Anoop Singh Vs Gopal Krishan Bhuradia & Anr

Court: Delhi High Court

Date of Decision: July 5, 2018

Acts Referred: Code Of Civil Procedure, 1908 â€" Section 96, Order 23 Rule 1(4), Order 41 Rule 33
Indian Contract Act, 1872 â€" Section 73, 74, 75

Hon'ble Judges: VALMIKI J. MEHTA, J

Bench: Single Bench

Final Decision: Allowed

Judgement

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908(CPC) is filed by the plaintiff in the suit. By the impugned judgment

dated 5.7.2017 trial court has dismissed the suit for specific performance filed by the appellant/plaintiff seeking specific performance of the

Agreement to Sell dated 24.1.2013 with respect to third and fourth floor with roof rights of the property bearing no.14-B/40, measuring 88.9 sq yds,

Dev Nagar, Karol Bagh, New Delhi-110005. Ã,

2. When this appeal came up for admission on 20.12.2017, the appellant/plaintiff sought only a limited relief in this appeal of refund of the amount paid

by the appellant/plaintiff to the respondents/defendants under the subject Agreement to Sell being the amount of Rs.10.25 lacs out of the total sale

consideration of Rs.90.25 lacs. The following order was passed on 20.12.2017:-

â€•CMs No.46486-87/2017 (both for condonation of delay in re-filing)

1. Delay in re-filing is condoned, subject to just exception. Ã,

2. Applications stand disposed of.

RFA 1061/2017 & CM No.46485/2017 (stay)

3. Learned counsel for the appellant argues that appeal is only pressed not for seeking specific performance and which relief has been rejected by the

trial court, but for refund of admitted earnest money amount which has been paid by the appellant to the respondents. It is argued that the trial court

has committed an error in holding that relief sought of refund of earnest money is barred on account of earlier suit filed by the appellant for recovery

of double the earnest money, inasmuch as, the cause of action in the earlier suit was different and was based upon breach of contract by the

respondents/plaintiffs whereas the recovery of money aspect will not be based on any breach being caused of the respondents / plaintiffs but on

account of appellant being entitled to refund of the earnest money as no loss has been pleaded and proved to have been caused to the respondents/

plaintiffs for them to forfeit the earnest money amount.

4. Notice be issued to the respondents, both in the ordinary method as well as by registered post AD, returnable before the Joint Registrar on 9th

March, 2018.

5. Trial court record be requisitioned.

3. The issue therefore to be decided by this Court is that even if the appellant/plaintiff/buyer is guilty of breach of contract and did not have readiness

and willingness to go ahead with the specific performance of the Agreement to Sell dated 24.1.2013, whether in such circumstances the

respondents/defendants/sellers can forfeit the amount of Rs.10.25 lacs paid by the appellant/plaintiff to the respondents/defendants under the subject

Agreement to Sell. Ã,

4. I have recently had an occasion to consider this aspect in the judgment delivered in the case of M.C. Luthra Vs. Ashok Kumar Khanna 2018 (248)

DLT 161. In the judgment in the case of M.C. Luthra (supra) I have referred to the Constitution Bench judgment of the Supreme Court in the case of

Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405 and which judgment holds that in case of a breach of an agreement to sell there cannot be

forfeiture of an amount paid under the Agreement to Sell unless the seller pleads and proves that loss has been caused to him on account of breach by

the buyer of not going through with the sale transaction. Constitution Bench of the Supreme Court in the case of Fateh Chand (supra) has held that

except a very nominal amount no further amount can be forfeited by a seller. The Constitution Bench judgment of the Supreme Court in the case of

Fateh Chand (supra) has been followed by the Supreme Court in its recent judgment in the case of Kailash Nath Associates Vs. Delhi Development

Authority and Another (2015) 4 SCC 136 and which holds that before any seller under the Agreement to Sell seeks to forfeit the amount paid under

the Agreement to Sell, the factum of causing of loss and its being proving is a sine qua non and failing which the seller cannot forfeit the amount paid

to him by the buyer under the Agreement to Sell. This Court has also dealt with the judgment of the Supreme Court in the case of Satish Batra Vs.

Sudhir Rawal, (2013) 1 SCC 345 and which judgment laid down the ratio that in case there is a clause under the Agreement to Sell for forfeiture of

the earnest money, then, earnest money can be forfeited. This Court distinguished this judgment of Satish BatraÃ¢â‚¬â„¢s case (supra) by referring to the

earlier Constitution Bench judgment of the Supreme Court in the case of Fateh Chand (supra) and as followed in the judgment in the case of Kailash

Nath Associates (supra). I may note that an SLP was filed in the Supreme Court against the judgment of this Court in the case of M.C. Luthra

(supra) and this SLP(C) No.11702/2018 was dismissed by the Supreme Court on 15.5.2018. The relevant paras of the judgment in the case of M.C.

Luthra (supra) are paras 3 to 17 and these paras 3 to 17 read as under:-

3. Today counsel for the appellant/defendant/counter-claimant has, in spite of what is recorded in the order dated 12.9.2017 of appellant/defendant

restricting the claim of forfeiture to a reasonable amount of Rs. 3 lacs out of Rs.9 lacs, argued by placing reliance upon the judgment of the Supreme

Court in the case of Satish Batra Vs. Sudhir Rawal (2013) 1 SCC 345 that since the amount of Rs.9lacs was paid by the respondent/plaintiff to the

appellant/defendant as earnest money, hence in accordance with the ratio in the case of Satish Batra (supra) the entire amount of Rs. 9 lacs can be

forfeited by the appellant/defendant as permitted by Clause 8 of the agreement to sell. The impugned judgment of the trial court is therefore prayed to

be set aside and the counter-claim of the appellant/defendant is prayed for being decreed for entitling the appellant/defendant to forfeit the entire

amount of Rs.9 lacs received by the appellant/defendant from the respondent/plaintiff.

4. There is no dispute between the parties that parties had entered into an agreement to sell dated 15.9.2005 for the appellant/defendant to sell the

subject suit property to the respondent/plaintiff. The total sale consideration was Rs.31.50 lacs and it is not in dispute that at the time of entering into

the agreement to sell the appellant/defendant received an amount of Rs.9 lacs with the amount of Rs.7 lacs being paid in terms of demand drafts and

a sum of Rs.2 lacs being paid in cash. Disputes and differences arose between the parties as to who was guilty of breach of contract in not

performing the agreement to sell dated 15.9.2005. Respondent/plaintiff filed the subject suit pleading that the appellant/defendant was guilty of breach

of contract and that therefore in terms of Clause 8 of the subject agreement to sell dated 15.9.2005, the respondent/plaintiff was entitled from the

appellant/defendant to double the amount of the money paid of Rs.9 lacs i.e an amount of Rs.18 lacs. The appellant/defendant prayed for the suit to be

dismissed and sought a declaration that the appellant/defendant should be held entitled to forfeit the amount paid of Rs.9 lacs received by

appellant/defendant under the agreement to sell, forfeiture being on account of breach of contract by the respondent/plaintiff and as permitted by

Clause 8 of the agreement to sell. Ã, 5. Trial court, after pleadings were complete, framed the following issues:-

1. Whether the defendant had discharged his all the liabilities raised against him by the concerned authority i.e. MCD/Society, bank by the stipulated

dated i.e. 18.11.2005. If not its effect? OPD

2. Whether there is a cause of action in filing the present suit in favour of the plaintiff? OPD

3. Whether the plaintiff is entitled to double the amount of earnest money as claimed in the plaint? OPP

4. Whether the plaintiff was having sufficient funds available with him to perform the agreement? OPP

5. Whether the plaintiff is entitled to recover the suit amount from the Ã, defendant? OPP

6. Whether the defendant is entitled to forfeit the earnest money as claimed by defendant in the counter claim? OPD

7. Relief.

6. Trial court has by the impugned judgment held that none of the parties are guilty of breach of contract. Trial court has held that besides none of the

parties being guilty of breach of contract, the respondent/plaintiff is found to have filed the suit before the due date fixed for performance as per the

agreement to sell, and that therefore the respondent/plaintiff cannot seek double the amount of earnest money paid of Rs.9 lacs i.e the

respondent/plaintiffÃ¢â‚¬Ëœs suit for the claim of Rs.18 lacs will fail. Trial court however decreed the suit for a sum of Rs.9 lacs being the amount paid

under the agreement to sell by holding that there cannot be forfeiture of the amount paid under an agreement to sell because the amount of Rs.9 lacs

paid under the agreement to sell could not be categorized as earnest money. The relevant paras of the impugned judgment also show that the trial

court has held that the appellant/defendant has failed to prove any loss on account of the breach of contract and further that the amount received of

Rs.9 lacs is not earnest money under the contract because terms of the agreement to sell did not indicate that this amount of Rs.9 lacs was given as

guarantee for due performance of the obligations. The relevant observations of the trial court in this regard are contained in paras 34 to 42 of the

impugned judgment and these paras read as under:-

34. So Ã, far Ã, as Ã, counter Ã, claim Ã, of Ã, defendant Ã, for Ã, claiming Ã, that earnest amount of plaintiff is liable to be forfeited, law is well settled.

