



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

+ **RFA No. 137/2010**

% **4th November, 2011**

SUDHIR RAWAL Appellant
Through : Mr. K.C. Dubey, Advocate.

versus

SATISH BATRA Respondent
Through : Mr. Surender Chauhan, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 23.10.2009. By the impugned judgment, the trial Court dismissed the suit for recovery of Rs.7 lacs which was filed by the appellant/plaintiff being the amount which was paid by the appellant/plaintiff/proposed buyer under an agreement to sell with the respondent/defendant/proposed seller. The trial Court upheld the entitlement of the respondent/defendant to forfeit the amount of Rs.7 lacs



received pursuant to the agreement to sell.

2. The facts of the case are that the parties entered into an agreement to sell dated 29.11.2005 whereby the respondent/defendant had agreed to sell to the appellant/plaintiff the property bearing No.14/11, Second Floor, Punjabi Bagh, New Delhi for a total sale consideration of Rs.70 lacs. An advance payment of Rs.7 lacs was received by the respondent/defendant under the agreement to sell.

3. An entitlement of the proposed seller to forfeit the advance price or earnest money received is an issue which is no longer res integra. The Constitution Bench of the Supreme Court way back in the judgment of ***Fateh Chand Vs. Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405*** has held that even if the proposed buyer is guilty of breach of contract, the seller cannot forfeit the advance price or earnest money unless he pleads and proves that loss has been caused to the seller/defendant on account of breach of contract of the appellant/plaintiff/buyer. The relevant paragraphs of the decision in the case of ***Fateh Chand (supra)*** are 8,10,15 and 16 and the same read 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 material 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 may be, 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 *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.

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 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.

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 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 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)

4. Before this Court, it is not disputed by the counsel for the respondent/defendant that the respondent/defendant neither pleaded nor proved the case that the respondent/defendant had suffered loss on account of breach of contract which is stated to have been committed by the appellant/plaintiff/proposed buyer. Accordingly, in view of the decision in the case of **Fateh Chand (supra)**, respondent is entitled to forfeit only a nominal amount and not a huge amount which is received. Learned counsel for the respondent sought to argue that there is cross-examination and admission on behalf of the appellant/plaintiff with respect to loss being caused, however, no amount of evidence can be looked upon the plea which is not put forth i.e. no evidence can be looked into unless firstly there is pleading to that effect and an issue in this regard is got framed by the person who is interested to seek a decision on that issue in his favour as in the present case that loss has been caused on account of breach and hence the entitlement to claim the damages.

5. In view of the facts of the present case, and the ratio of the Constitution Bench decision in the case of **Fateh Chand (supra)**, the impugned judgment is against the law and is accordingly set aside. The respondent/defendant however will be entitled to forfeit an amount of



Rs.50,000/- out of the amount of Rs.7 lacs and the respondent/defendant bound to refund a sum of Rs.6,50,000/- to the appellant/plaintiff and for which amount of Rs.6,50,000/- a decree is passed in favour of the appellant/plaintiff and against the respondent/defendant. Appellant is also held entitled to interest @ 12% per annum simple from 29.11.2005 upto the date when the decreed amount is paid to the appellant/plaintiff. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

NOVEMBER 04, 2011
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