

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

+ **RFA No.761/2003**

% **25th January, 2012**

SHRI LAXMAN SINGH Appellant
Through: Mr. R.K. Sharma, Advocate.

versus

SHRI RAJESH KUMAR & ANR. Respondents
Through: Ms. Jyoti Dutt Sharma, Advocate
with Mr. Rahul Sharma, Advocate
for respondent No.1.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This case is on the Regular Board of this Court since 16.1.2012. Today, the matter is effective item No.4 on the Regular Board. Counsel for the appellant appears. Of course, he has not appeared on his own but he has appeared because the counsel for the respondent No.1 informed him. Ordinarily, the appeal would have been dismissed in default but the counsel for the respondent No.1 had the courtesy to inform the counsel for the appellant. Counsel for the appellant is however not ready to argue the appeal. It is not as if the counsel for the appellant is a new counsel who has been recently engaged. Request is therefore declined. I

have therefore heard the counsel for the respondent No.1 and after perusing the record am proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 7.8.2003 decreeing the suit of the respondent No.1/plaintiff for a sum of ₹ 5 lacs alongwith interest @ 12% per annum simple being the amount which was paid to the appellant/defendant No.1 under an agreement to sell, and which agreement could not fructify.

3. The facts of the case are that the respondent No.1/plaintiff entered into an agreement to sell with the appellant/defendant No.1 on 21.9.1998 with respect to property bearing No.A-234, measuring 200 sq. yds. situated at Shastri Nagar, Delhi 110052 for a total sale consideration of ₹ 30,50,000/-. In part performance of the agreement to sell, a sum of ₹ 5 lacs was paid to the defendant No.1 as earnest money and the defendant No.1 executed a receipt and an agreement to sell dated 21.9.1998. The appellant/defendant No.1 failed to perform the contract and did not appear before the Sub-Registrar for execution of the sale documents on 20.11.1998. The respondent No.1/plaintiff waited in the office of the sub-Registrar till 4.00 P.M. with no result. The subject suit was therefore filed

for return of the amount of ₹ 5 lacs which was paid to the defendant No.1 on 21.9.1998.

4. The appellant/defendant No.1 contested the suit and denied that he entered into an agreement to sell of the suit property. It was also denied that he received ₹ 5 lacs. It was alleged that the receipt and the agreement to sell dated 21.9.1998 were forged and fabricated documents inasmuch as they were got signed in blank.

5. After completion of pleadings, the trial Court framed the following issues:-

“1. Whether the present suit is within limitation? OPP

2. Whether the plaintiff alongwith defendant no.2 entered into an agreement with defendant no.1 to purchase property of defendant no.1 bearing No.A-234, Shastri Nagar, Delhi for a total sale of ₹ 30,50,000/- as alleged in the plaint? OPP

3. Whether the plaintiff alongwith defendant no.2 had paid an amount of ₹5,00,000/- to defendant no.1 on 21.9.98 as part sale consideration for purchase of afore-mentioned property, as alleged? OPP

4. Whether the signatures of defendant no.1 on receipt and agreement to sell dated 21.9.98 (Ex.P-1 & Ex.P-2) were obtained by plaintiff alongwith defendant no.2 fraudulently in connivance and collusion with defendant no.1's own son Madan Mohan as alleged in para 4 of the preliminary objection of W.S.? OPD

5. To what amount, the plaintiff is entitled to recover from defendant no.1? OPP

6. Whether the plaintiff is entitled to get any interest on the suit amount if so at what rate and for which period? OPP

7. Relief.”

6. The trial Court has in the impugned judgment referred to the fact that the agreement dated 21.9.1998 and receipt of the same date have been proved and exhibited as Ex.P-2 and Ex.P-1. The agreement to sell Ex.P-2 was executed in the presence of two witnesses who were examined by the respondent No.1/plaintiff. The respondent No.1/plaintiff also proved withdrawal of an amount of ₹ 3 lacs from his bank account on 21.9.1998, and which was part of the amount of ₹ 5 lacs paid to the appellant/defendant No.1. While referring to the defence of the appellant/defendant No.1, the trial Court has referred to the fact that it was admitted by the appellant/defendant No.1 in the cross-examination that in fact he had received a sum of ₹ 5 lacs under the agreement to sell dated 21.9.1998 though the same was denied in the written statement. The trial Court also noted that though the appellant/defendant No.1 was of advanced age, he lacked credibility and was lying. The relevant observations of the trial Court are contained in paras 12 and 13 of the impugned judgment which read as under:-

“12. The above case set up by defendant no.1 in his own could not be proved by him. From the pleadings of defendant no.1 contained in his W.S., it appears that he is

