

\$~4 & 5

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

Date of Decision 07.05.2015

+ CS(OS) 1369/2010
SANJEEV KAKKAR & ANR Plaintiffs
Through: Mr. Manoj Sharma with
Mr. Kapil Kaushik, Advs.

versus

ARDEE INFRASTRUCTURE PVT LTD & ANR..... Defendants
Through: Mr. Anil Kumar Mishra, Adv.

+ CS(OS) 1370/2010
S.K. SETHI Plaintiff
Through: Mr. Manoj Sharma with
Mr. Kapil Kaushik, Advs.

versus

ARDEE INFRASTRUCTURE PVT LTD & ANR..... Defendants
Through: Mr. Anil Kumar Mishra, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Open Court)

These are two suits for recovery of damages amounting to Rs.69,82,020/- (in CS(OS) No.1370/2010) and Rs.23,20,560/- (in CS(OS) No.1369/2010) respectively and further damages of Rs.1,05,540/- per month (in CS(OS) No.1370/2010) and Rs.96,690/- per month (in CS(OS) No.1369/2010) respectively along with interest *pendente lite* and future

interest @ 18% per annum.

On 16.4.2013, in CS(OS) No.1369/2010, this Court had noted that no oral evidence was to be led between the parties since the agreement to sell dated 27.11.2002 had been admitted by the defendant. Therefore, all that would be required is the interpretation of the terms of the said agreement and a finding is to be returned on the issues framed.

Plaintiffs' Contentions

It is the case of Mr. S.K. Sethi, the plaintiff in CS(OS) 1370/2010, that he had entered into an agreement dated 27.11.2002 with the defendants to purchase the properties being No.SR-01 with saleable area of 1571 sq.ft.; SR-02 with saleable area of 1947 sq.ft.; SR-03 with saleable area of 2632 sq.ft. and Shop No.C-1 with saleable area of 591 sq.ft. (hereinafter referred to as suit properties with saleable area of 6741 sq.ft.) in the defendants' project Plaza Gardenia, Gurgaon, for which the entire sale consideration of Rs.68,75,820/- had already been paid by him. The said properties were supposed to have been delivered within twenty four months from the date of commencement of its constructions and not later than September, 2004, failing which the damages clause would be triggered and the defendants would be liable to pay Rs.30 per sq.ft. per month. The damages Clause reads as under:-

“48. The First Party would pay penalty to its Allottee @ Rs. 30/- per sq.ft. saleable area per month for delay in handing over the said premises beyond the date of possession as mentioned in clause 12 hereinabove. Similarly, the Allottee would be liable to pay to the First Party @ Rs. 30/- per sq.ft. per month if he fails to take the possession within the stipulated

period as informed to him in writing.”

Clause 6 acknowledges that the plaintiff had already paid Rs.68,75,820/- as full and final consideration. Clause 4 further stipulates that sale price of this unit is affirmed, therefore, there was no scope for revision of the sale price or requirement of paying any other monies till the time of offer of possession which if made would entail expenses towards transfer and registration charges as per notified rates. The learned counsel for the plaintiffs submits that no demands for additional payments have been raised by the defendants. Clause 4, 5 and 6 read as under:

“4. That the sale price of this unit is firm.

5. That while calculating sale price of the said premises the First Party has taken into account the external Development Charges levied by the Director, Town & Country Planning, Haryana on the date of issues of licenses and present thereto. However, any increase in this levy hereafter shall be in the account of the allottee who shall pay the same to the First Party on demand on pro rata basis.

6. That the Allottee has already paid a sum of Rs.68,75,820.00/- (Rupees sixty eight lacs seventy five thousand eight hundred twenty only) towards full consideration for the purchase of the said premises subject to any other payment, enhancement etc. as agreed by the parties in the Agreement, the receipt of which the First Party hereby acknowledges.”

