

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

+ **RFA No.664/2003**

% **13th January, 2012**

GHANSHYAM DASS GUPTA Appellant
Through: Mr. Atul Kumar, proxy counsel

versus

MAKHAN LAL Respondent
Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Proxy counsel appearing for the counsel for the appellant states that the appellant has taken back the brief.

2. The impugned judgment and decree dated 29.3.2003 is a judgment and decree in favour of the respondent/plaintiff for an amount which was paid under an Agreement to Sell. The impugned judgment and decree directs refund of the amount paid inasmuch as it is found that the appellant/defendant was guilty of breach of contract in not having obtained the permission from the Income Tax Authorities viz. the income tax clearance certificate.

3. Some of the relevant paragraphs of the Trial Court decreeing the
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suit read as under:-

“5. Plaintiff had filed his affidavit by way of evidence. He was cross examined at length by the Ld. Counsel for the defendant. Similarly, defendant had filed his affidavit as evidence who was cross examined at length by Ld. Counsel for the plaintiff. Final arguments were heard. My issue-wise findings are as under:-

Issue No.4

i) The agreement to sell Ex.DW1/1 and Ex.DW1/3 are admitted documents. It is the case of both the parties that initially the agreement to sell Ex.DW1/1 was executed between the parties on 3.10.2000 in respect of the property in dispute. Total sales consideration was ₹28.00 Lakhs and a total of ₹1.25 Lakhs was paid as Byana/Earnest Money. Thereafter on 9.11.2000 again ₹1.25 Lakhs was paid and a fresh agreement Ex.DW1/3 was executed. The date fixed for finalisation of the deal was 1.1.2001 in agreement Ex.DW1/1 which was extended to 10.1.2001 in agreement Ex.DW1/3.

ii) As per the plaintiff, defendant has breached the terms of agreement whereas the case of the defendant is that the plaintiff has breached the terms of agreement to sell Ex.DW1/3. Plaintiff has filed the present suit for recovery of double the amount of Byana/Earnest Money, on the basis of the terms and conditions contained in the agreement. On the other hand the defendant has pleaded that the earnest money stands forfeited since the plaintiff has violated the terms and conditions of the agreement.

XXXX XXXX XXXX XXXX

iv) Admittedly, the deal was for ₹28.00 Lakhs. As per the provisions of Income Tax Act contained in Section 230A nad 269UC, specific permission from the Income Tax

Authority was required to finalise the deal. It is not the case of any of the party that this permission was ever applied for by them. Since, the permission was neither applied nor obtained, the sale deed could not have been executed on the date fixed in the agreement because of the prohibitory clause in the Income Tax Act. The agreement as such was not capable of performance on the date fixed for finalisation of the sale deed.

v) The case of defendant is that he had got the sale deed of the property executed in his name only with a view to transfer better title to the plaintiff and it is the plaintiff who has backed out from his deal. The modes opperendi of deceiving the revenue authorities is clear from the copy of the sale deed filed by the defendant on record and marked as D-2. The said sale deed bears date of its execution on 6.11.2000 and total sale consideration shown in ₹1.50 Lakhs only. On the other hand the agreement to sell dated 3.10.2000 and 9.11.2000 show the sales consideration at ₹28.00 Lakhs. In this way the sales transactions are under valued at the time of registration of the sale deed causing loss to the exchequer and by escaping from obtaining the mandatory permission from the Income Tax Department. In the present suit both parties have relied upon the agreement to sell wherein the consideration is admitted to be ₹28.00 Lakhs and in the absence of the permission from the Income Tax Authority, the sale deed could not have been executed on the date fixed.”

4. I completely agree with the aforesaid findings and conclusions as the appellant/defendant was bound to obtain the income tax clearance certificate, which he failed to obtain, and therefore, was guilty of breach of contract.

5. A reading of the written statement shows that the

appellant/defendant has not even taken up a case that the monies paid to him under the Agreement to Sell were forfeited, or that any loss was caused to him. The Constitution Bench of the Supreme Court in the case of ***Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405*** has held that there cannot be forfeiture of amount under the Agreement to Sell unless loss is pleaded and proved. The relevant paras of the 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)

6. In view of the above, there is no merit in the appeal inasmuch as not only because the appellant/defendant was guilty of breach of contract but also because the appellant/defendant did not plead and prove the forfeiture of earnest money or any loss having been caused to him. The appellant/defendant was, therefore, liable to refund the amount which he received under the Agreement to Sell.

7. In view of the above, there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs.

VALMIKI J. MEHTA,J

JANUARY 13, 2012
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