
(2012) 07 DEL CK 0151
In the Delhi High Court
Case No : CS (OS) No. 3129 of 1996

Alfa Bhoj Pvt. Ltd.

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (2012) 6 AD 429 : (2012) 4 BC 167 : (2012) 191 DLT 548 : (2012) 5 ILR Delhi 447

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Anil Airi, Ms. Sadhna Sharma, Mr. Ravi Kishan and Mr. Prityush Sharma, for the Appellant; Ashutosh Lohia standing counsel for N.D.M.C, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta. J

1. The present suit has been filed by the plaintiff for recovery of Rs. 30,90,000/- alongwith interest at 24% per annum. The total amount of Rs. 30,90,000/- is split up into four parts, one amount of Rs. 50,000/- being the earnest money amount, second amount of Rs. 20 lacs being two months advance licence fee, thirdly of interest claim of Rs. 40,000/- upto the date of the suit, and fourthly the claim of Rs. 10 lacs towards loss of reputation. The causes of action which are stated in the plaint, though run into several parts, however, learned counsel for the plaintiff at the stage of final arguments confined his claim to the recovery of Rs. 20 lacs arguing that on account of failure of the plaintiff to comply with the formalities for creation of a licence for the restaurant space, at best the defendant in terms of Clause 2 of the general terms and conditions of the tender could have forfeited an amount of Rs. 50,000/- but not the entire amount with it of Rs. 20,50,000/-. It is prayed that the plaintiff be refunded the amount of Rs. 20 lacs, and the defendant be held entitled to forfeit only the sum of Rs.

50,000/-.

2. The facts of the case are that the defendant on 12.2.1996 by insertion of advertisements in newspapers invited tenders for licence of an air conditioned restaurant space measuring 5426 sq. ft. (approximately) located at Palika Parking Complex, Connaught Place, New Delhi. Since the first highest tenderer failed to complete the formalities, therefore, after forfeiting the earnest money amount of such tenderer, the plaintiff was offered the restaurant on licence vide the letter dated 30.7.1996 (Ex.PW1/4) of the defendant. As per the terms and conditions of auction (Ex.P-2), the plaintiff had to deposit a total amount of six months' license fee, of which, an amount of Rs. 20 lacs was the advance licence fee for two months, and Rs. 40 lacs was to be kept as interest fee security deposit by the defendant. The plaintiff was also liable to pay advance AC charges for one month. Though there are allegations and counter-allegations, the plaintiff alleging that defendant was guilty of concealment of facts etc etc, and, the defendant relying on the terms and conditions of the tender to show that what was offered was "as is where is basis" and the plaintiff was in fact duty bound to inspect the premises and not raise any objection on any ground thereafter, I am not required to go into such aspects in the present judgment.

3. I have already stated above that counsel for the plaintiff has gone on the basis that the plaintiff has committed breach by not completing the formalities and because of which the contract of license could not be entered into between the parties. On that basis it was argued that in terms of Clause 2 of the terms and conditions of the allotment, the defendant had only a right to forfeit the earnest amount of Rs. 50,000/- and no right to forfeit any other/more amount. Relying on the term no.2, it is argued that in case of non completion of formalities, the specific forfeiture which has been provided is only of Rs. 50,000/- and nothing more. It is also argued that there is no other clause of forfeiture in the terms and conditions as per which the amounts were given by the plaintiff to the defendant and thus neither advance license fee nor security deposit (if the same had been deposited) could be forfeited.

4. The following issues were framed by this Court on 9.9.1997:-

1. Whether the plaintiff is a company duly incorporated under the companies Act and Shri Harish Bhasin is competent to institute the present suits OPP
2. Whether the defendant is entitled to forfeit the earnest money and the security deposit amount, of the plaintiffs OPD
3. Whether the plaintiff is entitled to claim damages, if so, to what amounts OPP
4. Whether the plaintiff is entitled to claim interest, if so, at what rate and on which amounts OPP
5. To what amount the plaintiff is entitled to recover from the defendants OPP
6. Relief.

5. So far issue no.3 is concerned, as already stated above, the same is not pressed by the plaintiff. Issue no.1 is not pressed by the defendant, especially in view of the decision of the Supreme Court in the case of United Bank of India Vs. Naresh Kumar and others,

6. The main issue is therefore issue no.2 as to the entitlement of the defendant to forfeit the earnest money and the advance licence fee paid of Rs. 20 lacs (wrongly called security deposit amount in this issue). As already stated, there is no objection to the defendant forfeiting the earnest money of Rs. 50,000/-, and what is pleaded is that the defendant wrongly forfeited the advance license fee of two months totaling to Rs. 20 lacs and hence plaintiff is entitled to refund of the same.

