

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

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Date of decision: 2nd July, 2014.

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FAO(OS) 260/2014

SHRI GOVERDHAN SINGH

..... Appellant

Through: Mr. Anand Yadav with Ms. Anita
Tomar, Advocates.

Versus

M/S ALISHA ENTERPRISES PVT. LTD.

..... Respondent

Through: Mr. Rajiv Nayar, Sr. Adv. with Ms.
Shyel Trehan and Ms. Manjira
Dasgupta, Advocates.

AND

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CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. These appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) impugn the common order dated 25th April, 2014 of the

learned Single Judge of this Court in OMPs No.15/2013 & 136/2013 filed by the respondent and the appellant respectively, both under Section 9 of the Arbitration Act.

2. The respondent filed OMP No.15/2013, pleading:

- (i) that the respondent was a tenant under the appellant vide two separate Lease Deeds, both dated 1st December, 2009, with respect to the ground, first and covered area on the third floor and the open and covered area above the third floor of property No.T-12/A situated at Khasra No.624/278, Hauz Khas Village, New Delhi;
- (ii) that both the Lease Deeds contained an arbitration clause;
- (iii) that the respondent had taken the said premises for running a restaurant;
- (iv) that the respondent had been regularly paying lease rental of Rs.1,80,000/- and Rs.95,000/- per month under the two Lease Deeds;
- (v) that the respondent in fact is in possession of the said premises since the year 1990, on the basis of earlier lease agreement;
- (vi) that the respondent entered into a Business Collaboration Agreement with M/s Impresario Entertainment & Hospitality Private

Limited and M/s Epiphany Hospitality Private Limited, to start a restaurant in collaboration, in the said tenanted premises;

(vii) that the appellant herein executed affidavits dated 20th August, 2011 and 18th November, 2011 supporting the respondent's applications to the concerned authorities for necessary permissions for so starting the restaurant;

(viii) that the appellant however sent to the respondent legal notice dated 23rd August, 2012 alleging subletting to the aforesaid M/s Impresario Entertainment & Hospitality Private Limited and M/s Epiphany Hospitality Private Limited;

(ix) that the respondent replied to the said legal notice informing that the respondent had not sublet but had merely entered into a business Collaboration Agreement and which was not in violation of the terms and conditions of the Lease Deeds with the appellant;

(x) that the appellant however wrote letters to the Local Authorities including the Municipal Corporation of Delhi (MCD), objecting to the grant of license to the proposed restaurant being so started by the respondent;

- (xi) that the respondent began renovating and fitting out the tenancy premises for the purposes of the proposed restaurant in October, 2012;
- (xii) that however the appellant obstructed and prevented the respondent from carrying out renovation; instances of such obstructions were pleaded;
- (xiii) that owing to the aforesaid, arbitral disputes had accrued.

Accordingly, the petition under Section 9 was filed seeking the interim measures of restraining the appellant from obstructing the respondent from enjoying peaceful possession of the premises and from obstructing the renovation and fitting out of the said premises and conduct of the business therein and to desist from calling upon the Local Authorities to not grant the requisite permissions or revoke the permissions already granted for the proposed restaurant.

3. The appellant filed OMP No.136/2013, not denying the tenancy of the respondent since the year 1990 and the renewal of the lease vide Deeds dated 1st December, 2009 and further contending:

- (a) that the complete second floor and areas of the property not covered by the two Lease Deeds dated 1st December, 2009 were in the sole possession of the appellant;
- (b) that as per the Lease Deeds, any renovation to be carried out by the respondent in the tenancy premises, could be carried out only after obtaining written consent of the appellant and only after bringing the nature and extent of changes to the knowledge of the appellant;
- (c) that the respondent has taken some of the adjoining properties also on lease, either itself or with his associates, from the owners thereof and had been intending to merge the premises in tenancy of the respondent under the appellant with the adjoining premises by making structural changes and by removal of load bearing walls dividing/demarcating the property of the appellant from the other adjoining properties;
- (d) that the structural changes being carried out by the respondent had even caused cracks on the second floor where the appellant resides;
- (e) that the nature of the structural changes being made by the respondent were hazardous to the building, habitat of the building as well as adjoining buildings;

- (f) that the intent of the respondent was to amalgamate the property of the appellant with the adjacent property;
- (g) that the appellant had filed a complaint with the MCD in this regard;
- (h) that the respondent had been intending to sublet the property.

Accordingly, the interim protection of restraining the respondent, from making any alterations, renovations, structural changes, removing the load bearing walls dividing the premises of the appellant in the tenancy of the respondent from other properties and from amalgamating the property No.T-12A Hauz Khas of the appellant with other properties bearing No.9A, 12, 12B, 13B and a direction for restoration of the premises to the original position was claimed. Interim protection, in the form of relief of restraining the respondent from subletting, assigning or parting with possession of the tenancy premises and from obtaining license and permission in the name of third parties with respect to the said premises, was also claimed.

4. Needless to state that both the petitions were contested.

5. The learned Single Judge, vide the impugned common order dated 25th April, 2014 has disposed of both the petitions, finding/observing/holding:

(I) that vide order dated 9th January, 2013 in OMP No.15/2013 filed by the respondent/tenant, the appellant/landlord had been restrained from obstructing the respondent/tenant from enjoying peaceful possession of the tenancy premises and from carrying out the renovation and fitting out works; the said order was continued from time to time;

(II) that vide order dated 11th December, 2013 in OMP No.136/2013 filed by the appellant/landlord, the respondent/tenant had been directed to maintain *status quo* regards the work at the site in issue; the said ad-interim order had also continued;

(III) that the factual position was that as on 11th December, 2013, when order directing *status quo* was passed, the renovation of the ground floor had already been completed and the renovation work on the first, third and the space above the third floor and terrace was in progress;

(IV) that the main grievance of the appellant/landlord was that the respondent/tenant had amalgamated the premises of the appellant/landlord with the adjoining properties by breaking open the walls demarcating the two properties;

(V) that while it was the case of the appellant/landlord that the walls demarcating the premises of the appellant/landlord from the adjoining properties had been demolished in the year 2013, the case of the respondent/tenant was that the amalgamation had taken place much earlier, in or around the year 1990;

(VI) that the aforesaid controversy, i.e. the date when the respondent/tenant had removed/demolished the walls separating the premises of the appellant/landlord from adjoining properties, was a disputed question of fact which could not be adjudicated in a proceeding under Section 9 of the Act and which has to be adjudicated by the Arbitral Tribunal;

(VII) that it was the submission of the counsel for the respondent/tenant that the amalgamation was in existence since the year 2005 i.e. even prior to the date of execution of the Lease Deeds dated 1st December, 2009;

(VIII) that the report of the Court Commissioner appointed also was that the premises had been amalgamated with the adjoining properties but on the basis of the said report it could not be said, whether the said

amalgamation was done in the year 1990/2005 or had been done recently;

(IX) that the apprehension expressed by the appellant/landlord that the said amalgamation may jeopardize his interests vis-à-vis his neighbours can be addressed by requiring the parties to clearly demarcate the premises of the appellant/landlord vis-à-vis the adjoining properties and directions wherefor were issued;

(X) that if the appellant/landlord succeeds in the arbitration proceeding, the respondent/tenant shall not claim any equity or special rights on account of the fact that he, in the meantime, invested monies to complete the renovation process in the property and any such renovation work shall be carried out by the respondent/tenant entirely at his own risk and peril;

(XI) that the Archaeological Survey of India and the South Delhi Municipal Corporation of Delhi had already issued 'No Objection Certificate' (NOC) in favour of the respondent/tenant;

(XII) that it was not in dispute that the respondent/tenant had been paying rent month by month and was not in default;

(XIII) that in these circumstances, the balance of convenience lies in permitting the respondent/tenant to put the entire premises to use till further orders are passed by the Arbitral Tribunal;

(XIV) that the respondent/tenant shall be bound to comply with all the legal requirements and shall not resort to any illegality while using the tenancy premises.

Accordingly, the order dated 11th December, 2013, in OMP No.136/2013 of *status quo*, was vacated and an Arbitrator appointed to adjudicate the disputes which had arisen.

6. The counsel for the appellant/landlord,

(A) has invited our attention to the report of the visit by the Court Commissioner on 15th December, 2013 to contend that therefrom it is apparent that the openings/merging in the premises of the appellant/landlord with the adjoining properties had been made recently only;

(B) has invited our attention to Clause 2 of the Lease Deeds dated 1st December, 2009 and the relevant portion whereof is as under:

“TO HAVE AND TO HOLD the same to the Lessee for a term appearing hereunder and in order to facilitate the Lessee to carry out the necessary renovations to suit the business requirement of the lessee and furnishings with the consent of Lessor for the purpose of running the business of restaurant or any other activities in the leased premises. The Lessor has put the Lessee in possession of the leased premises.”

to show that the respondent/tenant could not have carried out any renovations without the consent of the appellant/landlord and has argued that no such consent has been taken;

(C) has invited our attention to the photographs of the property to contend that the work of amalgamation of the premises of the appellant with the adjoining properties is still underway;

(D) has invited our attention to the site plan filed by the respondent/tenant for the purposes of grant of Health Trade License and has contended that the site plan filed is wrong and the position is entirely different; our attention is also invited to the correct site plan;

(E) has argued that the respondent/tenant for the purpose of obtaining the licenses/permission has also altered the copy of the Lease Deeds and made other false representations to the authorities concerned;

(F) has argued that the premises of the appellant/landlord cannot be permitted to be merged with the adjoining properties.

7. Per contra, the senior counsel for the respondent/tenant has contended:

(i) that the appellant had concealed the NOCs handed over by the appellant/landlord to the respondent/tenant for the purposes of obtaining the various permissions and that the same show the consent of the appellant/landlord to the renovation work commenced by the respondent/tenant;

(ii) that the respondent/tenant, after the *ex-parte* ad-interim order dated 9th January, 2013 in OMP No.15/2013 restraining the appellant/landlord from obstructing in the work of repairs, has gone ahead with the work of repair/renovation in the property;

(iii) that the appellant/landlord subsequently as an afterthought lodged complaints with the various authorities, to scuttle the launch of the proposed restaurant of the respondent/tenant in the premises;

(iv) that the only dispute between the parties is of ‘amalgamation’ and which is also an afterthought, the amalgamation having been done in the year 1990/2005.

8. We, sitting in appellate jurisdiction over an order in a proceeding under Section 9 of the Arbitration Act, are not required to decide whether the respondent/tenant under the terms of the Lease Deeds with the appellant/landlord was or was not entitled to, break the walls separating the premises in its tenancy under the appellant/landlord from the adjoining properties. That decision will fall in the domain of the Arbitral Tribunal. Of course, even in a proceeding under Section 9, we would have been required to take a *prima facie* view thereon, if the walls had not been demolished as yet. However, today the position is that the separating walls already stand demolished. The amalgamation complained of, has thus already taken place.

9. When we put the same, as is also evident from the photographs on record, to the counsel for the appellant/landlord, all that he could say was that the furnishing of the entire premises as one is still to take place and we should direct the openings already made, amalgamating the tenancy premises with adjoining properties, to be closed. Though the photographs show rough edges at the place from where the separating walls have been removed, and which is indicative of the same having taken place recently but the possibility, of the same having been done earlier or in the year 1990/2005, as claimed by the respondent/tenant, also cannot be ruled out, as often while repairing/renovating

the premises, the existing plaster/plaster of paris is removed to re-plaster the walls and which can lead to such rough edges; similarly, if in such renovations, the door frames/leaves are changed, the same can also give an impression of the opening having been made recently only. We therefore concur with the learned Single Judge that no definite fact finding in this regard can be given without recording of evidence; though we may record that generally when the same is permitted, a specific clause therefor exists and which is not found in the Lease Deeds dated 1st December, 2009.

10. What persuades us from not interfering with the order of the learned Single Judge is the fact that separating walls have already been demolished and amalgamation of tenancy premises with adjoining properties, at the level of the ground, first and third floor, has already been done. The owners of the adjoining properties are not parties to the Lease Deeds containing the arbitration clause and are not parties before us. They perhaps have no objection to such works/amalgamation. As far as the apprehension of the appellant/landlord of, owing thereto the boundaries of the property of the appellant/landlord having disappeared, has to be addressed at the final stage and not at this interim stage, when only the work of completing the works already commenced and done, remains.

11. On a perusal of the photographs and the site plans on record, we are also of the *prima facie* view that it will not be difficult to identify the separating lines between the premises of the appellant/landlord and the adjoining properties at a subsequent point of time.

12. As far as the grievance of the appellant/landlord of the renovation illegally carried out by the respondent/tenant having jeopardized the structural safety of the premises and having damaged the premises is concerned, the remedy therefor also is at the final stage only, either by claiming damages or a direction to the respondent/tenant to restore the premises and at this stage, when there are no specifics also of the damages, no interim order with respect thereto can be made.

13. Yet another factor which also cannot be lost sight of is that the locality where the premises is situated has a large number of eateries and restaurants and the appellant/landlord let out his property for the purposes of operating the restaurant therefrom. The said locality was originally a part of village *abadi* and which was subsequently urbanized and considering the sizes of the property therein, the practice of such amalgamation of several properties to create larger spaces is not unknown.

14. For the aforesaid reasons, no interference is called.

15. Dismissed.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

JULY 02, 2014

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