

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

Date of Reserve: 23.1.2009

Date of Order: 06.3.2009

IA No. 13444/2007 in CS(OS) No. 1650/2007

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06.03.2009

Rani Parvati Devi & Anr.

... Plaintiffs

Through: Ms. Shayamla Pappu, Sr. Advocate
with Mr. R.Krishnamorthi, Advocate

Versus

Turner Morrison Ltd. & Ors.

... Defendants

Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Lalit Gupta, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

ORDER

IA No. 13444/2007

This application has been made by defendant no.2 under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter in question to the Arbitrator.

2. The plaintiff no. 2 society (hereinafter referred as plaintiff) was allotted on lease a plot B-25, Qutub Institutional Area by DDA measuring 5324.40 sq. m (1.32 acre) for furtherance of its objects for a consideration of Rs.10,56,000/- on yearly rent of Rs.26,400/-. It is submitted by plaintiff society that in lieu of this, Archeological Survey of

India had acquired Royal Palace owned by plaintiff society. Society had no funds for making construction over this plot. So, the society entered into an agreement dated 11.12.1995 with Turner Morrison Ltd. defendant no.1, this agreement was named as 'construction agreement'. As per this construction agreement, the entire work of construction, including appointment of architect, preparation of plans for building, seeking permission/approvals from different authorities and utilization of maximum FAR including construction of basement and other floors was to be done by the defendant at its own cost. The only obligation on plaintiff was to cooperate with the defendant for necessary approvals and for that purpose to sign all applications, power of attorneys and affidavits. The defendant no. 1 was to do all work including obtaining of completion certificate. The cost of construction was initially assessed @ Rs.1200 per sq. ft. The total area constructed by defendant under the agreement was as under:

		<u>Area (in Sq. ft.)</u>
Basement	=	13,510
Ground Floor	=	13,430
First Floor	=	13,938
Second Floor	=	8,502
Third Floor	=	8,502
Fourth Floor	=	6,156
Fifth Floor	=	3,237
Terrace (6 th Floor)	=	527

(as per assessment made by Joint Assessor & Collector MCD)

3. The entire amount on the construction of the building was spent by the defendants from their own pocket and as per defendants, the defendants had spent around Rs.6,90,00,000/- on the construction of the building.

4. In terms of construction agreement, this amount was to be paid back by the plaintiff to the defendants as per schedule of payment annexed with the agreement and in the event of delay of payment, plaintiff was to pay interest @ 36% p.a. The plaintiff was also to deposit original title deeds of the property with the defendants, who was to retain the title deeds as security till the payment of entire construction amount and other dues and expenses were not cleared by the plaintiff. The agreement also provided that the defendant (second party to the agreement) shall have a lien over the plot of land as well as over the construction till the entire construction cost was paid by the plaintiff and in case plaintiff failed to discharge this liability, the defendant would have authority to recover all its construction cost, interest and expenses incurred by it by sale/transfer or lease of the constructed area.

5. The agreement also provided that the second party shall carry out the construction either itself or the construction could be carried out through its nominee or nominees, as per the building plans sanctioned by the competent authority. The construction was to be carried out within a period of 24 months from the date of sanction of the plans and plaintiff had agreed and undertaken to execute a general power of attorney in favour of second party to enable the second party to commence and complete the construction and to let out the building or part thereof at the discretion of the second party. It was further agreed that in case an additional construction was permitted on the plot on a future date, the second party only shall be empowered to

make such additional construction through its own funds and out of such additional construction an area maximum upto 1/6th of such additional construction will be given to the first party i.e. plaintiff and remaining area shall be retained by the second party or by its nominee for which second party shall pay a sum of Rs.1300/- per sq. ft. to the first party as security deposit and shall also pay rent @ 0.50 for such area. The second party i.e. M/s Turner Morrison Ltd. shall have full authority and power to let out the additional area to any prospective tenant and in the event, the additional area could be transferred in future, the first party shall transfer the said additional area in favour of the second party or its nominee or nominees and in that event the sum of Rs. @ Rs.1300/- per sq. ft. which was the security deposit lying with the first party shall be the adequate and sufficient consideration.