If we go through the terms of the agreement Ex.PW1/1, stipulation in the shape of Clause 8 regarding forfeiture of earnest money cannot be termed

as a penalty. Consequences for breach of the contract are provided in Chapter VI of the Contract Act which contains three sections, namely, section

73 to section 75. As per Section 73 of the Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting

party, compensation for any loss or damage caused to him by such Ã, breach, Ã, which Ã, naturally Ã, arose Ã, in Ã, usual Ã, course Ã, of things from

such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision makes it

clear that such compensation is not to be given for any remote or indirect loss or Ã, damage sustained by reason of the breach. The underlying

Ã, principle enshrined in this section is that Ã, a mere breach of contract by a defaulting party would not entitle other side to claim damages unless said

party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the

plaintiff is to be compensated to the extent of actual loss or damage suffered.

35. Section Ã, 74 of Ã, the Ã, Act Ã, entitles Ã, a Ã, party Ã, to Ã, claim reasonable compensation from the party who has broken the contract which

compensation can be pre-determined compensation stipulated at the time of entering into the contract itself. Thus, this section provides for pre-

estimate of the damage or loss which a party is likely to suffer if the other party breaks the contract entered into between the two of them. In Fateh

Chand v. Balkishan Das, 1964 (1) SCR Ã, 515, Ã, Supreme Ã, Court Ã, has Ã, held: Ã, â€•Section Ã, 74 Ã, of Ã, the Indian Contract Act deals with the

measure of damages in two classes of cases (i) where the contract names a sum to be Ã, paid Ã, in Ã, case Ã, of Ã, breach Ã, and Ã, (ii) Ã, where

Ã, the Ã, contract contains any other stipulation by way of penalty.

36. We are in the Ã, present Ã, case Ã, not Ã, concerned Ã, to Ã, decide Ã, whether Ã, a covenant of forfeiture of deposit for due performance of a

contract Ã, falls Ã, within Ã, the Ã, first Ã, class. Ã, The Ã, measure Ã, of damages in the case of breach of a stipulation by way of penalty Ã, is Ã, by

Ã, Section Ã, 74 Ã, reasonable Ã, compensation Ã, not exceeding the penalty stipulated for. In assessing damages the Ã, Court Ã, has, Ã, subject Ã, to

Ã, the Ã, limit Ã, of Ã, the Ã, 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 Ã, stipulated; Ã, but

Ã, compensation Ã, has Ã, to Ã, be reasonable, Ã, and Ã, that Ã, imposes Ã, upon Ã, the Ã, Court Ã, duty Ã, to award compensation according to settled

principles. The section undoubtedly Ã, says Ã, that Ã, the Ã, aggrieved Ã, party Ã, 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 â€•actual loss

or damages; it does Ã, not Ã, justify Ã, the Ã, award Ã, of Ã, compensation Ã, when Ã, in consequence Ã, of Ã, the Ã, breach Ã, no Ã, legal Ã, injury Ã, at

Ã, all Ã, 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.

37. Thus, section 74 of Contract Act 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 Ã, enactment Ã, is Ã, not Ã, restricted Ã, to Ã, cases Ã, where

Ã, the aggrieved party claims relief as a plaintiff. The Section does not confer a special benefit upon any party; it merely declares Ã, the Ã, law Ã, that

Ã, notwithstanding Ã, any Ã, term Ã, in Ã, the contract Ã, predetermining Ã, damages Ã, or Ã, providing Ã, for forfeiture of any property by way of

penalty, the Court will award Ã, to Ã, the Ã, party Ã, aggrieved Ã, only Ã, reasonable compensation not exceeding the amount named or penalty

stipulated. Ã, The Ã, Court Ã, has Ã, to Ã, adjudge Ã, in Ã, every Ã, case reasonable compensation to which the plaintiff is entitled from Ã, the

Ã, defendant Ã, on Ã, breach Ã, of Ã, the Ã, contract. Ã, Such compensation has to be ascertained having regard to the conditions existing on the date of

the breach.

38. In Maula Bux v. Union of India (UOI), 1970 (1) SCR 928, it was held: â€•Forfeiture of earnest money under a contract for sale of property

movable or immovable if the amount is reasonable, does not fall within Section 74. That Ã, has Ã, been Ã, decided Ã, in Ã, several Ã, cases: Kunwar

Chiranjit Ã, Singh v. Har Ã, Swarup, A.I.R.1926 Ã, P.C.1; Roshan Lal v. The Delhi Cloth and General Mills Company Ã, Ltd., Ã, Delhi, I.L.R.

Ã, All.166; Muhammad Habibullah v. Muhammad Ã, Shafi, I.L.R. Ã, All. Ã, 324; Bishan Chand v. Radha Kishan Das, I.D. 19 All. 49. These Ã, cases

Ã, are Ã, easily Ã, explained, Ã, for Ã, forfeiture Ã, of Ã, a reasonable amount paid as earnest money does not amount to imposing a penalty. But if

forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of

money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a

penalty.

39. In Shree Hanuman Cotton Mills and Others v. Tata Air Craft Limited, 1969 (3) SCC 522, Apex Court elaborately discussed the principles which

emerged from the expression â€•earnest money. Apex Ã, Court, considering Ã, the Ã, scope Ã, of Ã, the Ã, term Ã, â€•earnest, Ã, laid Ã, down certain

principles, which are as follows:

From a review of the decisions cited above, the following principles emerge regarding â€•earnest

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, â€•earnest is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It Ã, is Ã, forfeited Ã, when Ã, the Ã, transaction Ã, falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

40. In Delhi Ã, Development Ã, Authority v. Grihstrapana Ã, Cooperative Ã, Group Ã, Housing Ã, Society Ltd., 1995 (1) SCC (Suppl.) 751, Apex Court

held that the forfeiture Ã, of Ã, the earnest Ã, money was Ã, legal. Ã, In V. Lakshmanan v. B.R. Mangalgiri and Others, 1995 (2) SCC (Suppl.) 33,

Supreme Court held as follows:

The question then is whether the respondents are entitled to forfeit the entire amount. It is seen Ã, that Ã, a Ã, specific Ã, covenant Ã, under Ã, the

contract was that respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed

Ã, by Ã, the Ã, appellant, Ã, as Ã, part Ã, of Ã, the contract, they are entitled to forfeit the entire amount.

41. Law is, therefore, clear that to justify the forfeiture of advance money being part of â€—earnest moneyÃ¢â‚¬Ëœ the terms of the contract should be clear

and explicit. earnest money is paid or given at the time when the contract is entered into Ã, and, Ã, as Ã, a Ã, pledge Ã, for Ã, its Ã, due Ã, performance

Ã, by Ã, the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to

perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price

cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment

of consideration and not intended as earnest money then the forfeiture clause will not apply.

42. In view of the legal proposition as discussed above, in facts and circumstances of the case while I have already held that both the parties cannot

be held guilty for non compliance of terms of agreement, therefore, defendant to my mind is also not entitled for forfeiture of entire earnest amount. In

peculiar facts and circumstances of the case while Ã, I Ã, decide Ã, the Ã, issue Ã, no. Ã, 1 Ã, that Ã, defendant Ã, has discharged Ã, all Ã, his

Ã, liabilities, Ã, therefore, Ã, plaintiff Ã, is Ã, not entitled for double of the amount as claimed. Therefore, plaintiff to my mind is entitled for recovery of

only Rs.9 lacs admittedly paid by him to defendant as earnest money however, plaintiff is entitled for such recovery of amount with interest @12 %

from the date of filing of the suit till realization. Above Ã, said Ã, issues Ã, are Ã, being Ã, accordingly decided.

