

Manju Bhatia & Anr.

Vs

New Delhi Municipal Council

(K. Ramaswamy, S. Saghir Ahmad, G. B. Pattanaik JJ)

06.05.1997

O R D E R

1. Leave granted.

2. We have heard learned counsel on both sides.

3. The admitted facts are that the builder impleaded as one of the respondents, after obtaining the requisite sanction, built 8 floors (including ground floor) on November 22, 1984 as per the guidelines which permitted 150 F.A.R. with the height restriction of 80 feet. The construction of the building known as "White House", came to be made and the possession of the flats was delivered to the purchases, the appellant being one of them. At a later stage, it was found that the builder constructed the building in violation of the Regulations. Consequently, the flats of the top four floors were demolished. The demolition came to be challenged by way of the writ petition in the High Court. The High Court dismissed the same. Thus this appeal by special leave.

4. Before we go into the controversy involved, it would be appropriate and advantages at this stage to refer and discuss the law of equity and its role in the field of tort and equity.

5. In Hanbury & Martin's Modern Equity (14th Edn. - 1993) by Jill E. Martin, at page 3 it is stated, on the "General Principles of Equity" that 'equity' is a word with many meanings. In a wide sense, it means that which is fair and just, moral and ethical; but its legal meaning is much narrower." "Developed system of law has ever been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. Rules formulated to deal with particular situations may subsequently work unfairly as society develops. Equity is the body of rules which evolved to mitigate the severity of the rules of the common law." Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad discretion. Equity has no monopoly of the pursuit of justice. Equitable principles are rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion." Lord Radcliffe, speaking of common lawyers, said that equity lawyers were "both surprised and discomfited by the plentitude of jurisdiction and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues". Just as the common law has escaped from its early formalism, so over the years equity has established strict rules for the application of its principles. Indeed, at one stage the rules became so fixed that a "rigor aequitatis" developed; equity itself displayed the very defect which it was designed to remedy. We will see that today some aspects of equity are strict and technical, while others leave considerable discretion to the court.

6. Hudson's Building and Engineering Contracts [10th Edn.] by I.N. Duncan and Wallace defines

"building contract" as "an agreement under which a person undertakes for reward to carry out, for another person, variously referred to as the building owner or employer, works of a building or civil engineering character." In the typical case, the work will be carried out upon land of the employer or building owner, though in some special cases obligation to build may arise by contract where that is not so, e.g. under building leases and contracts for the sale of land with a house in the course of erection upon it. M.A. Sujan in "Law Relating to Building Contracts" (2nd Edn.) quotes in para 3.3 Keating's definition of "building contracts" according to which they include "any contract where one person agrees for valuable consideration to carry out building or engineering works for another". He also quotes Gajria's definition thus: "Building contract is defined as contract containing as exact and minute description of the terms, account or remuneration of particulars for the construction of a building". He further quotes thus: "A building or engineering contract is a legally binding agreement which has for its subject matter or principal subject matter, the conditions intended to govern the erection of a proposed building or the execution of works of engineering construction; and by which one person or body of persons, undertakes, for a consideration, to erect or construct for another, such works in conformity with the design of the proposed building to be erected by one party on the land of the other and for the latter's benefit. The terms 'contract' and 'agreement' when applied to building and engineering works, have the same legal significance. But in practice, the terms 'building contract' and 'engineering contracts' are used in reference to works to be done for the use and benefit of the land-owner, whereas a 'building agreement' is one whereby a lease or other interest in the land is to be immediately granted to the contractor upon completion of the building". Hudson at page 68 has stated that "wherever a contractor is liable to a third person in this way, the building owner may also be vicariously liable for the builder's acts or omissions, or, perhaps more correctly, will be a joint tortfeasor. At page 579, under Section 2 dealing with "Damages", he has stated that "Under the complicated provisions of many building contracts the possible breaches of contract by the contractor are numerous, and in each case the general principles set out above must be applied in order to determine what, if any, damage is recoverable for the breach in question. Typical breaches of the less common kind are, for example, unauthorised sub-contracting, failure to insure as required failure to give notices, payment of unauthorised wages, and so on, which, depending on the particular circumstances of the case, may or may not cause damage. The commonest breaches causing substantial damage, and hence giving rise to litigation, may be broadly divided into three categories, namely, those involving abandonment or total failure to complete, those involving delay in completion, and those involving defective work. At page 580, the learned author has stated thus: "In the case of defective work it should also be remembered that the final certificate may, in the absence of an over-riding arbitration clause, bind in the employer and prevent him from alleging defective work altogether, and many contracts where no architect is used, particularly private-developer sales (or sales of houses "in the course of erection") may, depending on their terms, extinguish liability upon the later conveyance under the caveat emptor principle". The principle has been dealt with at page 289 stating as under: "The courts, in their desire to escape from the rule of fitness for habitation upon the purchase of a new house from a builder if the house is completed at the time of the contract of sale, have been able to justify a refusal to apply the rule of caveat emptor by finding that at the time of sale the house was "in the course of erection", and frequently apply the implied term as to habitability to houses which are virtually completed at the time of sale. Further more, while it might at first sight seem logical that the warranty of fitness should extended only to the work uncompleted at the time of sale, this difficulty has been brushed aside, and, once a building has been held to be in the course of erection, the warranty has been applied to the whole building including work already done.

