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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment pronounced on: 27.07.2018

+ O.M.P.(COMM) 301/2017

PIJUSH KANTI ROY AND ORS. Petitioners

Through Ms.Sushila Ram Verma and
Ms.Taruna Verma, Advocates

versus

EXPERION DEVELOPERS PVT. LTD. Respondent

Through Mr.Pankaj Vivek, Mr.A.Tripathi and
Ms.Bindya Rani, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to impugn the award dated 29.04.2017 passed by the learned Arbitrator.

2. The brief facts, which led to filing of the present petition, are that the petitioners jointly booked apartments being Flat Nos.502 and 702 in Tower - B in the Project HEARTSONG at Gurgaon. The total costs of each flat was Rs.1,30,32,933/-, respectively. On 25.12.2014 the petitioners requested the respondent to cancel the allotment of Flat Nos.502 and 702 as they were in financial difficulty. On 31.12.2014 the allotment of flats was cancelled. Regarding Flat No.502, the petitioners paid a total sum of Rs.76,68,422/- including payment from the bank from where a loan had been taken of Rs.53,01,873/-. For Flat No.702, a total payment of Rs.66,57,225/- including

payment from the bank from where a loan had been taken of Rs.43,43,103/- had been made. The respondent returned the amounts that had been received from the bankers. However, the balance amount, namely, Rs.23,66,549/- for Flat No.502 and Rs.23,14,122/- for Flat No.702 were withheld and forfeited by the respondent.

3. As disputes arose between the parties, the petitioners after having invoked the arbitration clause on 14.10.2015, filed a petition before this court. This court appointed Sh.Pradeep Chaddah, Former District & Sessions Judge, Delhi as the sole arbitrator. The learned Arbitrator has given his award dated 29.04.2017.

4. A perusal of the award would show that the learned arbitrator noted that as per the Apartment Buyer Agreement 15% of the basic price was to be forfeited. Further, the said agreement executed by the petitioners was never challenged. It was noted that forfeiture was mutually agreed upon. The learned arbitrator noted that on 22.02.2015 the four petitioners have acknowledged that while cancelling the Agreement certain amounts can be forfeited not limited to earnest money. The petitioners gave their consent regarding the proposed forfeiture and requested the respondent to proceed further. On 10.06.2015 two of the petitioners regarding Flat No.502 signed a full and final settlement receipt for Rs.53,01,873/- and also stated that nothing further remains to be paid. Similarly, receipt dated 29.04.2015 was signed regarding Flat No.702 according to which the petitioners received Rs.43,43,103/- and no further claims remain. The Award notes that the petitioners have done everything with open eyes and the claimants/petitioners requested the respondent to proceed when they were informed that as per agreement the stated sum is to be forfeited. There is no

allegation raised in the petition of fraud or coercion on the part of the respondent. Rather the respondent has paid some additional amount over what was agreed to be paid to the petitioner.

Further the award noted that the petitioners relied upon the judgment of the Supreme Court in the case of *M/s Kailash Nath and Associates v. DDA & Anr., 2015 (4) SCC 136*. The learned arbitrator, however, noted that the judgment cited by the petitioners do not apply to the facts of the present case. The learned arbitrator concluded that the matter was finally settled and nothing was left for arbitration. The claim petition was accordingly dismissed.

5. The grievance of the petitioners is that without permitting the parties to lead evidence in a summary manner, the learned arbitrator had passed the award against the legal position and against the principle of fairness and equity. At best, as per the agreement between the parties, the respondent could deduct some earnest money. However, the respondent has not only deducted the earnest money at 15% but also alleged brokerage paid and interest for delayed payment by the petitioners which is grossly illegal.

6. I have heard the learned counsel for the parties.

7. The learned counsel for the petitioners has reiterated relying upon the judgments of *M/s Kailash Nath and Associates v. DDA & Anr.*, (supra) and *National Insurance Company Ltd. v. Boghara Polyfab (P.) Ltd., AIR 2009 SC 170* to contend that the earnest deposit is deducted contrary to the legal position.

8. The learned counsel for the respondent has taken me through the documents executed by the petitioners stating that in terms of the agreement between the parties, the petitioners agreed to the forfeiture which has been

done by the respondent. It is pleaded that forfeiture was done in terms of the agreement between the parties which was duly accepted by the petitioners. He further submits that receipt showing full and final settlement were executed by the petitioners in April 2015. He states that the petitioners have belatedly woken up much later sending a legal notice on 04.09.2015. However, nowhere has it been stated or pleaded by the petitioner that the documents/receipts executed by them were under coercion. It is pleaded that the award has been rightly passed.

