

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

+ **RFA No.51/2012**

% **17th May, 2012**

MS. KRITI KOHLI Appellant
Through: Mr. Rao Balvir Singh, Advocate

VERSUS

SH. HARI NAND Respondent
Through: Mr. Rishi Pal Singh, Advocate.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 11.11.2011 dismissing the suit filed by the appellant/plaintiff for recovery of double the amount of advance price paid i.e. a total of ₹ 8 lacs alongwith interest @ 18% per annum. Trial Court has dismissed the suit as it held that the agreement to sell was not entered into with the appellant/plaintiff, but with her mother-Smt. Manju

Kohli, and thus only Mrs. Manju Kohli could have been the plaintiff and not the present plaintiff-Ms. Kriti Kohli.

2. The facts of the case are that the appellant/plaintiff as the proposed buyer and the respondent/defendant as the proposed seller entered into an agreement to purchase/sell the suit property bearing No.32A, Jain Nagar Extension, Delhi, admeasuring 333 sq. yds. The total sale price was fixed at ₹ 45,95,400/-, and out of which amount, the appellant/plaintiff paid a sum of ₹ 2 lacs on 12.2.2007, when the agreement to sell/earnest money receipt was entered into between the parties, and, another sum of ₹ 2 lacs was paid on 20.2.2007, and to evidence which an endorsement was made on the back of the earnest money receipt/agreement to sell dated 12.2.2007. The appellant/plaintiff pleaded that it transpired subsequently that the respondent/defendant was not the owner of the suit property and therefore she asked for return of the advance paid alongwith interest, which having been refused the subject suit came to be filed.

3. The respondent/defendant contested the suit by taking up the basic defence that the agreement which was entered into was not with the appellant/plaintiff but with her mother-Smt. Manju Kohli. It was claimed that the amount of ₹ 4 lacs which was paid was forfeited on account of

breach of contract by the appellant/plaintiff inasmuch as the balance sale consideration never came to be paid. It was pleaded in the written statement that the advance money receipt/agreement to sell was materially altered/forged to change the name of the proposed buyer from Smt. Manju Kohli to that of the appellant/plaintiff- Ms. Kriti Kohli who is the daughter of Smt. Manju Kohli.

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

- “1. Whether the plaintiff is entitled to a decree of an amount of Rs. 4 Lakhs alongwith interest 18% as prayed for? OPP
2. Whether the defendant has committed breach of the terms and conditions of agreement to sell dated 12.02.2007? OPP
3. Whether, if this issue no.2 is answered in affirmative the plaintiff is entitled to ₹ 4 Lakhs more as double the amount of consideration in terms of Bayana/agreement to sell dated 12.02.2007? OPP
4. Whether this agreement to sell dated 12.02.2007 is forged and fabricated? OPD
5. Whether there is any the privity of contract between the plaintiff and the defendant in terms of agreement to sell dated 1.02.2007 as the alleged agreement to sell dated 12.02.2007 was executed in favour of Ms. Manju, mother of the plaintiff? OPD
6. Whether the suit is barred by limitation? OPD
7. Relief, if any.”

5. As already stated, trial Court has dismissed the suit by arriving at a finding that the agreement was not entered into by the

respondent/defendant with the appellant/plaintiff, but with Smt. Manju Kohli and who was not the plaintiff. The relevant issues were issue Nos.4 and 5 and with respect to which the trial Court has made the following observations:-

“9. The crux and the controversy in the present suit is as to whether the agreement dated 12.02.2007 is forged and fabricated or not. The plaintiff has filed on record the original agreement dated 12.02.2007 as Ex.PW1/1 and the defendant has filed on record the carbon copy of the suit agreement as Ex. DW1/1. In the cross examination PW1 has admitted it to be correct that there is cutting in the name of her mother as well as at the place where the word is written “wife”. PW1 herself has further admitted in the cross examination that there is no signature/initial on the said cutting either of her father, brother or Sourabh or defendant or her own signature. Similarly, Sh. I.P Kohli who has been examined as PW2, Smt. Manju who has examined as PW3 have admitted in the cross examination that there is cutting in the name of Kriti and in the name of Manju as well. The defendant examined as DW1 has admitted in the cross examination that till that date he had not logged any complaint against the plaintiff. DW1 has further admitted that Ex. DW1/1 does not bear the second entry of the sale consideration of Rs. 2 Lacs dated 20.02.2007. DW1 has further stated that he has written Manju Devi but on the directions of the other party he has erased the word “Devi” and written “Kohli”.

