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IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.54/2024

RAJU D SOUZA … APPELLANT

Versus

ANTHONY LOBO AND ANR. … RESPONDENTS

Mr P. A. Kamat, Advocate for the Appellant.
Mr Nigel da Costa Frias with Mr R. Panchal, Advocates for the Respondents.

CORAM: M. S. KARNIK, J.

DATED: 28th FEBRUARY 2025

ORAL JUDGMENT:

1. This Second Appeal is admitted on the following substantial question of law:

> (I) Whether the payment of ₹1,000/- per day provided for by the agreement for every day delay committed by the appellant in handing over vacant and peaceful possession of the said flat on the termination of the licence is a stipulation by way of penalty in terms of Section 74 of the Contract Act in which case the mesne profit needed to be calculated on the principle of reasonable compensation not exceeding penalty so stipulated?

2. By consent heard forthwith.

3. The challenge in this Appeal is to the Judgment and Decree dated 29.04.2024 passed by the First Appellate Court i.e. District Judge-2 at Mapusa, Goa, thereby dismissing the Appeal filed by the original Defendant.

4. The Appellant is the original Defendant. The Respondents are the owners of a flat admeasuring 58 square metres. Vide an instrument of license dated 01.08.2005, the suit flat was given to the Defendant on leave and license basis for a period of 11 months subject to payment of a license fee of ₹2,500/- per month and a sum of ₹150/- per month towards water charges.

5. The Defendant did not vacate the suit premises upon the expiry of the agreement. Therefore, the Plaintiffs filed a suit with a prayer that the Defendant be directed to vacate and hand over the suit flat to the Plaintiffs and to pay the arrears of the license fee due, amounting to ₹7,800/- and to pay the water charges amounting to ₹1,000/-. It appears that thereafter, the Plaintiffs allowed the Defendant to occupy the suit premises for a further period from 01.10.2006 to 31.12.2006.

6. The agreement entered between the Plaintiffs and the Defendant set out the terms that if the Defendant failed to vacate the suit premises, he would be liable to pay ₹1,000 per day for each day's delay. The Defendant did not hand over the premises after the expiry of the period of the license i.e. on 31.12.2006.

The Defendant continued to occupy the premises and finally on 16.12.2011, the Defendant vacated the premises. It is for this period from 01.01.2007 to 16.12.2011 that the recovery is sought in terms of the agreement at the rate of ₹1,000/- per day.

7. The Trial Court by Judgment and Decree dated 02.08.2019 directed the defendant to pay a sum of ₹1,000/- per day to the plaintiff from 01.01.2007 till 16.12.2011 without any interest on the same as mesne profit. The First Appellate Court dismissed the appeal.

8. The Trial Court and the First Appellate Court on the basis of the agreement held that the defendant is liable to pay compensation at ₹1,000/- per day in case he defaulted in handing over the suit flat on 31.12.2006.

9. Mr P. A. Kamat, learned counsel for the appellant submitted that the payment of ₹1,000/- per day for every day's delay in handing over the possession of the flat is unreasonable and harsh. It is further submitted that the evidence on record indicates that at the highest the plaintiff could have got a rent of ₹8,000/- per month for the said flat during this period. It is further submitted that the amount of ₹1,000/- per day stipulated in the agreement was by way of penalty, in which a case the Courts ought to have been guided by principle laid down in Section 74 of the Contract Act, 1872.

10. Mr Nigel da Costa Frias appearing for the respondents submitted that there are concurrent findings of the courts below which cannot be regarded as perverse to warrant interference. It is submitted that the agreement clearly stipulated payment of a sum of ₹1,000/- per day for every day delay committed for handing over possession. It is submitted that the defendant had admitted entering into such agreement and therefore was liable to pay the amount in terms of the said agreement. It is further submitted that even after the expiry of the licence, it took the defendant four years and eleven months to hand over possession and therefore in such circumstances no fault could be found in the finding that the defendant needs to pay the amount. Mr Costa Frias relied upon Section 92 of the Evidence Act to submit that as the defendant has already admitted the execution of the agreement making him liable to pay the aforesaid amount, it was not open for him to lead any other evidence to demonstrate the amount of compensation for any loss caused to the plaintiff which naturally arose in the usual course of things from breach of contract, or which the parties knew, when they made the contract, to be likely to result from the breach of it. It is submitted that the amount stipulated can never be regarded as penalty and hence the appeal should be dismissed.

