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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 2259/2013 & I.A. 18582/2013

% ***Judgment dated 08.07.2014***

YOGESH AGGARWAL & ANR Plaintiff

Through: Mr.J.M. Bari, Advocate

versus

VIKAS GOYAL & ANR Defendant

Through: Mr.Rishi Pal Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Plaintiffs have filed the present suit for recovery of money and in the alternative for specific performance of the contract dated 29.1.2013. Pleadings are complete and admission / denial of documents has been carried out. All the documents stand admitted by the parties.
2. Mr.Bari, counsel for the plaintiffs submits that he wishes to give up relief of specific performance and restricts his relief only to recovery of Rs.45.0 lacs paid as part payment for the purchase of the suit property i.e entire second floor without roof rights of property bearing No.G-202, area measuring 211 sq. yds. situated at Pushkar Enclave, Paschim Vihar, New Delhi along with proportionate free hold rights of land underneath installed with lift for common use along with 1/4th undivided share in stilt parking with one servant room. Counsel for the plaintiffs further submits that it is not necessary to frame issues as the only defence raised by the defendant is that the earnest money stands forfeited in terms of the agreement to sell, whereas in accordance with law the defendant should

have given details of loss suffered in order to succeed. Reliance is placed on a decision in the case of *Airports Authority of India Vs. Shri R.K. Singhal* [RFA No.576/2002 decided on 16.11.2011].

3. As per the plaint, parties entered into an agreement to sell and purchase (BAYANA Agreement) on 29.1.2013 with respect to the entire second floor without roof rights of property bearing No.G-202, area measuring 211 sq. yds. situated at Pushkar Enclave, Paschim Vihar, New Delhi along with proportionate free hold rights of land underneath installed with lift for common use along with 1/4th undivided share in stilt parking with one servant room. The sale consideration was fixed at Rs.2.45 crores, but the proposed sale deed was to be executed only at the circle rate of Rs.16.1 lacs approximately.
4. Defendant no.1 received a sum of Rs.45.0 lacs from the plaintiffs on 29.1.2013. It has also been pleaded that besides the written agreement dated 29.1.2013 the parties had also entered into a separate oral agreement / understanding between themselves that the required conveyance / sale deed would be executed and registered by defendant no.1 in favour of the plaintiff at the circle rate. It is for this reason, according to the plaintiffs that the agreement dated 29.1.2013 was silent on this aspect.
5. It has also been pleaded that the oral agreement with respect to the sale consideration at which the sale deed was to be executed and registered was not inconsistent with the terms of the written agreement dated 29.1.2013. The property was to be constructed strictly in accordance with the sanctioned building plans and building bye laws. It is not in dispute that the agreement could not be completed, as the plaintiff did not pay the balance sale consideration, which according to the plaintiff was for the reason that the building was not being constructed in accordance with the sanctioned plan.

6. It is the case of the defendants that the plaintiffs did not have the means to pay the balance sale consideration, thus in terms of clause 5 of the agreement, advance / earnest money was forfeited by the defendants. Reliance is placed by counsel for the defendant on the legal notices issued by the defendants calling upon the plaintiff to complete the transaction, however, the plaintiffs refused to make the balance payment and in response thereto it was stated that only Rs.16.0 lacs was ready and available with them. Clause 5 of the agreement reads as under:

“5. That if the Second Party fails to pay the balance amount at the time of possession, the Second Party shall pay the interest @2% per month to the First Party on remaining amount. If the Second Party fails to pay the balance amount at least by October, 2013, the earnest money paid by the Second Party to the First Party will stand forfeited.”

7. According to counsel for the plaintiffs, the defendants have failed to plead any loss suffered by the defendants. Counsel for the defendants, however, submits that the defendants have so stated in the written statement that the earnest money paid by the plaintiffs would be forfeited in terms of the contract and further the defendants had suffered losses on account of sale transaction not being completed by the plaintiffs.
8. I have heard counsel for the parties and carefully perused the pleadings. Assuming that the plaintiffs are guilty of breach of contract, the short question which comes up for consideration before this court is whether the amount of Rs.45.0 lacs paid by the plaintiffs to the defendants as earnest money can be forfeited by the defendants and that too when the defendants have failed to plead any loss which was suffered. Counsel for the plaintiff submits that it is settled law that mere breach of a contract does not entitle the aggrieved party to claim damages unless losses have

been pleaded and proved, whereas, a reading of the written statement in the present case would show that the defendant has merely taken a stand that on account of non-fulfilment of the contract by the plaintiff, earnest money paid, stands forfeited, without proving any loss being caused to them. In the case of *Airports Authority of India (Supra)*, a Single Judge of this court has discussed in detail the legal position based on three Judgments of the Supreme Court. Relevant paragraphs of the judgment read as under:

“4. The law in this regard is well settled and three premier judgments of the Hon'ble Supreme Court are the judgments in the cases of *Fateh Chand Vs. Balkishan Dass* : (1964) 1 SCR 515: AIR 1963 SC 1405, *Maula Bux Vs. UOI* : 1969 (2) SCC 554 and *Union of India Vs. Raman Iron Foundry* : (1974) 2 SCC 231. It has been held in these judgments that clauses of forfeiture of liquidated damages by their very nature are hit by Section 74 of the Contract Act, 1872 inasmuch as such clauses are in the nature of penalty and at best only provide for the upper limit for claim of damages, and which if capable of being proved, have to be proved before the amount paid as earnest money can be forfeited. It is the ratio of these Supreme Court judgments that mere breach of contract eo instanti does not entitle the aggrieved party to forfeit the amount. The Constitution Bench in the case of *Fateh Chand (supra)* has specifically referred to the fact that the fine distinctions drawn in English law have been obliterated by Section 74 of the Contract Act, and as per which all clauses of liquidated damages are to be treated as bad, once losses otherwise can be established, and only on establishing of which forfeiture can take place. The relevant observations of the Supreme Court in the aforesaid judgment of *Fateh Chand (supra)* are as under:-

8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:-

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for.”

