

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

% Date of decision : 15.01.2010

+ FAO (OS) No.26/2010

NAMGYAL INSTITUTE FOR RESEARCH ON LADAKHI ART AND CULTURE
AND ANR.

...APPELLANTS

Through: Dr.Shyamlha Pappu, Sr.Adv. with
Mr.R.Krishnaamorthi, Mr.K.K.Singh
and Mr.V.K.Dawar, Advocates

Versus

TURNER MORRISON LTD.

...RESPONDENT

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

+ FAO (OS) No.27/2010

NAMGYAL INSTITUTE FOR RESEARCH ON LADAKHI ART AND CULTURE
AND ANR.

...APPELLANTS

Through: Dr.Shyamlha Pappu, Sr.Adv. with
Mr.R.Krishnaamorthi, Mr.K.K.Singh
and Mr.V.K.Dawar, Advocates

Versus

TURNER MORRISON LAND LTD.

...RESPONDENT

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

+ FAO (OS) No.45/2010

NAMGYAL INSTITUTE FOR RESEARCH ON LADAKHI ART AND CULTURE
AND ANR.

...APPELLANTS

Through: Dr.Shyamlha Pappu, Sr.Adv. with
Mr.R.Krishnaamorthi, Mr.K.K.Singh
and Mr.V.K.Dawar, Advocates

Versus

TURNER MORRISON LTD.

...RESPONDENT

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

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FAO (OS) No.46/2010

NAMGYAL INSTITUTE FOR RESEARCH ON LADAKHI ART AND CULTURE
AND ANR.

...APPELLANTS

Through: Dr.Shyamlha Pappu, Sr.Adv. with
Mr.R.Krishnaamorthi, Mr.K.K.Singh
and Mr.V.K.Dawar, Advocates

Versus

TURNER MORRISON LAND LTD.

...RESPONDENT

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

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE VEENA BIRBAL

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J.(ORAL)

1. The Namgayal Institute for Research on Ladakhi Art and Culture (appellant) acquired perpetual leasehold rights in respect of a plot of land measuring 5324.40 square metres situated in South of IIT Institutional Area bearing no.B-25, Qutab Institutional Area, New Delhi – 110016 from the DDA.

The perpetual lease deed was executed on 22.11.1995. In order to facilitate the construction on the plot, the appellant entered into a construction agreement with M/s Turner Morrison Limited (respondent) on 11.12.1995. The construction agreement stated that the appellant did not have the finances and expertise for construction of building. In terms of the said agreement, inter alia, the obligation of the appellant was to pay M/s Turner Morrison Limited ('TML' for short) a sum at the rate of Rs.1,200/- per square foot in accordance with the schedule of payment and in the event of delay, interest was payable. It was also provided that till the entire construction cost was paid, TML would have a lien over the land along with the construction thereon with a full authority and power to recover such amounts payable to TML by transfer of lease of such constructed area so as to meet the outstanding liabilities of the appellant. The original title deeds were to be deposited with TML to secure the payments. The possession of the property was handed over on the same day to TML for construction and powers of attorney were also executed on behalf of the appellant.

2. TML formed a subsidiary in the name and style of Turner Morrison Land Limited ('TMLL' for short) which is also respondent in the present proceedings. TML decided to carry out construction work through TMLL and made a request to the appellant on 04.03.1996 which was granted by the appellant on 28.03.1996 and a deed of assignment dated 02.08.1996 was accordingly executed with the appellant, TML and TMLL being parties to the same.

3. The appellant is also stated to have issued their NOC for creation of equitable mortgage in favour of third parties for raising funds and the permission to create equitable mortgage was granted by the DDA in the name of the appellant on 30.12.1996. Some further communication also took place about the increase in costs of construction which was proposed by TMLL at Rs.2250/- per square foot, but the appellant was agreed to only an increase to Rs.2,000/- per square foot. Since additional construction was also permitted, an arrangement was entered into between the parties even in that behalf. On 08.01.1999, a letter was addressed by the appellant in pursuance to certain meetings setting out the agreement between the two parties that the appellant would like to occupy and take possession of the total area of its share of 13,500 square feet on the ground floor and would forego the balance amount of security deposit in lieu of the additional area of 4,000 square feet made available on the ground floor. TML and TMLL agreed to take up the balance space in the building of approximately 13,500 square feet on the ground floor and 2,188 square feet in the basement. The undisputed position is that the appellant never paid a penny to either TML or TMLL. Thus, the respondents let out various portions to recover their costs. This fact is acknowledged even in a letter dated 10.05.2006 addressed on behalf of the appellant to the Lieutenant Governor when the lease was cancelled due to commercial user.