7. Before this Court on behalf of the respondent/plaintiff it is argued that even if respondent/plaintiff is held to be guilty of breach of contract, but since

no loss is pleaded and proved by the appellant/defendant to have been suffered by him on account of the breach of contract by the

respondent/plaintiff, therefore the appellant/defendant cannot forfeit the entire amount of Rs.9 lacs and that the appellant/defendant can forfeit only a

nominal amount or a reasonable amount out of the total amount received by the appellant/defendant of Rs.9 lacs. Reliance is placed by the counsel for

the respondent/plaintiff upon the Constitution Bench judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Dass AIR 1963 SC

1405. Reliance is also placed by the counsel for the respondent/plaintiff upon a recent judgment of the Supreme Court in the case of Kailash Nath

Associates Vs. Delhi Development Authority and Another (2015) 4 SCC 136 to argue that Supreme Court in this judgment of Kailash Nath

Associates (supra) has clarified with reference to the ratio of Fateh Chand's case (supra) that when what is forfeited pursuant to a clause in a

contract being an agreement to sell then that act of forfeiture is one falling under Section 74 of the Indian Contract Act, 1872 and that Section 74 of

the Contract Act would only apply if the contract is of such a nature that loss cannot be proved on account of breach of contract but if the loss can be

proved then it/loss must be proved failing which earnest money cannot be forfeited. Putting it in other words it is argued that it is held by the Supreme

Court in the case of Kailash Nath Associates (supra) that on forfeiture being effected of earnest moneys paid under the contract, the said act of

forfeiture is an act which falls under Section 74 of the Contract Act because forfeiture is taking place of a liquidated amount fixed as per the contract

between the parties, but eventuality of such a clause of forfeiture coming into application would only be where contract is such by its nature that the

loss cannot be proved; unlike those contracts where it is possible to prove the loss caused; and that breach of an agreement to sell/purchase of

immovable property is a type of contract where loss can be proved, and that once loss is not pleaded and proved to be caused to the

appellant/defendant, then earnest money amount cannot be forfeited. It is also argued on behalf of the respondent/plaintiff that amount of forfeiture if

results in forfeiture taking place then if the forfeited amount is in the nature of a penalty amount, then the Courts will not allow forfeiture of the

liquidated amount/earnest money which is in the nature of penalty and that Courts will only grant reasonable compensation lesser than the total amount

of earnest money which is a penalty amount. Ã,

8. The issue before this Court is that whether it is the ratio of the judgment of the Supreme Court in the case of Satish Batra (supra) which has to be

applied or it is the ratio of the judgments of the Supreme Court in the cases of Fateh Chand (supra) and Kailash Nath Associates (supra) which have

to be applied. Also, if the ratio in the case of Satish Batra (supra) applies, then it is to be decided to what extent can the appellant/defendant be held

entitled to forfeit the amount i.e whether appellant/defendant can forfeit the entire amount of Rs.9 lacs or only a lesser amount can be allowed to be

forfeited by the appellant/defendant, and what is that lesser amount. Ã,

9. The facts of the judgment of the Supreme Court in the case of Satish Batra (supra) are quite similar to the facts of the present case because in the

said case the Hon'ble Supreme Court was dealing with a fact situation as to whether when a contract being an agreement to sell contains a clause of

forfeiture then in such cases the seller on breach by the buyer under an agreement to sell is entitled to forfeit the amount of earnest money simply

because a clause of forfeiture is so provided under the agreement to sell. Supreme Court in the case of Satish Batra (supra) on account of a clause of

forfeiture existing in the agreement to sell in that case allowed forfeiture of an amount of Rs.7 lacs out of the total sale consideration of Rs.70 lacs i.e

10% of the amount received under the agreement to sell was held to be in the nature of earnest money being capable of forfeiture by the seller

because the clause in the agreement to sell so provided for. Supreme Court in the case of Satish Batra (supra) distinguished the judgment of the

Constitution Bench of the Supreme Court in the case of Fateh Chand (supra) and relied upon the subsequent judgments of the Supreme Court in the

cases of Shree Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited (1969) 3 SCC 522 and Videocon Properties Ltd. Vs. Dr. Bhalchandra

Laboratories and Others (2004) 3 SCC 711 for holding that the earnest money in an agreement to sell can always be forfeited without pleading and

proving any requirement of the seller having suffered any loss. The relevant paras of the judgment of the Supreme Court in the case of Satish Batra

(supra) are paras 5 and 8 to 17 and these paras read as under:-

5. We have heard the learned Counsel on either side at length. Facts are undisputed. The only question is whether the seller is entitled to retain the

entire amount of Rs. 7,00,000/- received towards earnest money or not. The fact that the purchaser was at fault in not paying the balance

consideration of Rs. 63,00,000/- is also not disputed. The question whether the seller can retain the entire amount of earnest money depends upon the

terms of the agreement. Relevant clause of the Agreement for Sale dated 29.11.2005 is extracted hereunder for easy reference:

e) If the prospective purchaser fail to fulfill the above condition. The transaction shall stand cancelled and earnest money will be forfeited. In case I

fail to complete the transaction as stipulated above. The purchaser will get the DOUBLE amount of the earnest money. In the both condition,

DEALER will get 4% Commission from the faulting party.

The clause, therefore, stipulates that if the purchaser fails to fulfill the conditions mentioned in the agreement, the transaction shall stand cancelled and

earnest money will be forfeited. On the other hand, if the seller fails to complete the transaction, the purchaser would get double the amount of earnest

money. Undisputedly the purchaser failed to perform his part of the contract, then the question is whether the seller can forfeit the entire earnest

money.

8. We are of the view that the High Court has completely misunderstood the dictum laid down in the above mentioned judgment in Fateh Chand Case

and came to a wrong conclusion of law for more than one reason, which will be more evident when we scan through the subsequent judgments of this

Court.

9. In Shree Hanuman Cotton Mills v. Tata Air Craft Limited, this Court elaborately discussed the principles which emerged from the expression

earnest money"". That was a case where the Appellant therein entered into a contract with the Respondent for purchase of aero scrap. According to

the contract, the buyer had to deposit with the company 25% of the total amount and that deposit was to remain with the company as the earnest

money to be adjusted in the final bills. Buyer was bound to pay the full value less the deposit before taking delivery of the stores. In case of default by

the buyer, the company was entitled to forfeit unconditionally the earnest money paid by the buyer and cancel the contract. The Appellant advanced a

sum of Rs. 25,000/- (being 25% of the total amount) agreeing to pay the balance in two installments. On Appellant's failure to pay any further amount,

Respondent forfeited the sum of Rs. 25,000/-, which according to it, was earnest money and cancelled the contract. Appellant filed a suit for recovery

of the said amount.

The trial Court held that the sum was paid by way of deposit or earnest money which was primarily a security for the performance of the contract and

that the Respondent was entitled to forfeit the deposit amount when the Appellant committed a breach of the contract and dismissed the suit."" (Shree

Hanuman Cotton Mills case)

The High Court confirmed the decision taken by the trial Court. This Court, considering the scope of the term ""earnest"", laid down certain principles,

which are as follows: (Shree Hanuman Cotton Mills case)

â€•21. From a review of the decisions cited above, the following principles emerge regarding ""earnest

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, ""earnest"" is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

10. In Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd., this Court following the judgment of the Privy Council

in Har Swaroop and Shree Hanuman Cotton Mills, held that the forfeiture of the earnest money was legal. In V. Lakshmanan v. B.R. Mangalgiri, this

Court held as follows:

5.The question then is whether the Respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that

Respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the Appellant, as

part of the contract, they are entitled to forfeit the entire amount.

11. In HUDA v. Kewal Krishan Goel, the question that came up for consideration before this Court was, where a land is allotted, the allottee

deposited some installments but thereafter intimated the authority about his incapacity to pay up the balance installments and requested for refund of

the money paid, was the allotting authority entitled to forfeit the earnest money deposited by the allottee or could be only entitled to forfeit 10% of the

total amount deposited by the allottee till the request is made? Following the judgment in Shree Hanuman Cotton Mills, this Court held that (Huda

case)

12. ... the allottee having accepted the allotment and having made some payment on installments basis, then made a request to surrender the land, has

committed default on his part and, therefore, the competent authority would be fully justified in forfeiting the earnest money which had been deposited

and not the 10% of the amount deposited, as held by the High Court."" In that case, this Court took the view that the earnest money represented the

guarantee that the contract would be fulfilled. 12. This Court, again, in Videocon Properties Ltd. v. Bhalchandra Laboratories, dealt with a case of

sale of immovable property. It was a case where the Plaintiff-Appellants had entered into an agreement with the Respondents-Defendants on

13.5.1994 to sell the landed property owned by the Respondents and a sum of Rs. 38,00,000/- was paid by the Appellants as deposit or earnest money

on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the

words used in the agreement alone would not be determinative of the character of the ""earnest money"" but really the intention of the parties and

surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security

for the performance of the contract by the party concerned.

