

(2012) 04 DEL CK 0086

In the Delhi High Court

Case No : Regular First Appeal No. 117 of 2012

Shri Megh Nath and Others

APPELLANT

Vs

Shri Rajnish Gupta

RESPONDENT

Date of Decision : 13-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7, 96
Contract Act, 1872 — Section 74

Citation : (2012) 04 DEL CK 0086

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Satyakam Saini, for the Appellant;

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.

CM No.4451/2012(for exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CM No.4449/2012(for condonation of delay)

For the reasons stated in the application the delay of 3 days in filing the appeal is condoned.

CM stands disposed of.

CM No.4450/2012(for condonation of delay in re-filing)

For the reasons stated in the application the delay of 15 days in re-filing the appeal is condoned.

CM stands disposed of.

1. The challenge by means of this Regular First Appeal filed u/s 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 29.7.2011 decreeing the suit of the respondent/plaintiff, not for double the amount of earnest money of Rs.3,00,000/- i.e. Rs.6,00,000/- as prayed for, but only for the earnest amount of money of Rs.3,00,000/- alongwith interest at 8% per annum. The facts of the case are that the appellants/defendants and the respondent/plaintiff entered into an agreement to sell dated 27.7.2009 whereby the respondent/plaintiff agreed to purchase the second floor without roof rights of the property no.11, Pocket-1, Sector 20, Rohini, Delhi admeasuring 48 sq. yds. Pursuant to the agreement to sell, an advance amount of Rs.3,00,000/- was paid and the balance sum of Rs.14,00,000/- was payable on or before 10.9.2009. The respondent/plaintiff pleaded that the construction of the suit property could not be done within the stipulated time frame, i.e. uptill 10.9.2009 and the appellants/defendants in spite of repeated requests to complete the construction and execute the title document after receiving balance payment, avoided to do so on one pretext or the other. When the appellants/defendants ultimately refused to execute the documents, the subject suit came to be filed for recovery of double the amount of earnest money paid. The respondent/plaintiff thereafter is said to have gone to the office of the sub-Registrar on 10.9.2009 but the appellants/defendants failed to appear. It was pleaded that the appellants/defendants wrongly forfeited the earnest money. The respondent/plaintiff is said to have replied to the legal notice dated 17.9.2009 issued by the appellants/defendants, by his reply dated 30.9.2009 wherein double the amount of advance money was asked for.

2. In the written statement, the appellants/defendants pleaded that the agreement could not go through, not because of the fault of the appellants/defendants, but because of the fault of the respondent/plaintiff as the respondent/plaintiff did not come forward to pay the balance amount of Rs.14,00,000/- within the stipulated period. The appellants/defendants pleaded that after 15.9.2009 they tried to contact the respondent/plaintiff a number of times but the respondent/plaintiff avoided. The appellants/defendants had, therefore, sent a legal notice on 22.9.2009 informing the factum of the forfeiture of the earnest money. It was also pleaded by the appellants/defendants that the time for payment was extended till 20.9.2009 and there was no question of visiting the sub-Registrar office on 10.9.2009. It was pleaded that the earnest money was forfeited on account of the breach of contract by the respondent/plaintiff and therefore the suit was bound to fail.

3. The Trial Court after the pleadings were complete, framed the following issues:-

1. Whether plaintiff is entitled for a decree of Rs.6,00,000/- along with pendent lite and future interest @ 18%?OPP

2. Whether the plaintiff has performed his part of contract in terms of agreement to sell dated 27.7.2009?OPP

3. Whether the defendant has committed any breach of terms and conditions of the agreement to sell? OPP

4. Relief, if any.

4. With respect to issue no.2, the Trial Court has held that the respondent/plaintiff did not have arrangement to pay the balance amount of Rs.14,00,000/- and hence failed to perform his part of the contract. Issue no.3 was also decided against the respondent/plaintiff. So far as the issue no.1 pertaining to the claim of Rs.6,00,000/-, i.e. double the amount of earnest money of Rs.3,00,000/- the Trial Court decreed the suit for the amount of earnest money of Rs.3,00,000/- by making the following observations:

ISSUE NO.1

8. If the plaintiff is entitled to recover Rs.6 lac or not, one has to refer to various clauses of agreement Ex.PW1/1.

Clause No.4 agreement to sell Ex.PW1/1 says that the defendants were liable to pay double the amount of earnest money in case they did not act as per the terms and conditions of the agreement and the plaintiff was at liberty to get the sale deed executed through the Court. It has been observed by me that the defendants were not at fault, hence, there is no question of their paying double the amount of earnest money to the plaintiff.

