

(2013) 07 DEL CK 0348

In the Delhi High Court

Case No : Regular First Appeal (OS) 123 of 2012

NDMC

APPELLANT

Vs

Alpha Bhoj Pvt. Ltd.

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (2013) 4 BC 469 : (2013) 202 DLT 237

Hon'ble Judges : Reva Khetrapal, J;Pratibha Rani, J

Bench : Division Bench

Advocate : Arvind Shah, Addl. Standing Counsel and Dr. Kumar Jwala, for the Appellant; Anil Airi, Hemant Manjani and Mrs. Sadhna Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Pratibha Rani, J.—This appeal is directed against the judgment dated 9.7.2012 whereby the suit filed by Alpha Bhoj Pvt. Ltd. (Plaintiff in CS(OS) No. 3129/1996) was decreed for a sum of Rs. 20 lacs along with pendente lite and future interest (simple) @ 9% per annum till realisation. The facts giving rise to filing of this appeal can be summarized as under:

The Appellant NDMC issued advertisement in newspaper on 12.2.1996 inviting tenders for licence for running an air-conditioned restaurant in underground Palika Parking Complex, Connaught Place, New Delhi. Since the highest bidder failed to complete the formalities, this resulted into forfeiture of the earnest money of Rs. 50,000/- of the highest bidder. Appellant, thereafter, offered the restaurant on licence to the second highest bidder i.e. Respondent Alpha Bhoj Pvt. Ltd. (plaintiff in CS(OS) No. 3129/1996). Appellant sent offer dated 30.7.1996 (Ex. PW 1/4) calling upon to complete the formalities by 9.8.1996, failing which, the allotment will automatically stand withdrawn after the expiry of above mentioned date and the earnest money deposited by the Respondent with the tender stand forfeited. The Respondent did not comply with the conditions

within the stipulated time and sought extension of time vide letter dated 8.8.1996 (Ex. D-8). Thereafter vide undated communication Ex. D-9, the Respondent enclosed a pay order dated 26.8.1996 for a sum of Rs. 20 lacs towards advance licence fee with a request to the financial advisor of the Appellant to accept the same and also undertook to deposit the balance amount of security deposit by 15.9.1996. The Respondent failed to complete the formalities as on inspection by the Respondent on 27.9.1996, the premises was found not suitable to run the restaurant. The Appellant forfeited the entire amount deposited by the Respondent i.e. earnest money of Rs. 50,000/- as well Rs. 20 lacs deposited towards two months advance licence fee. The Respondent filed a suit for recovery of Rs. 30,90,000/- challenging the right of Appellant to forfeit the amount towards earnest money and advance licence fee pleading that Respondent was not able to complete the formalities for the reasons solely attributable to the Appellant.

2. The pleas taken by the Appellant in the written statement were that the premises at underground Palika Parking, Connaught Place was to be allotted on licence on "as is where is" basis. In all eleven tenders were received and the Respondent quoted the second highest rate of Hence fee at Rs. 10 lacs per month. On failure of the highest tenderer to complete the formalities, offer was given to the Respondent/Plaintiff vide communication dated 30.7.1996. It is further the case of the Appellant in the written statement that on failure of the Respondent to comply with the conditions, the offer made to the Respondent was cancelled and at the time of filing the written statement (filed in May, 1997), fresh tenders had been invited and were under the process of approval. The receipt of letter dated 26.8.1996 and deposit of Rs. 20 lacs by the Respondent, though admitted, was pleaded to be accepted with a belief that the plaintiff will also complete all other requisite formalities. However, in the entire written statement, no communication addressed to the Respondent in response to his communication was pleaded. Despite the assurance given by the Respondent to complete the formalities, needful was not done thereby causing loss to Appellant. The licensor i.e. the Appellant had the right to forfeit the amount towards licence fee as well as the earnest money deposited along with the tender due to the default committed by the Respondent as Appellant suffered loss by keeping the premises unoccupied for two months.

3. On the pleadings of the parties, following issues were settled by the Court on 9.9.1997:

- (i) Whether the plaintiff is a company duly incorporated under the Companies Act and Shri Harish Bhasin is competent to institute the present suit? --(OPP)
- (ii) Whether the defendant is entitled to forfeit the earnest money and the security deposit amount, of the plaintiff? --(OPD)
- (iii) Whether the plaintiff is entitled to claim damages, if so, to what amount? --(OPP)

(iv) Whether the plaintiff is entitled to claim interest, if so, at what rate and on which amount? --(OPP)

(v) To what amount, the plaintiff is entitled to recover from the defendant? --(OPP)

(vi) Relief.