13. In that case, on facts, after interpreting various clauses of the agreement, the Court held as follows:(Bhalchandra case)

15. Coming to the facts of the case, it is seen from the agreement dated 13.5.1994 entered into between parties - particularly Clause 1, which

specifies more than one enumerated categories of payment to be made by the purchaser in the manner and at stages indicated therein, as

consideration for the ultimate sale to be made and completed. The further fact that the sum of Rs. 38 lakhs had to be paid on the date of execution of

the agreement itself, with the other remaining categories of sums being stipulated for payment at different and subsequent stages as well as execution

of the sale deed by the Vendors taken together with the contents of the stipulation made in Clause 2.3, providing for the return of it, if for any reason

the Vendors fail to fulfill their obligations under Clause 2, strongly supports and strengthens the claim of the Appellants that the intention of the parties

in the case on hand is in effect to treat the sum of Rs. 38 lakhs to be part of the prepaid purchasemoney and not pure and simple earnest money

deposit of the restricted sense and tenor, wholly unrelated to the purchase price as such in any manner. The mention made in the agreement or

description of the same otherwise as ""deposit or earnest money"" and not merely as earnest money, inevitably leads to the inescapable conclusion that

the same has to and was really meant to serve both purposes as envisaged in the decision noticed supra. In substance, it is, therefore, really a deposit

or payment of advance as well and for that matter actually part payment of purchase price, only. In the teeth of the further fact situation that the sale

could not be completed by execution of the sale deed in this case only due to lapses and inabilities on the part of the Respondents - irrespective of

bonafides or otherwise involved in such delay and lapses, the amount of rupees 38 lakhs becomes refundable by the Vendors to the purchasers as of

the prepaid purchase price deposited with the Vendors. Consequently, the sum of rupees 38 lakhs to be refunded would attract the first limb or part of

Section 55(6)(b) of the Transfer of Property Act itself and therefore necessarily, as held by the learned Single Judge, the Defendants prima facie

became liable to refund the same with interest due thereon, in terms of Clause 2.3 of the agreement

Therefore, the statutory charge envisaged therein would get attracted to and encompass the whole of the sum of rupees 38 lakhs and the interest due

thereon.

14. In the above mentioned case, the Court also held as follows:

(Bhalchandra case)

14. ...Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the

intention of parties and surrounding circumstances as well, that have to be baked into and what may be called an advance may really be a deposit or

earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest

money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by

the party concerned, who paid it.

15. The law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear

and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to

be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the

purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is

a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not

intended as earnest money then the forfeiture clause will not apply.

16. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the

moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to

bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by

reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011.

17. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs. 7,00,000/- as per the relevant clause, since the earnest

money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The

High Court has, therefore, committed an error in reversing the judgment of the trial court.

10. A reference to aforesaid paras of the judgment of the Supreme Court in the case of Satish Batra (supra) shows that there was a clause in the

agreement to sell which was held by the Supreme Court to entitle forfeiture of earnest money, and this clause was as is reproduced in Para 5 of the

judgment of the Supreme Court in the case of Satish Batra (supra), and therefore in the case of Satish Batra (supra) it was held that earnest money

paid under an agreement to sell can be forfeited without complying with the requirement of the seller pleading and proving that he has suffered a loss

on account of breach of the agreement to sell by the buyer. It also needs to be noted that in Para 14 of the case of Satish Batra (supra) reference is

made to the ratio of the judgment of the Supreme Court in the case of Videocon Properties Ltd.Ã¢â‚¬â„¢s (supra) that words used in an agreement are

not determinative of the character of the sum (received by a seller under an agreement to sell) and what is the character of the amount paid depends

upon the intentions of the parties and the surrounding circumstances. The Supreme Court therefore held that whether or not an amount called as

earnest money under the contract is or is not earnest money will have to be decided as per the facts and circumstances of each individual case. Ã,

11. In the present case, the Agreement to Sell (Ex.PW1/1) entered into between the parties reads as under:-

AGREEMENT TO SELL AND PURCHASE

This agreement is executed at Delhi, on this 15/09/2005

BETWEEN

Sh. M.C. Luthra s/o Sh. Mangal Das Luthra R/o H. No.691, Sector-V

R.K. Puram, New Delhi

(hereinafter called the PARTY NO.1)

AND

Sh. Ashok Kumar Khanna S/o Sh. Sant Ram Khanna R/o D-32, Fateh

Nagar, New Delhi

(hereinafter called the PARTY NO.2)

The expression of both the Parties wherever they occur in the body of this agreement shall means, and include their respective heirs, legal

representative, administrators, executors, successors, and assigns.

Whereas the Party No.1 is the exclusive owner of Flat No.D-504 Chankaya Cooperative Group Housing Society, Sector-4, Plot No.23 Dwarka, New

Delhi.

The aforesaid property is free from all kind encumbrances such as prior sale gifts, mortgage, litigation, disputes, stay orders, attachments, notifications,

acquisitions, charges liens, sureties etc.

Whereas the party No.1 for his bonafide needs and requirements has agreed to sell the aforesaid property for a total sale consideration of

Rs.31,50,000/- (Rupees Thirty one lakhs & Fifty Thousands only) and Party No.2 has agreed to purchase the same on the following terms and

conditions of this agreement:-

NOW THIS AGREEMENT WITNESSETH AS UNDER:-

1. That the Party No.2 has paid an amount of Rs.7,00,000/- (Rupees Seven Lakhs on 15.9.2005) as earnest money and balance amount of Rs.

2,00,000/- (Rs. Two lakhs only) will be paid by 23.9.2005.

2. The balance sale consideration amount of Rs.22,50,000/- (Rupees Twenty two lakhs and fifty thousands only) will be paid latest by 18/11/2005

(18th November 2005)

3. All liabilities up to the date of finalization of deal will be paid by Party No.1 and the same will be paid by Party No.2 after finalization of the deal.

4. That the Party No.1 shall not create any charges over the said property after the execution of this agreement and Party No.1 has no right to sell it

to anybody else after the signing of this agreement.

5. That all the expenditure regarding registration shall be borne by the Party No.2.

7. That the Party No.1 will deliver the vacant physical possession of the said property at the time of full and final payment and registration of

concerned documents in favour of the purchaser.

8. If the Party No.1 could not execute this agreement to sell then the Party No.1 will pay the double amount of the earnest money to Party No.2 and if

Party No.2 fails to pay the balance consideration amount within the due date then the amount of earnest money will be forfeited by Party No.1.

9. That Party No.1 has given his/her/their consent to the above condition without any reservation.

10. That Party No.2 hereby, further confirms and declares that this agreement is IRREVOCABLE and shall be final and binding on them, their heirs,

executors, administrators and assigns.

11. That both the parties will pay a commission of NIL% each to M/s xxx

Ã, IN WITNESS WHEREOF BOTH THE PARTIES HAVE PUT THEIR RESPECTIVE HANDS ON THIS AGREEMENT IN

PRESENCE OF THE FOLLOWING WITNESSES:-

Ã, WITNESSES:-Ã, Ã, Ã, Ã, Ã, sd/-

1. sd/-Ã, Ã, Ã, Ã, Ã, PartyNo.1 (SELLER)

2. sd/-Ã, Ã, Ã, Ã, Ã, Ã, sd/-

Ã, (PURCHASER)Ã, Ã, Ã, Ã, Ã, PartyNo.2

Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, Ã, (emphasis added)

12.(i) Clause 8 of the agreement to sell in the present case entitling forfeiture of earnest money is no doubt similar to the clause which existed in Satish

BatraÃ¢â‚¬â„¢s case (supra), however a reference to Clause 1 of the agreement to sell shows that earnest money is only Rs.7,00,000/- and not

Rs.9,00,000/-. It is only Rs.7,00,000/- which is stated as earnest money in Clause 1 of the agreement to sell and with respect to the other amount of

Rs.2,00,000/- it is stated that this is the 'balance amount'. Clause 2 of the agreement to sell then states that the 'balance sale consideration' amount

would be Rs.22,50,000/- i.e parties understood that in case the agreement to sell goes through then what has been paid in terms of Clause 1 of the

agreement to sell of Rs.7,00,000/- as earnest money will become part of the price to be paid under the agreement to sell. Ã,

(ii) Therefore in my opinion in the facts of the present case appellant/defendant cannot contend that earnest money amount was Rs.9,00,000/- and

therefore this Court holds that the earnest amount is Rs.7,00,000/-. Ã,

13.(i) The issue to be decided then is that how much amount should the appellant/defendant be held entitled to forfeit. As already stated above in

Satish BatraÃ¢â‚¬â„¢s case (supra) besides holding that what is earnest money depends on facts and circumstances of each case, and in Satish