The moot question now is despite the plaintiff being at fault, can he still recover the earnest money. Clause 10 of the agreement Ex.PW1/1 is relevant in this regard and it runs as under:

That the first party shall return the bayana/earnest money to the second party, in case, due to any reason or lack of title/documents in the said property, the bank does not sanction the housing loan in favour of the second party."

As per this clause, the defendants were to refund the earnest money to the plaintiff if due to lack of title documents, the bank did not sanction the housing loan to the plaintiff. However, as per the plaintiff, he never applied for a loan and never needed it

Now the agreement Ex.PW1/1 do not speaks of any other circumstance of the failure of plaintiff and its consequence. Neither Cl.10 above says that it shall be the only circumstance to refund the earnest money. Now question is if the plaintiff makes a default due to nonpayment, whether he shall not be entitled to refund of the earnest money. The agreement Ex.PW1/1 is silent on this aspect.

DW1 has admitted in his cross examination as well as in his written statement that there was no clause of forfeiture of earnest money in the agreement to sell Ex.PW1/1. DW3 Shri Naveen Gupta, a property dealer, though included the

forfeiture clause at Point D to D in a photo-copy of the agreement to sell, marked as mark A/DA, but he further deposed that he had told Rajat Singhal DW4) that he is not a party to the agreement Ex.PW1/1 and would not write anything on the agreement Ex.PW1/1, yet at the persistent request of DW4 he wrote the forfeiture clause.

It is an admitted fact that plaintiff did not sign on the forfeiture clause nor on any endorsement made by a property dealer DW3 on Mark A/DA. Hence, such endorsement, if any, would not bind the plaintiff.

Hence, in the absence of the forfeiture clause in agreement Ex.PW1/1, despite the plaintiff being at fault, the defendants would still be liable to refund the earnest money of the plaintiff lest they show that they had suffered some loss on account of the default of the plaintiff. The defendants in their evidence have not spoken a single word of any losses suffered by them due to the default by the plaintiff. It is an admitted fact that they had now sold the impugned property. Hence in the circumstances the plaintiff becomes entitle to the refund of earnest money of Rs.3 lac. I do not wish to award the costs, since the transaction failed due to the fault of the plaintiff.

However, the plaintiff shall be entitle to interest @ 8% per annum w.e.f 10.9.2009 till realisation since the defendants have been using the money of the plaintiff.

In the circumstances, I pass a decree in the sum of Rs.3 lac in favour of the plaintiff and against the defendants, jointly and severally, with interest at the rate of 8% per annum w.e.f 01.10.2009 till its realisation.

Decree Sheet be prepared. File be consigned to Record Room.

(emphasis added).

5. A reference to the aforesaid paras shows that the Trial Court addressed itself to the issue as to even if the respondent/plaintiff is at fault whether he can still recover the amount of earnest money. In this regard the Trial Court by reference to Clause 10 of the agreement has held that except for Clause 10 there was no other provision for forfeiting the earnest money and since the circumstances mentioned in Clause 10 of sanctioning of the loan never arose, as the respondent/plaintiff never applied to the loan and never needed it, there could not be forfeiture of earnest money. Trial

Court has held that there is no other forfeiture clause in the agreement, Ex.PW1/1.

More importantly, the Trial Court has held that the appellants/defendants in their evidence have not spoken a single word or line of any loss having been caused to them due to the fault of the respondent/plaintiff and in fact the appellants/defendants have thereafter sold the subject property. It is for this reason also that the Trial Court decreed the refund of the earnest money paid.

