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

% Pronounced on: 21.12.2018

\+ **CS(OS) 3994/2014**

BHAI MANJIT SINGH (HUF).....Plaintiff

Through Mr.Ashwini Mata, Sr.Adv. with
Mr.Suresh Dobhal and Mr.Yugank Goel, Advs

Versus

BHAI MANJIT SINGH & ANR. ...Defendant

Through Mr.Anil Sapra, Sr.Adv. with Mr.Vaibhav Mishra, Ms.Piyusha Singh,Mr.Sarthak Katyal, Mr.Jaideep Singh and Mr.Kartik Bhardwaj, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.5018/2015

1. This application is filed under section 8 of the Arbitration and Conciliation Act, 1996 seeking dismissal of the present suit in view of the existing arbitration clause.

2. The plaintiff has filed the present suit seeking a decree of declaration and permanent injunction. A decree of declaration is sought against defendants No.1 and 2 declaring that the Agreement to Sell dated 29.12.2010 in relation to the suit property is not binding on the plaintiff HUF. A decree

of declaration is also sought that defendant No.1 had no authority to represent the plaintiff HUF as a Member or Karta from 10.1.2010. The case of the plaintiff is that the plaintiff Bhai Manjit Singh (HUF) is an undivided Hindu family governed by Hindu Laws. The said plaintiff is the sole and absolute owner of the suit property 28A Prithviraj Road, New Delhi. The larger property was bought on 11.2.1949 by Sardarni Avtar Mohan Singh. The bigger property was bifurcated. A family settlement took place under which Bhai Manjit Singh Group/plaintiff became the sole and absolute owner of the suit property.

3. It is further submitted that an MOU dated 10.3.2000 was recorded amongst the members of the plaintiff HUF which recorded an oral settlement arrived at on 10.1.2000. In terms of the MOU Bhai Manjit Singh defendant No.1 ceased to be a member of the plaintiff/HUF w.e.f. 10.1.2000. The MOU was executed as Bhai Manjit Singh had already appropriated his entire share out of the assets of the plaintiff HUF. Further, in terms of the MOU dated 10.5.2000 Shri Vikramjit Singh was appointed as Karta of the HUF. Hence, it is pleaded that it is the consistent stand of all the members of the plaintiff HUF that defendant No.1 was the karta of the plaintiff only upto 10.1.2000 and thereafter he ceased to be so. As on that date defendant No.1 had no right, title or interest in any of the assets owned by the plaintiff HUF. It is further pleaded that it has been the consistent stand of the plaintiff in different judicial forums that after 10.1.2000 defendant No.1 ceased to be a member or the Karta of the plaintiff HUF.

4. On 3.12.2014 Shri Vikramjit Singh Karta of the plaintiff while checking some litigation came across an arbitration petition No. 34/2012 titled as Ashok Gupta vs. Bhai Manjit Singh (HUF) in the list of the Court.

As there had been no transaction with Ashok Gupta enquiries were made and certified copies were sought. These records revealed a shocking situation whereby fraudulent and collusive steps had been taken by the defendants to illegally usurp the suit property. Records reveal that defendant No.1 illegally and fraudulently projecting himself as a Member and Karta of the plaintiff (HUF) entered into fraudulent and illegal agreement to sell dated 29.12.2010 with defendant No.2 in respect of the suit property for a sum of Rs.254 crores. It is pleaded that the said Agreement to Sell between defendants No.1 and 2 is not only fraudulent and collusive but also tainted with criminal conspiracy intended to siphon off the asset of the plaintiff (HUF). Various grounds are given as to why the transaction was fraudulent, sham and it was for the sole purpose of cheating the HUF.

5. It is also noted that the records reveal that vide order dated 24.2.2012 passed in Arbitration Petition No.34/2012 titled Ashok Gupta vs. Bhai Manjit Singh this court appointed Justice R.C.Chopra (Retired) as the Sole Arbitrator in respect of the Agreement to Sell dated 29.12.2010 which contained an arbitration clause.