11. The only issue that remains to be dealt with is about the order of the Trial Court and the First Appellate Court as regards determining the mesne profit. The relevant clause of the agreement dated 20.09.2006 is clause (n) which reads thus:-

*" **(n)** To pay to the Licensors the sum of Rs.1000/- (Rupees One thousand only) per day for every day of delay committed by the Licensee in handing over the vacant and peaceful possession of the said flat on the termination and/or expiry of this licence."*

12. In the context of the submissions made by the learned counsel, reference needs to be made to Chapter VI of the Contract Act, 1872 which provides for consequences of breach of contract. Relevant are Sections 73 and 74 of the Act which read thus:-

73.Compensation for loss or damage caused by breach of contract.—*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.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—*When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

Explanation.—*In estimating the loss or damage arising from a breach of contract, the means which existed of* *remedying the inconvenience caused by the non-performance of the contract must be taken into account.*

74. Compensation for breach of contract where penalty stipulated for.—1*[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.*

Explanation.—*A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]*

Exception.—*When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 2[Central Government] or of any 3[State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*

Explanation.—*A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.*

13. This is a case where despite the termination of licence the defendant did not hand over possession. He continued to occupy the premises for a period of four years and eleven months. In the ordinary course, when the contract has been broken, the plaintiff was entitled to receive from the defendant, compensation for the loss or damage caused to him, 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.

14. In the present case, there was stipulation of an amount of ₹1,000/- per day for every day's delay in handing over the possession. This stipulation in my opinion, was by way of penalty as provided by Section 74 of the Contract Act. In terms of Section 74, the plaintiff would then be entitled to receive from the defendant reasonable compensation not exceeding the penalty stipulated. The agreement dated 20.09.2006 which stipulates the penalty is binding on the defendant. The defendant has handed over possession after four years and eleven months. The plaintiff would be entitled to a reasonable compensation in terms of Section 74 of the Contract Act not exceeding the amount of penalty stipulated.

15. Let me determine what should be a reasonable compensation. The evidence on record discloses that the flat in question would have fetched rent of approximate ₹8,000/- per month for the default period during which the defendant was occupying the said flat after termination of license. As per the agreement dated 20.09.2006, the appellant was to vacate the flat on or before 01.01.2007. He vacated the flat on 16.12.2011. The license fee payable as per the agreement was ₹2,650/- per month. The agreement provides that the appellant was required to pay the respondents sum of ₹1,000/- per day for every day's delay in handing over the possession. The delay in handing over the possession is four years and eleven months. The mesne profit payable as per the stipulation contained in the agreement is ₹18,11,000/-. As per the evidence of the plaintiff in the suit, for the relevant period the market rent payable for the flat in question would be ₹8,000/- to ₹10,000/- per month. In my opinion in such circumstances imposing penalty of ₹1,000/- per day for the default would be harsh and cannot be said to be reasonable. The plaintiff is entitled to a reasonable compensation not exceeding the amount prescribed in the agreement.

16. In my opinion, the rent of ₹8,000/- per month should be taken into consideration for payment to the plaintiff during the default period. The same will work out to ₹4,80,000/-. The reasonable compensation is determined at ₹8,000/- per month for the period from 01.01.2007 to 16.12.2011. The total amount payable would be ₹4,72,000/-.

17. From the date of the decree of the Trial Court, if interest @ 12% p.a. is calculated, the amount payable would be ₹7,55,200/-. If any rent is actually paid for the default period, the same of course will be adjusted. In my opinion, a lumpsum of ₹5,25,000/- payable by the defendant to the plaintiff would serve the interest of justice. The amount be paid within a period of two months from today. If the amount is not paid within two months from today, the said amount will carry further interest @ 9% p.a. till realisation. The findings of the Trial Court as well as the First

Appellate Court are interfered with to that extent. The decree of the First Appellate Court stands modified to the aforesaid extent.

18. The appeal is partly allowed in the above terms. There shall be no order as to costs.

M. S. KARNIK, J.