Clause 12 states that possession of the said premises is proposed to be delivered by the defendants to the allottee in 24 months from the date of construction of the said premises but not later than September, 2004, therefore there was a clear stipulation of the date by which the property was

to have been delivered i.e. 30th September, 2004. Clause 12 reads as under:

“12. That the possession of the said premises is proposed to be delivered by the first party to the Allottee in 24 months from the date of commencement of construction of the said premises but not later than September, 2004. If the completion of the building(s) is delayed by reason of non-availability of Steel and/or cement or other building materials, or water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the First Party, civil commotion or by reason of war or enemy action or earthquake or any act of God or if non-delivery of possession is as a result of an act, notice, order, rule or notification of the Govt. and/or any other public or competent authority or for any other reason beyond the control of the First Party then in any of the aforesaid event the First Party shall be entitled to a reasonable extension of time for delivery of possession of the said premises.”

Indeed, Clause 21 (a) of the agreement stipulates that the allottee would pay stamp duty, transfer charges etc. for the transfer as may be applicable apropos the said property.

In May, 2008, Mr. S.K. Sethi was contacted by Mr. Sanjeev Kakkar and Mrs. Seema Kakkar (Plaintiff Nos. 1 and 2 in CS(OS) 1369/2010) to purchase his allotted units being No. SR-03 with saleable area of 2632 sq.ft. and Shop No. C-1 with saleable area of 591 sq.ft. The said properties were transferred in favour of the Kakkars as per the Buyer's agreement dated 26.06.2008. It is not in dispute and the same has been endorsed by the defendants. The Court would note that a period of 47 months had passed since September, 2004, the time by which the possession of the suit properties was to be delivered to Mr. S.K. Sethi. In furtherance of this, the defendants entered into four separate agreements, all dated 26.06.2008, of

which two were with respect to unit No. SR-01 and SR-02 with Mr. S.K. Sethi and the other two with respect to unit No. SR-03 and Shop No. C-1 with the Kakkars. These four agreements were identical to the earlier agreement dated 27.11.2002 between Mr. S.K. Sethi and the defendants.

The learned counsel for the plaintiffs submits that the defendants had unequivocally undertaken to execute the sale deeds/transfer deeds in respect of the premises and hand over the property to the allottees/plaintiffs; that the 11 years have passed from the last agreed date of handing over of the premises and transferring the title of the same, therefore Clause 48 of the agreement to sell would come into play.

The learned counsel for the plaintiffs submits that by virtue of the aforesaid clause, the defendants are liable to pay Rs.30/- per sq.ft. saleable area per month. Indeed, the defendants/builders have sufficiently covered this under the sale clause by making the allottee also liable to pay an equivalent amount in the event of delay in taking possession of the property after an offer having been made in that regard. The entire saleable area for the four units comes to 6741 sq.ft. Therefore, the damages payable from 1st October, 2004 per month would be Rs.44,49,606/- for all the months in the subsequent years plus interest @ 18%.

It is not in dispute that the possession of the properties has neither been offered nor handed over till date.

Defendants' Contentions

The learned counsel for the defendants refers to a letter dated 22nd August, 2006 whereby some monies had been paid by the defendants to the plaintiff in CS(OS) 1370/2010 towards damages under Clause 48 of the agreement. He submits that this payment was towards full and final

settlement as per Clause 48 of the agreement dated 27.11.2002 for the delay in delivery of possession in respect of unit Nos. SR-01, SR-02, SR-03 and Shop No.C-1 having total saleable area admeasuring 6741 sq.ft. in Plaza Gardenia, Gurgaon and it was accepted by the plaintiff as a full and final settlement. Therefore, no monies would be payable thereafter. The offer was a suo moto and one-sided.

The plaintiff, Mr. S.K. Sethi, has acknowledged the receipt of Rs.15 lacs with respect to the said transaction. The learned counsel for the plaintiffs submits that the payment was taken only because no damages had been paid till that date by the defendants. It was not a one-time settlement since the monies payable as of that date were more than three times the amount paid by the defendants. The acceptance of the payment did not lead to condonation of delay nor to waiver of the amounts due under Clause 48 of the agreement. Therefore the letter and the receipt of interim damages does not constitute any waiver of the entire damages which were payable till that date. The learned counsel for the plaintiffs submits that the amount payable till 22nd August, 2006 towards damages was Rs.46,51,290/-and interest thereon has not been claimed in the present suit which was filed in the year 2010. Therefore, interest on delayed payment is claimed only from the date of filing of the suit. The plaintiff has sought the following relief:

“b. Pass further decree/order for damages/penalty Rs.105,540/- per month till the actual handing over the physical possession of the allotted units/premises under the terms of the Agreements dated 27.11.2002 and 26.06.2008 alongwith interest @ 18% per annum ”

This Court is of the view that the offer was only with respect to the amounts payable till 22nd August, 2006. It does not stipulate any agreement

on the waiver of future damages that may accrue towards the plaintiffs under Clause 48 of the agreement. Therefore, damages would be payable for the subsequent period of delay also. This default is continuous in nature and the plaintiffs would be entitled to interest thereon from three years prior to the filing of the suit.

