

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

+ **RFA No. 580/2006**

% **15th October, 2018**

M/S GROVER TANKERS INVESTMENT

..... Appellant

Through: Mr. Atul Bandhu, Advocate.

versus

M/S OTC EXCHANGE OF INDIA

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 29.05.2006 by which the trial court has dismissed the suit for recovery of Rs. 6,25,000/- filed by the appellant/plaintiff. The amount of Rs. 6,25,000/- was paid by the appellant/plaintiff for dealership of the respondent/defendant. Since the appellant/plaintiff could not fulfill Condition no. 6 of Annexure I of the Undertaking for grant of dealership and this

condition was that appellant/plaintiff as per its Memorandum cannot be permitted to carry on fund based activities, therefore in terms of Clause 19 of the terms and conditions of appointment of the appellant/plaintiff as a dealer of the respondent/defendant, the respondent/defendant forfeited the amount of Rs. 6,25,000/- which was deposited by the appellant/plaintiff with the respondent/defendant.

2. The facts of the case are that admittedly the appellant/plaintiff applied for being appointed as a dealer of the respondent/defendant. As per Clause 6 of the format of undertaking, it was required that the object clause of the Memorandum of the appellant/plaintiff should not enable the appellant/plaintiff to carry on funds based activities. The appellant/plaintiff, however, could not comply with this Clause 6, and therefore in terms of Clause 19 of Annexure I to the application of dealership, which provided that the sum paid of Rs. 6,00,000/- with the application for grant of dealership is not refundable or dealership transferable, the respondent/defendant forfeited the amount of Rs. 6,25,000/- which was paid by the appellant/plaintiff to the respondent/defendant. This clause 19 of the

terms and conditions of appointment of the appellant/plaintiff as dealer with the respondent/defendant reads as under:-

“19. The Admission fee of Rs.6 lakhs is neither refundable nor is the dealership transferable. If the applicant decides or is forced to terminate the Dealership or if OTCEI terminates the dealership, this fee of Rs.6 lakhs is not returnable by OTCEL.”

3. The issue in the present case is covered in terms of the judgment against the respondent/defendant in this appeal passed by this Court in ***RFA No. 576/2005*** decided on 30.10.2017 titled as ***M/s S.P.Virmani & Sons Pvt. Ltd. v. M/s OTC Exchange of India.*** Leaving aside minor aspects of difference in clause numbering, the issues which arise in this appeal are the very issues which arose and were decided in ***RFA No. 576/2005***. It was held in the judgment in ***RFA No. 576/2005*** that the relevant clause does not permit the forfeiture of the amount, unless first dealership is granted, and the same was not granted either to the applicant in ***RFA No. 576/2005*** and further, the same has not been granted to the appellant/plaintiff in the present case. Further, an amount deposited cannot be forfeited unless loss is pleaded and proved as required by the judgments of the Supreme Court. The relevant paragraphs of the judgment in the case

of *M/s S.P.Virmani & Sons Pvt. Ltd. (supra)* are paragraphs 2-9 and

these paragraphs read as under:-

“2. The facts of the case are that the respondent/defendant is a recognized stock exchange under Section 4 of the Securities Contracts (Regulation) Act, 1956 and which wanted to appoint dealers throughout India. For this purpose advertisements were issued by the respondent/defendant in leading newspapers. Appellant/plaintiff wanted to become a dealer by paying a sum of Rs.6 lacs as application fee and Rs.25,000/- as annual fee. A sum of Rs. 1,00,000/- was payable at the time of submitting of the application. Appellant/plaintiff applied for dealership and submitted application no. 6755 along with covering letter dated 31.1.1995 (Ex.PW1/3) and a pay order for a sum of Rs.1,00,000/-. Respondent/defendant after scrutinizing the application of the appellant/plaintiff sought clarifications which were provided by the appellant/plaintiff in terms of its letter dated 21.2.1995. Respondent/defendant called upon the appellant/plaintiff for test/interview which was duly attended by the appellant/plaintiff's Managing Director. Vide letter dated 24.8.1995 (Ex.PW1/5) the respondent/defendant informed the appellant/plaintiff that the appellant/plaintiff could be appointed as a dealer subject to completion of various formalities. Appellant/plaintiff realized that it would not be able to complete the formalities as directed by the respondent/defendant as the appellant/plaintiff company was engaged in the industrial activity and funds based activity and therefore cannot be appointed as dealer of the respondent/defendant and therefore the appellant/plaintiff proposed the respondent/defendant to allow one of its associate company to be appointed as a dealer. Appellant/plaintiff in terms of the demand of the respondent/defendant paid a sum of Rs.5,25,000/- to the respondent/defendant vide pay order no. 025760 dated 30.9.1995 towards the balance payment of the dealership fee. Respondent/defendant allowed the appellant/plaintiff to seek replacement with its sister concern, but which was also found not to be permissible/possible as the sister concern was not in a position to complete formalities. Appellant/plaintiff therefore since the dealership formalities could not be completed, and that the appellant/plaintiff or its sister concern could not be appointed as a dealer, vide its letter dated 30.9.1995 sought refund of the amount of Rs. 6,25,000/-. Since the respondent/defendant did not refund the amount, the

appellant/plaintiff served a demand notice dated 21.3.1997 (Ex.PW1/6). Respondent/defendant instead of complying with the notice sent a false reply dated 30.4.1997 (Ex.PW1/7). Appellant/plaintiff hence filed the subject suit.