10. During the course of arguments Ld. Counsel for the plaintiff has argued that no title document has been placed on record by the defendant. It has been further argued that Ex. DW1/1 has been forged by the defendant. It is further argued by the counsel for the plaintiff that carbon copy of agreement to sell has not been prepared simultaneously alongwith the original. Whereas,

on the other hand, Ld. Counsel for the defendant has vehemently argued that the defendant has been able to prove that Ex. PW1/1 original agreement filed by the plaintiff has been forged and fabricated and as such the suit of plaintiff is liable to be dismissed.

11. A careful examination of the original agreement dated 12.02.2007, Ex. PW1/1 as well as the carbon copy Ex. DW1/1 reveals that in the original agreement the name of 'Manju' cut off and, the word 'Devi' has been cut off, the word 'wife' (W/o) has also been cut and 'daughter' (D/o) has been written. Whereas, in the carbon copy, only the word Devi has been cut off. The carbon copy shows that the agreement was executed with Manju Kohli W/o I.P Kohli. In these circumstances, I am of the opinion that it appears that the original agreement Ex. PW1/1 has been tempered with. Ld. Counsel for the plaintiff has argued that DW1/1 is not a carbon copy of the original agreement(Ex. PW1/1) but in my opinion, the said submission of Ld. Counsel for the plaintiff is without any substances. But it is to be further seen that in the original agreement dated 12.02.2007, the word Kriti has been affixed in between the words 'Manju' and 'Devi', whereas, if the entire name 'Manju Devi' had been cut off then there was no need to affix the name 'Kriti' in between the words 'Manju' and 'Devi'. The plaintiff has failed to explain these cuttings in the original agreement to sell Ex. PW1/1 which are missing in the carbon copy Ex. DW1/1 even the plaintiff has admitted that carbon copy of agreement to sell Ex. DW1/1 might have prepared. I am of the opinion that the defendant has been able to prove that the said original agreement dated 12.02.2007 is forged and fabricated. As such, I am of the opinion that the defendant has been able to prove both the above said issues in his favour and accordingly issue no. 4 and 5 are decided against the plaintiff and in favour of the defendant.”

6. In my opinion, the trial Court has fallen into a grave error and

the appeal is bound to be allowed for the reasons given hereinafter.

7. The trial Court has clearly erred in holding that the agreement to sell/advance money receipt dated 12.2.2007 has been forged and fabricated. A reference to this document which is proved and exhibited as Ex.PW2/1 shows that no doubt the name of Smt. Manju Kohli has been altered to Ms. Kriti Kohli, the daughter of Smt. Manju Kohli and Sh. I.P. Kohli, however, simply on this ground to hold that the agreement to sell is forged and fabricated would be a travesty of justice. Obviously, object of forgery and fabrication is to take an illegal advantage, however, I do not find any illegal advantage in simply changing the name of the proposed buyer from Smt. Manju Kohli to Ms. Kriti Kohli. The mere fact that the duplicate advance money receipt/agreement to sell exhibited and proved by the respondent/defendant as Ex.DW1/1 contains the name of Smt. Manju Kohli and not Ms. Kriti Kohli is not a valid reason for holding existence of forgery inasmuch as when we look at the duplicate receipt Ex.DW1/1, we find that the same does not even contain the signatures of the three witnesses, which are found in the original advance money receipt/agreement to sell dated 12.2.2007. Obviously, the parties may have thought that if the necessary changes are made in the original agreement to sell dated 12.2.2007, the same

are sufficient, and that the changes need not be incorporated in the duplicate agreement to sell or possibly it could be that parties forgot to make the changes in the duplicate receipt, however, in my opinion once there is no illegal purpose for a mere alteration of a name, I would loath to dismiss the suit only on this technical ground especially as the respondent/defendant has failed to prove that he was the owner of the property and also that he does not dispute that he has received the amount of ₹ 4 lacs.

