

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

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Date of decision: 26th April, 2016

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RFA No.493/2013

MELANGE & ORS

..... Appellants

Through: Mr. Aadarsh B. Dial, Sr. Adv. with
Mr. Kunal Anand, Adv.

Versus

YWCA OF INDIA

..... Respondent

Through: Mr. Rohit Gandhi, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and money decree (of Rs.12,51,144/- with interest at 10% per annum from institution of the suit till realisation) dated 19th July, 2013 of the Court of the Additional District Judge (ADJ)-12 (Central), Delhi in CS No.167/2011 filed by the respondent/plaintiff under Order 37 of the CPC, consequent to dismissal of the application filed by the three appellants i.e. appellant no.1 and Mr. Gagan Bhandari and Mr. Gaurav Obrien Gardner being the partners of the appellant no.1 for leave to defend.
2. The appeal came up first before this Court on 28th October, 2013 when the counsel for the respondent/plaintiff being on caveat appeared and accepted notice and the trial court record was requisitioned and subject to the appellants

depositing the entire decretal amount i.e. with interest till the date of deposit in this Court execution was stayed. The appellants however deposited only Rs.3 lacs in this Court and applied for furnishing security for the balance decretal amount and which was allowed vide order dated 22nd July, 2014. Security in the form of original title deeds of immovable property was furnished and which was accepted. The parties were referred to mediation but which remained unsuccessful. Vide order dated 17th November, 2015 the deposited amount of Rs.3 lacs was ordered to be released in favour of the respondent/plaintiff subject to the respondent/plaintiff furnishing undertaking for restitution thereof in the event of the appeal succeeding. The respondent/plaintiff is reported to have withdrawn the same. Though the appeal has not been formally admitted as yet but considering the fact that in the event of being allowed the suit will have to be remanded, the counsels have been heard finally and the trial court record perused.

3. The respondent/plaintiff instituted the suit from which this appeal arises pleading that (i) the respondent/plaintiff has an international guest house at Sansad Marg, New Delhi with dining hall where services of boarding and lodging are provided to members and guests; (ii) that the appellant/defendant no.1 of which the appellants/defendants no.2&3 are partners had approached

the respondent/plaintiffs in early 2008 offering to provide dining services in the said guest house and a Licence Agreement dated 31st March, 2008 was entered into whereunder the respondent/plaintiff made available to the appellants/defendants for a period of three years an area of 1851.97 sq. ft. for dining hall, kitchen and store and front garden measuring 1755 sq. ft. in its aforesaid guest house for the purpose of providing dining services in the name and style of 'The Royal Court' and the appellants/defendants agreed to pay a licence fee of Rs.1,50,000/- per month to the respondent/plaintiff w.e.f. 1st June, 2008 beside electricity and water charges as per actual consumption; a supplementary agreement dated 19th April, 2008 was entered into between the parties whereunder the appellants/defendants deposited an amount of Rs.4,50,000/- with the respondent/plaintiff by way of security; (iii) on request of the appellants/defendants the time for commencement of payment of licence fee was extended to 1st July, 2008; (iv) that the appellants/defendants despite commencing dining services did not make payment of licence fee and of electricity and water charges and approached the respondent/plaintiff for reduction in licence fee and a fresh Licence Agreement dated 1st January, 2009 to come into effect w.e.f. 1st April, 2009 was entered into whereunder the licence fee was reduced to Rs.1,00,000/- per month; (v) the

appellants/defendants still defaulted and on their request the respondent/plaintiff agreed to further reduce the licence fee to Rs.50,000/- per month w.e.f. 1st December, 2009; (vi) that the appellants/defendants w.e.f. 5th January, 2010 stopped providing dining services save breakfast causing a great inconvenience and harassment to the respondent/plaintiff and its guests and members; (vii) that the respondent/plaintiff in the circumstances terminated the licence w.e.f. 31st March, 2010; and, (viii) that a total sum of Rs.23,50,000/- was due towards licence fee from 1st July, 2008 to 31st March, 2010 and a sum of Rs.3,07,159/- and Rs.95,855/- due towards electricity and water charges and after adjusting the security amount of Rs.4,50,000/- and the other monies due from the respondent/plaintiff to the appellants/defendants towards dining services provided by the appellants/defendants, a sum of Rs.18,36,035/- was due from the appellants/defendants to the respondent/plaintiff and for recovery whereof suit was filed.

4. The appellants/defendants sought leave to defend on the grounds (i) that the respondent/plaintiff was not a legal entity and the suit had not been filed by a duly authorised person; (ii) that the suit is not covered under the provisions of Order 37 of the CPC; (iii) that the adjudication of the disputes required interpretation of licence agreements; (iv) that the appellants/defendants faced

hindrances in using the premises for the purpose they were licensed to the appellants/defendants; (v) that the appellants/defendants could not even get licence for providing the services owing to the respondent/plaintiff itself not having a licence to run the guest house; (vi) that thus the dining hall remained un-operational till December, 2008 and the appellants/defendants suffered losses; (vii) that even after the dining hall became operational there were hardly any sales therein owing to rallies and road blocks taking place almost five days in a week on the main road on which the guest house was situated; (viii) it was in these circumstances that the appellants/defendants closed the dining hall in the licenced space; (ix) that the appellants/defendants were stopped from removing their goods lying in the licenced space and the respondent/plaintiff trespassed therein; (x) that the suit claim is false and frivolous; (xi) that the respondent/plaintiff is at best entitled to charges for the period from 1st April, 2009 to 31st November, 2009 at the rate of Rs.1,00,000/- from 1st December, 2009 to 31st March, 2010 at the rate of Rs.50,000/- per month and electricity charges for the said period i.e. a total of Rs.12,54,106 only; and, (xii) that goods of the appellants/defendants valued at Rs.17,20,020/- were lying in the premises.