4. Issue No. 1 was not pressed by the Appellant (defendant) in view of decision of Supreme Court in *United Bank of India v. Naresh Kumar & Ors.*, AIR 1977 SC 3. Issue No. 3 was not pressed by the Respondent (plaintiff).

5. Issue No. 2 is in two parts, (i) forfeiture of earnest money, and (ii) forfeiture of security deposit.

6. During trial, the Respondent (plaintiff) conceded to the right of Appellant to forfeit the earnest money of Rs. 50,000/-. Thus the dispute between the parties remained restricted to the right of NDMC to forfeit the amount of Rs. 20 lacs deposited towards advance licence fee/security and claim of the Respondent to get it refunded.

7. Learned Single Judge, while rejecting the contention of Appellant of its right to forfeit Rs. 20 lacs for keeping the premises unoccupied for two months in view of the assurance by the Respondent to abide by all terms and conditions and complete the formalities, considered the claim of Appellant for liquidated damages in the light of legal principles laid down in this regard by the Constitution Bench of Supreme Court in *Fateh Chand Vs. Balkishan Das*, . After examining the right of the Appellant to forfeit advance licence fee as liquidated damages in the light of Section 74 of Indian Contract Act and the legal principles settled in *Fateh Chand's* case, the learned Single Judge held that Appellant was entitled to forfeit only the earnest money. The findings by learned Single Judge on this issue are required to be extracted by us verbatim. They read as under:

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 licence 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 licence 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 licence 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.

8. The learned Single Judge has rejected the claim of Appellant to forfeit the two months' advance licence fee and further observed that under Clause 2 of the tender document, in the eventuality of the Respondent being not able to complete the formalities, Appellant had a right to forfeit the earnest money as agreed by both the parties under Clause 2 of tender document which has been quoted by learned Single Judge in para 7 of the impugned judgment.

9. Not only that, learned Single Judge has also come to the conclusion that the contract between the parties was at the stage of acceptance of tender only and main contract granting licence in favour of Alpha Bhoj Pvt. Ltd. which was conditional to the completion of formalities, was yet to be entered into. The decision of Supreme Court in the case of National Highway Authority of India Vs. Ganga Enterprises and Another, , wherein it was held that contract with respect

to invitation of tender is independent of the main contract which is to be subsequently entered into was relied upon to hold that only earnest money could be forfeited. The claim of the Appellant to forfeit the two months advance licence fee had been rejected by learned Single Judge for the reason that Clause 48 comes into play only on the formalities being completed by the licensee.

10. We have heard learned Counsel for the parties.

11. Learned Counsel for Appellant has referred to the notice inviting tenders wherein it was specifically mentioned that possession of the premises is to be taken on "as is where is" basis with liberty to the bidder to inspect the premises. It has been further submitted that the Appellant is within its right to forfeit the advance licence fee of Rs. 20 lacs under Clauses 4, 48 and 51 of the tender documents and for keeping the premises vacant for two months on the basis of communication by the Respondent to complete the formalities, loss has been suffered by the Appellant. Referring to the communication dated 30.7.1996 Ex. D-8, it has been contended by learned Counsel for the Appellant that Respondent was communicated that the licence fee shall be payable w.e.f. 9.8.1996 or from actual date of taking possession, whichever is earlier. Thus, now the Respondent cannot take a plea that on the basis of the condition of the premises where restaurant was to be run, it was not feasible to complete the formalities unless necessary repair work was done.

12. At the outset, learned Counsel for the Respondent informed the Court that the claim of the Appellant to seek damages for keeping the premises unoccupied for two months is liable to be rejected for the reason that till date, the premises had not been used for restaurant and subsequently its user was changed as the premises was not cleared by fire department for being used as restaurant. Learned Counsel for the Respondent, while agreeing that Appellant could have forfeited the earnest money of Rs. 50,000/-, claimed that the inspection of the premises was not permitted earlier (which was disputed by Appellant). It has been submitted that premises was situated in the basement with no clearance from the fire department. While referring to the instances of the highest bidder M/s. Bisto Americana Pvt. Ltd. wherein only the earnest money was forfeited, even on retendering, again the highest bidder failed to complete the formalities and the Appellant forfeited the earnest money of Rs. 50,000/-, he urged that on failure of the Respondent to complete the formalities mentioned in offer dated 30.7.1996 Ex. D-8, the Appellant had no right to forfeit advance licence fee of Rs. 20 lacs when neither the licence was granted nor Appellant had ever communicated or pleaded any loss or damage being suffered.

