

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

+ **RFA No.422/2011**

% **9th November, 2011**

BHULEY SINGH Appellant
Through: Mr. R.K.Shukla, Adv.

VERSUS

KHAZAN SINGH & ORS Respondents
Through: Mr. Ajit Nair with Mr. Sumit Rana,
Mr. Rajvir Singh & Mr. Ankit Tyagi, Advs.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 is to the impugned judgment of the Trial Court dated 3.3.2011 which dismissed the suit for recovery of Rs.10,00,000/- filed by the appellant/plaintiff against the defendants/respondents. The amount of Rs.10,00,000/- was claimed being double the amount of earnest money of Rs.5,00,000/- which was paid under an agreement to sell dated 5.1.2007. By the agreement to sell dated

5.1.2007, the appellant/plaintiff had agreed to purchase and the respondents/defendants had agreed to sell the suit property measuring 2,000 square yards forming part of Khasra no.72, Village Sabhapur, Chauhan Patti, Illaka Shahdara, Delhi.

2. When notice was issued in this appeal, counsel for the appellant confined his relief in the appeal not for payment of double the amount of earnest money but for refund of the advance price paid of Rs.5,00,000/-. This relief claimed is a lesser relief than the original relief of double the amount of earnest money.

3. Learned counsel for the appellant pleaded that the only defence of the respondents/defendants in the written statement was that they had forfeited the earnest money on account of breach of contract by the appellant/plaintiff. To this, counsel for the appellant argues that an earnest money or advance price paid under an agreement, cannot be forfeited, except for a nominal amount in view of the Constitution Bench decision of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405**. Counsel for the appellant/plaintiff relied upon the following paragraphs of the judgment in the case of **Fateh Chand (Supra)**:

“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 terrorem* 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)

Learned counsel for the appellant also argued that a Court is always empowered under Order 7 Rule 7 CPC to grant a lesser relief than as originally claimed and therefore, instead of grant of decree for Rs.10,00,000/- suit can always be decreed for Rs.5,00,000/- being the advance price paid, inasmuch as, the undisputed position which emerged in the suit was that there were no pleadings nor any evidence led on behalf of the respondents/defendants that any loss was caused to the respondents/defendants, and which entitled the respondents/defendants to forfeit the amount.

4. Per contra the learned counsel for the respondents/defendants

very vehemently argued that there was no requirement of any pleadings or any evidence of the respondents/defendants to show that any loss was caused, inasmuch as it was upon the appellant/plaintiff firstly to prove that he was entitled to refund of the advance money paid under the contract. Learned counsel for the respondents/defendants further argued that there was no issue which was framed in the Trial Court for refund of the amount paid of Rs.5,00,000/- and therefore there was no need for the respondents/defendants either to plead or prove any loss which is caused to them. It is also argued on behalf of the respondents/defendants that in the case the respondents/defendants have not received Rs.5,00,000/- but have only received Rs.4,00,000/- as Rs.1,00,000/- had been paid to the property dealer. Finally it is argued that in the cross-examination of the appellant/plaintiff, a case was put forth that the loss was caused to the respondents/defendants.

5. In my opinion, the appeal deserves to be allowed as the appellant/plaintiff has rightly claimed a lesser relief of Rs.5,00,000/- instead of a sum of Rs.10,00,000/- as claimed in the plaint and which he is surely entitled to under Order 7(7) CPC. The Trial Court had framed a specific issue being issue no.2 as to whether plaintiff was entitled to recover Rs.5,00,000/- from the respondents/defendants paid against the receipt dated 5.1.2007 and therefore the argument of the counsel for the respondents/defendants that no issue was framed has no force. Once there was a specific issue, this

issue could well have been urged so that the appellant/plaintiff could claim a sum of Rs.5,00,000/- from the respondents/defendants which was paid under the agreement to sell as an earnest amount on the basis of the undisputed position that the respondents/defendants did not plead or prove that loss had been caused to them so as to entitle them to forfeit the amount paid to them under the Agreement to Sell. The Constitution Bench of the Supreme Court in the case of **Fateh Chand (supra)** makes it more than clear that a mere breach of contract by a buyer does not entitle the seller to forfeit the amount as received, unless, loss is proved to have been caused to the prospective sellers/defendants/respondents. The Supreme Court in the judgment of **Fateh Chand (supra)** allowed forfeiture of amount of Rs.1,000/- out of the amount paid of Rs.25,000/-. I may also note that nomenclature of a payment is not important and what is important is really the quantum of price which is paid. In the present case, the total price payable for the suit property is Rs.20,00,000/- and therefore 25% of the payment made *stricto sensu* cannot be an earnest money, though it has been called so. Only a nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow forfeiture of that amount to a nominal extent as held in the case of **Fateh Chand (supra)**. For example can it be said that 100% of the price or 75%/80% of the price or 50% of the price is earnest money so that it can be forfeited. The answer surely is in the negative. Such high amounts called earnest money will be in the nature of penalty and thus hit by Section

74 of the Indian Contract Act, 1872 in view of **Fateh Chand's** case. The principles laid down in **Fateh Chand's** case; that forfeiture of a reasonable amount is not penalty but if forfeiture is of a large amount the same is in the nature of penalty attracting the applicability of Section 74; have been recently reiterated by the Supreme Court in the case of **V.K.Ashokan vs. CCE, 2009 (14) SCC 85.**

6. I also cannot accept the argument as raised on behalf of the respondents/defendants that it was the duty of the appellant/plaintiff to plead that no loss was caused to the respondents/defendants and therefore the amount could not have been forfeited because once it is admitted that the respondents/defendants have received an amount, and it was their/defendants'/respondents' case that they were entitled to forfeit such amount, it was for the respondents/defendants therefore to plead and prove that they could forfeit such an amount. Thus unless, there are pleadings and proof as to entitlement to forfeit the amount on account of loss being caused there cannot be a forfeiture in view of the ratio of **Fateh Chand's** case.

7. Since in the facts of the present case, the Trial court has held the appellant/plaintiff guilty of breach of contract, therefore, the respondents/defendants are entitled to only forfeit a reasonable amount. In my opinion, a reasonable amount of Rs.50,000/- can, at best, be allowed to be forfeited out of an amount of Rs.5,00,000/- paid by the appellant/plaintiff to the respondents/defendants. At this stage, I also reject the argument of

the respondents/defendants that they only received a sum of Rs.4 lacs because the agreement to sell dated 5.1.2007 itself mentions in so many words that the respondents/defendants have received Rs. 5 lacs and thus no evidence to contradict the terms of a written document is permissible vide Section 92 of the Indian Evidence Act, 1872.

8. In view of the above, appeal is accepted. Impugned judgment and decree is set aside. A decree is passed in favour of the appellant/plaintiff and against the respondents/defendants for a sum of Rs.4,50,000/- with interest at 12% per annum simple from 5.1.2007 till the date of filing of the suit and also pendent lite and future at the same rate till payment is made under the present money decree by the respondents/defendants to the appellant/plaintiff. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

NOVEMBER 09, 2011
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VALMIKI J. MEHTA,J