4. The dispute arose between the parties and in view of the construction agreement dated 11.12.1995 containing an arbitration clause with a named arbitrator, orders were passed on an application filed by respondents under Section 8 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short) in a suit of the appellant and in another application which came to be filed under Section 11 of the said Act by the respondents. In terms of the order dated 06.03.2009, learned Single Judge of this Court on the Original Side referred all the disputes between the parties to the sole arbitration of Justice A.B.Saharya (Retd.), former Chief Justice of Punjab and Haryana High Court. A review application by the respondents in respect of certain facts set out in the Order dated 06.03.2009 was allowed on 01.07.2009. The arbitration proceedings have, however, not proceeded as the appellant has not participated though the respondents have filed their written statement of claim. The appellant preferred an appeal against the order dated 06.03.2009 before the Division Bench in December, 2009. The appeal is stated to be still pending though there is no stay of the operation of the order of the learned Single Judge referring the disputes to arbitration.
5. It is in the aforesaid background that two OMPs came to be filed on the Original Side of this Court by TML and TMLL respectively against the appellant. The arrangement between the parties was set out by the respondents and it was pleaded that they were in possession of the entire built up property except the area on the ground floor and the

basement parking of the appellant. The building was lying sealed on account of misuser. These OMPs were filed under Section 9 of the said Act seeking a restraint order against the appellant from occupying or using any portion of the property except the area of 13,500 square feet on the ground floor and 2,188 square feet on the basement for parking and from the appellant transferring, leasing, licensing, mortgaging and encumbering portions of the property which were under the possession and control of the respondents. It may be noticed that in the assignment deed, TMLL was claiming certain rights while TML was claiming to be carrying on the maintenance service in the entire property. These petitions were contested by the appellant once again seeking to raise the issue of there being no valid assignment and there being no arbitration agreement apart from the plea that no injunction could be issued in favour of a trespasser against the true owner and that the claims were barred by time. The learned Single Judge noticed that there was no stay of the reference of disputes to arbitration and the adjudication in respect of the reference of disputes to arbitration had been concluded by a judgment of the learned Single Judge of the Court and the mere pendency of the appeal or any other application for review could not come in the way of the Court exercising the power under Section 9 of the said Act. This became all the more necessary as the arbitration proceedings were also not proceeding in view of the stand of the appellant and thus as an interim measure of protection, the arbitrator could really not be moved. The learned Single

Judge allowed these applications in terms of the impugned order dated 23.09.2009 recording in para 7 as under:

“As far as the merits of granting the interim measures are concerned, the senior counsel for the respondents does not dispute that since the completion of the construction of the building and till sealing, the portions of the property with respect whereto interim measures are claimed were in the control and possession of the petitioners. It is also admitted that the maintenance services were being carried out by the petitioner and the petitioner had installed their plant & equipment for the said purposes. The plea in this regard is that pursuant to sealing, the petitioner had vacated the premises. It is contended that the petitioners having vacated are now not entitled to any interim relief.”

6. The learned Single Judge recorded the conclusion in para 9 to 11 as under:

9. In my view, once it is admitted that the petitioners were in control and possession of the portions with respect whereto interim measures are claimed, till sealing, the factum of sealing by the Government Agency cannot interfere with the rights, if any, of the petitioner. Such action of a third party cannot vest any advantage in the respondent. At this stage, it is not deemed appropriate to go into the merits of the respective case. All that can be said is that the courts have taken notice of such transactions in Delhi and at least in Ansal Property & Industries Private Limited Vs. Anand Nath MANU/DE/0824/1991 the true nature of such transactions was also gone into. I thus find the petitioners to have made out a prima-facie case. The rights sought to be protected being with respect to immovable property, cannot be compensated in money. The balance of convenience is also found to be in granting the interim relief claimed.