5. Though voluminous reply to the application for leave to defend was also filed but need to refer thereto is not felt.

6. The learned ADJ vide the impugned order/judgment dismissed the application for leave to defend finding/observing/holding:-

- (a) that the plea of the appellants/defendants of the respondent/plaintiff being not a legal entity was a bald one as the respondent/plaintiff had filed copy of certificate of its registration as a Society under the Societies Registration Act, 1860 along with its constitution and bye-laws and resolution authorizing the institution of the suit;
- (b) that the appellants/defendants had not denied the execution of the licence agreements on which the claim in suit was based;
- (c) the licence agreement did not contain any representation on the part of the respondent/plaintiff of having a licence and the appellants/defendants had not been able to show any representation to the said effect having been made by the respondent/plaintiff to the appellants/defendants;
- (d) rather as per the licence agreement it was the appellants/defendants who were to obtain the necessary licences

and the appellants/defendants could not shift the burden on the respondent/plaintiff;

- (e) that the appellants/defendants in the contemporaneous correspondence also had not raised the issue of the respondent/plaintiff not having a licence;
- (f) the appellants/defendants had entered into the agreements with the respondent/plaintiff with an open eye and should have investigated all the facts before entering into the agreements and once the agreements had been entered into, it was not open to the appellants/defendants to deny their liability thereunder on such grounds;
- (g) the appellants/defendants having admitted liability in the sum of Rs.12,54,106/-, dispute remained for the period 1st July, 2008 to 31st March, 2009 only and liability for which period the appellants/defendants were controverting for the reason of the licence agreement for the said period having been frustrated and the subsequent agreement having been entered into;
- (h) however from a reading of the agreements it was not so borne out;

- (i) that even in the contemporaneous correspondence the appellants/defendants were seeking reduction of the licence fee and not claiming frustration of the agreement;
- (j) rather it was on record that the respondent/plaintiff had been pressing for its dues all throughout;
- (k) merely because the appellants/defendants failed to succeed in running the restaurant did not entitle them to escape their liability to pay licence fee with respect thereto; and,
- (l) that the appellants/defendants had also not initiated any legal proceedings for recovery of the amounts which they claimed to be due from the respondent/plaintiff.

7. The senior counsel for the appellants/defendants has before me also raised the same arguments i.e. of no payments being due for the earlier period after a fresh licence deed was executed and of the suit being not maintainable under Order 37 of the CPC.

8. The claim in suit for licence fee and electricity and water charges is in accordance with the agreement in writing between the parties and which is not in dispute. Under the said licence agreement the appellants/defendants had agreed to pay the licence fee at the rates mentioned therein, for use of the

premises of the respondent/plaintiff for the purposes of running of a restaurant / dining hall therein. It is not in dispute that the electricity and water charges claimed are as per consumption recorded in the sub-meters provided. The only plea of the appellants/defendants is of having not been able to earn from the premises for various reasons and for the reason of the respondent/plaintiff having not allowed the appellants/defendants to take away their goods from the premises. It is otherwise not in dispute that during the time for which licence fee is claimed, the premises of the respondent/plaintiff were in use and occupation of the appellants/defendants.

9. The licence fee which the appellants/defendants had agreed to pay to the respondent/plaintiff was in lieu of the premises of the respondent/plaintiff and of which premises the respondent/plaintiff was admittedly deprived for the period for which licence fee is claimed. The disputes which the appellants/defendants raised in their application for leave to defend in my view have nothing to do with the liability of the appellants/defendants for payment of licence fee for the place / premises of the respondent/plaintiff admittedly in their use and occupation during the said time. It was not the concern of the respondent/plaintiff whether the appellants/defendants were able to earn from the premises during the said time or not. If there was any breach of agreement

in this respect by the respondent/plaintiff, it was for the appellants/defendants to make a claim therefor against the respondent/plaintiff and which the appellants/defendants admittedly did not make. Without the appellants/defendants making such a claim they could not in my view defend the claim of the respondent/plaintiff for licence fee and electricity and water charges for the premises of which the appellants/defendants admittedly availed during the relevant time. No error requiring interference is thus found in the impugned judgment and decree.

10. The appeal accordingly fails and is dismissed.

11. The appellants/defendants are also burdened with costs of this appeal. Counsel's fee assessed at Rs.25,000/-.

12. Decree sheet be prepared.

13. Before parting, I may notice that the appellants/defendants, more as a dilatory tactic have filed CM No. 14808/2016 under Order 41 Rule 27 of the CPC which is listed today for the first time for leave to place on record certain documents with respect to the licences. Filing of this application, after this appeal has remained pending for nearly three years and when last opportunity of today was given to the appellants/defendants to argue, is vexatious and

dilatory. Even otherwise in the light of the view taken, the documents sought to be placed on record have no relevance.

14. The amount of Rs.3 lacs deposited by the appellants/defendants is reported to have been already released to the respondent/plaintiff; however interest accrued thereon of Rs.59,668/- is stated to be still lying in this Court. The respondent/plaintiff is discharged from the undertaking subject to which the amount of Rs.3 lacs was released. The amount of Rs.59,668/- and further interest if any accrued be released forthwith to the respondent/plaintiff. If the appellants/defendants do not pay the balance decretal amount on or before 22nd August, 2016, the security furnished by the appellants/defendants be invoked.

RAJIV SAHAI ENDLAW, J.

APRIL 26, 2016

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(corrected & released on 16th June, 2016)