not clear on what he really wants to say in answer to the plaintiff's claim in this suit. I dare say that though defendant no.1 is an old man of 85 years of age but he is hardly a man to be trusted upon. From his testimony on record, it appears that he has scant regard to the oath he took at the time of filing of his affidavit in his evidence-in-chief. Though in W.S. he took a plea that he wanted to sell 100 sq.yds. rear portion of his property bearing No.A-234, Shastri Nagar, New Delhi to Radhey Shyam Sharma but when said Radhey Shyam Sharma appeared as plaintiff's witness (PW-3), no suggestion was given to him that he ever approached defendant no.1 for purchasing 100 sq.yds. portion of his property. Though in W.S. defendant no.1 has denied having received Rs.5 lacs from the plaintiff or from R.S.Sharma but he could not withstand the test of his cross-examination on this aspect. It may be noted that all the witnesses of the plaintiff namely PW-1, PW-2, PW-3 & PW-5 are consistent in their testimony on the point that defendant no.1 after taking Rs.5 lacs from the plaintiff, went accompanied by Ram Kumar Mishra (PW-2) in plaintiff's maruti car to his native village Akbar Pur, near Bakhtawar Pur, P.S.Alipur Delhi on the said date i.e. 21.9.98 as defendant no.1 wanted to keep the above money in safe custody in his house at native village. The plaintiff's witnesses have further deposed that the plaintiff and Ram Kumar Mishra after leaving defendant no.1 with the money at his house in village Akbarpur Majra returned back to their respective houses on the same date. There is no cross-examination of any of the witness on this point. **It shall be significant to note that defendant no.1 himself admitted in his cross-examination that Rs.5 lacs in cash were paid to him as earnest money on 21.9.98 but according to him the said money was paid to him by a third person introduced as R.S.Sharma by the plaintiff.** The said R.S.Sharma according to defendant no.1 had paid Rs.5 lacs to him has been examined by the plaintiff

as PW-3 but no suggestion was given to this witness on behalf of defendant no.1 that the payment of Rs.5 lacs was made by PW-3 to defendant no.1 and not by the plaintiff. He has further admitted that he had kept Rs.5 lacs received by him on 21.9.98 with himself. He said that the above amount of Rs.5 lacs which he received on 21.9.98 had been spent by him in contesting number of litigations thrust upon him by his son in relation to the said property. He, however, admitted that this is the only suit filed by the plaintiff against him and rest of the suits were filed by his son. Defendant No.1 further admitted that on 21.9.98 he alongwith property dealer R.K.Mishra went accompanied by plaintiff in his maruti car to his village for keeping the amount of Rs.5 lacs in safe custody in his house at native village Akbar Pur Majra near Bakhtawarpur. In view of this admission made by defendant No.1 following Court question was put to him:

Court question: I put it to you that you have admitted having received Rs.5 lacs from the plaintiff on 21.9.98, please tell how can you retain the said amount when you failed to complete the transaction of sale in respect of suit property?

Defendant No.1 gave the following answer to the above Court question:

Answer: I am prepared to execute the sale documents and give possession of the suit property to the person who paid me Rs.5 lacs provided he pay the balance sale amount out of the total consideration of Rs.30.50 lacs together with interest till date.

13. From the above testimony of defendant no.1 it is evidently clear that he is a liar of the first order. In the first instance he denied having executed any agreement of sale or receipt of having received an amount of Rs.5 lacs on 21.9.98 but later on realizing his folly, he came out with a totally new plea for the first time in his cross-examination that he was

ready to execute the sale documents provided the plaintiff pays the balance sale amount out of total sale consideration of Rs.32,50,000/- lacs.” (emphasis added)

7. In my opinion, no fault can be found with the findings and conclusions of the trial Court. Obviously, the appellant/defendant No.1 was forced to admit in the cross-examination that he had received ₹ 5 lacs under the agreement to sell though originally he had conveniently denied the same.

8. The trial Court has also observed that there is no question of any fraud being played on the appellant/defendant No.1 in obtaining his signatures because no evidence at all was produced in this regard. The relevant observations of the trial Court, in this regard, are contained in para 16 of the impugned judgment, and with which I agree, and the same reads as under:-

“16. ISSUE NO.4:

The onus of proof to prove this issue was on the defendant no.1. No evidence worth the name has been produced by defendant no.1 to show that his signatures on agreement to sell and receipt dated 21.9.98 (Ex.P-1 & Ex.P-2) were obtained fraudulently in connivance and collusion with defendant no.1's son Madan Mohan. For want of evidence, this issue is decided against defendant no.1.”

9. I may in addition to the reasoning of the trial Court note that the appellant/defendant No1 has led no evidence that he had suffered loss

on account of alleged breach of contract by the respondent No.1/plaintiff. Once there is no loss which is pleaded to have been caused or proved thereafter in evidence, there cannot take place forfeiture of an amount paid under an agreement to sell. This has been held by the Supreme Court in Constitution Bench judgment reported as *Fateh Chand Vs Balkishan Dass*, (1964) 1 SCR 515; AIR 1963 SC 1405. Relevant paras of this judgment, in this regard, are paras 8, 10, 15 and 16 and which 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 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)

10. A civil case is decided on balance of probabilities. An appellate Court will not interfere with the findings and conclusions of the trial Court, unless, the findings and conclusions are grossly perverse or cause grave injustice. Merely because two views are possible, an appellate Court does not interfere with an impugned judgment. In the present case, the trial Court has rightly come to the conclusion that the appellant/defendant No.1 was bound to repay the amount of ₹ 5 lacs received by him under an agreement to sell, which was not performed by the appellant/defendant No.1.

11. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

12. The amount deposited in this Court by the appellant/defendant No.1 alongwith accrued interest thereon be released to the respondent No.1/plaintiff in appropriate satisfaction of the impugned judgment and decree. The respondent No.1/plaintiff is entitled to recover the balance decretal amount from the security which is furnished by the appellant/defendant No.1 in this Court.

VALMIKI J. MEHTA, J

JANUARY 25, 2012

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