6. Hence, the present suit has been filed.

7. The defendant No.2 as noted above has filed the present application under section 8 of the Arbitration Act. It has been stated that pursuant to disputes that arose after execution of the Agreement to Sell dated 29.12.2010 the applicant/defendant No.2 filed an application under section 11 of the Arbitration Act. Thereafter this court appointed the learned Arbitrator. It has been pleaded that out of the agreed sale consideration of Rs.254 crores a sum of approximately Rs.4.30 crores has already been paid by the defendant No.2

to the plaintiff HUF which have been credited into the accounts of the plaintiff.

8. Subsequent to the order of this court dated 24.2.2012 allowing the petition under section 11 of the Arbitration Act, Justice R.C.Chopra (Retired) has commenced arbitration proceedings. It has been reiterated that the story concocted in the suit is make belief inasmuch as defendant No.1 Bhai Manjit Singh is said to have given up his share in the immovable properties of the HUF without any registered relinquishment deed or registered document. It is pleaded that the entire story is a farce and an attempt to usurp the money of the applicant and to scuttle the arbitration proceedings before the Arbitral Tribunal. Hence, the application.

9. I have heard learned counsel for the parties. Learned senior counsel for the plaintiff has pleaded as follows:-

(i) The relief which is sought in the present suit is outside the scope of reference to arbitration. Hence, the present application cannot be allowed.

(ii) It has been strongly pleaded that in proceedings initiated under section 11 of the Arbitration Act the plaintiff was not a party and hence not bound by the order of this court dated 24.2.2012 appointing a learned Arbitrator.

(iii) It is further submitted that the essential dispute is regarding the constitution of the plaintiff HUF and as to who is the Karta of the HUF. This dispute cannot be decided by the Arbitral Tribunal appointed pursuant to the fraudulent Agreement to Sell dated 29.12.2010.

(iv) It has further been pleaded that the stay application filed i.e. IA No.17484/2015 which was filed by the defendant shows participation in

the proceedings by the defendant No.2. Hence, the present application is not maintainable. The remedy of the defendant No.2 was to file a petition under section 9 of the Arbitration Act. Yet it chose to move an injunction application in the present proceedings. Hence, the present application cannot be allowed.

10. Learned senior counsel appearing for defendant No.2 has pleaded as follows:-

(i) He submits that on 24.2.2012 this court in exercise of powers under section 11 of the Act had referred the disputes to arbitration. That order has not been challenged so far and has attained finality.

(ii) It has further been pleaded that the Agreement to Sell between the plaintiff and defendant No.2 was signed by Bhai Manjit Singh. The only question is regarding composition of the HUF which is part of the dispute referred to arbitration.

(iii) It has been pleaded that under the amended section 8 of the Arbitration Act there has to exist only a prima facie valid arbitration Agreement and nothing more. Hence, this court is obliged to dismiss the suit and refer the parties to arbitration.

11. Section 8 of the Arbitration and Conciliation Act reads as follows:-

"8. Power to refer parties to arbitration where there is an arbitration agreement.—

"1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute,

then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. ;

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court. .

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

12. Hence, the Court before whom an action is brought may refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. The Supreme Court in ***A.Ayyasamy vs. A.Paramasivam and Ors., AIR 2016 SC 4675*** has held that the above provision contains a positive mandate that obligates the judicial authority to refer the parties to arbitration in terms of the arbitration agreement. The Supreme Court held as follows:-

"26. The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes—civil or

> commercial—from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, the parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute. The only exception is where the authority finds prima facie that there is no valid arbitration agreement. Section 8 contains a positive mandate and obligates the judicial authority to refer parties to arbitration in terms of the arbitration agreement. While dispensing with the element of judicial discretion, the statute imposes an affirmative obligation on every judicial authority to hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration. Article 8 of the Uncitral Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the 1996 Act has made a departure which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8."

