

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

+ **RFA No.421 /2010**

% **8th February, 2012**

SMT. PARAMJEET KAUR

..... Appellant

Through: Mr. Ashish Agarwal, Advocate with
Ms. Priyanka Tyagi, Advocate and
Ms. Lekha, Advocate.

VERSUS

AMARJEET SINGH & ORS.

..... Respondents

Through: Mr. Rajan Chaudhary, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. 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 7.4.2010 which dismissed the suit filed by the appellant/plaintiff/proposed buyer-Smt. Paramjeet Kaur w/o Sh. Daljit Singh for recovery of double the amount of the price paid of Rs. 4 lacs i.e. Rs. 8 lacs, under the agreement to sell dated 11.12.2006 entered into with the respondents/defendants/proposed sellers.

2. The facts of the case are that the predecessor-in-interest of

respondents/defendants namely Smt. Parmjit Kaur w/o late Sh. Gurbachan Singh entered into an agreement to sell dated 11.12.2006 with the appellant/plaintiff- Smt. Paramjeet Kaur w/o Sh. Daljit Singh with respect to first and second floor with roof rights of the property bearing No. 25-B, Single Storey, Ramesh Nagar, New Delhi for a total consideration of Rs. 24,65,000/-. An amount of Rs. 3 lacs was paid at the time of entering into the agreement to sell and thereafter an additional amount of Rs. 1 lakh was paid on 3.4.2007. The appellant/plaintiff claimed that the predecessor-in-interest of the respondents/defendants was guilty of breach of contract and therefore the appellant/plaintiff was entitled to receive double the amount of Rs. 4 lacs already paid and hence the subject suit for recovery of Rs. 8 lacs came to be filed.

3. The suit was contested and it was pleaded that it was the appellant/plaintiff who was guilty of breach of contract and not Smt. Parmjit Kaur w/o late Sh. Gurbachan Singh predecessor-in-interest of the respondents/defendants.

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

“1. Whether the plaintiff has cause of action to file the present suit? OPP

2. Whether the plaintiff is entitled for a decree for recovery of Rs. 8 lacs alongwith interest as prayed in the plaint against the

defendants? OPP

3. Relief.”

5. The trial Court has held that it was the appellant/plaintiff who was guilty of breach of contract and therefore she was not entitled to refund of the advance amount paid of Rs. 4 lacs under the agreement to sell much less the double of the said amount.

6. Before this Court, learned counsel for the appellant/plaintiff argued that even assuming the appellant/plaintiff was guilty of breach of contract, yet, the respondents/defendants or their predecessor-in-interest were not entitled to forfeit the amount of Rs. 4 lacs paid in two parts of Rs. 3 lacs and Rs. 1 lakh. It is argued that before a proposed seller under an agreement to sell forfeits an amount, such forfeiture being under Section 74 of the Contract Act, 1872, the proposed sellers/respondents/defendants has to plead and prove the entitlement to forfeiture on account of loss allegedly caused to such proposed seller on account of breach of contract by the proposed buyer. It is argued that there is no such pleading in the written statement filed by the proposed sellers/respondents/defendants in the trial Court nor has any evidence been led that the total amount of Rs. 4 lacs received under the agreement to sell is forfeited because the same being earnest money was forfeited on account of loss being caused to Smt.

Parmjit Kaur w/o Sh. Gurbachan Singh or the respondents/defendants on account of breach of agreement to sell dated 11.12.2006 by the appellant/plaintiff. Learned counsel for the appellant/plaintiff also argued that this Court has the requisite powers under Order 7 Rule 7 CPC read with Order 41 Rule 33 CPC to do complete justice to direct a lesser relief of refund of the amount of Rs. 4 lacs paid under the agreement to sell. It is argued that the appellant/plaintiff gives up the relief with respect to double the amount claimed and restricts the relief claimed in the suit to the amount of Rs. 4 lacs which is admittedly received by Smt. Parmjit Kaur w/o late Sh. Gurbachan Singh, the predecessor-in-interest of the respondents/defendants and hence, the suit should be decreed at least for this amount of ₹ 4 lacs.

