

(1993) 04 DEL CK 0006
In the Delhi High Court
Case No : Civil Petition No. 97 of 1992

Sardar Singh Kohli

APPELLANT

Vs

Ahuja Properties Financiers and Promoters (P) Ltd.

RESPONDENT

Date of Decision : 23-04-1993

Acts Referred:

Citation : (1993) 51 DLT 672 : (1993) 27 DRJ 48 : (1993) 2 ILR Delhi 591

Hon'ble Judges : J.K. Mehra, J

Bench : Single Bench

Advocate : Badri Nath and R.K. Kapur, for the Appellant;

Judgement

J.K. Mehra, J.

(1) This is a petition for winding up filed by the plot owner against the builder/ developer of the land for developing the property and constructing flats thereon under an agreement dated 4.1.1989. It is alleged by the petitioner that the Respondent is liable to pay the stipulated sum of Rs. 3 lacs on account of delay in completing the work.

(2) The petitioner was drawn my attention to various clauses of the collaboration agreement between the parties whereby the respondent company was authorised to develop the plot of land owned by the petitioner after demolishing existing structures thereon. The building when completed was to be shared equally between the petitioner and the respondent. The petitioner has referred to clauses 20 and 29 of the Agreement which inter alias provided for indemnity and payment of a stipulated sum in the event of the respondent's failure to complete the building within the time referred to in the agreement and that no amendment or modification to this agreement shall become operative or binding on the parties unless agreed to in writing between the parties respectively. Clause 29 was primarily made use of by the petitioner to rebut the arguments of the respondent that the petitioner had by his own conduct granted extension of time to the respondent to complete the building. The respondent has annexed to the

reply to the show cause notice the Memorandum of Understanding which is executed by all including the petitioner and the respondent dated 13th May, 1990 which inter alias provides, that Mr. S.S. Kohli (petitioner in the present case) in view of the representation of the party No. I is willing to extend the due date for completion of construction work given in clause I of the said Memorandum of Understanding which lays down as under:

"THAT request of M/s. Ahuja Property Financer & Promoters Pvt. Ltd. Party No. I. to extend the due date for completion of construction work on multi-storied flats at Plot No. C-1/3C, Model Town, Delhi for a period of six months will be reviewed and acted upon favorably by Mr. S.S. Kohli, Party No.2"

(3) The Memorandum further refers that the cost of unfinished work for completion of the project being estimated at approximately Rs. 15 lacs and that a sum of Rs.30 lacs is still expected to be received as balance Installments due from various purchaser? of flats.

(4) The petitioner has not disclosed the fact of aforesaid Memorandum of Understanding in the petition.

(5) Under the said agreement, copy whereof is Annexure-III to the petition, the petitioner had received at the initial stage a sum of Rs.7 lacs which was to be retained by him free of any interest until the completion of the project and on completion of the project this amount was to be refunded to the respondent. Apparently this provision was made only to enable the petitioner to hire alternate accommodation and meet the rental expenses out of the earnings he makes by investing the-said sum of Rs.7 lacs. The expenses on the rental are stated at the bar to be Rs.5,000.00 per month and the balance earning is being retained by the petitioner. In the present petition the petitioner has made a grievance that the respondent having failed to complete the project within the stipulated time has become liable to pay the compensation to the petitioner @ Rs.50,000.00 per month. The relevant clause reads as under:-

"THAT in case completion of work under the agreement is not completed by the Builder within 18 months period, as specified in clause 5 above, the Builder will be liable to indemnify the owner in the sum of Rs.50,000.00 (Rupees fifty thousand) per month during the delayed period. Liability at this rate will continue for a period of six months. In case the building is not completed in terms of this agreement during this period of six months the owner will be entitled to have the uncompleted building completed at the cost of the Builder. In case the work of construction is incapable of being carried on owing to defect in the title of the owner or any cause to which the Builder is not responsible not in any way the owner will indemnify the builder for the losses suffered by the Builder during such period."

(6) The Petitioner has clearly concealed the fact of the aforesaid Memorandum of Understanding whereby he had agreed to extend the time.