7. In Mcgregor on Damages, the Common Law Library No.9 (14th Edn.) by Harvey Mcgregor at

page 683. It is stated that "(P)hysical damage to or destruction of goods may result from a large variety of very different torts of which trespass is the oldest and negligence the most prolific, and which includes torts involving, or bordering upon strict liability, as where the damage or destruction results from nuisance, by reason of damagerous premises, goods or animals in the defendant's control, from his non-natural user of land under the rule in *Rylands Vs. Fletcher* [(1868) L.R. 3 H.L. 330], or from breach of statutory obligation giving rise to an action in tort.... Not only are most of the cases actions of negligence but most of those in which question of the measure of damages have been worked out have involved damage to or destruction of ships generally by collision. The principles expounded in these cases are however of universal application. "There is no special measure of damages applicable to a ship," said Pickford L.J. in *The Kingsway* [(1918) p. 344, 356 (C.A.)], different from the measure of damages applicable to any other chattel. The nature of the thing damaged may give rise to more difficult questions in the assessment of damages but it does not change the assessment in any way". The normal measure of damages, stated in para 998 at page 684, is the amount by which the value of the goods damaged has been diminished.

8. In the *Modern Law of Tort* by K.M. Stanton [Sweet & Maxwell] (1995 Edn.) at pages 4-5, it is stated that "(C)ontract and tort are the two main areas of the English law of obligations. Contractual duties are based on an agreement whereby one person is to provide benefits for another in return for some form of benefit, whether in money or otherwise. Tort duties are imposed by operation of law and may be owed to a wide range of persons who may be affected by actions..... A question which is commonly asked in this context is whether a plaintiff who is in a contractual relationship with the defendant can invoke tort in order to benefit his case when there has been a breach of contract. There are a number of reasons relating to a damages and limitation of actions which may make it advantageous to switch a claim out of contract and into tort". At page 9, it is stated under the heading "Breach of trust and other equitable obligation" that "(R)emedies for breach of trust or other equitable obligations, even though they may result in purely financial awards, are excluded from the law of tort. The reason for this is basically historically; tort derives from the work of common law courts whereas the Court of Chancery, developed completely separate equitable principles." At page 334, it is stated by the author that "the issue of the recovery of pure economic loss also raises fundamental questions concerning the relationship between contract and tort and, in particular, the forms of loss which are recoverable in the different kinds of action. The central question in this debate is whether the tort of negligence has the capacity to provide a remedy for defective quality in the case of buildings and chattels. The traditional view is that it cannot because defects affecting the quality of an item can only give rise to a negligence action in tort if persons have been injured or other property damaged thereby. Damages can only be claimed in the tort of negligence for losses inflicted on the person or other property and not for defects affecting the item itself."