7. Learned counsel for the respondents/defendants on the other hand argued that the respondents/defendants had suffered loss because it is mentioned in the written statement that their mother-Smt. Parmjit Kaur w/o late Sh. Gurbachan Singh died on account of threats made out by the appellant/plaintiff. It is also argued that amount which is paid under the agreement to sell of Rs. 3 lacs is earnest money and therefore the same can be forfeited.

8. The law with respect to entitlement of the proposed seller of a

property to forfeit the amount received under the agreement to sell is contained in Constitution Bench judgment of the Supreme Court in the case of *Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405*. The relevant paras 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 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)

A reference to the ratio of the judgment of the Supreme Court in the case of *Fateh Chand (supra)* shows that a mere breach of contract by the proposed buyer, does not entitle the proposed seller to forfeit the amount inasmuch as forfeiture is pursuant to Section 74 of the Contract Act, 1872 and there cannot be forfeiture under Section 74 of the Contract Act, 1872, unless loss which is alleged to be caused to the proposed seller is pleaded and proved. In contracts pertaining to agreement to sell of an immovable property, loss which is caused to the proposed seller can always be proved inasmuch as on the date of alleged breach, it can be shown that the value of the property has in fact come down and therefore loss was caused to the proposed seller. The contracts which are in the nature of agreement to sell, are to be distinguished from those contracts in which it is not possible to compute the damages and two such cases are the cases of *O.N.G.C. Vs. Saw Pipes Ltd., 2003 (5) SCC 705* and *Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd.*

AIR 1962 SC 1314. In these latter two cases of *O.N.G.C. (supra)* and *Sir Chunilal (supra)* the nature of contracts were such that it was not possible to calculate the loss. In *O.N.G.C.'s* case what would be the oil which would be extracted by the oil rig and what would be the international price of oil, could not be calculated for the damages to be awarded except the pre-fixed damages. In the case of *Sir Chunilal (supra)* fixed amount of damages were granted inasmuch as what was the benefit which could be derived from the managing agency agreement was not such which could be calculated because the profits for the years for which the agency was to operate could not be calculated. On the other hand, as already stated, with respect to contracts being agreements to sell, the loss can always be calculated on the date of breach because what is the price with respect to the subject property as on the date of the breach can always be known by means of the value of the property on the alleged date of breach.

9. A reference to the written statement shows that there is no pleading of the respondents/defendants that the amount of ₹ 4 lacs paid under the agreement to sell (₹ 3 lacs paid at the time of entering into the agreement and ₹ 1 lakh subsequently) has been forfeited being the earnest money. Not only there is no pleading of the amount being earnest money capable of being forfeited, there is no pleading or any evidence led with

respect to the alleged loss caused on account of the breach of contract by the appellant/plaintiff. Once there is no pleading and proof of loss in accordance with the ratio of the judgment of the Supreme Court in the case of *Fateh chand (supra)*, the appellant/plaintiff is justified in asking for refund of the amount paid, less the nominal amount towards the damages in accordance with the judgment of *Fateh Chand (supra)*.

10. Therefore, considering that an amount of ₹ 3 lacs was stated to be earnest money, I feel that a sum of ₹ 50,000/- would be more than sufficient as nominal damages in favour of the respondents and against the appellant/plaintiff, since the appellant/plaintiff is guilty of breach of contract. The balance amount of earnest money of ₹ 2,50,000/-, and the additional payment made of ₹ 1 lakh which admittedly was not earnest money, is therefore liable to be refunded by the respondents/defendants to the appellant/plaintiff. The appellant/plaintiff will also be entitled to interest @ 12% per annum simple from 7.5.2007 till the date of payment.

11. I may at the conclusion state that endeavour was made on behalf of the appellant/plaintiff that she is ready to compromise the matter with the respondents/defendants by receiving a reasonable amount and with reasonable rate of interest however counsel for the respondents states that he has received clear cut instructions to argue the case on merits as the

respondents are not ready to compromise the matter by paying a reasonable amount.

12. In view of the above, the appeal is accepted. A decree for a sum of ₹ 3,50,000/- is passed in favour of the appellant/plaintiff and against the respondents/defendants. The appellant/plaintiff will also be entitled to interest @ 12% per annum simple from 7.5.2007 till the date of payment. Appellant is also entitled to costs of this appeal, and which are quantified at ₹ 20,000/-. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

FEBRUARY 08, 2012

Ne