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

Reserved on : 26th October, 2018

Date of decision : 27th November, 2018

+ **CS (OS) 539/2014**

RAJESH GULLAH Plaintiff

Through: Mr. P. S. Bindra, Ms. Rishika Arora
and Ms. Asmita, Advocates.
(M:9811034970)

versus

SANGEETA SETHI & ANR. Defendants

Through: Ms. Sonali Malhotra, Advocate.
(M:9818024129)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiff – Mr. Rajesh Gullah has filed the present suit for specific performance and permanent injunction against Mrs. Sangeeta Sethi and Mr. Sannil Sethi (*hereinafter 'Defendants'*).

2. The basis of the suit is an agreement to sell dated 12th October, 2010 entered into between the Plaintiff and the Defendants. The said agreement is admitted between the parties and is marked as Ex.PW-1/2. The agreement is duly signed by the Plaintiff and the Defendants. The agreement relates to property no.2, Road No.40, Punjabi Bagh (West), New Delhi, admeasuring about 365 sq. yds. (*hereinafter 'suit property'*). The Plaintiff agreed to purchase the same from the Defendants for a total sale consideration of Rs.11,31,00,000/-. It is the case of the Plaintiff that he has paid the Defendants a total of Rs.1 crore i.e. Rs.75 lakhs by way of pay orders and Rs.25 lakhs by cash. The important terms and conditions of the said agreement are as under:

“..And WHEREAS the first party has agreed to sell the above mentioned Registration / property super-structure with the occupancy rights/ ownership/ freehold rights of land beneath the same in the second party for a sum of Rs. 11,31,00,000/- (Rupees Eleven crore thirty one lac only) and the second party has agreed to purchase it.

And whereas out of total settled consideration amount, second party have paid a sum of Rs. 1,00,00,000/ (Rupees one crore only) in cash/cheque to the first party, as an earnest money/advance money and balance amount of Rs. 10,31,00,000/ (Rupees Ten crore thirty one lac) will be paid by the second party to the first party on or before 12-2-2011.

PAYMENT TERMS

The Second Party will make part payment time to time as fixed verbally.

1. That 12-3-2011, is the date fixed as the final, on or before this date, the second party will pay the balance consideration amount, and in lieu of the same, the first party will execute the regular documents of same in favour of the second party, and if the first party will not fulfil his part of the contract, than the Second Party shall be entitled to complete this bargain through court of law on the cost and risk of first party, and if second party/purchaser will not fulfil his part of the contract, than the part/earnest money amount paid today to the first party will stand forfeited and the deal will come to an end.

...

5. That all the expenses of stamp papers, registration fees shall borne and payable by the second party/purchaser and second party shall be fully entitled to transfer the same in his name or in the name of his/her nominee or any desirous person as per his/her choice. for which first party or his/her legal heirs shall not raise any objection/claim against the same.

6. That first party shall deliver the peaceful vacant

possession of above noted property to the second party, as and when he/she will receive the balance amt. from the purchaser/second party.

...

8. That the Fixed Antenna on the top of the building will be removed as per the legal procedure by the first party (seller) before the registration of the building at his own cost & expenses."

As per the above agreement, 12th March, 2011 was the last date to conclude the transaction and the Plaintiff had agreed to make part payments to the Defendants.

3. The case of the Plaintiff is that there was an antenna which was installed on the property pursuant to a license agreement entered into by the Defendants with M/s Bharti Cellular Limited. According to the Plaintiff, the Defendants failed to remove the said antenna, which was fixed on the property and therefore the occasion to pay the remaining sale consideration did not arise. Notices and replies were exchanged between the parties. The disputes were not resolved and the Plaintiff filed the present suit seeking the following reliefs:

"a) pass a decree for specific performance of the Agreement to Sell dated nil and directing the Defendants to perform their part of obligations under the agreement to sell, inter-alia, by executing the sale deed and by handing over the vacant peaceful possession of property bearing No.2, Road No.40, Punjabi Bagh (West), New Delhi admeasuring about 365 sq. yards. Approx., along with all land and building (above and underneath), with original title documents in favour of the plaintiff or its nominee against receipt of the balance sale consideration and if the Defendants create any third party interest in the meanwhile in respect of the said property, to direct

such third party as well to join hands of Defendants in conveying the property in favour of the plaintiff.

b) In case the Defendants fails to perform their part of obligations, to get the said agreement to sell performed i.e. to get the sale deed executed and vacant peaceful possession delivered to the plaintiffs against payment of balance sale consideration through the agency of this court;

c) Pass a decree for permanent injunction in favour of the plaintiff and against the Defendants, his agents, associates, assigns etc., thereby restraining them from selling, alienating, parting with possession or creating any third party interest in the any portion or whole suit property bearing No.2, Road No.40, Punjabi Bagh (West), New Delhi admeasuring about 365 sq. yards. Approx., along with all land and building (above and underneath).

(d) to award cost of the suit in favour of the Plaintiff.

(e) to pass any other order which this Hon'ble Court deems, fit and proper in the present facts and circumstances of the case in favour of the Plaintiff in interest of justice."

