

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

+ **CS(OS) No.22/1999**

% **5th October, 2012**

N.K.TOMAR Plaintiff

Through: Mr. J.K.Bhola with
Ms. Sulacha, Advs.

VERSUS

M/S VIRAJ IMPLEX LTD. Defendant

Through: Mr. Shekhar Prit Jha with
Mr. Vikram Bhardwaj, Advs.

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

To be referred to the Reporter or not? YES

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit has been filed by the plaintiff for recovery of Rs.22,00,000/- alongwith interest. Suit amount is claimed on the ground that the plaintiff as a proposed purchaser paid a principal amount of Rs.22,00,000/- to the defendant, but since the transaction itself did not

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fructify, the defendant is bound to refund the amount of Rs.22,00,000/- alongwith interest.

2. The facts of the present case are that the defendant received from the plaintiff a sum of Rs.2,00,000/- vide demand draft dated 16.8.1995, and another sum of Rs.20,00,000/- vide cheque dated 1.1.1996. It is prayed that the plaintiff repeatedly called upon the defendant to enter into the transaction, but the defendant failed to do so, and therefore, the suit amount be decreed in favour of the plaintiff.

3. Defendant filed the written statement and raised several contentions. One contention was that actually parties had entered into a formal agreement to sell on 1.11.1995, and since it was the plaintiff who was in breach of the contract by failing to make payment of the balance consideration on account of a financial crunch, the contract was terminated and the amount paid was forfeited by the defendant on 6.1.1996. It is also argued that the suit is barred by time for both the amounts of Rs.2,00,000/- and Rs.20,00,000/-. So far as the amount of Rs.2,00,000/- is concerned, it is stated that the suit having been filed on 4.1.1999 and the payment of Rs.2,00,000/- having been made before 3 years on 16.8.1995, the suit is

barred by time for this amount of Rs.2,00,000/-. So far as the amount of

Rs.20,00,000/- is concerned, it is argued that the suit was first filed against a company Ms.Viraj Overseas Pvt. Ltd. and the present defendant was thereafter substituted and which is the company M/s. Viraj Impex Ltd., and therefore, in terms of Section 21 of the Limitation Act, 1963, the suit against the present defendant-M/s.Viraj Impex Ltd has to be taken to have been filed only as on date when the order dated 12.5.1999 was passed impleading M/s. Viraj Impex Pvt. Ltd, and which date 12.5.1999 is beyond three years from 1.1.1996 and consequently suit qua this amount of Rs.20,00,000/- is also time-barred. It is thirdly and finally argued that the defendant has suffered loss in the transaction and therefore, the defendant in terms of Section 74 of the Contract Act, 1872 it is entitled to forfeit the amount of Rs.22,00,000/-.

4. The following issues were framed in this case on 12.1.2005:-

- “1. Whether the suit filed by the plaintiff is maintainable, in view of the preliminary objection raised in para 2 of the written statement? OPD
2. Whether the suit is barred by limitation, as pleaded in the written statement? OPD
3. Whether the suit is bad for misjoinder of the cause of action? OPD

4. Whether the time was essence of the alleged contract and the defendant was entitled to forfeit the earnest money? OPD
5. Whether M/s. Chintoo creation (partnership firm of plaintiff) was under the obligation to obtain NOC from the competent authority to transfer the suit property in favour of the above mentioned partnership firm? OPD
6. Whether the plaintiff is entitled for a decree of Rs. 22 lacs against the defendant? OPP
7. Whether the plaintiff is entitled to interest, if any, at what rate? OPP
8. Relief.”

Issue No.2

5. Let me first take up the issue of limitation and which is issue no. 2. So far as the payment of Rs.20,00,000/- is concerned, the same was made on 1.1.1996, and the suit has been filed on 4.1.1999 after the Christmas vacation on the re-opening date, therefore, the suit so far as the amount of Rs.20,00,000/- is concerned, is within limitation, subject of course to the decision on the issue as to whether the suit against the present defendant would be barred under Section 21 of the Limitation Act, 1963.

6. In fact, in my opinion, the suit is within limitation for the total amount of Rs.22,00,000/- and no part of the amount of Rs.22,00,000/- i.e

either Rs.2,00,000/- or Rs.20,00,000/-, is barred by limitation. The reasons for the same are as given hereunder.