10. The petitions are accordingly allowed. The respondents are restrained from occupying or using and/or from alienating, encumbering or parting with possession of property No.B-25, Qutab Institutional Area, New Delhi save the portion of 13,500 sq. ft. on the ground floor of the said property and 2,188 sq. ft. in the basement of the said property. The respondents are also restrained from using or removing the equipment, plant & machinery of the petitioner for the purposes of carrying out maintenance services in

the said property and from carrying out the said services themselves.

11. It is sad that such valuable commercial property is being wasted for the last so many years. Though no claims in that respect have been made but I clarify that upon an application in this regard being made, the Arbitral Tribunal stated to have been already constituted shall attempt to make provision for allowing use/commercial exploitation of the said property so that pending the resolution of disputes between the parties the property can be put to optimum use.

7. The appellant filed a review application which has also been dismissed by the impugned order dated 27.11.2009. The review was sought of the observations made in para 7 of the Order 23.09.2009 contending that no such concession was made by the learned counsel for the appellant. Learned Single Judge noticed that fortunately the notes taken by the learned Single Judge at the time of hearing still existed on the file and on a perusal of the same, it has been verified that the concession made by the senior counsel for the appellant in para 7 was on the basis of what had been urged in the Court. In any case, the contention of the counsel for the appellant was that it was the TMLL who had let out the portions of the building though in the name of the appellant, but the rent for the said portions was being realized by TMLL, which was now pleaded to have been misappropriated.
8. The present four appeals are filed against the order dated 23.09.2009 in respect of the two respondents and of the review order dated 27.11.2009 against the same two respondents.
9. Learned counsel for the appellant once again sought to urge that the concession recorded in para 7 was not correct and

even if said concession had been made it was of no avail to the respondents since any concession contrary to pleadings cannot be accepted. Learned counsel relied upon the observations of the Supreme Court in Swami Krishnanand Govindanand v. M.D.Oswal Hosier (Regd.); (2002) 3 SCC 39.

10. On a perusal of the said judgment, we find the same does not apply to the facts of the present case. In the facts of that case, where the petition for bona fide requirement was filed by the landlord and admission was made by the tenant that the landlord is an institution covered under Section 22 of the Delhi Rent Control Act, 1958, contrary to the pleadings of the tenant. It was held that the admission cannot be considered relevant material on record on the basis of which satisfaction of the Rent Controller could be recorded. The judgment is really an order and in para 3 itself it states that “on the facts of this case”.
11. The Supreme Court has repeatedly emphasized that judgments and orders are not to be read as statutes and when an order is passed in the given facts of the case, it can hardly be treated as precedent, which is binding.
12. The factual matrix of the present case is completely different where the admitted position is that the appellant never paid a penny for the construction and in terms of the arrangement between the parties, even as envisaged under the original construction agreement, there was entitlement vested in the respondents to let out the premises other than the share of the appellant to recover their dues. This is exactly what has been done though letting out of the premises

would have been in the name of the appellant. The rent was also being realized by TMLL. We may further notice that in the appeal filed against the order of review dated 23.09.2009, only two grounds have been set out, which are as under:

“A. Because the learned Single Judge could not have given a finding contrary to the pleadings of the parties.

B. Because the learned Single Judge ought to have noticed that no injunction can be granted against the true owner specially when the person praying for injunction is admittedly not in possession.”

13. In fact, a preliminary hurdle in the way of the appellant in the appeals against the orders of review as submitted by the learned senior counsel for the respondents is the provisions of Order 47 Rule 7 of the Code of Civil Procedure, 1908 itself, which read as under:

“7. Order of rejection not appealable. Objections to order granting application

(1) An order of the Court rejecting the application shall not be appealable;

but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall

appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.”

