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*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) 199/2017 & CM No.24256/2017

% Reserved on : 5th September, 2017
Date of decision : 18th September, 2017

CHANDAN SINGH (SINCE DECEASED)

THR LRS & ORS.

..... Appellants

Through : Mr. Ravi Gupta, Sr. Adv. With
Mr. L.B. Rai, Mr. Sumit
Nagpal, Mr. Sachin Jain and
Ms. Mallika Bhatia, Advs.

versus

ADHUNIK DATAMATICS PVT. LTD. Respondent

Through : Mr. Ratan Kumar Singh, Mr.
Nikhilesh Krishnan, Mr. A.K.
Tiwari, Mr. Gaurav and Ms.
Sushila, Advs.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

GITA MITTAL, ACTING CHIEF JUSTICE

1. The appellants before us assail the order dated 29th May, 2017 passed by the ld. Single Judge granting I.A.No.14/2016 in *CS(OS)No.4052/2014 M/s Adhunik Datamatics Private Limited* (respondent herein) vs. *Chandan Singh & Ors.* (appellants herein - represented by legal heirs who have filed the present appeal)

2. The facts giving rise to the appeal are within a narrow compass and to the extent necessary, we set the same out hereunder

3. The respondent had entered into Agreement to Sell dated 11th of April 2013 for purchase of 1/5th share each of the appellants/predecessor in interest of the appellants in agricultural land ad measuring 45 bighas 12 biswas situated in Revenue Estate of Village Neelwal, Tehsil, Punjabi Bagh, District West, Delhi. The agreement was for a total sale consideration of Rs.28.50 crore.

4. As per clause 2 of the Agreement to Sell, the respondents were required to pay a total sale consideration of Rs. 28.50 crore. As per clause 2.1.1, the respondent paid amount of Rs.2.85 crore as **advance sale consideration**. We extract hereunder the payment mechanism postulated in clause 2 of the Agreement to Sell dated 11th April, 2013 in extenso which reads thus:

"2. Sale Consideration and Payment Mechanism

2.1 Purchasers shall pay the sale consideration to the sellers in the following manner :

2.1.1 Advance Sale consideration : A sum equivalent to [10% approx, of the Sale Consideration amount to Rs.2,85,00,000/- (Rupees Two crore Eighty Five Lac only) ("Advance Sale Consideration") has been paid by the purchasers at the time of execution of this Agreement in the following manner :

S.No.	Cheque No.	Dated	Amount	In favour of	Drawn on
1.	406387 Cash	11/04/2013	55,00,000/- 2,00,000/-	Chandan Singh Chandan	

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2.	406388	11/04/2013	55,00,000/-	Singh
	Cash		2,00,000/-	Raj Singh
3.	406389	11/04/2013	55,00,000/-	Raj Singh
	Cash		2,00,000/-	Dilbagh
				Singh
				Dilbagh
				Singh
				Kumar
4.	406390	11/04/2013	55,00,000/-	Azad
	Cash		2,00,000/-	Singh
				Azad
				Singh
5.	406391	11/04/2013	55,00,000/-	Mahipal
	Cash		2,00,000/-	Singh
				Mahipal
				Singh
TOTAL AMOUNT				Rs.2,85,00,000/-
(Rupees Two crore				
Eighty Five Lac				
only)				

*The Sellers confirm and acknowledge the receipt of the above **Advance Sales Consideration** from the Purchaser and the same shall be adjusted against the Sale consideration.*

*2.1.2 Balance Sale Consideration : The balance Sale Consideration amounting to Rs.26,65,00,000/- (Rupees Twenty Five Crore Sixty Five Lac only) ("**Balance Sale Consideration**") shall be paid by Purchasers to Sellers within **Ninety (90)** days from the execution of this Agreement, i.e., on or before 9th July, 2013 in the following manner :*

S.No.	Amount	In favour of
1.	5,13,00,000/-	Mr. Chandan Singh
2.	5,13,00,000/-	Mr. Raj Singh
3.	5,13,00,000/-	Mr. Dilbagh Singh
4.	5,13,00,000/-	Mr. Azad Singh
5.	5,13,00,000/-	Kr. Mahipal Singh"
Total	25,65,00,000/-	

(Emphasis by us)

5. In para 3 of the agreement, the parties had postulated *inter alia* the followings events to take place on or before the execution dated :

“3. **Transfer of Property**

(a) xxx xxx xxx

(b) the **Balance Sale Consideration** shall be paid by the Purchasers to the Sellers simultaneously with the execution of the sale deed by sellers in favour of the purchaser on or before execution of the sale deed i.e. 9th July, 2013.”