7. No doubt, limitation with respect to the factual situation such as the present would begin ordinarily from the date when the payment is given, however, the plaintiff in the plaint has stated that the payment of Rs.2,00,000/- was part of the action of entering into of the contract, and it is only when the contract was not entered into, did the cause of action arise for filing of the suit. It is also argued that as per the written statement of the defendant itself, this date when the contract was not finalized can be taken as 6.1.1996 inasmuch as, as per para 2(e) of the written statement it is on this date of 6.1.1996 that the defendant had terminated the contract and forfeited the amount. Plaintiff argues that limitation therefore will commence on 6.1.1996 because the contractual transaction did not fructify on this date as per the case of the plaintiff because the fact that no contract could be entered into became clear only on this date of 6.1.1996 and which is the date which can be taken because as per the defendant the contract was terminated on this date and amount was forfeited.

8. In my opinion, limitation in a case such as the present is governed by Article 113 of the Schedule of the Limitation Act and which provides that limitation of three years arises when the cause of action or right to sue accrues. In a transaction such as the present, the cause of action or right to sue accrues when the transaction falls through. Though the plaint does not mention the date of the transaction falling through, the defendant has clearly mentioned this date as 6.1.1996 and since the suit is filed on 4.1.1999 i.e within 3 years of 6.1.1996, the same is clearly within limitation.

9. Now on the issue as to whether the suit against the present defendant-company M/s.Viraj Impex Pvt. Ltd. is barred by time because the plaintiff when originally filed the suit on 4.1.1999 it sued another company-M/s.Viraj Overseas Pvt. Ltd. and therefore, Section 21 of the Limitation Act, 1963 will come into play, as is being contended by the defendant.

10. I cannot agree with the argument urged on behalf of the defendant that Section 21 of the Limitation Act applies inasmuch as when we see the application being IA No. 4818/1999 filed by the plaintiff to substitute M/s.Viraj Impex Ltd. in place of M/s.Viraj Overseas Pvt. Ltd., the original defendant, it is seen that in the application what is averred is that

there is a typographical mistake committed in describing the defendant which actually ought to have been M/s.Viraj Impex Ltd. and not M/s.Viraj Overseas Pvt. Ltd. This aspect that there is only a mis-description of the name of the defendant is further confirmed inasmuch as in IA No.4818/1999 it is stated that when the payment documents were examined, it was found that the relevant entry of payment of the cheque of Rs.20,00,000/- was made not in favour of M/s. Viraj Overseas Pvt. Ltd, but in favour of M/s.Viraj Impex Ltd. Paragraphs 2 to 4 of the said application being I.A 4818/1999, are relevant and they read as under:-

“2. That the plaintiff humbly submits that upon it being pointed out by the defendant, the plaintiff has realized that due to a typographical error the name of the defendant has wrongly been shown in the plaint as M/s. Viraj Overseas P. Ltd and in fact the name of the defendant is Viraj Impex Ltd. The plaintiff humbly submits that the said error is wholly bonafide and unintentional. The same is also evident from the perusal of the documents filed by the plaintiff being the Statement of account issued by his bank i.e. Syndicate Bank, Mayapuri, New Delhi. The relevant entry therein shows that the cheque for Rs. 20 lacs bearing No.51923 was issued in favour of M/s. Viraj Impex Ltd. It appears that M/s. Viraj Impex P. Ltd has subsequently become a public limited company and is now called M/s. Viraj Impex Ltd.

3. That the plaintiff humbly submits that the typographical error being bonafide and inconsequential deserves to be corrected.

4. That the present application is bonafide and in the interest of justice. The same is being moved at the earliest, as soon as the plaintiff has realized the said mistake. The plaintiff is filing herewith the amended Memo of Parties showing the name of the defendant correctly.

The plaintiff therefore, most humbly prays that this Hon'ble Court may be pleased to allow the plaintiff to correct the name of the defendant from M/s. Viraj Overseas P. Ltd to M/s. Viraj Impex Ltd. The Hon'ble Court may be further pleased to take the amended memo of parties on record.”

(underlining is mine)

11. In my opinion, in view of the averments in the application, the order dated 12.5.1999 allowing this application has to be read in terms of the averments made in the same that there is a mis-description of the defendant and it cannot be said that actually there is a substitution of one defendant by another defendant for the provision of Section 21 of the Limitation Act, 1963 to come into play. I therefore hold that there was no substitution of the defendant and there was only mis-description of the defendant and that mis-description was corrected from M/s. Viraj Overseas Pvt. Ltd. to M/s. Viraj Impex Ltd.