13. We have considered the rival contentions and also gone through the record of CS(OS) No. 1329/1996.

14. Before examining the right of the Appellant to forfeit two months licence fee, it is necessary to look into the contention of the Respondent that premises was not even cleared by the Fire Department for running a restaurant for the reason

that basement could be used only for parking/storage. No doubt, the stand of the Appellant is that earlier the same premises was being used as restaurant but it is also not disputed that till date despite tendering and retendering, it could not be used for purpose of restaurant and subsequently its user was changed.

15. Mr. Parimal Gupta, Junior Engineer (Civil), NDMC has filed his affidavit Ex. DW 2/A to the effect that the suit premises is on ground floor/level and is not in the basement or underground which is contrary to the factual situation and ground realities as it is case of the Appellant that restaurant was to be run in the underground Palika Parking, Connaught Place. The communication by Chief Fire Officer of NDMC vide letter Ex. PW 2/2 clarifies the position in this regard, which reads as under:

No. F-6/DFS/MS/98/489

dated 5.3.1998

To

The Fire Officer-cum-Nominated Authority,

NDMC, Palika Kendra,

New Delhi-110001.

Sub: Fire prevention and fire safety measures in newly allotted portion (5426 sq. ft.) for restaurant in Palika Parking.

Ref: F.O.-cum-NA/FMC/D/31 dated 7.1.98

Sir,

With reference to the above referred letter this is to inform you that the above mentioned space is located in the underground Palika Parking (i.e. basement) and as per the Building Bye-laws, 1983, the use of basement is permissible only for storage/parking. Restaurant is not allowed in the basement as per Building Bye-laws.

Yours faithfully,

Dy. Chief Fire Officer-II

For Chief Fire Officer

Delhi Fire Services.

16. This communication between NDMC and fire department brings on record that the premises being located in the basement, could be used only for storage/parking. Even as per Building Bye-laws, NDMC could not have offered that premises for running a restaurant. This also reflects how the officers of NDMC lead evidence by way of affidavit contrary to their own record and the ground realities.

17. The right to forfeit two months advance licence fee has been claimed by NDMC to be flowing from the terms of the contract i.e. Clauses 4, 48, and 51. It is undisputed position that no licence was granted to the Respondent on his failure to comply with the terms contained in offer dated 30.7.1996. The issue involved in this appeal needs to be examined from various angles i.e.:

(i) Terms of offer dated 30.7.1996.

(ii) Effect of non-compliance of the above terms by the Respondent within the specified period.

(iii) Effect of communication dated 8.8.1996 received by NDMC on 9.8.1996 seeking extension of time to complete the formalities.

(iv) Whether the deposit of two months advance licence fee towards partial compliance of offer dated 30.7.1996 without any approval by NDMC granting extension of time to complete the formalities, has the effect of entering into the main contract i.e. licence to run the restaurant.

(v) Whether any contract came into existence on/after 9.8.1996 so as to entitle the NDMC to invoke Clauses 4, 48 and 51 of the tender documents to forfeit the advance licence fee.

18. Since the entire case of the parties is based on documentary evidence, learned Counsel for the Appellant was requested to refer to the clause under which NDMC could forfeit Rs. 20 lacs deposited towards advance licence fee for two months.

19. While referring to the various correspondence entered into by the Respondent with Appellant seeking extension of time to deposit the amount of Rs. 60 lacs (Rs. 20 lacs towards advance licence fee and Rs. 40 lacs to be kept as interest free security) learned Counsel for the Appellant submitted that on the assurance of the Respondent to take the premises on licence, the premises was kept vacant thereby depriving the Appellant of licence fee for a period of two months, which it would have got had the premises been taken by the Respondent on completing the formalities. It is further submitted by learned Counsel for the Appellant that letter dated 8.8.1996 by the Respondent contained unequivocal undertaking to deposit the amount and complete the formalities with the request for extension of time to do the needful.

20. Learned Counsel for the Appellant has taken us through Clauses 4, 48 and 51 of the tender document and the correspondence by the Respondent with Appellant seeking extension of time to complete the formalities. It was argued on behalf of Appellant that in view of unconditional assurance by the Respondent to complete the formalities and pay the licence fee w.e.f. 9.8.1996 but thereafter backing out despite the tender being invited on "as is where is" basis, has caused loss to the Appellant. Since Appellant had kept the premises unoccupied in the belief that the Respondent would complete the formalities and pay the licence fee w.e.f. 9.8.1996, it was within the right of Appellant to forfeit the

advance licence fee of Rs. 20 lacs deposited by the Respondent.

