this case and hence cannot be accepted. In my opinion, the other submission that the action is barred by limitation, would therefore, also fall by the way side.

17. That brings me to the contention of Mr Abhijat that no injunction should be granted in this matter as the petitioner had failed to demonstrate that, firstly, he has a prima facie case; secondly, that the balance of convenience was in his favour; and lastly that if, the injunction sought was refused, irreparable injury would be caused to him.

17.1 In my view, the opposite is true in the case for the following reasons: The fact that the petitioner has invested a sum of Rs. 23 lacs has not been disputed by the respondent. The fact that the respondent has not been able to secure transfer of interest in the property in issue, albeit jointly, in his and the petitioner's favour, from Mr Islam, is also not in dispute. The fact that

Mr Islam is presently in possession of the land, and to obtain possession respondent would have to take recourse to due process of law, is also not in dispute. Therefore, the rights of the petitioner in the 2005 MOU are alive and the agreement can perhaps be consummated in the foreseeable future.

17.2 The balance of convenience would also be in favour of the petitioner as the petitioner has done, what he was required to do, under the terms of the 2005 MOU. It is not the respondent's case that the petitioner has not fulfilled his obligation under the 2005 MOU. In fact the petitioner has in his letter dated 31.07.2012 clearly indicated that he is ready to pay the balance amount provided it is demonstrated to him that the money already invested has been properly utilized. On the other hand, all that the respondent says, in his defence, is that, the petitioner, did not agitate his rights. In my view, as indicated above, that by itself would not turn the balance of convenience against the petitioner, as the ground reality, is that, the respondent, has not been able to take forward the development of the property in issue, as he has been unable to secure a settlement with Mr Islam; a position which has remained unchanged since the execution of the 2005 MOU.

17.3 There is another reason which would persuade me to continue the interim order, which has been granted by this court, which is that the respondent, as a matter of fact, has invested very little, in the venture at hand. Out of the total sum of Rs. 28 lacs to be paid to Mr Islam, the respondent has, on his own showing, paid a sum of Rs. 1.5 lacs in cash and another sum of Rs. 1.5 lacs in kind by handing over a Maruti 800 car to Mr Islam. On the other hand, the petitioner has admittedly, invested a substantial amount, equivalent to Rs. 23 lacs, in the venture. Respondent, presently, seems well placed to secure the rights in the property in issue having partially succeeded in the suit filed by Mr Islam, in the district court.

This status quo could get disturbed, if I were to vacate the interim order. It is quite likely that the respondent would, pending the adjudication of the disputes, between him and the petitioner, palm off the interest in the property to an unsuspecting third party and reap thereby huge financial benefit without much monetary investment, leaving the petitioner with nothing to fall back on for recovery of his investment if he were to succeed finally, in his action against the respondent.

17.4 Policy of law in awarding the damages to an aggrieved party is that, it puts such a party in the same position as it would be, had the contract been performed and not breached. In the instant case, this would be a difficult exercise and, hence, the argument that damages would be an adequate remedy, if the petitioner were to succeed ultimately, is not tenable.

18. Which brings me to the issue, as to whether refusal of injunction would cause irreparable injury to the petitioner of the kind which could not be compensated by money. In my view, the subject matter of the 2005 MOU is to jointly secure development of the property in issue. From the petitioner's point of view, it is a legitimate business venture whereby he hopes to reap long term gains in respect of an investment made in 2005. To calculate damages in the case of present kind, may prove to be difficult with no finality reached in the dispute pending between the respondent and Mr Islam; the waxing and waning of property prices generally; and not knowing what kind of development of the property, parties intended, when they executed the 2005 MOU. The details of property development are not fleshed out in the 2005 MOU.

18.1 Before I conclude, I may only say that in so far as the judgements cited by the counsel for the respondent are concerned, one cannot quibble with the principles articulated therein. I have no doubt in my mind that

while adjudicating upon a petition under Section 9 of the Act, where injunction is sought, the same principles of law apply which are applicable, while adjudicating upon an application filed under the provisions of Order 39 Rule 1 & 2 and Section 151 of the CPC. Therefore, no detailed discussions of those judgements is required. As would be evident from the foregoing discussion, based on the very same principles, I have come to the conclusion that injunction order dated 29.10.2013, should continue to operate in the matter, pending the conclusion of the arbitral proceedings between the parties herein.

19. Therefore, the best way forward in my opinion would be to continue with the injunction that this court had granted on 29.10.2013. The injunction order is, therefore, made absolute. The petition is disposed of in the aforesaid terms. The parties, however, will be left to bear their own costs.

RAJIV SHAKDHER, J

DECEMBER 23, 2014

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