

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

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Date of decision: 10th January, 2014

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RFA 299/2013

PRAVEEN OBEROI

..... Appellant

Through: Ms. Jyotika Kalra

Versus

RAJ KUMARI

..... Respondent

Through: Mr. Mahavir Sharma, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 12th April, 2013 of the Court of the Addl. District Judge-01, South District, Saket Courts, New Delhi in Suit No.262/11 filed by the respondent) against the appellant/defendant and in favour of the respondent/plaintiff of recovery of Rs.11 lacs. The said recovery from the appellant/defendant was ordered in enforcement of a clause in the Agreement of Sale of immovable property executed by the appellant/defendant in favour of the respondent/plaintiff, of payment by the appellant/defendant to the respondent/plaintiff of double the amount of earnest money paid by the respondent /plaintiff at the time of execution of Agreement to Sell, in the event of appellant/defendant being in

breach of the said Agreement. Not finding any discussion in the impugned judgment on the proof of any loss or damage suffered by the respondent/plaintiff by the breach on the part of the appellant/defendant and being of the view that as per the dicta of the Constitution Bench in ***Fateh Chand Vs. Balkishan Dass*** AIR 1963 SC 1405 that in the absence of any loss or damage being proved, the mere existence of such a clause in the Agreement does not justify recovery of the amount by way of penalty, notice of the appeal was issued, the Trial Court record requisitioned and subject to the deposit by the appellant/defendant in this Court of the decretal amount of Rs.11 lacs, execution was stayed. The appellant/defendant had deposited the said sum of Rs.11 lacs in this Court.

2. After notice, considering that the appeal entailed a purely legal question, with the consent of the counsels, the appeal was finally heard and judgment reserved.

3. Need is not felt to set out in detail the controversy, it being not disputed:-

(a) that at the time of Agreement to Sell a sum of Rs.8 lacs was paid by the respondent/plaintiff/purchaser to the appellant/defendant/vendor;

- (b) that as per the Agreement to Sell, upon the appellant/defendant/vendor being in breach, he was liable to “refund the double of the advance/earnest money”;
- (c) the appellant/defendant/vendor did not present for payment/encash the cheque for Rs.1 lac out of total Rs.8 lacs received from the respondent/plaintiff/purchaser; thus the total payment received by the appellant/defendant/vendor was of Rs.7 lacs only;
- (d) that the appellant/defendant/vendor was in breach of the Agreement to Sell;
- (e) that the appellant/defendant/vendor prior to the institution of the suit refunded Rs.4 lacs to the respondent/plaintiff/purchaser;
- (f) that the respondent/plaintiff/purchaser did not opt to sue for specific performance but sued for recovery of Rs.11 lacs only i.e. for Rs.16 lacs being double the advance/earnest money of Rs.8 lacs less Rs.1 lac cheque whereof was not encashed by the appellant/defendant/vendor and less Rs.4 lacs refunded by the appellant/defendant/vendor;
- (g) the respondent/plaintiff/purchaser has not pleaded/proved any loss having been suffered on account of the breach of the Agreement

to Sell by the appellant/defendant/vendor and pegged her case only on the clause in the Agreement to Sell of payment of double the amount of advance/earnest money.

4. The counsel for the respondent/plaintiff/purchaser during the hearing pegged his case on *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* (2003) 5 SCC 705 and the judgments cited therein and further contended that since *Fateh Chand* supra was concerned only with Section 74 of the Indian Contract Act, 1872 and did not consider Section 73 of the said Act, hence *Saw Pipes Ltd.* supra is not *per incurium* to the said extent.

5. Section 73 of the Contract Act provides that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides that 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 the penalty stipulated.

6. ***Fateh Chand*** was also a case of breach of an Agreement of Sale of immovable property, where the vendor had agreed, if in breach, to refund Rs.25,000/- received from the purchaser and to pay a further sum of Rs.25,000/- to the purchaser and the purchaser had agreed, if in breach, to forfeiture of the said sum of Rs.25,000/-. The Constitution Bench of the Supreme Court held, (a) that the covenant for forfeiture of Rs. 24,000/- (Rs.1000/- paid by way of earnest money was allowed to be retained) was manifestly a stipulation by way of penalty; (b) the measure of damages where there is a stipulation by way of penalty, under Section 74 is “reasonable compensation not exceeding the penalty stipulated for”; (c) jurisdiction of the Court to award compensation is unqualified except as to the maximum stipulated; (d) compensation has to be reasonable; (e) the expression “whether or not actual damage or loss is proved to have been caused” merely dispenses with proof of "actual loss or damages"; 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; and, (g) where the plaintiff fails to prove the loss suffered in consequence of breach of contract committed by the defendant, no compensation can be awarded.

7. The counsel for the respondent/plaintiff/purchaser has very fairly not controverted the factual position here being the same as in ***Fateh Chand*** supra, of the respondent/plaintiff/purchaser having neither pleaded nor proved any loss having been suffered by him on account of the breach by the appellant/defendant/vendor.