BatraÃ¢â‚¬â„¢s case (supra) ten percent of the total sale consideration being Rs.7 lacs was held in terms of the contractual clause to be entitled for being

forfeited as earnest money as in Satish BatraÃ¢â‚¬â„¢s case (supra) the sale consideration was Rs.70,00,000/-. When we see the facts of the present

case it is seen that the total sale consideration is Rs.31,50,000/- and ten percent of which amount would therefore come to Rs.3,15,000/-. As already

observed in Satish BatraÃ¢â‚¬â„¢s case (supra) by referring to the ratio of Videocon Properties Ltd.Ã¢â‚¬â„¢s case (supra) that merely because the amount is

called as earnest money it will not automatically become earnest money and what is to be taken as the earnest money amount will depend upon the

facts and circumstances of each case with the intentions of the parties. Ã,

(ii) With respect to the amount being called as earnest money and whether merely by that itself that the amount is called as earnest money it will

become earnest money, it is seen that what is material is not label of the amount but the substance which has to be seen in view of the observations

made in Para 14 of the judgment of the Supreme Court in Videocon Properties Ltd.Ã¢â‚¬â„¢s case (supra), which has been reproduced above. I have also

in the judgment in the case of Shri Sunil Sehgal vs. Shri Chander Batra and Others, CS(OS) No. 1250/2006 decided on 23.9.2015 similarly held and

have observed as under:-

9. In the present case, defendants have led no evidence of any loss caused to them, and therefore, assuming that plaintiff is guilty of breach of

contract, yet, the defendants cannot forfeit the amount of Rs.15 lacs lying with them. A huge amount of Rs.15 lacs out of the total sale consideration

of Rs.79,50,000/- cannot in law be called earnest money. By giving a stamp of â€—earnest moneyÃ¢â‚¬Ëœ to advance price, the latter cannot become the

former. What is to be seen is the substance and not the label. Only a nominal amount can be said to be earnest money and not an amount of Rs.15

lacs out of Rs.79.50 lacs, by noting that if suppose an amount of Rs. 30 lacs or 40 lacs would be called as earnest money by the parties, that would not

take away the fact that such amount cannot be earnest money but would in fact be part of the price to be paid for sale.

(iii) I have also similarly held in the judgment passed in the case of Bhuley Singh Vs. Khazan Singh & Ors. in RFA No. 422/2011 decided on

9.11.2011 and the relevant Para 5 of the judgment reads as under:-

5. In my opinion, the appeal deserves to be allowed as the appellant/plaintiff has rightly claimed a lesser relief of Rs.5,00,000/- instead of a sum of

Rs.10,00,000/- as claimed in the plaint and which he is surely entitled to under Order 7(7) CPC. The Trial Court had framed a specific issue being

issue no.2 as to whether plaintiff was entitled to recover Rs.5,00,000/- from the respondents/defendants paid against the receipt dated 5.1.2007 and

therefore the argument of the counsel for the respondents/defendants that no issue was framed has no force. Once there was a specific issue, this

issue could well have been urged so that the appellant/plaintiff could claim a sum of Rs.5,00,000/- from the respondents/defendants which was paid

under the agreement to sell as an earnest amount on the basis of the undisputed position that the respondents/defendants did not plead or prove that

loss had been caused to them so as to entitle them to forfeit the amount paid to them under the Agreement to Sell. The Constitution Bench of the

Supreme Court in the case of Fateh Chand (supra) makes it more than clear that a mere breach of contract by a buyer does not entitle the seller to

forfeit the amount as received, unless, loss is proved to have been caused to the prospective sellers/defendants/respondents. The Supreme Court in the

judgment of Fateh Chand (supra) allowed forfeiture of amount of Rs.1,000/- out of the amount paid of Rs.25,000/-. I may also note that nomenclature

of a payment is not important and what is important is really the quantum of price which is paid. In the present case, the total price payable for the suit

property is Rs.20,00,000/- and therefore 25% of the payment made stricto sensu cannot be an earnest money, though it has been called so. Only a

nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow forfeiture of that amount to a nominal extent as held in

the case of Fateh Chand (supra). For example can it be said that 100% of the price or 75%/80% of the price or 50% of the price is earnest money so

that it can be forfeited. The answer surely is in the negative. Such high amounts called earnest money will be in the nature of penalty and thus hit by

Section 74 of the Indian Contract Act, 1872 in view of Fateh ChandÃ¢â‚¬â„¢s case. The principles laid down in Fateh ChandÃ¢â‚¬â„¢s case; that forfeiture of

a reasonable amount is not penalty but if forfeiture is of a large amount the same is in the nature of penalty attracting the applicability of Section 74;

have been recently reiterated by the Supreme Court in the case of V.K.Ashokan vs. CCE, 2009 (14) SCC 85.

Ã, I therefore hold that the appellant/defendant can at best seek to forfeit, in accordance with the ratio in Satish Batra's case (supra), a sum of Rs. 3

lacs, and not a sum of Rs. 9 lacs as is claimed by the appellant/defendant, but even this amount of Rs. 3 lacs cannot be allowed to be forfeited and the

reasons are given hereinafter. Ã,

14. At this stage this Court would like to observe with all humility that there are apparently two views which the Supreme Court has taken in its line of

cases as regards entitlement to forfeit earnest moneys. Whereas one view is the view which is the view taken by no less than a Constitution Bench

judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405 that forfeiture of earnest money can only be of a

nominal amount, and which was a sum of Rs. 1,000/- out of the total sale price of Rs. 1,12,500/- in Fateh ChandÃ¢â‚¬â„¢s case (supra), and that Supreme

Court in this judgment has laid down the ratio that whenever a seller forfeits an amount paid by a buyer under an agreement to sell then the source of

right of forfeiture arises only because of Section 74 of the Contract Act. It is held in Fateh ChandÃ¢â‚¬â„¢s case (supra) that where a seller pleads that

there is a breach of contract by the buyer and the seller seeks to forfeit an amount as paid by the buyer for being appropriated as designated liquidated

loss amount of damages as per contractual clause, then the act of forfeiture is one which falls under Section 74 of the Contract Act. Forfeiture of an

amount paid under the agreement is by a seller who already has with him moneys in his pocket and therefore there is no requirement to file a suit to

recover any amount from the buyer, however the law with respect to entitlement of forfeiture arises only because the forfeited amount is liquidated

damages under Section 74 of the Contract Act. That the forfeiture of earnest money is nothing but forfeiture of liquidated damages is clearly so

clarified by the recent judgment of the Supreme Court in the case of Kailash Nath Associates Vs. Delhi Development Authority and Another, (2015)

4 SCC 136 and relevant paras of this judgment are paras 30 to 44 which read as under:-

30. We now come to the reasoning which involves Section 74 of the Contract Act. The Division Bench held:

Ã¢â‚¬Å“38. The learned Single Judge has held that the property was ultimately auctioned in the year 1994 at a price which fetched DDA a handsome

return of Rupees 11.78 crores and there being no damages suffered by DDA, it could not forfeit the earnest money

39. The said view runs in the teeth of the decision of the Supreme Court reported as AIR 1970 SC 1986 Shree Hanuman Cotton Mills & Anr. V. Tata

Aircraft Ltd. which holds that as against an amount tendered by way of security, amount tendered as earnest money could be forfeited as per terms

of the contract.

40. We may additionally observe that original time to pay the balance bid consideration, as per Ex.P-I was May 18, 1982 and as extended by Ex. P-8

was October 28, 1982. That DDA could auction the plot in the year 1994 in the sum of Rupees 11.78 crore was immaterial and not relevant evidence

for the reason damages with respect to the price of property have to be computed with reference to the date of the breach of the contract.Ã¢â‚¬â€‹

31. Section 74 as it originally stood read thus:

Ã¢â‚¬Å“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, 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.Ã¢â‚¬â€‹

32. By an amendment made in 1899, the Section was amended to read:

â€•74. Compensation for breach of contract where penalty stipulated for. 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. Explanation.A stipulation for

increased interest from the date of default may be a stipulation by way of penalty. Exception.When any person enters into any bail-bond, recognizance

or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State

Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any

condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in

which the public are interested. 33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads â€•Of the consequences of breach of

contract. It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and

compensation for damage which a party may sustain through nonfulfillment of a contract after such party rightfully rescinds such contract. It is

important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused

by such breach.