6. We may also extract clause 10 of the agreement which refers to breach of agreement. The same reads as follows:

“10. **Breach of Agreement**

10.1 In case the sellers cause breach of this Agreement fails/defaults/avoids or refuses to implement the terms of this Agreement in this manner as stipulated herein then in that even the purchasers shall have the right to enforce the specific performance of this Agreement at the cost and risk of the sellers.

10.2 In case the purchasers fail/default/avoid or refuse to pay the Balance Sale Consideration in the manner as stipulated herein then in that event the seller shall have the right to forfeit the **Advance Sale Consideration** paid by the purchaser under Clause 2.1.1 and the sale agreement shall stand cancelled.”

(Emphasis by us)

7. We find that the agreement also postulated that since the land in question was agricultural land, compliance with provisions of the Delhi Land (Restrictions on Transfer) Act, 1972 was required. In terms of Section (5)(1) of this enactment a no objection certificate was

required to be obtained from the competent authority. The parties therefore, had agreed in clause 4.2(a) of the Agreement to Sell dated 11th April, 2013 that the sellers/defendants in the suit would sign the necessary applications forms for approvals/permission and application forms for issuance of the no objection certificate ('NOC' hereafter) and that it would be the obligation of the purchaser/respondent to obtain all necessary approvals, permissions and NOC from the concerned authorities for execution of the sale deed. The purchaser/respondent was required to inform the seller after obtaining the NOC approvals/permission at least 15 days prior to the date of execution of the sale deed.

8. It was the case of the purchaser/plaintiff (respondent herein) that they got issued the requisite NOC on 29th June, 2013 and duly informed the sellers/defendants (appellants herein) who requested that the original NOC be handed over to them, which they would bring at the time of registration of the sale deed on 9th July, 2013. The plaintiff has asserted that in the first week of July, 2013, the defendants informed that the original NOC was misplaced by them. The plaintiff states that it had insisted that the defendants should make efforts to trace out the original NOC, failing which it would not be possible to get the sale deed registered on the scheduled date of 9th July, 2013. For the reason that the NOC could not be traced out by the defendants the sale deed could not be executed by the 9th July, 2013

9. It appears that defendants also got issued legal notice dated 12th July, 2013 stating *inter alia* that the plaintiff had failed to appear in the office of the Sub-Registrar on 9th July, 2013 to make payment of

balance amount and have failed to purchase the non-judicial stamp papers required for the sale deed and so the advance amount stood forfeited and the agreement stood cancelled. It was *inter alia* specifically asserted as follows:

*“2. That you, as a **purchaser** agreed in the aforesaid agreement that in case of **purchaser’s fail/default/avoid** or refuse to pay the balance sale consideration in this manner stipulated in the agreement then in that event the **seller shall have the right to forfeit the advance sale consideration** paid by the purchaser and the sale agreement shall stand cancelled”*

10. In this communication, the appellants informed the respondents as follows :

*“In the above given facts and circumstances of the case the **advance amount** given by you to my clients in respect of this abovesaid agreement to sell **stand forfeited** and the abovesaid agreement to sell stand cancelled in terms of conditions of this agreement to sell dated 11/4/2013 and also because my client have even been ready to complete all and every obligation on their part but you failed to fulfil your obligation in this matter”*

Thus the appellants notified the respondents of the forfeiture of the amount as well as the cancellation of the Agreement to Sell dated 11th April, 2013.

11. In the plaint, the respondent states that it sent a reply dated 22nd July, 2013 pointing out that it was the defendants/appellants who had lost the NOC dated 29th June, 2013, delayed execution of the sale deed and who were in breach of the agreement.

12. We are told that the appellant/defendants again issued a reply dated 28th July, 2013 disputing receipt of the original NOC as well as the fact that it was lost by them.

13. Vide another letter dated 3rd August, 2013, the defendants informed the plaintiff that they had obtained a NOC dated 1st August, 2013 from the Tehsildar and that the sale deed be executed by 14th August, 2013. The purchaser responded by the letter dated 5th August, 2013 *inter alia* calling upon the seller to furnish the copy of the no objection certificate. This was followed by the letter dated 2nd September, 2013 addressed by the seller/plaintiff to the defendant again seeking copy of the NOC so as to verify the same and to prepare the draft sale deed.