6. The agreement contained an arbitration clause being clause no. 10 wherein it was agreed between the parties that in the event of any dispute or difference between the parties relating to the terms of this agreement or in part thereof, the same shall be referred to the sole arbitration of Shri P.V.Kapur, Senior Advocate, whose decision shall be binding, the venue of the arbitration was kept at Delhi.

7. By a Deed of Assignment M/s Turner Morrison Limited (the second party) assigned its rights and obligations under the agreement to M/s Turner Morrison Land Limited which was a 100% subsidiary of M/s Turner Morrison Limited, constituted for this purpose. It was provided in the Deed of Assignment that all terms and conditions of the construction agreement dated 11.12.1995 entered into with M/s Turner Morrison Land Limited shall be treated to have been with M/s Turner Morrison Land Limited and it shall fulfill each and every obligation of M/s Turner Morrison Limited in terms of the

construction agreement including the acceptance of arbitration clause. This Deed of Assignment was signed by Jigmit Wangchuk Namgyal, attorney of plaintiff on behalf of plaintiff and also by Shri Ravindra Maheshwari, authorized signatory of M/s Turner Morrison Limited.

8. After the construction was complete, the basement and ground floor possession was handed over to the plaintiff where the plaintiff opened its museum and started other activities. Rest of the floors i.e. 1st floor to 6th floor were retained by defendant no.1 for its own use and for further letting.

9. There is no dispute about the fact that plaintiff society had not paid the above amount to the defendant towards construction or towards other expenses. The claim of plaintiff is that the defendant recovered cost of construction by retaining the 1st floor to 6th floor for its company use as well as for letting out some of the parts of above floors to different tenants. Plaintiff states that after the cost of construction was got recovered, plaintiff served notice on defendant no.1 to hand over the portions retained by it but defendant no.1 did not return the floors (1-6th floors) to the plaintiff and kept on collecting huge amount as rent from the tenants. Defendant no.1 also illegally inducted its sister concern i.e. defendant no.2 into the building with which plaintiff had no commercial agreement. Delhi Development Authority (DDA) took strong objections to various unauthorized occupants in various portions of the building and in the first week of May'06 the perpetual lease of plaintiff was cancelled without notice to the plaintiff on the ground of sub-letting, in excess of permissible limit. Plaintiff challenged cancellation of the lease by filing a writ before this Court. However, on 15th November, 2006 the premises was sealed and all unauthorized occupants of defendants no. 1 & 2 vacated

their respective portions after giving undertaking before a Division Bench of this Court in CWP 4582/2003 Kalyan Sanstha Social Welfare v. Union of India & Ors.. The ground floor and basement were also sealed so the building was now lying vacant. Defendant no.2 filed a CWP in High Court in December, 2006 through Mr. R. Maheshwari, one of its Directors. The plaintiff then filed an application under Section 340 Cr.P.C. for taking action against Mr. R.Maheshwari. Proceedings under section 340 Cr.P.C. are stated to be pending. Defendants No. 1 & 2 also filed an application under Section 9 of the Arbitration and Conciliation Act before the Court resorting to the arbitration clause in the construction agreement and also referred the matter to arbitration of Mr. P.V.Kapur, Sr. Advocate in terms of the agreement. Mr. P.V.Kapur entered upon the reference and sent a notice of hearing of the claims to plaintiff and defendant no.2. The plaintiff claimed that Mr. P.V.Kapur had no jurisdiction to act as Arbitrator as there was no agreement between plaintiff and defendant no.2, also because plaintiff had not consented to the arbitration of Mr. P.V.Kapur who was an advocate representing defendants. Plaintiff submitted that despite plaintiff not submitting to the jurisdiction of the Arbitrator, the Arbitrator was continuing with the hearing, although, there was no commercial agreement between plaintiff and defendant no.2. Plaintiff therefore, filed this suit seeking a decree of permanent injunction in favour of plaintiff and against the defendants.