The learned counsel for the defendants refers to Clause 12 of the agreement which reads as under:

“12. That the possession of the said premises is proposed to be delivered by the first party to the Allottee in 24 months from the date of commencement of construction of the said premises but not later than September, 2004. If the completion of the building(s) is delayed by reason of non-availability of Steel and/or cement or other building materials, or water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the First Party, civil commotion or by reason of war or enemy action or earthquake or any act of God or if non-delivery of possession is as a result of an act, notice, order, rule or notification of the Govt. and/or any other public or competent authority or for any other reason beyond the control of the First Party then in any of the aforesaid event the First Party shall be entitled to a reasonable extension of time for delivery of possession of the said premises.”

The learned counsel for the defendants would submit that the possession certificate could not be offered due to the lack of occupation certificate being issued by the government agencies. He relies upon the said clause 12 to contend that non-issuance of completion certificate would be covered under it as the result of an act of the Government. He submits that there is no delay; that the possession could not be handed over till the occupation certificate had been issued by the Government of Haryana and a

letter was issued in this regard. He refers to Para 10 of the Written Statement which reads as under:

“10. Para 10 is admitted to the extent that the construction of the project Plaza Gardenia at Gurgaon was completed in terms of the agreement dated 27-11-2002. There is no delay on the part of the defendants to hand over the possession. The possession could not be handed over till the occupation certificate has been granted by the Government of Haryana, Chandigarh. The occupation certificate has now been granted by the Government of Haryana but the plaintiff is not entitled to possession for other reasons.”

This court is of the view that the said averments do not state as to when the construction of the properties was completed or when the occupation certificate was sought from the Government of Haryana. The pleadings are silent on this issue. No evidence has been led in this regard. Therefore, this submission of the learned counsel for the defendants is unfounded and is accordingly rejected.

The learned counsel for the plaintiffs submits that indeed no issue has been framed by this Court since this was never the case of the defendants.

The learned counsel for the defendants submits that although there may be a clause stipulated regarding liquidated damages and quantum of damages to be paid, the plaintiffs would have to show that the damages were actually suffered by the claimants. He relies upon Section 74 of the Indian Contract Act, 1872 which reads as under:

“74. Compensation for breach of contract where penalty stipulated for.- 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.”

He further relies upon the judgment in ***Airports Authority of India vs. R.K.Singhal*** in RFA No.576/2002 which reads as under:

4. *The law in this regard is well settled and three premier judgments of the Hon'ble Supreme Court are the judgments in the cases of Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515;AIR 1963 SC 1405, Maula Bux Vs. UOI, 1969 (2) SCC 554 and Union of India Vs. Raman Iron Foundry (1974) 2 SCC 231. It has been held in these judgments that clauses of forfeiture of liquidated damages by their very nature are hit by Section 74 of the Contract Act, 1872 inasmuch as such clauses are in the nature of penalty and at best only provide for the upper limit for claim of damages, and which if capable of being proved, have to be proved before the amount paid as earnest money can be forfeited. It is the ratio of these Supreme Court judgments that mere breach of contract eo instanti does not entitle the aggrieved party to forfeit the amount. The Constitution Bench in the case of Fateh Chand(supra) has specifically referred to the fact that the fine distinctions drawn in English law have been obliterated by Section 74 of the Contract Act, and as per which all clauses of liquidated damages are to be treated as bad, once losses otherwise can be established, and only on establishing of which forfeiture can take place. The relevant observations of the Supreme Court in the aforesaid judgment of Fateh Chand (supra) are 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 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 maybe, 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 interrorem 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 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 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)”