34. In Fateh Chand v. Balkishan Das, 1964 SCR (1) 515, this Court held:

Ã¢â‚¬Å“The section is clearly an attempt to eliminate the somewhat 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. Ã¢â‚¬Â¦. 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 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 damages""; 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.Ã¢â‚¬(At page 526, 527) 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.Ã¢â‚¬(At

page 530) 35. Similarly, in Maula Bux v. Union of India (UOI), 1970 (1) SCR 928, it was held:

Ã¢â‚¬Å“Forfeiture of earnest money under a contract for sale of propertymovable or immovable-if the amount is reasonable, does not fall within Section

74. That has been decided in several cases :Kunwar Chiranjit Singh v. Har Swarup, A.I.R.1926 P.C.1; Roshan Lal v. The Delhi Cloth and General

Mills Company Ltd., Delhi, I.L.R. All.166; Muhammad Habibullah v. Muhammad Shafi, I.L.R. All. 324; Bishan Chand v. Radha Kishan Das, I.D. 19

All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if

forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of

money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a

penalty.

Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry

contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not

entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act),

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"". It is true that in every case of breach of contract the person aggrieved by the breach is not

required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation

in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression ""whether or

not actual damage or loss is proved to have been caused thereby"" is intended to cover different classes of contracts which come before the Courts. In

case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation

can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be

regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the

nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were

purchased by them when the plaintiff failed to deliver ""regularly and fully"" the quantities stipulated under the terms of the contracts and after the

contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by

them in procuring the goods contracted for. But no such attempt was made.Ã¢â‚¬â€‹(At page 933,934)

36. In Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Limited, 1970 (3) SCR 127 it was held: Ã¢â‚¬Å“From a review of the decisions cited above,

the following principles emerge regarding ""earnest"":

(1) It must be given at the moment at which the contract is concluded (2) It represents a guarantee that the contract will be fulfilled or, in other words,

'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnestÃ¢â‚¬

(At page 139)

Ã¢â‚¬Å“The learned Attorney General very strongly urged that the pleas covered by the second contention of the appellant had never been raised in the

pleadings nor in the contentions urged before the High Court. The question of the quantum of earnest deposit which was forfeited being unreasonable

or the forfeiture being by way of penalty, were never raised by the appellants. The Attorney General also pointed out that as noted by the High Court

the appellants led no evidence at all and, after abandoning the various pleas taken in the plaint, the only question pressed before the High Court was

that the deposit was not by way of earnest and hence the amount could not be forfeited. Unless the appellants had pleaded and established that there

was unreasonableness attached to the amount required to be deposited under the contract or that the clause regarding forfeiture amounted to a

stipulation by way of a penalty, the respondents had no opportunity to satisfy the Court that no question of unreasonableness or the stipulation being by

way of penalty arises. He further urged that the question of unreasonableness or otherwise regarding earnest money does not at all arise when it is

forfeited according to the terms of the contract.

In our opinion the learned Attorney General is well founded in his contention that the appellants raised no such contentions covered by the second

point, noted above. It is therefore unnecessary for us to go into the question as to whether the amount deposited by the appellants, in this case, by way

of earnest and forfeited as such, can be considered to be reasonable or not. We express no opinion on the question as to whether the element of

unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors

to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting

the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding

the same, so that the respondents would have had an opportunity of meeting such a claim.Ã¢â‚¬â€‹(At page 142)

37. And finally in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, it was held:

Ã¢â‚¬Å“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian

Contract Act and the ratio laid down in Fateh Chand case [AIR 1963 SC 140: (1964) 1 SCR 515 at p. 526] wherein it is specifically held that

jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation

has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation

for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read

with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not

actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable

compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If

the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable

compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties

knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to

lead evidence to prove actual loss suffered by him.

67Ã¢â‚¬Â¦Ã¢â‚¬Â¦..In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In

such a situation, if the parties have preestimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the

party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of

the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been

specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated

damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for

payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of

penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and

unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery

of the goods, the respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled

to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate

of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that

is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not

required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in

case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not

by way of penalty or unreasonable, the court can award the same if it is genuine preestimate by the parties as the measure of reasonable

compensation.Ã¢â‚¬â€‹

38. It will be seen that when it comes to forfeiture of earnest money, in Fateh ChandÃ¢â‚¬â„¢s case, counsel for the appellant conceded on facts that

Rs.1,000/- deposited as earnest money could be forfeited. (See: 1964 (1) SCR Page 515 at 525 and 531).

39. Shree Hanuman Cotton Mills & Another which was so heavily relied by the Division Bench again was a case where the appellants conceded that

they committed breach of contract. Further, the respondents also pleaded that the appellants had to pay them a sum of Rs.42,499/- for loss and

damage sustained by them. (See: 1970 (3) SCR 127 at Page 132). This being the fact situation, only two questions were argued before the Supreme

Court: (1) that the amount paid by the plaintiff is not earnest money and (2) that forfeiture of earnest money can be legal only if the amount is

considered reasonable. (at page 133). Both questions were answered against the appellant. In deciding question two against the appellant, this Court

held:-

Ã¢â‚¬Å“But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. As mentioned earlier, the appellants never

raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law.

Nor have they raised any contention that the amount of deposit is so unreasonable and therefore forfeiture of the entire amount is not justified. The

decision in Maula Bux's [1970]1SCR928 had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being

forfeited. Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which

were under consideration, were paid as earnest money. It is under those circumstances that this Court proceeded to consider the applicability of

Section 74 of the Contract Act. (At page 143)Ã¢â‚¬â€‹

40. From the above, it is clear that this Court held that Maula BuxÃ¢â‚¬â„¢s case was not, on facts, a case that related to earnest money. Consequently,

the observation in Maula Bux that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within

Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case.

The law laid down by a Bench of 5 Judges in Fateh ChandÃ¢â‚¬â„¢s case is that all stipulations naming amounts to be paid in case of breach would be

covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply

to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated

above, forfeiture of earnest money on the facts in Fateh ChandÃ¢â‚¬â„¢s case was conceded. In the circumstances, it would therefore be correct to say

that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by

Section 74.

41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an

agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of

auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted

on its plain language because it applies only â€•when a contract has been broken.

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be

forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any

loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:- 1.

Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable

compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other

cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not

exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded

not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable

compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in

Section 73 of the Contract Act

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for

the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression â€•whether or not actual damage or loss is proved to have been caused thereby means that where it is possible to prove actual

damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount

named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and

conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further,

we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face

of the most basic principle on the award of damages Ã¢â‚¬" namely, that compensation can only be given for damage or loss suffered. If damage or loss

is not suffered, the law does not provide for a windfall.""Ã, Ã, Ã, Ã, Ã, Ã, (emphasis added) Ã,

15. In sum and substance what is held by the Constitution Bench of the Supreme Court in the cases of Fateh Chand (supra) and the recent judgment

in Kailash Nath Associates (supra) is that whenever there is a breach of contract then earnest money which is forfeited because of the breach,

whether by a plaintiff or a defendant in a contract, the forfeiture is of that amount which are in fact liquidated damages specified under a contract and

that for claiming damages under a contract, whether liquidated under Section 74 of the Contract Act or unliquidated under Section 73 of the Contract

Act, existence of loss is a sine qua non. In other words, if no loss is caused to a seller who has in his pocket monies of buyer, then the seller can only

forfeit a nominal amount unless the seller has pleaded and proved that losses have been caused to him on account of the breach of contract by the

buyer. Once there is no pleading of loss suffered by a seller under an agreement to sell, then large amounts cannot be forfeited though so entitled to a

seller under a clause of an agreement to sell/contract entitling forfeiture of 'earnest money' because what is forfeited is towards loss caused, and that

except a nominal amount being allowed to be forfeited as earnest money, any forfeiture of any amount, which is not a nominal amount, can only be

towards loss if suffered by the seller. Thus if there is no loss which is suffered by a seller then there cannot be forfeiture of large amounts which is

not a nominal amount, simply because a clause in a contract provides so. The following has been held in the judgment in the case of Kailash Nath

Associates (supra):- Ã, (i) As per the facts existing in the case of Kailash Nath Associates (supra) the Single Judge of the High Court had held that

since no damages were suffered by DDA therefore DDA could not forfeit the earnest money. (Para 30 of Kailash Nath Associates's case (supra)).

(ii) The Division Bench of the High Court however set aside the judgment of the Single Judge by holding that amount tendered as earnest money can

be forfeited because and simply forfeiture of amount called as earnest money can be forfeited in terms of the contract. (Para 30 of Kailash Nath

Associates's case (supra) reproducing Para 39 of the Division Bench judgment of the High Court).