12. Even assuming that there is substitution of the defendant M/s.Viraj Overseas Pvt. Ltd. to the present defendant M/s.Viraj Impex Ltd., I am of the opinion that the plaintiff deserves the benefit of the proviso of Section 21 of the Limitation Act, 1963 in treating the suit against the present defendant M/s.Viraj Impex Ltd. company to have been filed on the date of filing of the original suit on 4.1.1999. On this aspect I may state that when the application being IA 4818/1999 was allowed vide order dated 12.5.1999, it is not stated therein that if the same amounts to substitution of a defendant (i.e adding of another defendant as against the then existing defendant) then when will the suit be said to have been instituted against M/s. Viraj Impex Ltd. This issue was therefore left open as to when the suit against the present defendant is to have been taken to be filed. Once issue is left open, considering the bonafides of the plaintiff, I exercise my discretion under provision of Section 21 of the Limitation Act, 1963 to hold that the suit filed against the present defendant be taken as having been filed on the original date of institution of 4.1.1999. Of course I must hasten to add that this conclusion is independent and an additional conclusion from the earlier conclusion that in fact there is only correction of the mis-description of the

defendant and not substitution of the new company for a company against whom the suit was filed.

13. Issue no. 2 is therefore decided in favour of the plaintiff and against the defendant and it is held that the suit is within limitation for the entire amount of Rs.22,00,000/-.

Issue No.3

14. Issue no. 3 is also decided against the defendant and in favour of the plaintiff inasmuch as counsel for the parties state that this issue only pertains to the fact that two separate drafts/cheques were issued, one of Rs.2,00,000/- on 16.8.1995 and the second of Rs.20,00,000/- on 1.1.1996. Since both the draft/cheques were issued for the same transaction it is held that there is no mis joinder of cause of action

Issue nos. 1 and 6

15. These issues can be disposed of together. There are two basic heads qua these issues. The first head is whether at all a contract being an agreement to sell was entered into between the parties on 1.11.1995 as stated by the defendant in para 2(b) of the parawise reply of the written statement,

and if such an agreement was entered into the second head being whether the defendant is entitled to forfeit the amount of Rs.22,00,000/- in the facts and circumstances of the present case on account of an alleged breach by the plaintiff which caused loss to the defendant.

Whereas the case of the plaintiff is that there is no agreement, since the defendant in the written statement pleaded that a written agreement to sell was executed on 1.11.1995, onus was therefore on the defendant to prove that such an agreement was executed. Defendant admittedly has failed to file either the original or a copy of the so-called agreement to sell dated 1.11.1995. Accordingly, it is held that there was no written agreement dated 1.11.1995 as contended by the defendant. Once there is no agreement, the question of forfeiture by the defendant on account of alleged breach by the plaintiff does not arise. The defendant is, therefore, bound to refund the payment received of Rs.22,00,000/-.

16. Let me now assume that there was a contract entered into between the parties on 1.11.1995. Even if we assume that the agreement was entered into, however, it is found that the defendant has failed to show that there was any clause in the said contract in terms of the Section 74 of

the Contract Act, 1872 thereby entitling the defendant to forfeit the advance amount paid of Rs.22,00,000/- towards liquidated damages. Not only the defendant has failed to show that there was any such term between the parties, even if I assume that there was such a term, yet, the provision of Section 74 of the Contract Act cannot apply, in the facts of the present case inasmuch as once the loss is capable of being determined, the provisions which will apply, will be the provision of Section 73 of the Contract Act and not Section 74 of the Contract Act, 1872. The Supreme Court in the Constitution Bench judgment in the case of *Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405* has said that a mere breach of contract is not actionable i.e merely because there is a breach of contract the same is not actionable unless loss is proved where the contracts are those types of contracts where loss which has been caused can be proved by leading evidence. Putting it differently, the aggrieved party is not entitled to forfeit a liquidated amount on mere existence of breach unless the loss caused can otherwise be proved and is actually proved. The following paragraphs of the judgment of the Supreme Court in the case of *Fateh Chand (supra)*, hold that in contracts in which loss can be proved, in such

cases, Section 74 cannot be invoked for automatic claim of loss/forfeiture, and losses have to be proved before the amount can be forfeited:-

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)

17. The argument raised by learned counsel for the defendant for taking the benefit of Section 74 of the Contract Act, 1872 in view of the fact that no alleged agreement to sell dated 1.11.1995 has been proved, cannot stand, and, even assuming that there is such an agreement to sell yet the defendant has failed to prove that there was any term to forfeit the liquidated damages, and, even if both the aforesaid aspects of existence of an agreement to sell and a clause entitling the forfeiture is taken in favour of the defendant, yet, no forfeiture can be allowed as the contract in question is such that the loss should have been proved inasmuch as fall in the value of the property of the defendant entitling forfeiture is a loss which can very easily be proved but which loss has neither been pleaded nor proved. In contracts being agreements to sell, the difference of the price in the property as on the date of the breach of performance would be the amount of damages which have to be awarded in case of breach, and which difference of price has not been proved by the defendant by leading evidence of

sale/purchase transactions of similarly situated properties as on the date of breach viz 06.01.1996.