14. As nothing was received according to the respondent, in this background, on 15th December, 2014, it filed a summary suit for recovery of the amount of Rs.2,85,00,000/- against the appellant/defendant/seller under Order 37 of the Code of Civil Procedure.

15. Upon receipt of the summons in the suit, the appellant filed an application under Order 37 Rule 3 of the Code of Civil Procedure being I.A.No.14/2016 contending *inter alia* that as per clause 10.2 of the agreement to sell, if the purchaser fails or avoids or refuses to pay the balance sale consideration in the manner as stipulated therein, then in that event the seller shall have the right to forfeit the **advance sale consideration** paid by the purchaser under Clause 2.1.1 and the sale agreement shall stand cancelled.

16. This application of the appellants/defendants for leave to defend the suit was contested by the plaintiffs/respondents and considered by the court. It came to be decided by the impugned order dated 29th May, 2017 whereby the Id. Single Judge has granted conditional leave to defend and the appellant was directed to deposit a sum of Rs.2,56,50,000/- (after deducting 10% of the amount of Rs.2,85,00,000/-). For clarity, we extract the operative part of the order as follows :

“12. Thus, the law is well settled that who may be at default the advance money cannot be forfeited, unless the loss is pleaded. The plea of the defendants that the advance was infact the earnest money then also, per law, it could not have been forfeited in entirety and even if one may treat the advance amount to be an earnest money, the law as it stands today would only allow the defendants to deduct 5% to 10% of such amount, given the facts of each case. Hence making provision for 10% of the consideration viz Rs.28.50 Lac to plead and prove the loss, if any, suffered by the defendants, the leave to defend is hereby granted to the defendants on their depositing an amount of Rs.2,56,50,000/-(Rupees Two Crore Fifty Six Lacs & Fifty Thousands) in the Court or in the alternative on giving Bank Guarantee for the said amount, with the Registrar General of this Court within four weeks from today. In case the amount is deposited it shall be converted into a fixed deposit with a nationalised bank for a term of one year initially, extendable per order of the Court.”

(Emphasis by us)

17. This order has been challenged by the appellant before us. It is submitted by Mr. Ravi Gupta, Id. Senior Counsel for the appellants that having regard to the size of the consideration which was to the tune of Rs.28.5 Crores, the purchaser/respondent had paid an

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extremely miniscule amount of Rs.2.85 Crores at the time of signing the agreement to sell dated 11th April, 2013 which clearly showed that same was in the nature of earnest money and could never have been treated as payment of advance sale consideration. It is submitted that such token amount was paid only to establish the sincerity and bona fide of the purchaser that it was entering into a genuine transaction of purchase. The submission is that this amount, though referred to as “**Advance sale Consideration**” in the agreement was actually only in the nature of earnest money.

18. It is submitted that in view of Clause 10 of the agreement and the law, the appellants/sellers had an absolute right to forfeit the full amount thereof upon a breach of the agreement by the purchaser/respondent, without having to establish anything more. The submission is that consequently, the appellants/sellers were entitled to unconditional leave to defend in the suit. In support of this submission, Mr. Ravi Gupta, Id. Senior Counsel for appellants places reliance on the judicial pronouncements reported at *(2015) 4 SCC 136, Kailash Nath Associates vs. Delhi Development Authority; JT 2012 (11) SC 70 Satish Batra vs. Sudhir Rawal* and the judgment of this court reported at *(2015) SCC Online Delhi 12831 Manoj Tomar vs. Neena Khatter & Ors.* We may briefly advert to the principles laid down in these judgments.

19. So far as pronouncement in *Satish Batra* is concerned, the question under consideration before the Supreme Court was as to whether the seller was entitled to forfeit the earnest money deposited where the sale of immovable property falls through, by reasons of

faults or failure of the purchaser. Clause (e), the relevant clause of the agreement to sell dated 29th November, 2015, which was in question in *Satish Batra's* case has been extracted in the pronouncement, clearly states that if the prospective purchaser defaults in paying the balance sale consideration of Rs.63 crore, the transaction shall stand cancelled and that the earnest money will be forfeited.

20. In *Satish Batra*, the Supreme Court considered the earlier judicial pronouncements reported at *AIR 1926 P.C. 1 (Kunwar) Chiranjit Singh vs. Har Swarup; 1969 (3) SCC 522 Shree Hanuman Cotton Mills & Ors. vs. Tata Air Craft Limited; 1995 Supp (1) SCC 751 Delhi Development Authority vs. Grihstrapana Cooperative Group Housing Society Limited; (1995) Supp. (2) SCC 33 V. Lakshmanan vs. B.R. Mangalgiri; (1996) 4 SCC 249 Housing Urban Development Authority and Anr. vs. Kewal Krishan Goel & Ors. and (2004) 3 SCC 711, Videocon Properties Ltd. Vs. Dr. Bhaichandra Laboratories & Ors.* and held as follows:

“ 15.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 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.”