The learned counsel further relies upon the judgment in ***Maya Devi vs. Lalta Prasad*** AIR 2014 SC 1356. The learned counsel for the defendants

submits that damages @ Rs.30/- per sq.ft. per month as stipulated in the agreement was the upper limit of damages payable to the plaintiffs. According to him, the amount of damages suffered would have to be established through evidence, which the plaintiffs have failed to lead. He contends that the principle that what emerges from the aforesaid precedents is that the Court would have take consider whether i) damages were suffered by the claimant and ii) what reasonable compensation could be awarded. He submits that CS(OS) 1370/2010 seeks an amount of Rs.69,82,020/- of which Rs. 15 lacs has been paid to the plaintiff although the consideration amount was only Rs.68,75,820/-, therefore, what the plaintiff is seeking an amount more than what has been paid by him.

This Court is of the view that the said argument is wholly misconstrued and untenable because the purchaser of a property expects the property to be delivered to him within a certain period of time or by a fixed date. In the present case, the time was specified and the deprivation of use of the same from that time onwards entailed a fixed amount of damages. This Court is of the view that *Airports Authority of India* (supra) dealt primarily with earnest money being forfeited by the seller, whereas in the present suit, the claimant/plaintiff is neither at fault nor in default of any payment of the consideration amount. The question of actual loss having been suffered was considered because all along the seller had the benefit of the consideration amount and had then sought to forfeit the said amount because of default in further payments by the purchaser, whereas in the present case, all monies had already been paid to the seller, who, in turn, has been in default of delivery of possession of the property. Therefore, the said precedent is distinguishable on facts and its ratio inapplicable to the present case.

Analysis

The defendants have clearly defaulted in delivering possession of the suit properties to the plaintiffs. As per the terms of the agreements entered into between the plaintiffs and the defendants, the suit properties were to be constructed and handed over to the plaintiffs latest by 30th September, 2004, however, the defendants failed to honour their part of the agreement and thus, are liable to pay liquidated damages as set out in Clause 48 of the agreement. The defendants' argument that the plaintiffs must prove the injury and losses incurred by them due for this delay is untenable. Any person would expect to receive returns on an investment within a reasonable period of time. The plaintiffs had paid full and final consideration for the suit properties beforehand and the period of default on part of the defendants extended to 11 years,. Time was of the essence in the agreement and a delay of 11 years is highly unreasonable. Moreover, a one-time payment of Rs. 15 lacs cannot constitute a full and final settlement towards the damages owed by the defendants. The plaintiff was forced to accept Rs. 15 lacs as he had not been delivered possession and was constrained to accept some monies in response to what he had invested with the defendants. The acceptance of Rs. 15 lacs would not result in waiver of any future claims that the plaintiffs would have against the defendants. The agreement between the parties is clear on this aspect. Even till date, the defendants have failed to transfer possession of the suit properties to the plaintiffs and 86 months have passed since the defendants entered into four separate agreements with the plaintiffs on 26.06.2008.

Hence, the aforesaid arguments of the defendants are rejected since they are without basis. In terms of Clause 12 read with Clause 48 of the

agreements, the plaintiffs are entitled to damages @Rs.30/- per sq.ft. per month on which interest shall be payable from three years prior to the filing of the suit @ 18% per annum for each month of default.

Accordingly, the suits are decreed in favour of the plaintiffs. The defendants are directed to pay the plaintiff in CS(OS) 1370/2010 a sum of Rs.54,82,020/- along with interest @ 18% per annum till the date of realisation of the amount and further damages to the tune of Rs.1,85,81,250/- for the delay in delivering possession along with interest @ 12% per annum till the date of realisation of the amount. Similarly, in CS(OS) 1369/2010, the defendants are directed to pay the plaintiffs a sum of Rs.23,20,560/- along with interest at 18% per annum till the date of realisation of the amount and further damages to the tune of Rs.83,15,340/- for the delay in delivering possession along with interest @ 12% per annum till the date of realisation of the amount. The defendants are further liable to pay costs of Rs.1,00,000/- to the plaintiffs in each of the suits.

Decree sheet be drawn up accordingly.

The suits are disposed-off in terms of the above.

NAJMI WAZIRI, J

MAY 07, 2015/ak/nrk