9. In "*Winfield and Jolowicz on Tort*" (14th 1994 Edn.) by W.V.H. Rogers, at page 4, it is stated under the "Definition of tortious liability" that "(T)ortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages". It must also be emphasised that the number of cases in which it will be essential to classify the plaintiff's claim as tort, contract, trust etc., will be comparatively small. A cause of action in modern law is merely a factual situation the existence of which enables the plaintiff to obtain a remedy from the court and he is not required to head his statement of claim with a description of the branch of the law on which he relies, still less with a description of a particular category (e.g., negligence, trespass, sale) within that branch. But statutes and rules of procedure sometimes distinguish between, say, contract and tort with reference to matters such as limitation of actions, service of process, jurisdiction and costs and the court cannot then avoid the

task of classification. On "contract and tort", it is stated at page 5 that "(I)t is unlikely that any legal system can ever cut loose from general conceptual classifications such as "contract" and "tort" but the student will quickly come to recognise that the boundary must sometimes be crossed in the solution of a problem. It has long been trite law that a defendant may be liable on the same facts in contract to A and in tort to B (notwithstanding privity of contract); it is also clearly established (though with qualifications the boundaries of which are rather uncertain) that there may be concurrent contractual and tortious liability to the same plaintiff, though he may not of course, recover damages twice over. Winfield, therefore, considered that tortious liability could for this reason be distinguished from contractual liability and from liability on bailment, neither of which can exist independently of the parties' or at least of the defendant's agreement or consent. The liability of the occupier of premises to his visitor, for example, which is now governed by the Occupiers' Liability Act, 1957, is based upon breach of a duty of care owed by the occupier to persons whom he has permitted to enter upon his premises. The duty owed to trespassers, i.e., persons who enter without his consent, is not the same.

10. In the "Words and Phrases" (Permanent Edition), Vol. 5A, at page 309, "breach of trust" is stated to be, "violation by trustee of any duty which as trustee he owes to beneficiary". The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a "breach of trust". A "breach of trust" is a violation by the trustee of any duty which as trustee he owes to the beneficiary. In *Jarvis Vs. Moy. Davies, Smith, Vanbervell & Company* [(1936) 1 QB 399 at 404], the facts were that the plaintiff sued the defendants, a firm of stockbrokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained loss. At the trial, judgment was given in favour of the plaintiff and it was held by Greer L.J. that where the breach of duty complained of arises out of the obligations undertaken by a contract, the action is founded on contract; but where that which is complained of arises out of a liability independently of the personal obligation undertaken by a contract, an action brought in respect of this is founded on tort and this is so even though there may be a contract between the parties.

11. In this backdrop, it would be seen that the tort liability arising out of contract and tort, equity steps in and tort takes over and imposes liability upon the defendant for unquantified damages for the breach of the duty owed by the defendant to the plaintiff. Equity steps in and relieves the hardships of the Plaintiff in a common law action for damages and enjoins upon the defendant to make the damages suffered by the plaintiff on account of the negligence in the case of the duties or breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances. In this case, it is found that four floors were unauthorisedly constructed and came to be demolished by the New Delhi Municipal Council. It does not appear that the owners of the flats were informed of the defective or illegal construction and they were not given notice of caveat emptor. Resultantly, they are put to loss of lacs of rupees they have invested and given as values of the flats to the builder-respondent.

12. The question arising for consideration is: whether the appellants should be re-compensated for the loss suffered by them? The High Court in the impugned judgment has directed the return of the amount plus the escalation charges. We are informed that the escalated price as on the date is around 1.5 crores per flat. In this situation, taking into consideration the totality of the facts and circumstances, we think that the builder-respondent should pay Rs.60 lacs including the amount paid by the allottees, within a period of six months from today. In case there is any difficulty in making the said payment within the said period to each of the flat owners, the builder-respondent is given another six months per-emptorily for which, however, the builder-respondent will have to pay

interest @ 21 per cent per annum on the said amount from the expiry of first six months till the date of payment.

13. The builder implead, suo motu, as one of the respondents, is also directed to obtain the certified copy of the title deeds and secure the loan, if he so desires. After the payment is so made, the appellants are directed to deliver the original title deeds taken custody of on March 1, 1994. It appears that with regard to the payment of Rs.1 crore as the price of the flats, property and money are kept under attachment. The attachment will continue till the said amount is paid over.

14. The appeal is accordingly disposed of. No costs.