

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

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Date of decision: 9th September, 2013

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RFA 149/2009

LALIT KUMAR BAGLA

..... Appellant

Through: Mr. Vaibhav Agnihotri & Ms.
Niharika Ahluwalia, Advs.

Versus

KARAM CHAND THAPAR & BROS.

(CS) LTD.

.. Respondent

Through: Mr. V.K. Sharma, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This appeal impugns the judgment and decree dated 25th February, 2009 (of the Court of Addl. District Judge, Delhi in CS No.75/2008) in favour of the respondent, of recovery of principal sum of Rs.5 lacs together with Rs.55,000/- towards interest till the date of institution of the suit and interest *pendente lite* and future @ 6% per annum, from the appellant/defendant.

2. Notice of the appeal was issued and subject to the deposit by the appellant/defendant of the entire decretal amount in this Court, the execution stayed. The appellant/defendant preferred SLP (Civil) No.14282/2009 to the

Supreme Court against the said order but which was dismissed vide order dated 22nd June, 2009. The appeal was admitted for hearing on 14th September, 2009 and the Trial Court record was requisitioned. Vide order dated 4th December, 2009, subject to the respondent/plaintiff furnishing adequate security and subject to restitution in the event of appellant/defendant succeeding, the respondent / plaintiff was permitted to withdraw the decretal amount deposited by the appellant/defendant. The record shows the decretal amount to have been so released to the respondent/plaintiff against Bank Guarantee. Hearing of the appeal was expedited on the application of the appellant/defendant that he is a senior citizen.

3. The counsels have been heard.

4. The respondent/plaintiff had instituted the suit from which this appeal arises for recovery of Rs.6,72,500/- from the appellant/defendant pleading:-

- (a). that the respondent/plaintiff had agreed to purchase a Mercedes Benz Car Model 300-D having registration No.DL-9C-1687 represented to be a 1995 Model from the appellant/defendant for a sum of Rs.36 lacs and a sum of Rs.5 lacs was paid to the

appellant/defendant vide cheque dated 16th August, 1995 against receipt of the same date issued by the appellant/defendant;

- (b). that the appellant/defendant after receiving the said sum of Rs.5 lacs assured the respondent/plaintiff that he will produce/show the relevant documents pertaining to the said car but did not fulfill the said assurance;
- (c). it also transpired that the appellant/defendant misrepresented that the car was a 1995 model, in fact, it was actually a 1992 model;
- (d). that the appellant/defendant vide letter dated 1st September, 1995 threatened to forfeit the part payment of Rs.5 lacs;
- (e). the respondent/plaintiff vide its reply dated 4th September, 1995 informed the appellant/defendant of cancellation of the deal and called upon the appellant/defendant to refund the sum of Rs.5 lacs together with interest @ 18% per annum;

- (f). that the appellant/defendant instead of refunding the amount received sent a legal notice dated 12th September, 1995 claiming to have forfeited the sum of Rs.5 lacs; and,
- (g). that the aforesaid amount was not refunded despite legal notice dated 11th April, 1996 intimating the appellant/defendant that interest @ 18% per annum thereon will be charged.

Accordingly, the suit was filed in or about July, 1997.

5. The appellant/defendant contested the suit, by filing a written statement, on the grounds:-

- (i). denying to have represented that the car was a 1995 model;
- (ii). that the respondent/plaintiff was fully aware that only those cars (above 1600 cc) could be imported into India which were at least one year used and registered abroad in the name of an NRI returning on transfer/residence after staying abroad for more than two years and that the whole process of import takes at least 12 to 15 months and thus the question of a year 1995 model car being made available for sale in the Indian market in the same year did not arise;

- (iii). that the appellant/defendant had already shown the original documents of the car to the respondent/plaintiff at the time of accepting the cheque for Rs.5 lacs as advance and only after seeing such original documents and seeing the car model and the year of manufacture was 1992 did the respondent/plaintiff agree to purchase the car and had given the advance;
- (iv). that the respondent/plaintiff was not entitled to refund of Rs.5 lacs; and,
- (v). that as per the understanding, the respondent/plaintiff was to make the balance payment within ten days of the Agreement dated 16th August, 1995 and which the respondent/plaintiff failed to make and the appellant/defendant had no other alternative except to forfeit the advance amount paid by the respondent/plaintiff.

6. The respondent/plaintiff filed a replication denying the contents of the written statement and reiterating its case.

7. On the pleadings of the parties, the following issues were framed on 17th May, 1999:-

- “1. Whether the plaint has been signed and verified and the suit instituted by the plaintiff company through a duly authorized/competent person? OPP*
- 2. Whether the plaintiff has not come to this Court with clean hands/had suppressed true, material and correct facts? If so, its effect? OPD*
- 3. Whether the suit as filed by the plaintiff is misconceived, baseless and unwarranted? OPD*
- 4. Whether the suit is without any cause of action? OPD*
- 5. Whether the defendant is entitled to forfeit the money received from the plaintiff? OPD*
- 6. Relief.”*

8. The learned Addl. District Judge in the impugned judgment has found/observed/held:-

- (A). that the suit was instituted and the plaint signed and verified by a duly authorized person on behalf of the respondent/plaintiff;
- (B). no evidence had been led by the appellant/defendant to prove issue No.2, which was decided in favour of the respondent/plaintiff;
- (C). that the suit was not without cause of action and could not be said to be misconceived, baseless and unwarranted;

- (D). that it was the case of both the parties that time was the essence of the agreement between them;
- (E). that the version of the respondent/plaintiff that the appellant/defendant had not shown the documents of the car was difficult to believe in the light of the clear admission of PW1 in his evidence in rebuttal that after three to four days from 16th August, 1995 when he went to the office of the appellant/defendant, the appellant/defendant showed him papers regarding the car in question;
- (F). that it cannot be believed that the respondent/plaintiff agreed to buy the car and gave advance without seeing the relevant documents of the car;
- (G). however the defendant/appellant would be entitled to forfeit the amount of Rs.5 lacs only in case the same was intended to be a penalty;
- (H). that the appellant/defendant in his written statement had referred to the amount of Rs.5 lacs as “advance” and in his testimony had referred to the same as “part payment/security deposit”;

- (I). that the only written document between the parties was the receipt of Rs.5 lacs issued by the appellant/defendant and which also mentioned the said amount “as part payment towards the sale of Mercedes Benz 300 D” and further provided:-

“It is agreed that the Car along with all relevant documents including the Registration Book and the Transfer documents including Registration Book and the Transfer documents executed by the original owner in my favour will be delivered against the balance payment of Rs.31 lacs (Rupees Thirty One lacs) within a period of 10 days.”

- (J). that there was no stipulation in writing that the sum of Rs.5 lacs was intended as security or penalty in case of breach;
- (K). that the appellant/defendant appearing as DW-1 had also admitted that in no document it was mentioned, at the time of receipt, that the amount was liable to be forfeited in case the balance was not paid within ten days;
- (L). that from the testimony of the appellant/defendant and the contents of the admitted documents it was clear that forfeiture of the said sum was not contemplated by the parties ever and rather showed the subsequent unilateral decision of the

appellant/defendant to penalize the respondent/plaintiff for breach of contract;

(M). such unilateral decision of the appellant/defendant could not be binding on the respondent/plaintiff;

(N). that the amount of Rs.5 lacs was part payment and could not be forfeited;

(O). that though the appellant/defendant had argued that he was entitled to forfeiture because of having suffered a loss on account of breach of contract but there was neither any pleading to the said effect nor had any loss been proved;

(P). that the appellant/defendant had in or about March, 2004 attempted to amend his written statement to the suit to make a counter claim against the respondent/plaintiff but which was denied vide order dated 27th July, 2004;

(Q). that the appellant/defendant had failed to prove that there existed any stipulation or term in any oral or written contract between the parties that the said sum would be treated as liquidated damages, penalty, earnest money or security within the meaning of Section 74 of the Indian Contract Act, 1872;

- (R). there was also no loss or damage proved or claimed in the proceedings, in terms of Section 73 of the Contract Act;
- (S). that the appellant/defendant was even otherwise not entitled to forfeit the said amount; and,
- (T). however the claim of the respondent/plaintiff for interest @18% per annum was rejected and interest for the period prior to the institution of the suit, *pendente* and future was awarded @ 6% per annum.