9. I may see some of the relevant facts of the case. As per the agreement, on cancellation of the booking the respondent company was entitled to forfeit the earnest money. The clause 5 of the agreement between the parties dated 09.05.2013 and 10.09.2013 provides for earnest deposit stating that 15% of the total amount plus interest paid and accrued on delayed payments and commission/ brokerage paid by the company will be treated as earnest money for the purpose of this agreement. It further states that in case of cancellation/ termination of the agreement, the respondent shall be entitled to forfeit the entire earnest money. Clause 5.1 of the Apartment Buyer Agreement dated 10.09.2013 states as follows:

“It is agreed that 15% of the total BSP, Car Parking Use Charges (if applicable) and any amounts paid towards statutory taxes, levies and charges, interest paid and accrued on delayed payments and commission/brokerage/margin paid by the company will be treated as Earnest Money for the purposes of this Agreement. In case of any cancellation/termination of this Agreement as per provisions specified herein, the company shall be entitled to forfeit the entire Earnest Money or in case the total Earnest Money has not been received as at the date of such cancellation/termination then all of such money that may have been paid by the Buyer until the demand and balance of

the Earnest Money from the Buyer. Upon cancellation/termination of this Agreement, the Buyer will be left with no right, title, lien, interest, charge or claim of any nature whatsoever on the Apartment and the company shall be entitled to deal with the Apartment at its discretion and in the manner it deems fit. Any refund in this context shall be without any interest and shall be made after the re-allotment of the Apartment to another party. This will be without prejudice to any other remedies and rights of the company to claim damages which the company might have suffered due to such termination of this Agreement.”

10. On 23.04.2014 the respondent sent a communication to the petitioners cancelling the allotment of the flats in view of the fact that there has been a delay on the part of the petitioners in making payments. It is thereafter that the petitioners on 22.02.2015 have written for cancellation of the Apartment Buyer Agreement due to unavoidable circumstances. By the said communication, the petitioner confirmed that on cancellation of flats as per terms of the Apartment Buyer Agreement the earnest money stands forfeited and the balance will be paid to the bank. Respondent had on 10.04.2015 informed the petitioners about the amount being forfeited as earnest money and also demanded additional sum from the petitioners after deduction of the earnest money as there was a shortfall in payment of the dues of the bankers. On 29.04.2015 the petitioners issued a receipt stating that the payment made to the banks is in full and final settlement of the refund payable by the respondent on cancellation/surrender of allotment. The receipt states that the said amount paid to the bank is in full and final settlement of all the dues and claims including interest of any nature whatsoever against the company and also stating that nothing further remains payable by the company to the

petitioners.

11. As per the statement of chart/claim filed by the respondent company in court, the total cost of Flat No.702 is Rs.1,30,32,933/-. The petitioners had paid for this flat an amount of Rs.64,37,078/-. The respondent out of this, forfeited Rs.23,14,122/- and paid the balance to the bank to clear the dues of the bank. Hence about 35% of the amount which has been paid by the petitioners has been deducted. Similar picture is there regarding Flat No.502. The total cost of the flat is the same as of Flat No.702 i.e. Rs.1,30,32,933/-. The petitioners had paid Rs.74,96,294 for Flat No. 502. The respondent has forfeited Rs.23,66,549/-, i.e. roughly 35% and paid the balance to the bank to clear the dues of the bank. The deduction includes 15% of the basic sale price of Rs.17,45,190/-, alleged brokerage paid of Rs.4,07,807/- and interest accrued thereon i.e. for Flat No.702 it is Rs.1,61,125/- and for Flat No.502 it is Rs.2,13,552/-. This interest is for the alleged delayed payment made by the petitioners.

12. I may have a look at the legal position regarding deduction of earnest money and damages on cancellation of a contract. The Supreme Court in ***Kailash Nath and Associate v. DDA and Anr.***, (supra) noted as follows:

“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.....

Section 74 of the 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.

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.

35. Similarly, in *Maula Bux v. Union of India*, it was held:

"Forfeiture of earnest money under a contract for sale of property- movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases: *Kunwar Chiranjit Singh v. Har Swarup*, A.I.R.1926 P.C.1; *Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi*, I.L.R. All.166; *Muhammad Habibullah v. Muhammad Shafi*, I.L.R. All. 324; *Bishan Chand v. Radha Kishan Das*, I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in

respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "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". It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

“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.”

