

Kamil and Brothers Registered partnership firm Vs Central Dairy Farm U.P. Pashu Dhan Udyog Ltd. and Bank of India

Court: Allahabad High Court

Date of Decision: Aug. 22, 2007

Acts Referred: Contract Act, 1872 " Section 73, 74
Specific Relief Act, 1963 " Section 41

Citation: AIR 2008 All 33 : (2007) 4 AWC 3976 : (2008) 2 RCR(Civil) 790

Hon'ble Judges: Pankaj Mithal, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Pankaj Mithal, J.

The plaintiff-appellant was awarded a contract for the supply of 30,000/- live sheep & goats to the defendant-

respondent No. 1 i.e. Central Dairy Farm, Uttar Pradesh Pashu Dhan Uddyog Nigam Limited at the rate of Rs. 786/- per quintal. The contract

was for a period of one year and the supply was to be made between 1.10.1985 to 30.9.1986. The plaintiff-appellant deposited a sum of Rs.

2,60,000/- as security for the good performance of the above contract. The said security amount was in the form of a fixed deposit with the Bank

of India, Jhansi. The contract/agreement contained a forfeiture clause in respect of the security amount. According to the defendants-respondents

since the plaintiff-appellant defaulted in the due performance of the contract, the security was directed to the forfeited.

2. It was in the above circumstances the plaintiff-respondent a registered partnership firm through one of its partner filed original suit for permanent

injunction restraining the defendant-respondent No. 1 from encashing the security amount of Rs. 2,60,000/- kept in fixed deposit receipt No.

9/151 dated 21.9.1985 with the Bank of India, Jhansi. The suit was decreed by the Court of first instance but in appeal the judgment and order of

the Trial Court was reversed and the suit was dismissed. Therefore, the plaintiff-appellant has preferred this second appeal

3. Heard Sri Ramendra Asthana, learned Counsel for the appellant and Sri. R.N. Singh for the respondent No. 1.

4. On the basis of the submission made by the learned Counsel for the parties only one substantial question of law arises in this second appeal i.e.

whether the amount of security deposited by the plaintiff-appellant for the due performance of the contract is liable to be forfeited on the mere

allegation of breach of contract without sufferance of actual loss or damage and in the absence of determination and quantification of the actual

loss/damage suffered by the defendants-respondents ?

5. In order to appreciate the above substantial question of law, it is first necessary to consider the provisions of Section 73 and 74 of the Contract

Act, 1872 (hereinafter referred to as an Act). Both the above sections provide for the consequence of breach of contract. Therefore, they are to

be read together and not separately. Sections 73 and 74 of the Contract Act reads as under:

73. Compensation for loss or damage caused by breach of contract- When a contract has been broken, the party who suffers by such breach is

entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose

in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract -When an obligation resembling those created by contract

has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from

the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-...

74. Compensation for breach of contract where penalty stipulated for- When a contract has been broken, if a sum is named in the contract as the

amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is

entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract

reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for.

Explanation.-...

Exception.-...

Explanation.-...

6. The general principle which is embodied in Section 73 of the Act is that whenever there is a breach of contract, the party who suffers by such a

breach is entitle to recover the loss or damage caused to him from the other party. However, recovery of any such loss or damage cannot be made

unless the party claiming has actually suffered the loss or damage and the same has been quantified.

7. The position is slightly different with regard to liquidated damages. In a claim for liquidated damages the party complaining of breach of contract

must fulfil the following conditions :

(i) he must prove that he has sustained loss or damage due to breach of the contract;

(ii) only reasonable sum can be awarded as compensation for the loss or damage so sustained;

(iii) whatever may be the actual quantum of loss or damage sustained, the compensation cannot exceed the sum named in the contract;

(iv) The court has power to dispense with the proof of damage or loss so suffered; and

(v) it is always open to the other party to show that no loss was actually suffered.

8. Therefore, even in cases where the damages or penalty is named in the contract or is provided by a forfeiture clause though proof of actual

amount of loss or damages may be dispensed with but nonetheless sufferance of loss or damage due to such breach of contract is a sine quo non

for claiming damages or for forfeiting the security amount.

9. A five judges Bench of the Supreme Court while dealing with the similar controversy and in interpreting the provisions of Section 74 of the Act

in Fateh Chand Vs. Balkishan Das, held that where a contract contains stipulation by way of penalty the Court has jurisdiction to award such sum

only as it considers reasonable but not exceeding the amount specified in the contract by way of compensation. It further lays down that Section 74

of the Act provides that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual

damage or loss is proved. It merely dispenses with proof of "actual loss or damage" but it does not justify the award of compensation when as a

consequence of breach of contract no legal injury has been caused. This has been provided because compensation for breach of contract is

awarded to make good only the loss or damage which arose in the natural course of things and not otherwise.