13. The admitted position is that, there exists an arbitration clause in the agreement to sell executed between Bhai Manjit Singh (HUF) through Bhai Manjit Singh and defendant No.2. The arbitration clause which is clause 26 reads as follows:-

> "26. In case of any dispute or difference between the parties, the parties shall refer the dispute for arbitration to a mutually decided arbitrator. The venue of arbitration shall be New Delhi and the language of Arbitration shall be English. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996. The parties shall jointly bear all expenses in relation to the said Arbitration including arbitrator's fee."

14. Essentially the dispute raised here is as to whether Bhai Manjit Singh (HUF) has executed the Agreement to Sell or not. The document is executed by defendant No.1 acting as the Karta of the plaintiff. Defendant No.1 has not entered appearance and has not disputed his signatures on the said document. What the plaintiff objects is that defendant No.1 had no authority to enter into the said Agreement to Sell in view of earlier family settlement dated 10.1.2000. Hence, the plaintiff is not a signatory to the Agreement to Sell and the parties cannot be referred to arbitration. Further, there is no valid arbitration agreement between the parties.

15. A bare perusal of the Agreement to sell dated 29.12.2010 shows that ostensibly the plaintiff Bhai Manjit Singh, HUF is a party to the said agreement to sell. The dispute raised by the plaintiff herein is that the document in question, namely, agreement to sell has not been executed and signed by an authorised signatory of the plaintiff. Clearly, this would be one of the first major defences that the plaintiff would raise in the course of arbitration proceedings, namely, that the signatory who has purportedly signed the agreement to sell on behalf of the plaintiff was not authorised. The plaintiff cannot wriggle out of the arbitration agreement stating that the authority who has signed the agreement on behalf of the plaintiff was not authorised to sign the said agreement to sell. Such a defence, if allowed, would open a flood gate. It would be the easiest defence to wriggle out of arbitration proceedings saying that the signatory of the arbitration agreement was not authorised to enter into an agreement. In my opinion, there is no merit in the said contention of the plaintiff. The plaintiff is bound to be referred to arbitration in terms of the agreement to sell dated 29.12.2010.

16. Even otherwise, as noted, the major defence raised by the plaintiff is that they have not signed the agreement to sell/arbitration agreement.

17. Over passage of time the law regarding reference to arbitraton has evolved. Even non signatories have now been referred to arbitration. In this context reference may be had to some of the recent judgments of the Supreme Court. In ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc.& Ors., (2013) 1 SCC 641*** the Supreme Court held as follows:-

> "70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (*sic* underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2nd Edn.) by Sir Michael J. Mustill:
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> "1. The claimant was in reality always a party to the contract, although not named in it.
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> 2. The claimant has succeeded by operation of law to the rights of the named party.
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> 3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
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> 4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

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73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1 The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also

called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

18. Similarly, in ***Cheran Properties Limited vs. Kasturi & Sons Limited and Ors., 2018 SCC Online SC 431*** the Supreme Court held as follows:-

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26. The Court held that it would examine the facts of the case on the touch-stone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a 'direct commonality' of the subject matter and on whether the agreement between the parties is a part of a composite transaction:

> "A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even no signatory parties would fall within the exception afore-discussed."

27. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus:

> "The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
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> The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.
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> ..
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> We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."
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> …..