(iii) Supreme Court in the case of Kailash Nath Associates (supra) as per Para 44 of its judgment holds that the Division Bench of the High Court had

gone wrong in principle because compensation can be awarded (where there is breach of contract) only if loss or damage is suffered i.e where there

is no loss or damage suffered as a result of breach of contract no compensation can be awarded as law does not provide for a windfall i.e large

amounts though called contractually as earnest money cannot be forfeited unless loss is pleaded and proved to have been suffered. These

observations have cross-reference to Para 34 of the judgment of Kailash Nath Associates's case (supra) where with reference to the para of Fateh

Chand's case (supra) it is held that the language of Section 74 of the Contract Act that 'whether or not damage or loss is proved to have been caused

by breach' is the language that such language only discharges proof of actual loss but that does not justify award of compensation where in

consequence of breach no injury/loss has at all resulted.

(iv) Earnest money is an amount to be paid in case of breach of contract, and named in contract as such, and that forfeiture of earnest money is

covered under the entitlement to liquidated damages under Section 74 of the Contract Act vide Para 40 in the case of Kailash Nath Associates

(supra).

(v) The language of Section 74 of the Contract Act that ""whether or not actual loss or damage is proved to have been caused thereby"" means only

that where it is difficult or impossible to prove loss caused by the breach of contract then the liquidated damages/amount (being the amount of earnest

money) can be awarded vide Para 43(6) of Kailash Nath Associates's case (supra) but where nature of contract is such that loss caused because of

breach can be assessed and so proved then in such cases loss suffered must be proved to claim the liquidated damages of earnest money. This finding

has cross reference to Para 37 of judgment in Kailash Nath Associates's case (supra) where the observations of Supreme Court in Para 67 of the

case of ONGC Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705 are quoted that liquidated damages are awarded where it is difficult to prove exact loss or

damage caused as a result of breach of contract.

(vi) Even where liquidated damages can be awarded under Section 74 of the Contract Act because loss or damages cannot be proved in a contractual

breach yet if the liquidated damages (earnest money) are a penalty amount by its nature i.e prescribed liquidated damages figure is unreasonable, then

for the liquidated damages amount or earnest money amount forfeiture cannot be granted/allowed and that only reasonable amount is allowed as

damages with the figure of liquidated damages being the upper limit vide Para 43(1) of Kailash Nath Associates's case (supra).

16. Similar ratio as has been laid down by the Supreme Court in Kailash Nath Associates's case (supra) was also the ratio of the judgment of the

Supreme Court in the case of V.K. Ashokan Vs. Assistant Excise Commissioner and Others (2009) 14 SCC 85 and paras 66 to 71 of this judgment

reads as under:-Ã, Ã,

66. There is another aspect of the matter which cannot be lost sight of. If damages cannot be calculated and the terms of the contract provides

therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a

reasonable sum only could be recovered which need not in all situations even be the sum specified in the contract. (See Maula Bux vs. Union of India

and Shree Hanuman Cotton Mills vs. Tata Air Craft Ltd.)

67. Section 74 of the Contract Act reads as under:

74. Compensation for breach of contract where penalty stipulated for-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.

68. There are authorities, no doubt coloured by the view which was taken in English cases, that Section 74of the Contract Act would have no

application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, e.g.,. Natesa Aiyar v. Appavu

Padayachi, Singer Manufacturing Company v. Raja Prosad; Manian Patter v. The Madras Railway Company, but this view no longer is good law in

view of the judgment of this Court in Fateh Chand vs. Balkishan Das.

69. This Court in Fateh Chand case observed at pp. 526-27 (of SCR): â€•10. Section 74 of the 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. Ã¢â‚¬Â¦ 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.

The Court also observed: (AIR p. 1411, para 11)

11. 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 Section 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 â€—the contract

contains any other stipulation by way of penaltyÃ¢â‚¬Ëœ 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 Section 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.

and that,

14. Ã¢â‚¬Â¦ There is no ground for holding that the expression â€—contract contains any other stipulation by way of penaltyÃ¢â‚¬Ëœ is limited to cases of stipulation

in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property

delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited. (AIR p. 1412, para 14) 70.

Forfeiture of earnest money under a contract for sale of property whether movable or immovable, if the amount is reasonable, would not fall within

Section 74. That has been opined in several cases. (See Kunwar Chiranjit Singh v. Har Swarup; Roshan Lal v. Delhi Cloth and General Mills Co.

Ltd.; Mohd. Habib-ullah v. Mohd. Shafi ; Bishan Chand v. Radha Kishan Das.) These cases have explained that forfeiture of a reasonable amount

paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies.

71. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has

already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. (See Maula Bux and Saurabh Prakash v.

DLF Universal Ltd.)""Ã, Ã, Ã, Ã, (emphasis added)

17. All the judgments of the Supreme Court which have been relied upon in Satish BatraÃ¢â‚¬â„¢s case (supra) are of a Bench strength lesser than the

Constitution Bench strength of the Supreme Court in Fateh Chand's case (supra) and the law is well settled that it is the judgment of the larger Bench

of the Supreme Court which will prevail over the judgment of a Bench strength of lesser number of judges. Also, as already stated above, in the

recent judgment in Kailash Nath Associates's case (supra) Supreme Court has now clarified that a forfeiture of an earnest money necessarily falls

under Section 74 of the Contract Act i.e before forfeiture can take place it must be necessary that loss must be caused. Also, Supreme Court has

further clarified in Kailash Nath Associates's case (supra) that it is very much possible that forfeiture of an amount can be in the nature of penalty and

if the amount which is allowed to be forfeited under the contract is in the nature of penalty then Courts are empowered to treat the amount of

liquidated damages (earnest money) as one in the nature of penalty clause and that earnest money amount only represents the upper limit of damages

which are allowed to be forfeited in terms of the forfeiture clause, and actual forfeiture only of a lesser and a reasonable amount should be allowed

instead of the large amount/penalty as stated under a contract as being entitled to be forfeited and that too merely because a contractual clause allows

such a forfeiture. Ã,

5. I may note that in the present case the ratio of Satish Batra case (supra) will not apply because in the subject Agreement to Sell dated 24.1.2013,

admittedly there is no clause which entitles the respondents/defendants/sellers to forfeit the amount of earnest money. Therefore in any case the

respondents/defendants would have to plead and prove the loss being caused to them on account of the breach by the appellant/plaintiff of failing to

perform the subject Agreement to Sell, and consequently entitlement of the respondents/defendants to forfeit the amount paid under the Agreement to

Sell of the sum of Rs.10.25 lacs on account of the loss being caused because of breach of contract/agreement to sell by the appellant/plaintiff.

6. A reading of the written statement filed by the respondents/defendants shows that the respondents/defendants at internal page two specifically

pleaded that rates of the property have fallen down and therefore the appellant/plaintiff has failed to complete the sale transaction. This aspect was

reiterated by the respondents/defendants in the affidavit by way of evidence dated 28.3.2017. No doubt, no specific issue has been framed by the trial

court with respect to the entitlement of the plaintiff to seek back refund of the amount of Rs.10.25 lacs paid by the appellant/plaintiff to the

respondents/defendants under the Agreement to Sell, however once the parties are aware of the respective cases and have also accordingly led

evidence, any failure to frame an issue will not disentitle the Court to decide the same. In fact, the contention of the counsel for the

respondents/defendants is misconceived that this issue was not argued before the trial court inasmuch as reference to para 38 of the impugned

judgment shows that the issue with respect to refund of earnest money was considered by the trial court and this relief was rejected by reference to

Order XXIII Rule 1(4) CPC on account of the appellant/plaintiff having earlier filed a suit not for specific performance but for recovery of double the

amount of earnest money.