10. The legal position that emerges from the plain reading of Section 73 and 74 of the Act in the light of the above authority of the Supreme Court

is that a party complaining of the breach of contract is entitled to receive compensation for loss or damage suffered by it from the party who has

broken the contract; where the amount of compensation has been named or provided in the contract by way of penalty or forfeiture of any amount,

the Court shall assess and award reasonable compensation but not exceeding the amount so named; and for the assessment of such reasonable

compensation the party need not prove the actual damage or loss suffered but it would not justify the award of compensation when no such damage

or loss has actually been suffered on account of breach of contract. Section 74 of the Act, merely dispenses with the proof of actual loss or

damage only for assessment of damage or loss as the maximum limit has been named in the contract but it does not dispense with the burden of

proving that in fact damage or loss has actually been suffered.

11. In *Maula Bux Vs. Union of India (UOI)*, a three judges Bench of the Supreme Court while making a distinction between the earnest money

and the amount deposited in security for the due performance of the contract held that a person complaining of the breach of contract is not

required to prove actual loss or damage suffered by him and the Court is competent to award reasonable compensation even if no actual damage

is proved. The aforesaid authority has been followed by the Division Bench of the Supreme Court in *Union of India (UOI) Vs. Rampur Distillery*

and *Chemical Co., Ltd.*, The Division Bench of the Allahabad High Court in *State of U.P. Vs. Chandra Gupta and Co.*, relying upon the above

two decisions of the Hon^{ble} Supreme Court held that Section 73 and 74 of the Act entitles a person complaining of breach of contract to get

reasonable compensation but not if no damage is suffered on account of its non performance.

12. Thus, in my considered opinion a person is entitled to receive compensation in terms of money only if he has actually suffered damage or loss

on account of breach of contract by the other party and not otherwise. Therefore, sufferance of damage or loss is an essential pre condition for the

award of compensation by way of damages. The determination or assessment of damage or loss caused is altogether another aspect of the matter.

The assessment of damages can be made by actual proof of damage or loss suffered or it may be a reasonable sum which the Court thinks fit but

not exceeding the amount named in the contract where it is not possible to assess the same on the basis of material on record. The party aggrieved

may be absolved of the burden of proving the amount of actual damage or loss but nevertheless is responsible to prove that the breach of the

contract had actually caused damage or loss to it.

13. Sri R.N. Singh, learned Counsel for the respondent has placed reliance upon *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, and

has contended that there is no requirement of proving the actual loss or damage suffered when under the contract the amount of loss is pre-

stipulated by way of forfeiture clause. The Division Bench of the Supreme Court in the above case held that the jurisdiction of the Court to award

compensation in case of breach of contract is unqualified except for the fact that it has to be reasonable and not above the amount specified under

the contract. It also lays down that a party complaining of the breach of contract is entitled to receive reasonable compensation whether or not

actually loss is proved to have been caused by such breach, as in some cases it is impossible for the court to assess the compensation arising from

such breach. However, neither Section 74 of the Act nor any of the above authorities cited at the Bar dispenses with the pre-condition of actual

damage or loss being suffered for awarding compensation. Only proof of amount of actual loss and damage has been dispensed with where the

contract itself specifies the amount or provide for a penalty or forfeiture of the sum specified.

14. In the present case undisputedly there is a forfeiture clause of the security amount which is other than the earnest money, in the event of breach

of contract. Therefore, on breach of the contract by the plaintiff-appellant, the defendant-respondent No. 1 is entitled to a reasonable

compensation not exceeding the amount of security but not without establishing that it had actually suffered damage or loss on account of the said

breach. In other words, compensation cannot be awarded where no loss or damage has been suffered at all. There is nothing on record to

establish that any loss/damage was actually suffered by the defendant respondent No. 1 on account of the alleged breach of contract by the

plaintiff-appellant. Thus, in view of the legal position as discussed above specially in the light of five judges decision of the Supreme Court in Fateh

(Supra) the defendant-respondent No. 1 cannot forfeit the security amount without proving any actual loss or damage suffered by it.

15. In the end learned Counsel for the respondents urged that the suit itself was not maintainable and was barred by Section 41(h) of the Specific

Relief Act, 1963 as the agreement/contract contained an arbitration clause. However, a perusal of the judgment and order of the lower appellate

Court reveals that the said issue was decided against the defendant-respondent No. 1 though the appeal was allowed in its favour. The defendant-

respondent No. 1 has not preferred any cross objections against the finding on the above aspect. I have also perused the agreement. It does not

contain any such arbitration clause. The respondent No. 1 who complains of the breach of contract has itself not invoked the arbitration clause, if

any, and has straight away proceeded to forfeit the security without waiting for a finding of any competent authority about the breach being

committed and the party responsible for such a breach of contract. Therefore, the above submission is without substance.

16. In the result, the appeal succeeds and is allowed. The judgment and order dated 8.11.2005 of the lower appellate court dated passed in Civil

Appeal No. 148 of 2003 (Central Dairy Farms, Uttar Pradesh, Pashudhan Uddyog Nigam Ltd. and Anr. v. Kamil and Brothers) is set aside and

that of trial court dated 15.11.2003 passed in Original Suit No. 344 of 1987 (Kamil and Brothers v. Central Dairy Farms, Uttar Pradesh,

Pashudhan Uddyog Nigam Ltd. and Anr.) is restored. No order as to costs.