14. In the present case, the application for review has been rejected on merit and thus no appeal lies. Thus, the appeals filed against the review order are not even maintainable apart from the fact that the learned Single Judge has again verified that the submissions were recorded correctly including concessions as the notes of the learned Single Judge were still preserved in the file. It is clearly an afterthought of the learned senior counsel for the appellant who was seeking to wriggle out of the position of admitted facts only to create grounds of appeal. If this aspect is read even with the pleadings, it is apparent that though the letting out of the premises may be in the name of the appellant, same was done by TMLL as per the authority conferred on TMLL by the appellant and the rents were being appropriated by TMLL towards construction costs since undisputedly the appellant had not paid a penny for the construction.

15. The second aspect sought to be urged by learned counsel for appellants is that there cannot be an injunction order against the true owner. In this behalf, learned counsel referred to the judgment of the Supreme Court in Percept D'Mark (India) P. Ltd. v. Zaheer Khan and Anr.; (2006) 4 SCC 227. Once again, in the facts of that case, the factual matrix is completely different since an interim injunction had been granted on an application under Section 9 of the said Act compelling specific performance of a contract for personal,

confidential and fiduciary service, which was held to be barred under the relevant provisions of The Specific Relief Act, 1963 and was thus impermissible. Learned counsel also referred to the observations in Premji Ratansey Shah & Ors. v. Union of India & Ors; JT 1994 (6) SC 585 where it has been observed that injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the owner.

16. We have already observed that in the present case, the possession of the property for construction was given to the respondents who after construction handed over possession of the portion of the appellant to them and the remaining portion under due authorization was let out by them to recover the dues of construction for which not a penny had been paid by the appellant.
17. In the present case, the subject matter of dispute is an immovable property and the rights conferred on the respondent to let out portions of the same in the name of the appellant to make recovery of their dues. The property has been sealed by the MCD and the object of an interim measure of protection is to ensure that on de-sealing the appellant does not take advantage of the sealing by the MCD and the previous position is restored in respect of right of possession.
18. Learned senior counsel for the respondents also emphasized that what order can be passed is only an interim measure of protection as observed in Firm Ashok Traders and Anr.etc. v. Gurumukh Das Saluja and Ors.; AIR 2004 SC 1433.

Once again there can be no dispute about the proposition. It is obvious from the impugned order that the rights have been protected pending the arbitration proceedings and in fact the learned Single Judge in the last paragraph of the Order has observed that the arbitral tribunal constituted could look into the matter so that the property is not wasted for years together pending resolution of disputes.

19. Learned counsel for the appellant sought to take advantage of the application moved by the various tenants for de-sealing to contend that it is their own case that the lease was in the name of the appellant. Once again, the answer to this has already been discussed above setting out the true arrangement *inter se* the parties.

20. We may notice that in the writ proceedings filed by the appellant challenging cancellation of lease, the respondents sought to be impleaded as a party, which was permitted. The appellant sought to challenge the signatures of its authorized representative on documents which resulted in the documents being sent to CFSL, the report of which found against the appellant after comparing the signatures with the undisputed signatures.

21. We have put to learned counsel for the parties that there is no dispute that if the appeals of the appellant succeed and the matter is held not referable to arbitration, then the impugned orders would not subsist and the parties would be free to take other appropriate legal remedies since the impugned order has been passed on the premise of existence of a valid arbitration clause in view of the reference

already made. Even if the arbitration were to be proceeded, the impugned order takes care of the interest of the parties by observing that the arbitrator would look into the aspect of best utilization of the property pending resolution of disputes between the parties so that the property is not wasted.

22. We also make it clear that any observations made in the impugned order and the present order are naturally by way of prima facie observations as they are in the nature of interim measure of protection and would not in any way influence the final adjudication in the arbitration proceedings or otherwise.

23. We find the appeals completely devoid of merit and having heard learned senior counsel for the appellant for a better part of an hour and fifteen minutes, dismiss the appeals with costs quantified at Rs.25,000/- per appeal to be paid to the respective respondents in appeals within a period of fifteen days.

SANJAY KISHAN KAUL, J.

JANUARY 15, 2010
dm

VEENA BIRBAL, J.