

\$~6.

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

+ **Date of Decision: 13.01.2015**

% **CRL.A. 545/2008**

D.D.A. Appellant

Through: Mr. Rajesh Mahajan, Advocate.

versus

MADHUBAN HOLIDAY INN & ORS. Respondents

Through: Mr. S.S. Lalsinghani & Mr. Gaurav
Harnal, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present appeal under Section 378 Cr.P.C. is directed against the judgment and order dated 14.09.2006 passed by Sh. A.K. Chaturvedi, Metropolitan Magistrate (MM), New Delhi acquitting the respondents accused in Case No.121/2002 under Section 14 read with Section 29(2) of the Delhi Development Act, 1957 (the Act). Leave to appeal was granted on 02.07.2008.

2. The case of the appellant/ complainant Delhi Development Authority (DDA) in brief is that an inspection was conducted on 28.09.2001 of the premises in question, i.e. B-71, Greater Kailash Part-I, New Delhi. During

inspection, it was found that the said property was being used for running a banquet hall, restaurant and guest house in basement, first floor and second floor in an area of about 4500 sq.ft. in basement, 3500 sq. ft. in ground floor, 3500 sq.ft. each on first and second floor in the name and style of “M/s Madhuban Inn”.

3. The case of the appellant was that as per the Master Plan/ Zonal Development Plan, the said premises could be used for residential use, thus, there was violation of Section 14 read with Section 29(2) of the Act. The appellant claimed that after obtaining requisite sanction under Section 49 of the Act, it preferred the complaint. The appellant examined two witnesses. The respondent/ accused, on the other hand, examined one witness. The defence of the accused was that the user of the premises in question was lawful by virtue of proviso to Section 14 of the Act. The said provision reads as follows:

“14. User of land and buildings in contravention of plans

After the coming into operation of any of the plans in a zone, no person shall use or permit to be used any land or building in that zone otherwise than in conformity with such plan:

PROVIDED that it shall be lawful to continue to use upon such terms and conditions as may be prescribed by regulations made in this behalf any land or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force.”

4. The submission was that the property had been put to use as a Nursery School-cum-Office even prior to 1962, when the Master Plan for Delhi (MPD) came into force. In this regard, the accused relied upon the evidence

of DW-1 Sh. S.L. Malhotra from the House-Tax Department of the Municipal Corporation of Delhi (MCD), who produced the inspection report and inspection book maintained in its department for the survey year 1962-63 prepared on the basis of the inspection conducted on 30.07.1962 (Exhibit DW-1/A). As per the inspection book, the user was recorded as commercial and under the column “*Number of rooms and approximate area of rooms or frontage in case of shops*”, it was recorded “*1000 sq.yd. – Happy Primary School and Office*”.

5. The Trial Court held that since the property in question was being used for commercial purpose even prior to coming into force of MPD, mere change of user from one commercial purpose to another commercial purpose would make no difference. In this regard, reliance was placed on the decision of this Court in ***Delhi Development Authority Vs. Shri H.S. Kalra & Others***, 20 (1981) DLT 124, and in particular, on the following observation made by the Court in that decision:

“Once a premises is shown to have been used for commercial purpose from before coming into force of the master plan i.e.1962, simply because the nature of that purpose was changed into another one, though retaining the commercial character would not amount to deviation from the purpose. It may be that on a narrow interpretation placed upon the words, “for the purpose and to the extent for”, violation of Section 14 of the Act can be detected even where there occurs a change in the nature of one commercial user to another commercial user.”

6. The submission of the appellant DDA that the extent of user had increased inasmuch as earlier about 1,000 sq.yd. area was found to be under commercial use, and upon inspection on 28.09.2001, it is found that an area

of approximately 15,000 sq.ft. was under commercial use, and thus, the respondent was liable to face penalty under Section 29 of the Act, was rejected by the learned MM by observing that:

“The area of use were commercial purpose was 1000 sq yds and the nature of user was Happy Primary School and office. Now in the present case the user is running of a restaurant in guest house. The area of mis user is approximately the same. It was argued by Ld JLO, it is not to the same extent and not for the same purpose as earlier and therefore the protection as per Section 14 of the DD Act is not available. However, in view of the aforesaid observations of the Division Bench of our own High Court and in view of the fact that the area in question more or less the same, I am not convince the arguments by Ld JLO that the present case is not to the same extent and same purpose as earlier and I am of the opinion that the present misuser is squarely protected under the provisions of Section 14 proviso of DD Act 1957 and the said benefit must be extent to it.”