3. Respondent/defendant contested the suit and pleaded that as per the terms and conditions of the dealership, the dealership fee was not refundable. Reference was invited by the respondent/defendant as per its written statement to Clause 11 (A) of the letter of the respondent/defendant dated 24.8.1995 to the appellant/plaintiff stating that admission fee of Rs.6 lacs is neither refundable nor the dealership transferable and if the dealership is terminated, the fee of Rs.6 lacs becomes non-refundable. Therefore, as per the respondent/defendant once the appellant/plaintiff agreed to this term with open eyes, hence the amount which was sought by the appellant/plaintiff was not refundable.

4. After pleadings were completed, the trial court framed the following issues:-

- “1. Whether the suit is signed, verified and instituted by duly authorized person? OPP
2. Whether the suit is barred by territorial jurisdiction? OPP.
3. Whether it is proved that plaintiff was appointed as authorized dealer of the defendant? If yes, what is the effect? OPP.
4. Whether the amount of Rs.6,25,000/- paid to the defendant is liable to be refunded? OPP.
5. Whether the plaintiff is stopped from claiming refund of Rs.6,25,000/-? OPD.
6. Whether the plaintiff is entitled to the interest, if yes, at what rate and on what amount.
7. To what relief, if any, the plaintiff is entitled to?
8. Relief.”

5. The relevant issues for determination are issues nos. 3 and 4 and which issues were decided by the trial court in favour of the respondent/defendant holding that in view of the application filed by the appellant/plaintiff (Ex.D-1/Ex.PW1/3) the dealership fee could not be refunded as per the terms given in the annexure to the application form. Trial court has held that the appellant/plaintiff failed to fulfill the terms and conditions as mentioned in the letter dated 24.8.1995 (Ex.PW1/5) and instead made a counter-proposal in terms of the appellant/plaintiff's letter

dated 9.9.1995 (Ex.P-2). Trial court held that even the subsidiary company of the appellant/plaintiff could not be appointed as a dealer as it was not in a position to fulfill the conditions laid down in the letter dated 24.8.1995 (Ex.PW1/5). Accordingly, the trial court held that appellant/plaintiff failed to fulfill the conditions of being appointed as a dealer nor could the sister concern of the appellant/plaintiff complete the formalities and hence the amount paid by the appellant/plaintiff could not be refunded to the appellant/plaintiff. Trial court also further held that a fresh contract between the sister concern of the appellant/plaintiff and the respondent/defendant resulted when the appellant/plaintiff vide its letter dated 30.9.1995 (Ex.P-4) forwarded the draft of Rs.5,25,000/-. Trial court has also referred to the undertaking dated 21.2.1995 (Ex.D-2) given by the appellant/plaintiff that in case of non-compliance, the admission of the appellant/plaintiff as a dealer will automatically lapse and the appellant/plaintiff undertakes to accept the decision of the respondent/defendant in this regard. Trial court has concluded that as the respondent/defendant accepted the proposal of the appellant/plaintiff vide its letter dated 4.1.1996 Ex.P-5, and that therefore in accordance with the agreed terms and conditions, the appellant/plaintiff is estopped from claiming the refund of Rs.6,25,000/-.

6.(i) In my opinion, appellant/plaintiff is entitled to succeed and the impugned judgment has to be set aside because it is seen that on the record of this case, there is no Clause 16 of Annexure-1 to the application form and all that is there on record of the trial court is Clause 11(A) of the procedure of selection which specifies that the onetime non-refundable dealership fee would be of Rs.6 lacs and dealership is non-transferable. Once therefore there is no clause providing for forfeiture for non-compliance of formalities, the respondent/defendant could not have forfeited the amount received by it for prospective dealership. Even assuming for the sake of arguments that there is a Clause 16 of Annexure-1 to the letter dated 24.8.1995, and which in addition to what is stated in Clause 11(A) of the procedure for selection provides that if the dealership is terminated the fee of Rs.6 lacs is non-refundable by the respondent/defendant, even then this clause will come into operation only if dealership is granted. Admittedly, no dealership was granted to the appellant/plaintiff or its sister concern. The issue therefore of forfeiture of dealership fee could only be if the dealership is granted and thereafter cancelled.

(ii) Most importantly I may note that in terms of the same application form containing procedure for selection, in Clause 11(B) and (C) thereof, it is specifically provided that processing fee is only Rs.2,000/- and in case a person is not selected as a dealer, then, after deducting the processing fee of Rs.2,000/-, the remaining amount of Rs.98,000/- would be refunded.