8. Another reason to hold that suit was liable to be decreed and not dismissed is that in terms of Order 1 Rule 10(2) CPC, a Court is empowered “at any stage” (an appeal being continuation of the suit), with or without an application of either of the parties, to order that the name of a person who ought to have been joined but was not joined, be added as a party to the suit so as to effectually and completely adjudicate/settle the questions involved in the suit. Though Order 1 Rule 7 CPC providing for joinder of defendants in strict sense is not applicable, and which provides that where plaintiff is in doubt as to the person from whom he is entitled to obtain redress, then a plaintiff may join two or more persons as defendants so that the question as to liability of the defendants or which of them is

Rule 10 (2) CPC it becomes clear that even more than one person can be added as plaintiff when there is a doubt with regard to which of the plaintiffs has a legal right. In my opinion, therefore the trial Court ought not to have dismissed the suit on a technical ground that the agreement was entered into with Smt. Manju Kohli and not with the appellant/plaintiff-Ms. Kriti Kohli inasmuch as the trial Court should have exercised powers under Order 1 Rule 10(2) CPC and added Smt. Manju Kohli as the alternate/second plaintiff in the suit. In exercise of my powers under Order 41 Rule 24 CPC, Order 41 Rule 33 CPC and Order 1 Rule 10(2) CPC, I add Smt. Manju Kohli as plaintiff No.2 only and only for holding that either the existing appellant/plaintiff-Smt. Kriti Kohli or her mother, Smt. Manju Kohli would be entitled to the suit amount i.e. a decree will be passed against the respondent/defendant and amounts under the same can be recovered either by the existing appellant/plaintiff-Ms. Kriti Kohli or by her mother-Smt. Manju Kohli.

9. I may note that a reference to the written statement as also the affidavit by way of evidence filed on behalf of the respondent/defendant shows that there is no categorical denial of the respondent/defendant having received a sum of ₹ 4 lacs from the appellant/plaintiff. The
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respondent/defendant has also failed to prove that he was the owner of the suit property as admittedly no title documents (or for that matter any other documents) were filed to show the right of the respondent/defendant in the suit property. Therefore, it is the respondent/defendant who is guilty of breach of contract and is bound to refund the advance moneys received of ₹ 4 lacs alongwith interest @ 18% per annum. I am granting interest @ 18% per annum simple because of the breach of contract of the respondent/defendant in not selling the suit property to the appellant/plaintiff and, but for the breach, the appellant/plaintiff way back in February, 2007 would have invested the amount paid to the respondent/defendant in an immovable property, and since the year 2007 till today the property prices have substantially risen in the city of New Delhi, the same persuades me to grant interest @ 18% per annum simple.

10. There is another reason to decree the suit as prayed, however only for the amount of price paid of ₹ 4 lacs, and not the double of the amount, inasmuch as the respondent/defendant has not pleaded or proved that on account of alleged breach by the appellant/plaintiff in having failed to pay the balance sale consideration the respondent/defendant has suffered

losses. For the purpose of this discussion, I am assuming that the
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appellant/plaintiff is guilty of breach of contract although it was the respondent/defendant who was guilty of breach of contract. It is now settled law by virtue of judgment of the Supreme Court in the case of ***Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405*** that mere breach of contract by a proposed buyer will not entitle the proposed seller to forfeit the amount of advance price received. I have also had an occasion to consider a similar issue in RFA No.422/2011 titled as ***Bhuley Singh Vs. Khazan Singh & Ors.*** decided on 9.11.2011 wherein I have held as under:-

“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.”

An SLP against the said judgment dated 9.11.2011 in RFA No.422/2011 has been dismissed by the Supreme Court on 26.3.2012 being S.L.P. (Civil) No.8689/2012.

11. In view of the above, appeal is allowed. Impugned judgment and decree dated 11.11.2011 is set aside. The suit of the appellant/plaintiff alongwith Smt. Manju Kohli as an alternate plaintiff will be decreed against the respondent/defendant for a sum of ₹ 4 lacs with interest @ 18% per annum simple from 20.2.2007 till actual payment. Appellant/plaintiff will also be allowed costs of ₹ 20,000/- with respect to this appeal in terms of the judgment of the Supreme Court in the case of ***Ramrameshwari Devi and Others v. Nirmala Devi and Others (2011) 8 SCC 249.*** I am also empowered to impose actual costs by virtue of ***Volume V*** of the ***Punjab High Court Rules and Orders (as applicable to Delhi), Chapter VI, Part I,***

Rule 15.

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12. Appeal is allowed and disposed of with the aforesaid observations. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

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