7. In order to appreciate the issue at hand, it is necessary to reproduce Clause 2 of the terms and conditions of allotment/tender, and which reads as under:-

Each Tenderer shall attach to the tender application earnest money in the shape of Bank Draft drawn in favour of the Secretary, NDMC equal to the amount of Rs. 50,000/-(Rs. Fifty Thousand only). The earnest money so deposited by a tenderer whose tender is not accepted shall be refunded after the Council has taken a decision regarding acceptance/rejection of the tenders. The Earnest money is liable to be forfeited in case the tenderer on acceptance of his offer fails to complete any of the formalities of allotment or withdraws or amends his offer after submitting the tender application.

(underlining is mine)

8. The aforesaid underlined portion of Clause 2 leaves no manner of doubt that in case the plaintiff fails to comply with the formalities of allotment or withdraws his offer after submitting the tender application, the entitlement of the defendant is specifically restricted to its entitlement to forfeit the earnest money deposit of Rs. 50,000/-. Learned counsel for the defendant could not show me any other clause in the terms and conditions of allotment which refers to entitlement of the defendant to forfeit any other amounts including the security deposit amount or any advance licence fee deposited.

9. Counsel for the defendant had placed reliance on Clauses 4,48 and 51 of the said tender conditions to argue that even the advance license fee amount deposited with the defendant by the plaintiff can be forfeited. In order to appreciate the arguments, Clauses 4,48 and 51 are reproduced here-in-below.

4. The licensee shall be required to deposit six months licence fee in cash or Bank Draft in the Council Treasury on receipt of acceptance of the offer. Out of this deposit, licence fee equal to four months licence fee will be reckoned and adjusted towards security for due fulfillment of the contractual obligations and the balance amount will be adjusted against monthly licence fee becoming due for two months from the date of commencement of licence fee. No interest will be payable on this deposit. Earnest money deposited by the tenderer/applicant

shall be adjusted in the security deposit referred to above. The security will be returnable only on successful completion of the period/term of licence and fulfillment of contractual obligations on the part of the licensee. In this regard, the decision of the licensor shall be final and binding on the licensee.

48. In the event of breach of any of the terms and conditions of licence and on cancellation with or without assigning any reasons, the licensee shall hand over the vacant possession of the cancellation of allotment and the licensee shall be liable to pay the damages at the rates as may be determined by the licensor from time to time from the date of cancellation of licence till the date of vacant possession of the premises is handed over to the licensor besides forfeiting the security in the event of breach of any of the terms and conditions of the licence and default in payment of monthly licence fee.

51. In the event of breach of terms and conditions of the licence, the council shall be entitled to forfeit the whole or part of the security deposit besides terminating and revoking the licence and on the revocation of licence it shall be the duty of the licensee to quit and vacate the premises without any resistance and obstruction and give complete control of the restaurant to the council.

10. Surely Clause 4 has no application to the present case inasmuch as this nowhere entitles or provides for the defendant to forfeit the advance license fee deposited. Clause 48 only comes into play once there is a contract of license which is entered into by the parties. Though counsel for the defendant sought to contend that contract of the license was completed when the defendant sent its letter dated 30.7.1996, however, this argument is one of the futility inasmuch as admittedly, the plaintiff was never given possession of the licensed premises and when we look at the various terms as stated in the terms and conditions, the contract of license is only complete after the formalities are completed by the plaintiff. Once the formalities were not completed, and more so because possession of proposed licensed premises could not have been and was not transferred to the plaintiff without the completion of the formalities, the contractual relationship never came into existence. At best the contract was till the stage of acceptance of tender, and for the contractual position till this date, there is a specific term no.2 which deals with this eventuality in entitling the forfeiture of the earnest money deposited of Rs. 50,000/-. Useful reference can be had to the judgments of the Supreme Court in the cases of National Highway Authority of India Vs. Ganga Enterprises and Another, and State of Maharashtra and Others Vs. A.P. Paper Mills Ltd., which hold that there is a contract with respect to invitation to tender and which contract is independent of the main contract which is subsequently entered into. Accordingly, I hold that the argument of the defendant has no substance. Clause 48 comes into play post the contractual license being entered into i.e. on the formalities being completed including of the plaintiff giving the amount towards the security deposit being four months license fee and AC charges of one month and possibly entering into of the licence deed. Clause 51 also accordingly will have no application in the

present case inasmuch as this clause deals with the breach of terms and conditions of the license i.e. post the main contract of license coming into existence.