(iii) Also the undertaking Ex.D2 dated 21.2.1995 given by the appellant/plaintiff only provides that in case of any non-compliance of the undertaking dealership will lapse and decision of the respondent/defendant will be accepted but this undertaking nowhere provides that even before dealership is granted, then, the amount of Rs.6,25,000/- lacs which is given by an applicant, who is a prospective dealer, would stand forfeited for non-compliance of formalities. As already stated above, in terms of Clause 11(B) and (C) of the procedure for selection, in case of non-appointment as a dealer there would only be a processing fee charge of Rs.2,000/- and that no other amount would be deducted by the respondent/defendant. In my opinion therefore the appellant/plaintiff is entitled to succeed by respondent/defendant being directed to refund a sum of Rs.6,23,000/- instead of a sum of Rs.6,25,000/-, along with interest from the date of service of the legal notice dated 21.3.1997 (Ex.PW1/6).

7. In my opinion there is also a legal issue on the basis of which this appeal has to be allowed and the suit for recovery filed by the appellant/plaintiff has to be decreed. This is because of the provisions of Sections 73 and 74 of the Indian Contract Act, 1872. In law merely because there is a breach of contract such breach is not actionable unless because of the breach loss is caused to the aggrieved party. There can be forfeiture of an amount paid under a contract only when the aggrieved party is caused loss. Two relevant judgments in this regard are the judgments of the Constitution Bench of the Supreme Court in the case of **Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405** and the recent judgment of the Supreme Court in the case of **Kailash Nath Associates Vs. Delhi Development Authority and Another, (2015) 4 SCC 136**. The relevant paras in the judgment in the case of **Kailash Nath Associates (supra)** are paras 34, 43 and 43.1 to 43.7 and these paras read as under:-

“34. In *Fateh Chand v. Balkishan Das*, this Court held:

“The section is clearly an attempt to eliminate the somewhat 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.....

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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 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 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. (At page 526, 527)

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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."

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43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

(underlining added)

8. In the present case as is seen from the admitted facts on record that the respondent/defendant neither as per its written statement nor as per its evidence led, ever pleaded and proved that any loss has been caused to the respondent/defendant on account of the failure by the appellant/plaintiff to take dealership of the respondent/defendant. Therefore even assuming that there is some breach of contract on the part of the appellant/plaintiff, yet since no loss has been caused to the respondent/defendant which is pleaded and proved, therefore in accordance with the ratio of the judgments of the Supreme Court in the cases of ***Fateh Chand (supra)*** and ***Kailash Nath Associates (supra)***, the respondent/defendant could not have forfeited the total amount of Rs.6,25,000/- deposited by the appellant/plaintiff with the respondent/defendant.

9. This appeal is accordingly allowed. The suit of the appellant/plaintiff is decreed against the respondent/defendant for recovery of a sum of Rs.6,23,000/- along with interest at 7 ½% simple from 21.3.1997 till the date of filing of the suit on 1.8.1997 and thereafter *pendente lite* and

future till realization of the decretal amount at the same rate of 7 ½% per annum simple. Parties are left to bear their own costs. Decree sheet be prepared.”

(Underlining Added)

4. It is, therefore, held that the respondent/defendant wrongly relied upon Clause 19 for forfeiting the amount paid to it because Clause 19 would only come into play if the first dealership was granted to the appellant/plaintiff, but admittedly no dealership was granted in the present case. In any case, an issue of forfeiture cannot be upheld in law unless the plea of forfeiture is based upon loss which is pleaded and proved to be caused, and the same is held by the Constitution Bench Judgment of the Supreme Court in *Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405* as referred to in the judgment in the case of *M/s S.P. Virmani & Sons Pvt. Ltd. (supra)*.

5. I may note that the respondent/defendant in *RFA No. 576/2005*, is the respondent/defendant in this RFA being M/s O.T.C. Exchange of India, had applied for review of the judgment dated 30.10.2017, and this *Review Petition No. 105/2018* was also dismissed by the order of this Court dated 09.03.2018.

6. In view of the aforesaid discussion, this appeal is allowed, suit of the appellant/plaintiff is decreed for a sum of Rs.

6,00,000/- along with *pendente lite* and future interest to be paid at 7½ % per annum simple, inasmuch as the respondent/defendant would have been put to some loss of man hours/time/money in dealing with the application of the appellant/plaintiff and for which the respondent/defendant can forfeit a sum of Rs. 25,000/-.

7. The suit of the appellant/plaintiff therefore will be decreed for a sum of Rs. 6,00,000/- along with *pendente lite* and future interest till payment to be paid at 7½ % per annum simple. Parties are left to bear their own costs. Decree sheet be prepared.

8. Appeal is accordingly allowed and disposed of.

OCTOBER 15, 2018

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VALMIKI J. MEHTA, J

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