(Emphasis by us)

21. On a consideration of the factual matrix of *Satish Batra*, the Supreme Court concluded that the amount paid at the time of execution of the contract was represented as guarantee that the contract would be fulfilled that is to say “*earnest*” was given to bind the contract, which, if the transaction is carried out, would form part of the purchase price and it would be forfeited when the transaction falls through by reasons of default or failure of the purchaser. The court observed that there was no other clause which militated against such an interpretation of the stipulation. The Supreme Court therefore, declared the legal position that upon breach of an agreement to sell by the purchaser, it is only earnest money given as a guarantee that the contract would be abided with, could be forfeited.

22. In *Kailash Nath Associates*, the court considered the applicability of Section 73 and Section 74 of the Contract Act. The Court noted that Section 74 is placed between Section 73 and 75 which deals with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfilment of a contract by the other party compelling such party to rightfully rescind such contract. It is important to note that like Section 73 and Section 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

23. This appeal (*Kailash Nath Associates*) arose out of public auction conducted by the DDA wherein the appellant was the highest bidder for a commercial plot. As per the terms and condition of the auction, the appellant deposited an amount of Rs.78 lakhs being 25% of the bid amount with the DDA as earnest money, under the terms and conditions of the auction. The balance 75% amount of the bid was liable to be deposited after the three months of the communication of the acceptance of the bid. On request of the appellant, the DDA extended the time for payment of the balance amount upto 28th October, 1982 with interest.

24. We may usefully extract the consideration by the court in paras 31, 32, 33 and in para 40 of *Kailash Nath Associates* wherein the court noted the enunciation of law in *Maula Bux vs. Union of India (1969) 2 SCC 554* and *Fateh Chand vs. Balkishan Das 1964 (1) SCR 515*. These paras read as follows:

“31. Section 74 as it originally stood read thus:

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.

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

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 bailbond, 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 "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 non-fulfillment 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.***

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40. From the above, it is clear that this Court held that *Maula Bux* case [*Maula Bux v. Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] was not, on facts, a case that related to earnest money. Consequently, the observation in *Maula Bux* [*Maula Bux v. Union of India*, (1969) 2 SCC 554 : (1970) 1 SCR 928] 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 five Judges in *Fateh Chand* case [*Fateh Chand v. Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] 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 Chand* case [*Fateh Chand v. Balkishan Dass*, (1964) 1 SCR 515 : AIR 1963 SC 1405] 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."

(Emphasis by us)

25. Thereafter the law of compensation for breach of contract and Section 74 of the Contract Act was summed up in para 43 of *Kailash Nath* in the following terms :

"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 "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."

(Emphasis by us)

26. We may also note the pronouncement of this court in ***Manoj Tomar*** on which reliance has been placed by Mr. Ravi Gupta, Id Senior Counsel for the appellants. In this case, the Id. Single Judge was considering the issues as to whether, even if, the plaintiff is guilty of breach of contract, the defendants are entitled to forfeit the advance money received by the defendants under the agreement to sell? In para 3 of this judgment, the Id. Single Judge noted thus :

" 5. The issue is that even if the plaintiff is guilty of breach of contract, whether the defendants are entitled to forfeit the advance money received by the defendants under the agreement to sell. Para 14 of the written statement shows that defendants have made an averment that the defendants have forfeited the amount because the plaintiff did not call upon the defendants to complete the sale transaction, however there is no averment in the written statement that defendants have forfeited the amount on account of loss being caused to them by the plaintiff on account of the breach of contract, much less details of loss and how caused as required by Order VI Rule 4 CPC is pleaded. In law, once no loss is caused to the aggrieved party as per Section 73 and 74 of the Indian Contract Act, 1872, no cause of action arises for claiming damages or forfeiture of advance money received under the agreement to sell as damages. ... "

(Emphasis by us)

27. The Id. Single Judge has summed up the applicable principles in paras 6 and 7 in the following terms :

*“6. A reading of the ratio of Kailash Nath Associates’s case (supra) makes it more than clear that the law with respect to entitlement of a defendant/proposed **seller to forfeit an amount received under the agreement to sell is subject to loss being caused** and appropriation is actually pursuant to Section 74 of the Indian Contract Act by taking the advance payment received as liquidated damages, but **once there is no plea of loss** being caused alongwith necessary details, there does **not arise issue** of appropriation by the defendants, of the advance price received under the contract as liquidated damages.*