21. Learned Counsel for the Appellant was questioned about the stand of Appellant as to the offer letter dated 30.7.1996 informing therein that on failure of the Respondent to complete the formalities, in that circumstance, it would be presumed that the Respondent was not interested in the allotment and the same would automatically stand withdrawn and earnest money deposited with the tender forfeited.

22. Learned Counsel for the Appellant, in this regard, referred to the communication dated 8.8.1996 (Ex. D-7) by Respondent seeking extension of time as main Director of the company was out of town. Thereafter subsequent communication dated 16.9.1996 (Ex. D-6) seeking further extension of time till 30.9.1996 for depositing the balance due. Prior to that, through letter (Ex. D-9), Respondent had already deposited Rs. 20 lacs vide letter dated 26.8.1996 Ex. D9 and assured that possession would be taken after depositing the additional licence fee/security. In the given circumstances, Appellant was fully justified in forfeiting the two months advance licence fee deposited by the Respondent with consent to pay the licence fee w.e.f. 9.8.1996.

23. A perusal of record shows that the Appellant had given offer to Respondent being the second highest bidder vide communication dated 30.7.1996 (Ex. D-8). While informing the Respondent M/s. Alpha Bhoj Pvt. Ltd. that its tender application dated 29.2.1996 with offer of Rs. 10 lacs per month plus Rs. 95,585/- as A.C. Charges per month has been accepted, Respondent was asked to complete the formalities referred to in paras 1 to 5 of the communication. The concluding paragraph of the offer Ex. D-8 being relevant for the purpose of this appeal needs to be extracted and reads as under:

REF: No. HA(A)/Estate/1735-1737

dated 30.7.1996

M/s. Alfa Bhoj (P) Ltd.

816, Arunachal Bldg.

19, Barakhamba Road,

NEW DELHI-110001.

Sub: Allotment of Restaurant space at under ground Palika Parking, Connaught Place, New Delhi.

Dear Sir,

With reference to your tender application dated 29.2.1996 on the subject cited above you are hereby informed that it has been decided to accept your offer of Rs. 10.00 lacs per month plus Rs. 95,585/- as A.C. charges p.m. You are, therefore, allotted above mentioned Restaurant space measuring 5426 sq. ft. on monthly licence fee of Rs. 10.00 lacs on licence basis for a period of five years on

the terms and conditions mentioned in the tender and already agreed to by you. You are permitted to run the trade of Running of Restaurant.

Further, you are requested to complete the following formalities immediately:-

1. xxx
2. xxx
3. xxx
4. xxx
5. xxx

Please note that the licence fee in respect of the above said Restaurant Space shall commence w.e.f. 9.8.96 or from the actual date of taking over the possession whichever is earlier. Please also note in case you fail to complete the formalities by the date mentioned above, it will be presumed that you are not interested in the allotment and the said allotment will automatically stand withdrawn after the expiry of above mentioned date and the E/M deposited by you with the tender stand forfeited.

Sd/-

Dy. Director (Estate)

Encls: As above.

Copy to the following for information and necessary action.

1. Ex. Engr. (CBM), Palika Parking, New Delhi.
2. Ex. Engr. (Elect.) BM-I, Mohan Singh Place, New Delhi.

Dy. Director (Estate).

24. Statement of DW-1 Mr. S.K. Verma, Assistant Director (Estate), NDMC also needs to be referred to determine the right of the Appellant to forfeit two months advance licence fee. DW-1 Mr. S.K. Verma deposed that as M/s. Bisto Americana Pvt. Ltd. failed to complete the formalities, entire amount of Rs. 50,000/- deposited as earnest was forfeited. He also stated that Respondent, who was second highest bidder, was also required to complete the same formalities and that licence deed was not executed in favour of the Respondent on its failure to complete the required formalities prior to executing the licence deed. His subsequent cross examination needs to be quoted, which is as under:

It is correct that as per Ex. P-1 and Ex. P-2 only earnest money of rupees fifty thousand deposited by the plaintiff could have been forfeiting after the plaintiff failed to complete the formalities. Again said, I misunderstood the question and correct position is that the entire amount deposited by him by that time was liable to be forfeited, There is no particular document authorizing defendant to

forfeit the entire amount deposited by the plaintiff.