9. The counsel for the appellant/defendant has confined his submissions to the findings of the learned Addl. District Judge under issue No.5 only and has neither urged any arguments nor challenged the findings with respect to the other issues. On issue No.5, it is argued:-

- (I). that the receipt issued by the appellant/defendant of Rs.5 lacs though did not provide for forfeiture but at the same time also did not make the said amount of Rs.5 lacs refundable by the appellant/defendant to the respondent/plaintiff;
- (II). that the said receipt mentioned the time for transfer of the car by the appellant/defendant against payment of the balance sale consideration by the respondent/plaintiff within a period of ten

days and the factum of the appellant/defendant vide letter dated 1st September, 1995 calling upon the respondent/plaintiff to pay the balance sale consideration and intimating that failing the same the amount of Rs.5 lacs would be forfeited and the car sold to some other party, re-affirmed the time being of the essence;

- (III). the respondent/plaintiff in its reply dated 4th September, 1995 confirmed that the time was of the essence and the reason given by the respondent/plaintiff for not paying the balance sale consideration has been found in the impugned judgment to be untrue;
- (IV). that the appellant/defendant soon thereafter gave notice dated 12th September, 1995 of forfeiture of the amount;
- (V). the respondent/plaintiff responded thereto after nearly eight months and filed the suit after nearly two years;
- (VI). that the respondent/plaintiff in its reply dated 4th September, 1995 had not controverted the right of the appellant/defendant of forfeiture but had disputed the forfeiture on the ground of

being not in breach and which ground has been disbelieved and decided against the respondent/plaintiff;

(VII). that the respondent/plaintiff has been successively trying to improve its case; in the reply dated 4th September, 1995 the only ground pleaded was of the appellant/defendant having not given inspection of the documents; subsequently in the legal notice dated 11th April, 1996 as an afterthought the case of the appellant/defendant having misrepresented the car to be of the year 1995 was stated; that the witness of the respondent/plaintiff in the cross examination admitted that the documents of the car had been shown; and,

(VIII). that the nomenclature used by the parties with respect to the amount of Rs.5 lacs is not relevant and the learned Addl. District Judge was unduly swayed by the said amount in the receipt thereof having been referred to as “advance”.

10. The counsel for the appellant/defendant has himself referred to my recent judgment dated 10th July, 2013 in CS(OS) No.1100/2005 titled ***M/s Entrepreneurs Co-op Group Housing Society Ltd. Vs. M/s Schindler India Pvt. Ltd.*** dealing with the said aspect and has contended that the facts of the

present case are distinguishable and has further contended that the agreement of forfeiture need not be in writing and can be oral, in the form of understanding of the parties, to be inferred from the circumstances and the conduct of the parties and has in this regard relied on *State Bank of India Vs. Union of India* 199 (2013) DLT 697 and on *Satish Batra Vs. Sudhir Rawal* (2013) 1 SCC 345. He has further contended that the understanding of the parties that the said amount of Rs.5 lacs would be forfeited is evident from, the appellant/defendant in the very first instance having informed the respondent/plaintiff that upon non-payment of the balance sale consideration the said amount will be forfeited. He has yet contended that the judgment in *Entrepreneurs Co-op Group Housing Society Ltd.* is not applicable since in that case no notice of forfeiture was given and the party seeking to forfeit was under the Agreement not required to carry out any work. It is contended that the appellant/defendant in his evidence has deposed that he could not sell the car for two years and ultimately sold at a loss.

11. Per contra, the counsel for the respondent/plaintiff has invited attention to the cross examination of the appellant/defendant to contend that the statement, of the car having been sold after two years and at a loss is vague and no particulars whatsoever were given. He has further contended

that not only the receipt issued by the appellant/defendant himself refers to the amount as “advance” but the appellant/defendant in his written statement also referred to the same as “advance” and is now not entitled to claim the same to be by way of earnest money.

12. I have considered the rival contentions.

13. I have in *Entrepreneurs Co-op Group Housing Society Ltd.* supra, on a conspectus of the case law, including the other two judgments in *State Bank of India* and *Satish Batra* supra cited by the counsel for the appellant, concluded:

- i) that even in the absence of a clause for forfeiture there could be forfeiture depending on the nature and character of the payment and the intention of the parties and in determining which, the designation used by the parties to indicate the nature of the sum that was paid though is relevant but not determinative;
- ii) that there is no distinction in this regard between contracts for sale of goods and contracts for sale of immovable property;

- iii) that it has to be determined, whether the money paid was intended to serve as earnest or security for performance, necessarily implying a liability to forfeit or as a part payment;
- iv) that if it is intended to serve as earnest or security for performance, even in the absence of a clause for forfeiture, it is liable to be forfeited upon breach of the contract by the giver;
- v) however the rule of forfeiture has no application to money received as part payment;
- vi) that the monies given as earnest or security for performance, once paid are and continue to remain the property of the recipient, having been paid as a contract of security which is distinct and separate from real or pure contract and the right to forfeiture arises under a contract of security which can be provided expressly or impliedly;
- vii) however to justify forfeiture, the terms of contract should be clear and explicit; viii) where the language used in the

contract is neutral, then a payment will generally be interpreted as part payment so that it is, in principle, recoverable;