*7. In my opinion, an amount of Rs.1,35,00,000/- cannot be taken as earnest money inasmuch as, earnest money is only a nominal amount . In similar circumstances I have recently in the case of **Sh. Sunil Sehgal Vs. Shri Chander Batra & Ors.** CS(OS) No. 1250/2006 decided on 23.9.2015 held that what is to be seen is the substance and not the label and merely because a huge amount is called as earnest money, the same will not become an earnest money but would be an advance price paid under the agreement to sell. The relevant paras of this judgment are paras 8 and 9, and which read as under:*

8. In the present case, the nature of contract is such that losses could have been proved by the defendants by proving the falling of prices of the subject property, and only if the prices of the property had fallen and breach was committed by the plaintiff/buyer, the defendants could have only then been entitled to forfeit the amount paid by the plaintiff as damages on account of loss caused. Para 43.4 of the judgment of the Supreme Court in the case of Kailash Nath Associates (supra) reproduced above shows that the provisions of Sections 73 and 74 of the Indian Contract Act applies whether a person is plaintiff or a defendant in the suit ie a defendant who is a seller cannot forfeit any moneys

unless loss is proved to be caused by fall in the price of the property.

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 'earnest money' 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."

(Emphasis by us)

28. In para 40 of **Kailash Nath**, it has been clearly stated that it would be correct to say that "*as earnest money is the amount to be paid in case of breach and named in the contract as such it would be necessarily covered by Section 74*".

29. From the above, the clear principle that emerges is that reasonableness of compensation under Section 74 would apply to all amounts to be paid in cases of breach whether they are in the nature of penalty or otherwise. So far as forfeiture of the earnest money is concerned, reliance on **Fateh Chand**'s case may not be appropriate inasmuch as, on the facts of that case, the same was conceded.

30. There can be no dispute with the foregoing well settled principles. Let us examine the same as against the factual matrix placed by the parties before us.

31. We find that even the Id. Single Judge has rightly observed in para 10 of the impugned judgment that it was settled law that even earnest money cannot be forfeited in the entirety unless the loss is pleaded.

Whether the amount in the instant case was earnest money or advance?

32. The question which has to be answered in the present case therefore is as to whether the amount paid by the plaintiff to the respondent was in the nature of earnest money or payment of advance consideration?

33. Mr. Ravi Gupta, Id. Senior Counsel for the appellants has strongly pressed that in the instant case, the amount paid by the purchaser at the time of execution of the agreement had to be treated as the earnest money given the percentage that it formed of the full consideration. In this regard, it is necessary to advert to the terms of the agreement as extracted above.

34. Clause 2.1.1 of the Agreement to Sell dated 11th April, 2013 (extracted by us heretofore) stipulated payment of sum of Rs.2.85 crore as "*Advance Sale Consideration*" and notes the manner in which the same is paid. The agreement records the confirmation and acknowledgement of the receipt of the said amount as advance consideration. Clause 2.1.2 refers to the payment of the "*balance sale consideration*" of Rs.25,65,00,000/-.

35. Furthermore, there is reference to payment of “balance sale consideration” in clause 3 of the agreement. Again in Clause 10.2 of the Agreement to Sell dated 11th April, 2013, there is reference to the rights of the seller to forfeit the “*advance sale consideration paid by the purchaser under clause 2.1.1*”.

36. We may note that the seller/defendant has also not treated the payment of the amount of Rs.2,85,00,000/- as earnest money and addressed the legal notice dated 12th July, 2013 noted above which clearly refers to the amount as “*advance sale consideration*”. By this very communication, the appellant also notified the respondents that the “*advance amount*” given by it to the appellants stands forfeited in terms of the agreement dated 11th April, 2013.

37. In I.A.No.14/2016, also the appellant/seller has referred to the receipt of the amount as advance payment. Payment was addressed as advance payment.

38. We may note that in the impugned order dated 29th May, 2017, the Id. Single Judge has noted the arguments of the defendants in para 4 when it has argued that as there was failure on the part of the plaintiff to get the sale deed executed in time, so the forfeiture of its advance of Rs.2.85 crore and consequently cancellation of the agreement to sell raises a triable issue and hence they be granted unconditional leave to defend.

Clearly, the seller has not treated the payment as payment of a token/earnest money but has treated the same as payment of advance sale consideration.