6. Though I am not in agreement with the earlier part of the reasoning contained in the impugned judgment passed by the Trial Court, I completely agree with the reasoning of the Trial Court holding the respondent/plaintiff entitled to refund of the amount on the ground that the appellants/defendants have not suffered any loss due to breach of contract by the respondent/plaintiff.

7. This issue of disentitlement to forfeiture as no losses are caused, is no longer *res integra* as Constitution Bench of the Supreme Court in the judgment reported as *Fateh Chand Vs. Balkishan Das*, has held that merely because there is a breach of contract, the seller of a property cannot forfeit the advance price which is received. The relevant observations of the Supreme Court are contained in paras 8, 10, 15 & 16 and which 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)

8. I, therefore, do not find any fault in the impugned judgment which has decreed the suit for recovery of Rs.3,00,000/-, and which was the amount which was received by the appellants/defendants under the agreement to sell.

9. Learned counsel for the appellants/defendants argued that the Trial Court could not have granted relief for the amount of refund of the earnest money inasmuch as there was no prayer for refund of the earnest money. Reliance is placed upon the judgment of the Supreme Court in the case of M/s. Trojan & Company vs. R.M.N.N. Nagappa Chettiar, AIR 1953 SC 235 in support of the proposition. The Supreme Court in the judgment in the case of M/s. Trojan (supra) has held that once there is a pleading with respect to a particular aspect, and which relief a person is disentitled on account of admissions made in cross-examination, he could not be granted a different relief than as he had prayed for. The relevant observations of the Supreme Court are contained in para 22 of the said judgment, as relied upon by counsel for the appellants/defendants and which reads as under:-

(22) The second question canvassed before the High Court and also before us, was in respect of the Associated Cement shares. As above stated, the plaintiff's account was credited in the sum of `6,762.80 on account of the purchase of these shares. Plaintiff had pleaded that the transaction was not authorized by him and that it had been made in contravention of his instructions. He had claimed compensation on the ground of breach of instructions, he did not in the alternative claim on the ground of failure of consideration the amount credited by the defendants in the promissory note account and which credit disappeared by reason of the failure of the suit on the promissory note. At the hearing of the case before Bell J. the contention that the purchase was unauthorized was abandoned by counsel and the same position was adopted before Clark J. During cross-examination of the plaintiff it was elicited that he either instructed the defendants to purchase the shares or at any rate ratified the purchase which the

defendants had made on his behalf. It was argued before the appellant bench of the High Court that having pleaded one thing and having led evidence in support of that thing but later on having been forced to admit in the witness box that the true state of things was different the plaintiff had disentitled himself to relief as regards these shares and he could not be granted the relief that he had not asked for. The High Court negated this contention on the ground that though a claim for damages in respect of a particular transaction may fail, that circumstance was no bar to the making of a direction that the defendants should pay the plaintiff the money actually due in respect of that particular transaction.

It also held that the plaintiff's claim in respect of this item of `6,762.80 was within limitation. We are unable to uphold the view taken by the High Court on this point. It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. The allegations on which the plaintiff claimed relief in respect of these shares are clear and emphatic. There was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration. That being so, we see no valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him. In disagreement with the Courts below we hold that the plaintiff was wrongly granted a decree for the sum of `6,762.80 in respect of the Associated Cement shares in this suit. Accounts settled could only be reopened on proper allegations."

10. I am unable to agree with the arguments as put forthwith on behalf of the appellants/defendants inasmuch as the facts in the case of M/s. Trojan (supra) were totally different and hence the judgment is distinguishable inasmuch as a totally new plea and a totally new relief cannot be prayed, however, surely a plaintiff/respondent is always entitled to a lesser relief than the larger relief which is prayed for. This course of action is permissible under Order 7 Rule 7 CPC and there is a catena of judgments of the Supreme Court under this provision which holds that on the facts as found, a Court can always mould a relief including granting a lesser relief. In the facts of the present case, the respondent/plaintiff claimed an amount of Rs.6,00,000/- being double the amount of earnest money and therefore, the lesser relief of only claiming of earnest money of `3,00,000/-, could surely have been granted to the respondent/plaintiff under Order 7 Rule 7 CPC.

11. No other point or issue is urged before me. In view of the above, I do not find any merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs.