

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

% *Date of Judgment: 06.4.2011*

+ **RSA No.397-98/2006 & CM Nos.16452/2006 & 16454/2006**

MRS.NEETA GHUMAN & ANR. Appellants
Through: Mr.Keshav Dayal, Sr.Advocate
with Arun Beriwal and
Mr.Prehlad Dayal, Advocates.

Versus

DELHI DEVELOPMENT AUTHORITY Respondent.
Through: Mr.Rajiv Bansal, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned and judgment dated 16.9.2006 which had endorsed the finding of the trial judge dated 07.10.2002 whereby the suit filed by the plaintiff Neeta Ghumen seeking permanent injunction against the defendant/ Delhi Development Authority (DDA) restraining them from acting upon the notice dated 09.12.1983 holding her guilty for the misuse of the suit property had been dismissed.

2. The case of the plaintiff is that plaintiff has purchased this property bearing No.82/13, Safdarjung Enclave, New Delhi from the President of India vide perpetual lease dated 23.12.1965; It comprised of a ground floor, first floor, mezzanine floor, second

floor and a garage block. This property was admittedly located in a residential zone. Plaintiff had fulfilled all conditions to run a guest house. On 22.5.1981 she had applied for permission to run a guest house/boarding house/lodging house but no reply was received. On 08.3.1983 plaintiff received a notice stating that she was not entitled to carry on any trade or business in the said premises. Reply dated 15.3.1983 was sent by the plaintiff clarifying that the premises are being used for a family dwelling house and for no other purpose; the guests who use the same are paying guests; user was residential only. Thereafter on 29.12.1983 another notice was received by the plaintiff terminating the lease of her plot holding it to be in violation of the terms of the lease.

3. The defence of the defendant was that the plaintiff is seeking a declaration under the garb of an injunction. Suit is bad for want of notice under Section 53B of the Delhi Development Act. Plaintiff had applied for permission for running guest house; no permission was granted. The user of the property for running a guest house/boarding house/lodging house by the plaintiff is in contravention of the terms of the lease. Suit is liable to be dismissed.

4. On the pleadings of the parties six issues were framed; they read as follows:

- i. Whether suit is not bad for want of notice Under Section 53-B of DD Act? OPP
- ii. Whether notice dated 9.12.83 is bad, illegal and against the provisions of law? OPD
- iii. Whether order dated 9.12.83 is against the terms and conditions of these lease deed? OPD
- iv. Whether plaintiff has committed violation of the lease deed? OPP
- v. Whether plaintiff is entitle to the relief claimed for? OPP

v. Relief.

5. Oral and documentary evidence was led. Trial judge was of the view that although the plaintiff had applied for a licence for running a guest house but the same had not been permitted; the notification Ex.PW-2/1 dated 7.5.1999 permitting user of guest house is permitted in certain areas only. Safdarjung Development Area where is the suit property is located is not one such area; it was not covered by this notification Ex.PW-2/1. The contention of the plaintiff that the premises are being used for residence and no food is being served is an afterthought story which has been cooked up by the plaintiff. This has been noted in the para 11 of the judgment of the trial judge. Suit of the plaintiff was dismissed.

6. In appeal this finding was endorsed. The relevant extract of para 10 of the impugned judgment qua this submission is noted herein below:

“On perusal of the impugned order I find that Ld. Civil Judge has dealt with this aspect. It was observed by the Ld. Civil Judge that plea of the plaintiff that no food was being served there was an after thought story. I also analyze the evidence. There is no evidence of the plaintiffs which could corroborate her statement on this aspect. No witness either from M/s Ghuman Hotels Pvt. Ltd or any other person was examined on this aspect that suit premises was used only for lodging and boarding and no food was served there. Plaintiff has also failed to examine any paying guests on this aspect that no food was served to him or her during her/his stay. Ex.PW-1/3 is the letter of the plaintiffs dated 05.11.1980 to the Joint Director Master Plan DDA seeking permission for using the suit premises as a guest house. This letter nowhere contains that food will not be served in the guest house/lodging house/boarding house.”

7. This is a second appeal. On 18.8.2008, it is admitted and the following substantial question of laws were framed:

1. Whether the mere use of a part of the residential premises for the purposes of a guest house will change the nature of premises

from 'residential' to commercial'?

2. Whether the case of the appellant is covered by notification dated May 17, 1995 and the letter dated November 13, 2000 issued by the Ministry of Urban Development and Poverty Alleviation?

8. On behalf of the appellant, it has been urged that the finding in the impugned judgment in para 10 is a perverse finding wherein it has endorsed the finding of the trial judge holding that this submission of the plaintiff (that she is using this premises for a guest house only/residential purpose and is not serving food is an afterthought) is clearly a perversity. Counsel for the appellant has placed reliance upon a judgment of this Court reported in WP(C) No.2004/1997 Vikramjit Kapoor Vs. UOI to substantiate his submission that the running of a guest is a residential user only; it does not contravene the terms the lease.