11. Clause 2 of the terms and conditions stated above clearly provides for liquidated damages. Liquidated damages are the subject matter of Section 74 of the Contract Act, 1872. The law with respect to Section 74 of the Contract Act is contained in the Constitution Bench judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Das, of the said judgment are relevant and which read as under:-

7. The Attorney-General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1,000/- which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000/- out of the amount paid by the defendant was stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000/- was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1,000/- as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000/- was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. 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.

8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjudged 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.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether s. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that s. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to

enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by s. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

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.

(Underlining added)

12. A reading of the aforesaid paras shows the following:-

(i) Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872.

(ii) Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff.

(iii) Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject of course to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract.

13. In the facts of the case before the Supreme Court in Fateh Chand (supra) there was an Agreement to Sell which provided for forfeiture of earnest money of

Rs. 1000/-, and there was also an additional clause entitling forfeiture of the part price paid in advance of Rs. 24,000/-. In the absence of any pleading and proof as to loss suffered, the Supreme Court disallowed the claim to forfeit the amount of Rs. 24,000/-. The facts of the case before the Supreme Court are strikingly similar to the facts of the present case, and in fact the facts of the case before me are on much stronger footing than the facts of the case of the Supreme Court in the case of Fateh Chand (supra) for applicability of the provision of Section 74 of the Contract Act. This I say so because whereas in the case of Fateh Chand(supra) there was a specific clause entitling forfeiture even of the advance price, in the present case there is no term/condition of the tender whereby the defendant is entitled to forfeit the part of the advance licence fee paid. Accordingly, once there is no clause entitling forfeiture of the advance license fee and there is no loss which is pleaded and proved by the defendant (i.e even assuming there was a clause of forfeiture of advance license fee paid), yet, in terms of the decision of the Supreme Court in Fateh Chand(supra), the defendant is not entitled to forfeit the advance license fee paid. Admittedly, and as already stated above, there is no pleading and proof of any loss having been caused to the defendant.

14. In fact, in my opinion, defendant would have been even prevented from claiming any further loss merely on account of non entering into a proper license contract by the plaintiff with the defendant, inasmuch as, Clause 2 specifically restricts eventuality in case of non compliance of the formalities, to an amount of Rs. 50,000/- of the earnest money. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place i.e. parties consciously provided that in the eventuality of non completion of the formalities only the amount of Rs. 50,000/- could be forfeited, consequently, as per the ratio of the judgment of Fateh Chand (supra) u/s 74 of the Contract Act liquidated damages provided in the contract are the upper limit, nothing further can be claimed by the defendant.

15. Counsel for the defendant states that the defendant has moved an application two days back in the Registry seeking amendment in the written statement to plead the case of entitlement to adjustment by forfeiting of the advance license fee deposited. In my opinion, besides the fact that the application is hopelessly delayed as the same has been filed only to come up during the course of final arguments, even if such a defence was contained in the existing written statement, the same would have no legs to stand upon inasmuch as the parties with open eyes specifically provided that in case the formalities are not completed, then, maximum amount of entitlement of the defendant to forfeit was the earnest money of Rs. 50,000/- and nothing more. Once that is so and the parties have provided for an upper limit of damages in case of the eventuality of non completion of the formalities, there does not arise the issue of forfeiture or adjustment of any other amounts.

16. So far as the issue no.4 is concerned, and which pertains to the entitlement of the plaintiff to claim interest, in the facts of the present case I deem it fit that since the defendant has taken advantage of the monies deposited by the plaintiff, and would have in fact made profits thereon and which really are in the nature of interest, and since the plaintiff has lost benefit of interest on this amount of Rs. 20 lacs, I deem it fit that the plaintiff be and is awarded pendente lite and future interest till realization at 9% per annum simple.

I do not find any reason to agree with the counsel for the defendant not to award interest inasmuch as by whatever expression, the loss to the plaintiff is called i.e. interest or loss of return on the amount of Rs. 20 lacs or damages on the amount of Rs. 20 lacs, it is settled law that when the defendant illegally retains the amount of the plaintiff, the defendant is liable to pay compensation to the plaintiff, by whatever name it be called, interest or otherwise vide para 22 of Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others Vs. N.C.Budharaj (2001)2 SCC 721. Issue nos. 2,4 and 5 are therefore answered in favour of the plaintiff and the suit of the plaintiff will stand decreed against the defendant for a sum of Rs. 20 lacs along with pendente lite and future interest at 9% per annum simple till realization. Parties are left to bear their own costs.