- ix) where the contract is of a sale and no property in goods has passed to the buyer, the money will generally be recoverable by the purchaser because the right of the vendor to retain the principal payment is conditional upon completion of the contract because when completion does not take place, the condition upon which the vendor retains the money fails with the result that the money is recoverable by the purchaser; and,
- x) however where the contract is one for work and materials, the pre-payment is less likely to be recoverable because the recipient of money incurs expenditure in the performance of the contract and because the failure of consideration in such case is not total.

14. I now proceed to apply the aforesaid principles to the case in hand.

15. The contract is for sale of goods i.e. car and the nomenclature used by the parties in the receipt issued of payment, correspondence exchanged, written statement and evidence is of advance / part payment and there is no clause for forfeiture.

16. The property in goods i.e. the car has admittedly not passed on from the appellant to the respondent.

17. The appellant neither in his written statement nor in his examination-in-chief has deposed of any circumstances relating to the payment to show that the same was intended to be a security given by the respondent to the appellant for performance of the agreement for purchase of the car by payment of the balance sale consideration within ten days.

18. Rather, the appellant appearing as DW1 has deposed that upon the deal being struck for sale of the car for Rs.36,00,000/-, Mr. I.M. Thapar, Managing Director of the respondent had directed an officer of the respondent to pay to the appellant a cheque of Rs.5,00,000/-. The appellant has not deposed that the said amount of Rs.5,00,000/- was a negotiated amount or represented any percentage of the total sale

consideration. The appellant has also not pleaded or deposed that there was any discussion between the parties that in the event of the respondent not completing the deal, the appellant would suffer any loss and to compensate the appellant for which the money was agreed to be paid. The appellant has also neither pleaded nor deposed of any consideration owing to which there would have existed any possibility of the appellant, in the event of the respondent not completing the sale, suffering any loss.

19. The appellant / defendant in the cross examination of the witnesses of the respondent / plaintiff also did not suggest any such circumstances which would show that it was in the contemplation of the parties that the amount of Rs.5,00,000/- paid was non refundable.

20. The conclusion is thus inevitable that the appellant / defendant on whom lay the onus to prove a right to forfeiture has failed to prove that the payment of Rs.5,00,000/- was ever intended by the parties to be a security for performance of the contract or to vest in the appellant / defendant irrespective of the performance of the contract by the respondent.

21. I may record that I had during the hearing also enquired from the counsel for the appellant / defendant whether there was any custom / practice of trade of such payments being forfeitable. The counsel for the appellant fairly admitted that no evidence to the said effect was led.

22. I had in the arguments also enquired from the counsel for the appellant / defendant as to how the appellant / defendant had treated the said payment in his books of accounts and whether the same remained reflected as an advance or was treated as an income, in the interregnum between the accrual of the dispute and the filing of the suit. Though the counsel for the appellant / defendant again stated that there was nothing on record but the appellant / defendant present in person stated that he had in his income tax return of the relevant year of prior to the filing of the suit shown the amount as having been forfeited. Alas! there is no evidence to the said effect also except for the bare statement at the fag-end of the hearing.

23. Once that is the position, the appellant / defendant did not have a right to forfeit; even if the appellant / defendant had suffered any loss on account of breach of the agreement by the respondent, as has been held

by the Trial Court, the remedy of the appellant / defendant was to sue for recovery of the compensation / loss from the respondent as is the law as laid down in *Fateh chand Vs. Balkishan Dass* AIR 1963 SC 1405 and in *Baldev Steel Ltd. Vs. Empire Dyeing & Manufacturing Co. Ltd.* 92 (2001) DLT 471 and in *Dilip Kumar Bhargava Vs. Urmila Devi Sharma* 182 (2011) DLT 646. The appellant / defendant has not done so also.

24. As far as the contention of the appellant, of the respondent / plaintiff in reply dated 04.09.1995 having only disputed forfeiture and not right to forfeit, all that can be observed is that correspondence exchanged between men of commerce is not to be construed as pleadings.

25. There is thus no merit in the appeal which is dismissed. The counsel for the appellant / defendant having made a commendable effort to persuade this Court, I refrain from burdening the appellant / defendant with any further costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 09, 2013

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