13. The facts of the present case show that the respondents have forfeited approximately 35% of the payments made by the petitioners, i.e. roughly

Rs.23 lacs out of Rs.64 lacs paid. The total sale consideration payable for each flat was about Rs.1.30 crores and what has been forfeited also amounts to roughly 18% of the said total agreed sale consideration.

14. The legal position as noted above is that 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. Where the amount fixed is in the nature of penalty only reasonable compensation can be awarded. The reasonable compensation can be not exceeded the penalty. Further, damage or loss caused is *sine qua non* for the applicability under sections 73 and 74 of the Contract Act. The proof of actual loss or damage is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated damages named in the contract, if a genuine pre estimate of damage or loss can be awarded.

15. In the present case, the learned arbitrator has failed to apply the settled legal proposition to the facts of the case. The learned arbitrator has merely based on terms of the contract and the receipts executed by the petitioner concluded that no arbitral dispute survives. In fact, even the evidence was not directed to be led.

16. In the aforesaid judgment of *M/s Kailash Nath and Associates v. DDA & Anr.*, (supra), the petitioner had in a public auction made a bid for the plot in question at Rs.3.12 crores which bid was accepted. After cancellation of the contract, DDA in re-auction received a bid for Rs.11.78 crores meaning thereby DDA suffered no damages. The Supreme Court held that compensation can only be given for damages or loss suffered. If damages or loss is not suffered, law does not provide for a windfall.

17. It would also be useful to note the judgment of the Constitution Bench of the Supreme Court in *Fateh Chand v. Balkishan Das*, AIR 1963 SC 1405. In para 11, the court noted that it cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract. That was a case in which a party entered into an agreement to sell. Rs.1000/- was paid as earnest. On receipt of possession another payment of Rs.24,000/- was to be made. Vendee was to get sale deed registered by a particular date, failing which the sum of Rs.25,000/- shall be deemed to be forfeited and the agreement cancelled. The Supreme Court observed as follows:

“21. 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; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs. 25,000/- consisting of Rs.1000/-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. 1,000/- which was paid as earnest money. We cannot however agree with the High Court that 10 per cent 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 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. 1,000/-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. 1,000/- (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 of 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."

18. In the present case, the respondent cannot argue that the damage or loss suffered was impossible to prove. The respondent builder was obliged to lead evidence to show what damages he has suffered. Merely because certain amount was stated in the agreement with stipulation that the respondent would forfeit this amount on cancellation of the agreement by the petitioner does not give a right to the respondent for forfeiture. The said clauses providing for forfeiture of 15% of the total sale consideration plus commission paid to the broker plus interest on delayed payment etc. as earnest deposit was a clear stipulation *in terrorem* i.e. stipulation by way of penalty. The respondent had to lead evidence to show the damages suffered. He could only be awarded reasonable compensation.

19. The learned arbitrator in the Award has permitted the respondent to forfeit large amounts allegedly on the ground that forfeiture of the earnest deposit is in terms of the contract between the parties without giving any opportunity to prove the facts and the issues noted above. The respondent had to prove the damages suffered. He has retained large amounts for a long period without handing over possession of the flat. He would have sold the

flat subsequently. Nothing is on record to show how much he recovered. Merely because the petitioner executed a receipt showing full and final payment did not absolve the respondent the duty to deduct amounts as per law. As the respondent deducted in excess, disputes were raised by the petitioners. The Award suffers from a grave error of law. It is passed contrary to the provisions of law. Upholding the forfeiture of such large amounts as damages which are penal on the face of it being unrelated to the damages suffered by the respondent is clearly unwarranted. The award is contrary to the Fundamental Policy of Indian Law. No person can be allowed unjustly and unfairly recover amounts in this manner.

20. The Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, noted as follows:

“In DDA v. R.S. Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus:

“21. From the above decisions, the following principles emerge:

(a) An award, which is

- (i) contrary to substantive provisions of law; or
- (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

.....”

21. I, accordingly, *set aside* the award dated 29.04.2017. Liberty is granted to the petitioners to take steps for appointment of a fresh arbitrator as per law.

22. The petition stands disposed of.

JAYANT NATH, J.

JULY 27, 2018/v