39. There can be no dispute with the submission that it is not the label of the amount assigned to the payment which is of consequence but the substance thereof which is relevant and material has not been held that it is payment of only a nominal amount can be said to be in the nature of earnest money. Payment of the sum of Rs.2,85,00,000/- by no stretch of imagination could be treated as payment of a token or notional amount.

40. On this aspect, in the impugned judgment, the Id. Single Judge has rightly observed that under the agreement to sell dated 11th April, 2013, the balance sale consideration was payable by 9th July, 2013 when the sale deed was to be executed. However, this event did not happen. The plaintiff has contended that this was for reason of the mischievous loss of the original No Objection Certificate dated 29th June, 2013, though the defendants allege that as the plaintiff did not come forward, so they had obtained the another No Objection Certificate dated 1st August, 2013 and afforded yet another opportunity to the plaintiff to pay the balance sale consideration and get the sale deed executed by 14th August, 2013. In these facts, the Id. Single Judge has held that the stipulated time limit as agreed by the parties in the agreement to sell dated 11th April, 2013 was not adhered too and that time was not of the essence of the agreement.

Whether the seller had an absolute right to forfeit the advance payment made by the purchaser to it.

41. We have agreed with the Id. Single Judge that the amount paid by the respondent was in the nature of advance sale consideration and not earnest money. Even if the same could be treated as earnest money, the above extract shows that entitlement of the seller to forfeit the amount received under the agreement to sell is subject to loss being occasioned and such appropriation can be effected only in accordance with Section 74 of the Indian Contract Act, 1872.

Therefore, even upholding of the forfeiture of any amount necessarily requires consideration of the pleadings of loss on behalf of the seller as well as evidence on the issue.

42. We have extracted above, the notice dated 12th July, 2013 sent by the seller/appellant to the respondents herein. The same makes no reference to any loss at all but places reliance on clause 10 of the agreement to sell dated 11th April, 2013 and asserts an absolute power premised where on it claims to have forfeited the advance amount paid by the purchaser to the seller. There is not the remotest suggestion of any loss having been occasioned to the appellant. Even the letter dated 28th July, 2013 (at page 159) sent by the appellants through its counsel makes reference to only payment of the '*advance*' and payment of '*balance sale consideration*' on or before 9th July, 2013 and '*forfeiture of advance amount*'. There is not a single reference of any loss as having occasioned therefrom.

43. Even in the I.A.No.14/2013, the leave to defend application filed by the appellant, there is not a whisper of a pleading to the effect that any loss had occasioned to the appellant.

44. Even if the plea of the defendant that the advance payment was in fact the earnest money was accepted, as per the settled law, it could not have been forfeited in its entirety. There can be no forfeiture without pleadings of loss.

In the present case, the defendants have miserably failed to plead any loss having been caused.

45. In para 12 of the impugned judgment dated 29th May, 2017, the Id. Single Judge has further held that in any case, the entire amount paid by the plaintiff/respondent could not have been forfeited in its entirety. We have extracted the direction by the Id. Single Judge hereinbefore where it has been held that even if one may treat the advance amount to be in the nature of an earnest money, the law as it stands today would only allow the defendants to deduct 5% to 10% of such amount given the facts of each case.

46. It is well settled that a party can lead evidence only on its pleadings. In the present case, the appellants have failed to even plead any loss suffered by it.

47. In our view therefore, the Id. Single Judge has exercised its discretion generously while enabling the appellants to make provision for 10% of the consideration which is Rs.28.5 lac to plead and prove loss, if any, suffered by them and granted leave to defend conditionally on their depositing the sum of Rs.2,56,50,000/- in the

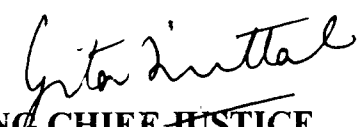
court or in the alternative by furnishing security in the nature of bank guarantee for the said amount.

48. The respondent/plaintiff has not assailed the liberty granted by the Id. Single Judge to withhold the amount of 10% of the sale consideration of the amount of advance payment.

49. In view thereof, we find no merit in this appeal and pending application, which are hereby dismissed.

50. The respondents shall be entitled to costs of the appeal which are quantified at Rs.25,000/-.

51. We make it clear that we have not expressed any opinion on the merits of the case of the parties which has to abide by final adjudication after evidence has been led. Nothing herein contained shall be so construed.


ACTING CHIEF JUSTICE


C.HARI SHANKAR, J

SEPTEMBER 18TH, 2017
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