Para 38 of the impugned judgment reads as under:-

38. But the plaintiff had earlier filed CS(OS) No.553/2014 for recovery of double the amount of earnest money and the said suit was dismissed as

withdrawn vide order dated 05.03.2014 passed by the HonÃ¢â‚¬Ëœble High Court of Delhi. Therefore in so far as the relief of recovery of earnest money

is concerned that portion of the suit/claim would be barred by Order XXIII Rule 1(4) CPC as the subject matter of the present suit and the previous

suit would be the same qua the relief of recovery of earnest money. Therefore, the relief of recovery of earnest money cannot be granted to the

plaintiff on account of unconditional withdrawal of the previous suit in view of the provisions of Order XXIII Rule 1(4) CPC.Ã‚

7. The affidavit by way of evidence filed by the respondents/defendants except making self-serving statement of the property prices having fallen

does not state as to what is the specific monetary loss on account of falling of the prices of the property, and this self-serving averment is also not

cross-referenced with respect to any documentary evidence that the property prices have fallen by more than Rs.10.25 lacs so as to entitle the

respondents/defendants to forfeit the amount of Rs.10.25 lacs. In my opinion therefore the appellant/plaintiff is entitled to argue before this Court that

the appellant/plaintiff ought to have refunded the earnest money which was paid by the appellant/plaintiff to the respondents/defendants under the

subject Agreement to Sell and which was denied to the appellant/plaintiff in terms of para 38 of the impugned judgment. Ã,

8. In my opinion, counsel for the respondents/defendants is also not justified in arguing that since the appellant/plaintiff had earlier filed a suit for

recovery of double the amount of the earnest money, therefore, the appellant/plaintiff should be denied the relief of return of the earnest money paid

under the subject Agreement to Sell. This is because the earlier suit being CS(OS) No.552/2014 filed by the appellant/plaintiff against the

respondents/defendants sought a money decree for double the amount of the earnest money alleged breach of agreement to sell by the

respondents/defendants on account of the fact that construction of the subject property being third and fourth floor was not permissible by MCD and

which floors were to be sold by the respondents/defendants to the appellant/plaintiff under the subject Agreement to Sell. Therefore, the

appellant/plaintiff had predicated the earlier suit on the ground that specific performance was not possible and hence the appellant/plaintiff be held

entitled to the double amount of the earnest money on account of failure/inability of respondents/defendants to specifically perform the subject

agreement to sell.Ã, In that earlier suit CS(OS) no.552/2014 the following two orders were passed on 24.2.2014 and 5.3.2014 showing withdrawal of

the earlier suit and which was because the Court was of the opinion that since there was no denial by the respondents/defendants to specifically

performing the Agreement to Sell the appellant/plaintiff could not have filed the earlier suit for recovery of double the amount of earnest money but

ought to have filed the suit for specific performance. The orders dated 24.2.2014 and 5.3.2014 read as under:-

Order dated 24.2.2014

1. The plaintiff has sued for recovery of Rs.20,61,000/- pleading that he had entered into an agreement with the two defendants for purchase of the

third and fourth floors of a property in Karol Bagh and had paid an advance of Rs.10,25,000/- to the defendants; that the plaintiff has however now

discovered that the said third and fourth floors are notified by the MCD as having illegal projections on municipal land and the plaintiff is thus now not

interested in purchasing the said floors.

2. It is further the case of the plaintiff that the Sale Deed in favour of the defendants is of the third floor with terrace rights and the defendants thus do

not have title to the fourth floor, also agreed to be conveyed to the plaintiff.

3. The plaintiff is relying upon Clause 3 in the Agreement to Sell which made the defendants liable to pay, double the amount of earnest money

received to the plaintiff in the event of being in breach of the Agreement and thus claim Rs.20,50,000/- and Rs.11,000/- towards costs of notice.

4. It has been enquired from the counsel for the plaintiff, whether not the Sale Deed in favour of the defendants of the third floor with terrace rights

would make the defendants owner of the fourth floor also.

5. The counsel for the plaintiff agrees.

6. It has further been enquired from the counsel for the plaintiff as to how the clause entitling the plaintiff to double the amount of earnest money can

be invoked when the defendants are still ready and willing to perform their obligation under the Agreement to Sell and it is the plaintiff who, owing to

the said floors being notified as aforesaid, is withdrawing from the Agreement to Sell and whether not the plaintiff can at best would be entitled to

interest on the said amount of Rs.10,25,000/- and in which case the suit would be below the minimum pecuniary jurisdiction of this Court.

7. The counsel for the plaintiff seeks time to consider.

8. List on 5th March, 2014.

Order dated 5.3.2014

1. This order is in continuation of the previous order dated 24th February, 2014.

2. The counsel for the plaintiff states that he has instructions to withdraw the suit.

3. Dismissed as withdrawn.Ã, Ã,

9. In my opinion therefore the fact that the appellant/plaintiff had withdrawn his earlier suit for recovery of double the amount of earnest money

cannot prevent the appellant/plaintiff from filing the subject suit for specific performance, and which in any case is not the issue before this Court

because the issue before this Court is the relief claimed by the appellant/plaintiff not of specific performance but refund of the earnest money paid

under the subject Agreement to Sell. As already stated above, this issue was considered by the trial court and rejected in terms of para 38 of the

impugned judgment, but this finding of the trial court in para 38 is completely illegal because in the earlier suit the appellant/plaintiff had sought

recovery of double the amount of the earnest money on the pleading that the respondents/defendants were guilty of breach of contract, however for

determining the issue of refund of the earnest money amount the cause of action is totally a different cause of action that taking that it is the

appellant/plaintiff who is guilty of breach of contract, and not the respondents/defendants, whether the respondents/defendants can still forfeit the

earnest money paid under the subject Agreement to Sell without properly pleading and proving the loss caused of an amount of Rs.10.25 lacs or more.

As already stated above, except making general pleading and leading general evidence of falling of the prices of the property, there is no evidence that

falling in the prices of the subject property as on the date of the performance under the Agreement to Sell was for a sum of Rs.10.25 lacs or more so

as to enable the respondents/defendants to forfeit the earnest money amount of Rs.10.25 lacs. Also as already stated above, the ratio of the Satish

Batra case(supra) will not apply because the ratio of the Satish Batra case(supra) was as per the clause in the Agreement to Sell, in that case which

entitled the seller/defendant to forfeit the amount of earnest money, and which clause is conspicuous by its absence in the present case. Ã,

10. Though counsel for the respondents/defendants has argued that trial court could not have in any case passed a decree for refund of the earnest

money amount, and which has been rightly returned in terms of para 38 of the impugned judgment, however as already observed above, once parties

are aware of the respective cases and a case is decided on that basis and which is of the issue of entitlement of refund of the earnest money to the

appellant/plaintiff, this Court is entitled to consider the grant of relief of refund of earnest money to the appellant/plaintiff and against the

respondents/defendants.Ã, Ã,

11. In view of the aforesaid discussion, and taking that the appellant/plaintiff is guilty of breach of contract, in my opinion, at best the

respondents/defendants can forfeit an amount of Rs.1 lakh under the subject Agreement to Sell and not the entire amount of Rs.10.25 lacs.

Respondents/defendants therefore are legally bound to refund the amount of Rs.9.25 lacs to the appellant/plaintiff and for which a money decree is

passed in favour of the appellant/plaintiff and against the respondents/defendants.

12. The next aspect which arises is as to whether the appellant/plaintiff is entitled to any interest. In the case of M.C. Luthra (supra) this Court has

granted interest @ 12% per annum from the date of payment till the date of recovery by referring to the ratio of the judgment of the Supreme Court in

the case of South Eastern Coalfileds Ltd. Vs. State of M.P. and Others (2003) 8 SCC 648. I may also additionally note that in case the

appellant/plaintiff would have sought a loan, then, the appellant/plaintiff would have had to pay ordinarily an interest of around 12% per annum simple

for the loan taken of Rs.10.25 lacs from any bank or financial institution. Rate of interest at 12% is justified and as so observed in para 18(i) of the

judgment in the case of M.C. Luthra (supra) and which para 18(i) reads as under:-

18.(i) In view of the aforesaid discussion, this appeal is allowed to a limited extent that the appellant/defendant is held entitled to forfeit only a nominal

sum of Rs.50,000/- and not a sum of Rs.9,00,000/- as claimed by the appellant/defendant inasmuch as no loss is pleaded and proved to be caused to

the appellant/defendant on account of the breach of the agreement to sell by the respondent/plaintiff. The impugned judgment of the trial court

therefore is partly modified in that the judgment and decree in favour of the respondent/plaintiff will be only of an amount of Rs.8,50,000/- and not

Rs.9,00,000/-. Also, in exercise of powers under Order XLI Rule 33 CPC, and as prayed before this Court on behalf of the respondent/plaintiff, since

the trial court has not granted pre-suit interest, I hold that the impugned judgment and decree which only grants pendente lite and future interest will be

modified in view of the judgment of the Supreme Court in South Eastern Coalfileds Ltd. Vs. State of M.P. and Others (2003) 8 SCC 648 (as per

paras 21 and 22 thereof) that the respondent/plaintiff will be entitled to interest at the rate granted by trial court of 12% per annum from the date of

the agreement to sell being 15.9.2005 till the filing of the suit also i.e respondent/plaintiff will be entitled to interest at 12% per annum on the amount of

Rs.8,50,000/- from 15.9.2005 till the filing of the suit, and thereafter pendente lite and future till payment. Decree sheet be drawn accordingly. Ã,

13. In view of the aforesaid discussion, this appeal is allowed. A money decree is passed in favour of the appellant/plaintiff and against the

respondents/defendants for a sum of Rs.9.25 lacs alongwith interest @ 12% per annum simple from 24.1.2013 till payment.

Appellant/plaintiff is also entitled to costs of this appeal. Appeal is accordingly allowed and disposed of in terms of aforesaid observations.