7. Mr. Mahajan, learned counsel for the appellant DDA submits that even if it were to be accepted on the basis of Exhibit DW-1/A that 1,000 sq.yd. area was in use for commercial purpose prior to coming into force of the MPD, the aspect with regard to the change of area, i.e. extent of misuse has been brushed aside by the learned MM without proper examination. He submits that CW-1 Sh.A.K. Aggarwal, J.E., DDA had deposed that he had visited the premises in question on 28.09.2011 and found that a banquet hall, restaurant and guest house was functioning under the name and style of “M/s Madhuban Holiday Inn” in the basement, ground, first and second floor. He had also deposed with regard to the area of each of these floors, which was under commercial use, and the fact that there were 25 persons seen working there. He deposed that Sh.Rajesh Gulati had met him at the

site and disclosed the names of other two persons. He further deposed that FIR Exhibit CW-1/A was prepared at the site, which Sh. Rajesh Gulati refused to sign.

8. Mr. Malhotra, therefore, submits that it could not be said that the area was more or less the same inasmuch as, area found under misuse was about 15,000 sq.ft. as opposed to the area under previous misuse, which was 1,000 sq.yds., i.e. about 9,000 sq.ft.

9. On the other hand, the submission of learned counsel for the respondents is that earlier the entire premises admeasuring 1,000 sq. yd. was under misuse and the said position continued even after coming into force of the MPD. He further submits that proper sanction had not been obtained under Section 49 of the Act. He further submits that the inspection report Exhibit CW-1/A had not been got signed by any other witness even though the said witness had claimed that there were about 25 people working at the premises upon his visit.

10. Having considered the submissions and perused the record, I am of the view that there is merit in the submission of Mr. Mahajan.

11. So far as the aspect of sanction is concerned, there is a presumption in law that official acts had been validly and legally performed. It was for the respondent accused to dislodge that presumption. However, the same has not been done in the present case. The cross-examination of CW-1 on the aspect of sanction reads as follows:

“I filled in the proforma of the sanction Ex. CW 1/D. It is correct that Ex. CW 1/D is a cyclostyled proforma. wherein fill

in the blank have been done by me. It is correct that i Ex. CW 1/D there is no mention of any show cause notice or reply thereof., nor even of the alleged subsequent letter. It is correct that the sanction was obtained in official routine and not personally by me. The sanctioning authority did not call me personally at the time of grant of sanction. It is correct that whatever file I sent for obtaining the sanction the sanction is always granted. In the present case also the file which went for according of sanction must had been contained copy of FIR, copy of show cause notice, their reply, copy of LUP and copy of ZDP. It is wrong that there is improper sanction and the same is without the application of mind.”

12. From the aforesaid evidence, it cannot be said that upon examination of CW-1, it had been established that the sanction was obtained without application of mind from the competent authority. CW-1 had deposed that the case file was sent for according sanction which “must have contained copy of FIR, copy of show-cause notice, their reply, copy of LUP, copy of ZDP. It is wrong that there is improper sanction and that the same is without the application of mind”. CW-1 has, therefore, deposed that relevant material must have been placed before the competent authority. Merely because the said witness may not have been personally aware as to whether, or not, the relevant material was placed before the competent authority, it does not follow that the relevant material was not so placed. If the respondents were to dislodge the presumption, it was for the respondents to lead positive evidence in this regard by summoning the requisite file dealing with the aspect of sanction.

13. So far as the inspection report is concerned, the cross-examination of CW-1 shows that the respondent did not dispute, or challenge the inspection report CW-1/A on any aspect, including on the aspect of area found and

recorded as under misuse. The misuse, which is permitted by proviso to Rule 14 in contravention of the Zonal Development Plan is only in respect of *“the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force”*. Therefore, not only the purpose but also the extent of misuse which is permissible by virtue of Section 14 of the Act is limited. It, therefore, stands established that the extent of misuse, which was earlier 1,000 sq.yd., i.e. about 9,000 sq.ft. stood enhanced to 15,000 sq.ft. Thus, the violation of Section 14, to that extent, stands established.

14. So far as the aspect of penalty is concerned, the present being the first instance of contravention of Section 14 of the Act, the said contravention is punishable with fine, which may extend to Rs.5,000/- by virtue of Section 29(2) of the Act. Since the extent of misuse beyond about 9,000 sq.ft. is to the extent of 6,000 sq.ft., in my view, the interest of justice would be served by imposition of fine of Rs.1,000/- on each of the respondents. The respondents shall deposit the fine within four weeks, and in default of payment of fine, respondents No.2 to 4 shall suffer simple imprisonment for a period of 15 days each.

15. Dasti.

VIPIN SANGHI, J

JANUARY 13, 2015

B.S. Rohella