9. Arguments have been countered. It is pointed out that the concurrent findings of the fact cannot be interfered with. Substantial question of law has not arisen. The fact finding courts had returned a positive finding that the user of the premises was commercial.

10. Record had been perused. Para 6 and 8 of the plaint are relevant. In both these paragraphs there is a clear and categorical stand of the plaintiff that the premises are being used for a guest house and no food is being served therein; in the corresponding paras of the written statement there is no specific denial to this particular averment. PW-1 has also on oath deposed that the premises are being used for the residence of guests only and no food is being served therein; there is no contravention of the lease. PW-1 has not been cross-examined on this aspect. The averment in the plaint and the testimony of PW-1 has not only been misread and

misconstrued in the impugned judgment but has been completely topsy-turned. What the plaint has said and what PW-1 had deposed has been read in reversal. Finding of fact has been returned holding that the averment of the plaintiff that the premises are being used for a guest house and no food is being served therein is an afterthought is a complete illegality; this is evident from the record; this finding is nothing but perverse.

11. In the judgment of Vikramjit Kapoor a Bench of this Court after examining the case law on mis-user charges being levied upon the properties which were being run as a guest house/boarding house, relying upon a judgment of this Court reported in 2003 III AD (Delhi) 634 Ashwani Kumar Khanna vs. DDA it had held that only when the non-residents were permitted user of restaurant and eating place would the user change from a residential to a commercial user. In the absence of food being served in the boarding house and there being no restaurant the user remains residential. In this judgment it was further held that even if there was a requirement for seeking permission for running a guest house, running of the same without such a permission would not convert the user from “residential” to “commercial”.

12 In this view of the matter, it is clear that the impugned is liable to be set aside. There was no violation of the terms of the lease deed. The use of the premises by the plaintiff was a residential use for the paying guests where the food was not being served; it did not amount to a commercial user. There being no violation of the terms of the lease deed, the impugned notice dated 09.12.1983 is an illegality.

13. Admittedly the plaintiff had applied for permission to use the

premises as guest house. It is contended by the learned counsel for the appellant that this was by way of an abundant pre-caution as the plaintiff being a law abiding citizen did not wish to contravene any provision of law. The case of the plaintiff was also not covered by the notification dated 7.5.1999 (Ex.PW-2/1) whereby certain colonies in Delhi were permitted user of guest house. Safdarjung Enclave does not fall in that category. Be that as it may, since on the factual scenario the case of the plaintiff does not amount to a violation of the terms of the lease and the premises being continued to be used for a residential purpose (as the guest house was not serving any food and not having any eating joint therein) the protection of the notification dated 7.5.1999 is not necessary as the user by the plaintiff of the disputed premises was residential only.

14. Learned counsel for the respondent has pointed out that the impugned judgment has also noted that a suit in the present form; i.e. a suit for injunction is not maintainable as the averment in the plaint show that although it has been described as a suit for injunction yet it is in fact a suit seeking prayer of declaration and the suit had been dismissed on the ground of maintainability as well.

15. The impugned judgment had returned this finding in para 12; it reads as follows:

“12. It has been further argued by Ld. Counsel for the appellants that Ld. Civil Judge has committed error in holding that the plaintiffs/appellants should have challenged the order of the Lease Administrative Officer by way of suit of declaration. Counsel for the defendant/respondent argued that suit of the plaintiff was not maintainable as the plaintiff got relief of declaration under the garb of suit for injunction. On perusal of the trial court record, I find that plaintiff/appellant has sought

relief of permanent injunction without seeking relief of injunction. Therefore, suit is not maintainable and it is further held that the impugned judgment is beyond any error or mistake.”

16. On behalf of the appellant, it is submitted that a suit in the present form is maintainable. For this proposition reliance has been placed upon a judgment reported in 141 (2007) DLT 822 Modi Rubber Ltd. Vs. Guardian International Corp.

17. Averments in the plaint have been perused. Prayer in the present plaint reads as follows:

“the defendant be restrained from taking possession of the plot of land together with complete structure standing thereon from the plaintiffs and the defendant be restrained from making that re-entry in the said premises.”

This was a suit simplicitor for injunction with a prayer that the defendant be restrained from making a re-entry in the said premises. The prayer made in the prayer clause clearly shows that there is no relief of declaration which has been sought. Even otherwise this is not one of the substantial question of law which has been formulated by this Court on 18.8.2008. This court sitting in second appeal has to answer only the substantial questions of law which have been framed by it.

18. In view of the aforementioned discussion, the substantial questions of law are answered accordingly in favour of the appellant. Appeal is allowed. The suit of the plaintiff stands decreed.

CM Nos.16452/2006 & 16454/2006

Dismissed being infructuous.

INDERMEET KAUR, J.

APRIL 6, 2011
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