18. In my opinion, there is another reason why damages cannot be awarded to the defendant, much less a liquidated figure of Rs.22,00,000/-, inasmuch as, what the defendant pleads in the written statement is that loss has been caused to the defendant because the defendant was in urgent need of money for opening of a letter of credit for importing iron and steel from abroad, and which could not be done on account of failure of the plaintiff to go ahead with the transaction resulting in losses to the defendant and which defence is specifically averred in para 2(d) of the reply on merits of the written statement. This claim of loss made by the defendant actually is a claim of special damages and not general/normal, and hence cannot be granted for the reasons detailed hereinafter.

19. Firstly, even assuming that such a claim was permissible, (and which is not for the reasons given hereinafter) the defendant except making self-serving oral statement in his evidence, has failed to file any concrete evidence or credible evidence to show that in fact a contract with any foreign seller was ever entered into and that the alleged quantified loss of ₹ 22 lacs

has been suffered by the defendant. The defendant therefore cannot be said to have discharged the onus of proving the loss as alleged in the written statement. Secondly, even assuming that the contract with the foreign seller was entered into, and the defendant has suffered the alleged loss, even this loss the defendant is not entitled to claim from the plaintiff in terms of Section 73 of the Contract Act. As per Section 73 what can be claimed are normal damages which naturally arise from the breach of contract and ordinarily no special damages can be awarded. In case such as present the damages which naturally arise or are naturally caused are only those damages which arise from the difference of prices of the immovable property which is agreed to be purchased and sold, and, loss caused with respect to a wholly independent contract of import of iron and steel are not normal general damages but are special damages. Before any claim for such special damages are laid the facts which can cause the special damages have to be specifically informed to the other side (i.e. the plaintiff in this case), **at the time of entering into the contract**. It is sine qua non that the issue of special damages is brought to the notice of the other party at the time of the entering into the contract, and if it is not done, the claim of special damages even if loss is caused, cannot be claimed in law. In this case there is no

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pleading or evidence of the defendant that any issue of special damages based on the special facts and circumstances of the import contract of the defendant was ever brought to the notice of plaintiff at the time when the alleged contract dated 1.11.1995 was entered into. The defendant therefore cannot claim the loss which are in the nature of claim of special damages.

20. In view of all the aforesaid reasons, I hold that the defendant is not entitled to forfeit the amount of Rs.22,00,000/- paid by the plaintiff to the defendant.

Issue nos. 4 & 5

21. I have already held that there was no agreement being agreement to sell dated 1.11.1995 entered into and accordingly issue nos. 4 and 5 are decided against the defendant, and in any case, these issues can have no effect in terms of the discussion and conclusions aforesaid because the defendant is not entitled to the claim of any alleged loss.

22. In the present case the substantial amount of Rs.22,00,000/-is lying with the defendant since about 13 years. This amount was given towards part price of an immovable property. If the defendant had not

illegally retained the amount, the plaintiff could have invested this amount in an immovable property or as part consideration thereof as was sought to be done with the defendant in the present case. Property prices from the year 1999 till today would have increased by more than 4 to 5 times, and of which I take judicial notice and presumption, Delhi being the capital/megapolis of this country. Therefore, the plaintiff has lost benefit of appreciation of the amount, and on the other hand defendant would have earned interest or other returns on this amount of ` 22,00,000/- which the defendant has illegally withheld. Considering all the facts and circumstances of the case, though I agree with the defendant that the pre suit interest cannot be awarded inasmuch as no legal notice was served under Section 3 of the Interest Act, 1978, since the court always has power under Section 34 of CPC to grant pendente lite and future interest, in the facts and circumstances of this case, considering the nature of transaction being of an immovable property, in my opinion, it is necessary to compensate the plaintiff at 21% per annum simple for pendente lite and future period till actual payment.

23. In view of the above, suit of the plaintiff is decreed against the defendant for a sum of Rs.22,00,000/- along with pendente lite and future

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interest at 21% per annum simple till payment. Plaintiff will also be entitled to the costs in terms of the Rules of this Court. Decree sheet be prepared.

VALMIKI J. MEHTA, J

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