The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems

reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to

which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff

was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs.11,250 as damages to the plaintiff must therefore be set aside.

(Underlining added)

5. To the same effect are the observations in *Maula Bux Vs. UOI*: 1969 (2) SCC 554 and para 4 of which reads as under:-

“4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt in "The Dictionary of English Law" at p. 689 : "Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds." As observed by the Judicial Committee in *Kunwar Chiranjit Singh v. Har Swarup* A.I.R. 1926 P.C. 1

Earnest money is part of the purchase price when the transaction goes forward : it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money.

5. Section 74 of the Contract Act provides :

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

.....

There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach : Natesa Aiyar v. Appavu Padayachi I.L.R. [1913] Mad. 178, Singer Manufacturing Company v. Raja Prosad I.L.R.. [1909] Cal. 960, Manian Patter v. The Madras Railway Company I.L.R. 1906 Mad.188 But this view is no longer good law in view of the judgment of this Court in Fat eh Chand's case : [1964] 1 SCR 515 : [1964] 1 SCR 515. this Court observed at p. 526 :

“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.... 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 :

“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 whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" 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,

“There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" 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.

(Underlining added)

6. In Union of India Vs. Raman Iron Foundry (1974) 2 SCC 231 there are similar conclusions. Para 11 of this judgment reads as under:-

“11. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the

respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates 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 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, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due From the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for

damages.....The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

(Underlining added)”

9. The present case is to be decided on the touchstone of the law laid down by the Supreme Court. A careful reading of the written statement would show that nothing has been pleaded except for the plea raised that on account of the fact that the plaintiff did not comply with his part of the contract, the defendant was liable to forfeit the earnest money. The relevant paragraphs of the written statement read as under:

“Preliminary Objections:

1. That the present suit filed by the plaintiffs is abuse of the process of the law hence deserves to be dismissed at the first instance and hearing itself. It is submitted that despite repeated opportunities accorded to the plaintiffs by the defendant, he failed to perform his part of contract i.e. to make balance payment and get the sale deed registered in terms with sale agreement dated 29.1.2013. It is submitted that the plaintiffs cannot be permitted to take benefit of his own wrong and deliberate / intentional omission to perform his part of contract. The contract stood discharged on account of frustration due to none performance by the plaintiffs and as such nothing survives thereafter. The earnest money paid by the plaintiffs, hence stood forfeited in accordance with the terms of the contract and the law governing the issue.

2. That there is no cause of action in favour of the plaintiffs once he failed to perform his part of contract. The rights and obligations of the parties are governed by the terms of the contract which is sale agreement dated 29.1.2013. Once a party defaults the consequences as agreed in the agreement would follow. Since

admittedly the plaintiffs opted not to purchase the property i.e. flat in property bearing No.G-202, Pushkar Enclave, Paschim Vihar, New Delhi, the earnest money should be forfeited hence, there is no cause of action survives in favour of the plaintiffs seeking money decree of Rs.90,00,000/- (Rupees Ninety Lacs Only) with interest @18% or alternatively performance of the agreement to sell / purchase at a fictitious sale consideration of Rs.61,00,000/- (Rupees Sixty One Lacs only) only while the agreed sale consideration in the agreement dated 29-01-2013 is Rs.2,45,00,000/- (Rupees Two crores and forty five lacs only). In the absence of any cause of action, the suit does not survive.”

10. In response to paragraph 3 of the plaint, the defendant has stated as under:

“3. In the event the plaintiffs failed to perform his part of contract, the initial amount of Rs.45,00,000/- (Rupees Forty Five Lacs Only) termed as earnest money liable to be forfeited as per the specific term of sale agreement.”

11. It may also be noticed that in paragraph 28 of the written statement the defendant has taken a stand that the loss suffered by the defendant no.1 is explicit and expressed in the notice dated 10.9.2013.
12. During the course of hearing counsel for the defendant was asked whether a copy of the notice dated 10.9.2013 was filed, to which he submitted that in fact there was no notice of 10.9.2013, but there are two notices of 10.07.2013 and 2.9.2013.
13. Perusal of both these notices show that the defendant has failed to state the amount of losses which have been suffered. It may also be noticed that the present agreement is an agreement to sell and in case the plaintiff did not comply with his part of the agreement, the defendant would have well been in a position to quantify the damages suffered by him, if at all he had suffered any damages. In the absence of any pleadings to this effect in the written statement or any document, which has been placed on

record, the defendant cannot claim forfeiture of Rs.45.0 lacs which cannot be termed as earnest money. Resultantly the present suit is decreed in the sum of Rs.45.0 lacs with interest @8%, as all other reliefs are given up. Decree sheet be drawn up accordingly.

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14. In view of order passed in the suit, the present application stands disposed of.

G.S.SISTANI, J

JULY 08, 2014

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