

(2012) 02 DEL CK 0476

Delhi High Court

Case No: Regular First Appeal No. 911 of 2003

Balwant Singh

APPELLANT

Vs

Ram Charan

RESPONDENT

Date of Decision: Feb. 7, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33, Order 7 Rule 7
- Contract Act, 1872 - Section 74

Citation: (2012) 3 AD 290 : (2012) 190 DLT 589

Hon'ble Judges: Valmiki J Mehta, J

Bench: Single Bench

Advocate: R.S. Tomar, With Appellant in Person, for the Appellant;

Final Decision: Allowed

Judgement

Valmiki J Mehta, J.

This matter is on the Regular Board of this Court since 2.2.2012. Today, it is effective item No. 18 on the Regular Board. No one appears for the respondent although it is 12:45 P.M. I have hear counsel for the appellant and after perusing the record am "proceeding to dispose of the appeal. Learned Counsel for the appellant/plaintiff on instructions from the appellant/plaintiff who is present in person confines his relief in the appeal to refund of the amount of Rs. 2,70,000/- which is paid under the subject agreement to sell along with interest at 9% per annum simple from the date of payment which is the date of agreement to sell viz. 24.8.2001.

2. The present appeal impugns the judgment and decree of the Trial Court dated 29.9.2003 dismissing suit for specific performance under the agreement to sett dated 24.8.2001 with respect to the suit property No. 688-A, Khasra No. 53 situated in the Abadi known as Gosian Mohalla, Township, Najafgarh, New Delhi. The property is situated on a plot admeasuring 105 sq. yds. It was not disputed before the Trial Court that when the agreement to sell dated 24.8.2001 was entered into for

a total consideration of Rs. 8,0,000/-, of which a sum of Rs. 2,70,000/- was received by the respondent/defendant

3. The respondent/defendant claims to have forfeited this amount on account of breach of contract by the appellant/plaintiff. There are however no pleadings or evidence to the effect that forfeiture has taken place because the respondent/defendant has suffered a loss. Before an amount can be forfeited which is paid as an advance price under an agreement to sell, it is necessary to plead and prove that the loss has been caused to the proposed seller/defendant. This is a ratio of the Constitution Bench judgment of the Supreme Court in the case of [Fateh Chand Vs. Balkishan Das](#), and relevant paras 8,10,15 and 16 of this judgment read as under:-

8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:-

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.

The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorism is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all

the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says 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 to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which

compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs. 11,250 as damages to the plaintiff must therefore be set aside. (Underlining added)

4. As per the provision of Order 7 Rule 7 of the Code of Civil Procedure, 1908 (CPC), Court can modulate the relief which can be given in the facts and circumstances of the case, though the relief is not specifically asked for. I am also empowered to modulate the relief in terms of Order 41 Rule 33 CPC since the respondent/defendant does not dispute of having received the amount of Rs. 2,70,000/- Specific performance was not granted to the appellant/plaintiff, therefore, the respondent/defendant cannot have unjust enrichment by retaining the amount of Rs. 2,70,000/-, although no loss is pleaded or proved to be caused in terms of the ratio of the judgment in the case of Fateh Chand (supra).

5. The appellant/plaintiff is also entitled to a reasonable rate of interest on the amount of Rs. 2,70,000/- which has been received by the respondent/defendant inasmuch as surely the respondent/defendant would have received the benefit in the form of accretion to the principal amount of Rs. 2,70,000/- by interest thereupon or from the investment which would have been made out of the amount of Rs. 2,70,000/- received. Interest is, in fact, a recompense also with respect to the fact that with passing of time, purchasing power of money falls. Considering all aspects of the matter I feel that interest at 9% per annum simple in favour of the appellant/plaintiff and against the respondent/defendant will meet the ends of justice. Accordingly, this appeal is allowed by passing a decree in favour of the appellant/plaintiff and against the respondent/defendant for a sum of Rs. 2,70,000/- along with interest at 9% per annum simple from 24.8.2001 till payment. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.