(7) The aforesaid clause clearly provides that the builder will be liable to indemnify the owner in the sum of Rs.50,000.00 per month till that delayed period of six months. It is further provided that this liability was to continue for a maximum period of six months, where after the owner would have the liberty to get the building completed at the cost of the builder. That very clause further provides that in case the work of construction is incapable of being carried on owing to defect in the title of the owner or any cause for which the builder is not responsible the owner would indemnify the builder for the losses suffered by the builder during such period. In essence this clause appears to be a contract for indemnity. The contract for indemnity has been defined u/s 124 of the Indian Contract Act as "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person...."

(8) My attention was drawn by the learned counsel for the petitioner to the effect that this provision was more in the nature of a clause making provision for liquidated damages for the recovery of a specific amount. The law relating to damages in India has been provided in Section 74 of the Indian Contract Act which reads as under:-

"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 therein 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.

(9) A reading of the complete section and the illustrations provided there under would clearly lay down that the liquidated damages are at best pre-estimates of the likely loss which will occur or is sustained by the party and that the aggrieved party will have a right to recover such amount as reasonable compensation not exceeding the amount so named. Thus the amounts stipulated in the agreement lays down only the outer limit up to which the Court can award compensation. It does not absolve any party claiming compensation under such an agreement from proving the loss he has actually suffered. The law relating to damages provides for compensating the party for the loss sustained.

(10) From the documents and the records produced before me it is not possible to conclude that any such exercise of determination of actual loss has been carried out and the amount after having been so determined has not been paid by the respondent. On the contrary the respondent has raised certain disputes which appear to have arisen prior to not only the filing of this petition but earlier in time to the service of the notice u/s 434 also. Apart from that the Memorandum of Understanding clearly brings out that substantial part of the construction had already been undertaken and completed but nevertheless certain very important aspects had remained unattended and had not been taken

care of, the value whereof had been ascertained to be Rs.15 lacs. The respondent has further pointed out that the petitioner had turned dishonest and had got the premises sealed through his influence with the civic authorities. The respondents have further said that they are even now prepared to go ahead and complete the entire unfinished job within six months provided the petitioner co-operates but in the absence of such co-operation it is not possible to go ahead with the project because the petitioner had revoked the power of attorney where under the respondents were operating for completing the job.

(11) In the light of this it cannot be said that there is no bona fide dispute between the parties.

(12) It is pointed out that in all 16 flats have been constructed out of which 8 were to belong to the petitioner and the remaining eight were to fall to the share of the builder. The builder can sell those and reimburse himself for the cost of construction etc. It is also pointed out that a substantial sum has already been raised from the sale of the flats which had fallen to his share and on account of incomplete job one of the flat buyers has already filed a suit. I have been informed that one of the parties booked a flat with the builder respondent-company. He has also instituted a suit against both the petitioner as well as the respondent which is pending in this court being suit No. 1480 of 1992. Counsel for the petitioner has placed reliance on *Kudremukh Iron Ore Co. Ltd. V. Kooky Roadways P. Ltd.* reported as 69 Comp Cas 178, wherein it was held that even if the precise amount has not been ascertained the respondents nevertheless are debtors and they have not been able to pay the said amount in response to a notice u/s 434 of the Companies Act. That was a case of the carrier who had short delivered the goods and the extent of short delivery was not in dispute and it was only the value thereof which was the question for determination. In that case there was no question of determining what is the adequate compensation as provided or envisaged u/s 74 of the Indian Contract Act. In any event I am unable to accept the contention that for an amount even though unascertained and undetermined, subject to a maximum of Rs. 3 lakhs, inspire of having an interest free deposit of Rs.7 lacs, the petitioner is entitled to maintain a petition for winding up of the company simply because a notice of demand u/s 434 of the Companies Act was served on the company and on its failure to pay in response thereto. The requirement of law is not satisfied in a case where the compensation is still to be determined although outer limit of the compensation is provided for in the agreement particularly when the terms of that agreement did undergo a change by means of the Memorandum of Understanding and the subsequent correspondence exchanged. The pleas raised by the respondent to indicate that there does exist a bona fide dispute about the amount due to the petitioner.

(13) For these reasons I hold that present petition is not maintainable and the same is dismissed leaving the parties to bear their own costs. This order shall not in any manner prejudice the petitioner's right to pursue his claim/remedy in a

civil court.