8. Though undoubtedly there is no reference to Section 73 in ***Fateh Chand*** supra but in ***Saw Pipes Ltd.***, in para 64 of the judgment, both Sections 73 & 74 along with ***Fateh Chand*** are mentioned and it has been held that Section 73 has to be read with Section 74.

9. Though in ***Saw Pipes Ltd.*** also, there was no proof of any loss but the Supreme Court nevertheless held that in case of breach of 'some' contracts it may be impossible for the Court to assess compensation arising from breach. Illustration was given of a contract for construction of a road or a bridge and it was held that upon delay in completion within the stipulated time it would

be difficult to prove how much loss is suffered by the society/State. Finding in the facts and the evidence of that case that it was difficult to prove the exact loss or damage suffered because of breach and that the parties realizing so had pre-estimated such loss after clear understanding, it was held that it would be totally unjustified to arrive at the conclusion that party who had committed breach of the contract is not liable to pay compensation and to hold so would be against the specific provisions of Sections 73 & 74 of the Contract Act. It was further noticed that the contract in that case “specifically mentioned” that the amount agreed to be paid in the event of breach was an agreed genuine pre-estimate and not by way of penalty.

10. It would be evident from the aforesaid that the argument of the counsel for the respondent/plaintiff/purchaser, of there being a difference in claims under Section 73 and under Section 74 of the Contract Act is contrary to the dicta in *Saw Pipes Ltd.* laying down that Section 74 is to be read along with Section 73. I may notice that while Section 73 creates an entitlement for compensation for loss or damage in the event of breach of contract and which contract may or may not provide for penalty or payment of specified amount payable in case of breach, Section 74 of the Contract Act provides that in the case of contracts providing for penalty or payment of specified

amount in the event of breach, reasonable compensation not exceeding the amount so named would be payable. There can be no doubt that the Agreement to Sell subject matter of the present proceedings is of the kind falling in Section 74.

11. The Agreement to Sell and the breach thereof in the present case does not fall in the category where it is impossible for the Court to assess compensation for breach; that is not the case also of the respondent/plaintiff/purchaser. The respondent/plaintiff/purchaser could have very well pleaded and proved that the price of the property had risen since the date of Agreement to Sell and if the respondent/plaintiff/purchaser were to at the time of breach buy another similar property she would have to pay a higher price. The respondent/plaintiff/purchaser could have similarly proved that owing to the subject Agreement to Sell she did not avail of entering into an agreement to buy some other similar property at the same price. There are admittedly no such pleadings/proof. Similarly there is no plea/evidence as in *Saw Pipes Ltd.*, of the basis on which the parties had agreed that in the event of breach by the appellant/defendant/vendor the respondent/plaintiff/purchaser would suffer loss in the sum of Rs.8 lacs.

12. Though the aforesaid is sufficient for the present *lis* to be governed by ***Fateh Chand*** which in any case is a dicta of a Constitution Bench (***Saw Pipes Ltd.*** is a dicta of two Judges Bench) but the matter is placed beyond any pale of controversy by the judgment of the Division Bench of this Court in ***Vishal Engineers & Builders Vs. Indian Oil Corporation Limited*** MANU/DE/6829/2011 where also the question for consideration was, whether in view of such a stipulated amount, damages are liable to be paid *ipso facto* without any further proof qua the issue of sufferance of damages or quantification thereof or something more is required to be done. After considering ***Fateh Chand*** as well as ***Saw Pipes Ltd.*** and a host of other judgments, it was held that the observations in ***Saw Pipes Ltd.*** have to be read in the context of the pronouncement of the Constitution Bench in ***Fateh Chand*** and only where it is impossible to assess the compensation arising from breach coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation, that amount can be awarded as a genuine pre-estimated loss suffered and it cannot be read to mean that even if no loss whatsoever is caused to a party, it can still recover amounts merely by reason of the opposite party being in breach. It was thus held that if there was absence of any loss whatsoever, an

aggrieved party cannot claim that it is still entitled to liquidated damages without at least proving a semblance of loss.

13. The respondent/plaintiff/purchaser in the present case has admittedly not pleaded/proved any loss. I am therefore bound by the dicta of the Division Bench in *Vishal Engineers & Builders*.

14. The counsel for the appellant/defendant/vendor has not opposed entitlement of the respondent/plaintiff to the balance Rs.3 lacs.

15. The appeal therefore succeeds. The impugned judgment and decree is set aside. The respondent/plaintiff/purchaser is held entitled only to recover balance Rs.3 lacs out of the amounts paid to the appellant/defendant/vendor and having failed to plead/prove any loss, is held to be not entitled to the amounts stipulated to be paid to her in the event of breach by the appellant/defendant/vendor. The suit of the respondent/plaintiff is thus entitled to succeed only for recovery of Rs.3 lacs and the claim of the respondent/plaintiff for the balance amount is dismissed. No costs.

16. Decree sheet be drawn up.

17. Out of the amounts deposited by the appellant/defendant in this Court, a sum of Rs.3 lacs be released to the respondent/plaintiff and the balance

Rs.8 lacs with interest if any accrued on the total amount be refunded to the appellant/defendant.

RAJIV SAHAI ENDLAW, J.

JANUARY 10, 2014
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