10. Smt. Rani Parvati Devi, who is plaintiff no.1 in fact has no locus standi in the matter because the suit land was not allotted in the personal name of Smt. Rani Parvati Devi, neither it is the case of society that this suit land was allotted to Smt. Ram Parvati Devi or there was any construction agreement between Smt. Rani Parvati Devi,

in her individual capacity, and defendant no.1. The Construction Agreement was entered into between the society (plaintiff no. 2) and defendant no.1. By making Smt. Rani Parvati Devi as co-plaintiff without any specific right in her, would make no difference to the factual situation.

11. It is in the above context that defendant had filed this application under Section 8 of the Arbitration and Conciliation Act for referring the matter to the Arbitrator. Defendant (Turner Morrison Limited) has also filed an independent Arbitration Application 446/2007 wherein a prayer has been made for referring the dispute between the parties to the Arbitrator.

12. The claim of the plaintiff is that there was no arbitration agreement between the plaintiff society and defendant no.2. There is no dispute that defendant no.2 is a fully owned subsidiary of defendant no.1 and was in fact constituted for the specific purpose of carrying out the construction under the agreement and an Assigning Agreement was also executed between plaintiff no.2 and defendant no.1 thereby assigning the rights and obligations under construction agreement in favour of defendant no.2. The plaintiff had taken a plea that the assignment agreement was not signed by the attorney of the plaintiff and the signatures on this were forged. However, I have perused the other correspondence between the parties. Prima facie, it does not seem that the Assigning Agreement was the result of a forgery. The correspondence between the parties also showed that the plaintiffs were fully aware of this Assigning Agreement. In any case the plaintiff society would be at liberty to raise this issue as well before the Arbitrator.

13. The rights of defendant no.1 & 2 and that of plaintiff vis-à-vis this construction agreement are yet to be crystallized. There can be no doubt that the entire amount on construction of the building was spent by defendants no. 1 & 2. The amount carried huge interest of 36% in case of non-payment by plaintiff. This agreement was signed by the plaintiff with open eyes. The plaintiff has not assailed the correctness of this agreement with defendant no.1 nor has stated that any clause of this agreement was unconscionable or voidable. Under these circumstances, unless and until the rights of the plaintiff no.2 and the defendants no. 1 & 2 are not adjudicated vis-à-vis construction agreement and a conclusion is arrived at as to what was the amount payable by the plaintiff no. 2 to the defendants no. 1 & 2 in order to terminate the lien of defendants no. 1 & 2 over the property and to get the papers of the property back, the issue of user of the property by the plaintiffs cannot be decided.

14. There is no dispute that the plaintiff society was peacefully enjoying basement and ground floor of premises in terms of the agreement and was satisfied with the operation of the agreement, it is only when the sealing started and plaintiff found that the action was being taken by DDA for cancellation of the lease, the plaintiff thought it necessary and proper to issue notice to the defendants. Prior to that, there was not a single letter written by the plaintiffs to the defendants showing its willingness to pay anything or asking the defendant no. 1 & 2 about accounts showing adjustment of the construction cost. I, therefore, consider that it is a case where entire dispute between the parties revolves around the construction agreement and the assignment agreement and the matter is required to be referred to the Arbitrator only, in terms of Section 8 of the Arbitration and Conciliation Act.

15. The plaintiff has raised a doubt about the impartiality of Mr. P.V.Kapur Advocate, who is the nominated Arbitrator in the agreement. The defendant in Arbitration petition no. 446/2007 has prayed that any other independent Arbitrator may be appointed. I consider that appointment of an independent Arbitrator would be proper in this case to douse all apprehensions. I, therefore, nominate Justice A.B.Saharya (Retd.) (former Chief Justice of High Court of Punjab & Haryana) as the Arbitrator in this case, who, if having no reservations, shall enter the reference and shall charge fee from the parties as per the standard set by Indian Council of Arbitrators. The parties shall file their claim before the Arbitrator within 60 days from today. The Arbitrator shall endeavor to pass the award as early as possible.

In terms of above, the application as well as the suit of the plaintiff stand disposed of.

Copy of this order be sent to Mr. Justice A.B.Saharya (Retd.).

March 06, 2009
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SHIV NARAYAN DHINGRA, J.