31**.** Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. **Redfern and Hunter** explain the theoretical foundation of this principle:

> "..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an

> agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession..[11]"

19. Similarly, in ***Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Another, 2018, SCCOnline SC 487*** the Supreme Court held as follows:-

> "35. Under the Act, an arbitration agreement means an agreement which is enforceable in law and the jurisdiction of the arbitrator is on the basis of an arbitration clause contained in the arbitration agreement. However, in a case where the parties alleged that the arbitration agreement is vitiated on account of fraud, the Court may refuse to refer the parties to arbitration. In *Ayyasamy case*, this Court held that mere allegation of fraud is not a ground to nullify the effect of arbitration agreement between the parties and arbitration clause need not be avoided and parties can be relegated to arbitration where merely simple allegations of fraud touched upon internal affairs of parties is levelled. Justice A.K. Sikri observed that it is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced. In para (25) of *Ayyasamy case*, Justice Sikri held as under:—
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> > "25…..Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only

> when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

36. While concurring with Justice Sikri, Justice D.Y. Chandrachud pointed out that the duty of the Court is to impart "*sense of business efficacy*" to the commercial transactions pointing out that mere allegations of fraud were not sufficient to decline to refer the parties to arbitration. In para (48) of *Ayyasamy case*, Justice D.Y. Chandrachud held as under:—

> "48. The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy."
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> (Underlining added)

20. The Court had clearly held that modern business transactions are effectuated through multiple layers of agreements and the circumstances in which they were entered into may reflect the intention to bind the signatories and non signatory entities. The factors such as relationship of a non signatory to a party who is a signatory to the Agreement, the commonality of such matter, the composite nature of transaction would be matters to be taken into account. Hence, non-signatories to an Agreement between contracting parties may also be bound by the Arbitration Agreement.

21. In the present case the only dispute raised is as to whether the plaintiff Bhai Manjit Singh (HUF) could have been represented by the defendant No.1 or had to be represented by Bhai Vikram Jit Singh. While adjudicating upon the dispute between the said plaintiff and defendant No.2 the authority of the signatory who executed the Agreement to Sell dated 29.12.2010 on behalf of plaintiff would form an integral part of the issues raised by the parties and would have a bearing on the final award/adjudication. It is manifest that the issues and disputes raised in the present suit are an integral part and connected to the disputes which are pending before the learned Arbitrator. Hence, the plaintiff cannot wriggle out of the arbitration agreement on the ground that the defendant No.1 had no authority to execute the Agreement to Sell.

22. I may now deal with the next submission of the learned counsel for the plaintiff, namely, that the defendant has himself filed an application i.e. IA No. 17484/2015 seeking interim orders against the plaintiff. It is pleaded that this application was filed instead of filing a petition under Section 9 of the Arbitration Act. Hence, it is pleaded that in terms of Section 8 of the Arbitration Act, the matter cannot be referred to arbitration as the defendant has made his statement on the substance of the dispute.

23. Section 8 of the Arbitration Act requires that the application must be filed not later than the date of submitting his first statement on the substance of the dispute.

24. In the present case, the defendant did file IA No. 17484/2015 seeking injunction against the plaintiff to restrain the plaintiff from alienating or entering into an agreement to sell or creating third party rights in the suit property. This application was, however, filed after the present application

i.e. IA No. 5018/2015 was filed under Section 8 of the Arbitration Act. Hence, the defendant had already indicated his intention to have the matter referred to arbitration before the application for stay was filed i.e. IA No. 17484/2015.

25. Even otherwise, it is settled law that filing of an application for interim relief does not result in the defendant being non-suited to file an application under Section 8 of the Arbitration Act.

26. Reference in this context may be had to the judgment of the Supreme Court in the case of ***Rashtriya Ispat Nigam Ltd. & Anr. vs. Verma Transport Co., (2006) 7 SCC 275*** where the Supreme Court held as follows:-

> **"**36**.** The expression "first statement on the substance of the dispute" contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question in some detail, a little later."

27. Keeping in view the above fact and the legal position, it cannot be said that the defendant has submitted his first statement on the substance of the dispute.

28. In view of the above, in my opinion, prima facie an arbitration agreement exists between the parties. The present suit does not lie and is disposed of. Parties may take steps as per law to approach the learned Arbitrator/appoint an Arbitrator.

(JAYANT NATH)
JUDGE

DECEMBER 21, 2018
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HIGH COURT OF DELHI
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