25. Learned Counsel for the Appellant was requested to point out any power under the contract vested in the Appellant in exercise of which Appellant could stop the operation of the clause in the offer Ex. D-8 under which, on failure of the Respondent to complete the formalities, the offer stood automatically withdrawn on expiry of the given date leading to forfeiture of earnest money deposited with the tender documents by the Respondent.

26. On behalf of Appellant, again a reference was made to the communication dated 8.8.1996 (Ex. D-7) wherein extension of time was prayed by the Respondent to complete the formalities and on agreeing to pay the licence fee w.e.f. 9.8.1996 to avoid any losses to NDMC.

27. Since, the Appellant claimed to have believed and acted upon the acceptance Ex. D-7, a perusal of the same reveals that it was received in the office of Appellant on 9.8.1996 and marked by the official concerned to the Director (Estate) on the same day. There is no approval accorded by the Director (Estate) or any other competent authority granting extension of time to the Respondent to comply with the formalities contained in the offer dated 30.7.1996 Ex. D-8. All the letters addressed to the Appellant by the Respondent were its unilateral acts in anticipation of approval being granted in its favour. Even after expiry of 9.8.1996 i.e. the stipulated time, the partial licence fee of Rs. 20 lacs was annexed with letter Ex. D-9 without any extension of time being granted by Appellant.

28. Since the Respondent failed to complete the formalities neither under clause 48 nor under any other clause of the tender document, the Appellant had any right to forfeit the advance licence fee deposited towards compliance of offer dated 30.7.1996 and that too after expiry of the crucial date i.e. 9.8.1996. We add here that once the offer given to the Respondent was conditional i.e. to abide by the terms and conditions and complete the formalities, by a particular date (9.8.1996) and it being the admitted case of the parties that till 9.8.1996 except dropping a letter dated 8.8.1996 Ex. D-7 received by Appellant on 9.8.1996, there being no compliance by the Respondent, the offer of allotment automatically stood withdrawn and the earnest money deposited along with the tender document also stood forfeited.

29. As noted by learned Single Judge and not disputed before us, the Respondent is not disputing the right of the Appellant to forfeit the earnest money. The limited question to be examined in this appeal is correctness and legality of the finding of learned Single Judge about the Appellant being held not entitled to forfeit Rs. 20 lacs deposited by the Respondent towards advance licence fee. Here we may observe that unilateral act of the Respondent to write various letters to Appellant seeking extension of time on one pretext or other did not have the effect of extension of time. The amount of Rs. 20 lacs deposited by him of his own also could not have extended the time to comply with the

conditions contained in offer Ex. D-8. This can be inferred from the affidavit Ex. DW 1/A filed by Mr. S.K. Verma, Section Officer (Estate) wherein he did not state about any extension of time being granted by Appellant to comply with the requirements of the offer Ex. D-8.

30. It is admitted case of the parties that possession of the premises could not be handed over as no licence was granted to the Respondent on his failure to complete the formalities. The Appellant NDMC could have taken recourse to Clauses 4, 48 and 51 of the tender documents only on grant of licence to run the restaurant on terms and conditions agreed upon by the parties and on completion of contract. Thus forfeiture of two months advance licence fee by NDMC was neither in accordance with terms and conditions of the tender documents nor the Appellant could plead and prove any loss so as to stake its claim for liquidated damages u/s 74 of Indian Contract Act.

31. Other reason given by the Appellant claiming its right to forfeit the two months advance licence fee is that the premises had remained unoccupied for two months causing loss to Appellant which it has a right to recover in view of consent given by the Respondent vide letter dated 8.8.1996 to pay the licence fee w.e.f. 9.8.1996. Taking note of the various clauses of tender documents and respective contentions, referred to the legal position laid down by Constitution Bench of Supreme Court in Fateh Chand's case (supra), we concur with the finding of learned Single Judge that u/s 74 of the Contract Act, Appellant could not have forfeited the two months advance licence fee taking recourse to Clauses 4, 48 and 51 of the tender documents as these clauses come into operation post grant of licence.

32. For the foregoing reasons, we are of the view that learned Single Judge rightly rejected the plea of Appellant to forfeit Rs. 20 lacs deposited by the Respondent towards advance licence fee for two months under terms and conditions of tender. This was in addition to the finding that Appellant was not entitled to forfeit the advance licence fee in view of the settled legal position by the Constitution Bench of Supreme Court in Fateh Chand's case (supra).

33. There is no merit in the appeal and the same is hereby dismissed. No costs.

CM No. 19846/2012 (Stay)

Since the main appeal has already been dismissed, the present application is hereby dismissed for having become infructuous.