4. The Defendants, in their written statement, claimed that the Plaintiff failed to perform his part of the contract, and in accordance with the terms of the agreement, the Defendants forfeited the amount of Rs.1 crore. In fact, the Defendants state that since 12th March, 2011 was a second Saturday, they visited the Sub-Registrar's Office on 14th March, 2011. However, the Plaintiff never came to the said office. Since, the payment of the remaining sale consideration was not made, the Defendants were well within their rights to forfeit the entire amount. The Defendants' further case is that there was no pre-condition in the agreement to sell that the fixed antenna had to

be removed from the suit property. According to the Defendants, they had taken steps for the removal of the mobile tower. In fact, the process was commenced in March, 2011 and the tower was fully dismantled and removed in December, 2012. Moreover, the Plaintiff's conduct was dishonest inasmuch as on the one hand the Plaintiff had paid a sum of Rs.1 crore to the Defendants and had also, on the other hand, entered into an agreement to sell with some other buyer in respect for the suit property pursuant to which he had received a sum of Rs.1,50,00,000/-. This fact was stated in a police complaint filed by the Plaintiff himself against the Defendants. The said complaint is relied upon by the Defendants to submit that the Plaintiff never had adequate funds to purchase the suit property. According to the Defendants, in view of the fact that the Defendants showed to the police that the Plaintiff did not have funds, the police complaint was also dropped. The Defendants have averred that the Plaintiff is a speculator in immovable property and does not deserve any indulgence. Further, the Plaintiff was to make payment of Rs.2,50,00,000/- per month in instalments as was agreed, which schedule was not adhered to by the Plaintiff.

5. The following issues were framed on 24th September, 2014.

(i) Whether the plaintiff is entitled for specific performance of the contract/Agreement dated 12.10.2010? OPP

(ii) Whether the plaintiff was ready and willing to perform his part of the contract/Agreement? OPP

(iii) Whether there was no precondition in the Agreement to sell dated 12.10.2010 for removal of mobile tower prior to the execution of the sale deed? OPD

(iv) Whether the suit is time barred? OPD

(v) Whether there is no cause of action is favour of the plaintiff to file the present suit? OPD

(vi) Relief

The Plaintiff himself appeared as PW-1. One Mr. Gaurav Kalia deposed as PW-2. Defendant No.1 appeared as DW-1.

6. The Plaintiff – PW-1 stated in his cross-examination that he had paid Rs.1 crore at the time of the agreement and that there was no time schedule for the next payment. According to him, the remaining payment was to be made only before the registration of the sale deed. He, however, admits that he was required to make part payments. He confirmed that he had not written any letter calling upon the Defendants to accept payments. He claimed he had sent messages to Mr. Anil Sethi – the husband of Defendant No.1. He claimed that he had gone to the office of Sub-Registrar on 11th March, 2011. He also claimed that he was not aware if the tower was removed in December, 2012. He admits the statements made by him to the police which is exhibited as PW1/X-2. His testimony in respect of the agreement which he entered into with two other persons, namely, Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh is vague and is set out below:

“Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh also live in Punjabi Bagh. I do not remember the date, month or year when I entered into agreement with them. I do not remember for what amount that agreement was made. I do not remember what amount if any I had taken as earnest money from them. I think they had entered into some deal with another person but I do not remember his name and addressed. I do

not know if they had taken any earnest money.”

He thus claimed that he did not remember the date, month or year when he entered into an agreement with them. He also did not reveal the terms of the said agreement. He claimed that he had arranged the remaining sale consideration through Taneja Estates Developers and Finance Corporation Pvt. Ltd.

7. PW-2 was an employee of Taneja Estates Developers and Finance Corporation Pvt. Ltd. He stated that the Plaintiff had filled a form seeking a loan and that the company also valued the property in his affidavit. He had claimed that his company had approved a loan facility of Rs.11 crores to enable the Plaintiff to purchase the suit property. The loan sanction letter dated 17th January, 2011 was exhibited by him. However, he confirmed that no amount had been disbursed to the Plaintiff.

8. Defendant No.1 appeared as DW-1. It was claimed by her that the Plaintiff had to pay Rs.2,50,00,000/- per month and that the entire amount was to be cleared on or before 12th March, 2011. She also supported the stand taken in the written statement. DW-1 highlighted the contradictory stands taken by the Plaintiff in respect of availability of funds. She relied on an affidavit filed by Mr. Ajminder Pal Singh. However, the said person did not depose as a witness. According to her, the contradictory stands of the Plaintiff were:

- i) That the loan of Rs.11 crores was sanctioned by Taneja Estates Developers and Finance Corporation Pvt. Ltd.;
- ii) That an MOU was executed between the Plaintiff and one M/s BTM Exports under which long term lease rights in the suit property were to be transferred to the said firm;

iii) An agreement to sell was entered into with Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh, who had also sought impleadment in the present suit and had claimed that they had paid a sum of Rs.1,50,00,000/- to the Plaintiff.

9. On the basis of above three facts, DW-1 deposed that the Plaintiff is a speculator. She confirmed that the mobile antenna of M/s Bharti Cellular Limited was not removed till 15th March, 2011 though the same was under process.

10. The following documents were exhibited by the witnesses:

Plaintiffs

- i) Copy of Agreement for Sale - Ex. PW 1/2
- ii) Copy of Receipt of Rs. 1 Crore- Ex. PW 1/3
- iii) Copy of Legal Notice dated 15th March, 2011- Ex. PW 1/5
- iv) Copy of Reply dated 23rd March, 2011 to Legal Notice- Ex. PW 1/6
- v) Copy of Police Complaint dated 19th June, 2013 – Ex. PW 1/10
- vi) Copy of Leave and License Agreement dated 26th February, 2004 entered into with Bharti Cellular Limited – Ex. PW 1/1
- vii) Copy of Letter dated 11th March, 2011 addressed to the Registrar Office – Ex. PW 1/4
- viii) Copy of Public Notice in newspaper – Ex. PW 1/9
- ix) Copy of SMSs- Ex. PW 1/7
- x) Copy of letter dated 9th February, 2011 – Ex. PW 1/X1
- xi) Letter dated 17th January, 2011 from Taneja Estate Developers and Finance Corporation Private Limited in respect of Loan Facility – Ex. PW 1/8
- xii) Memorandum of Understanding dated 31st January, 2011 executed

between Ajminder Pal Singh & Gurinder Pal Singh with M/s BTM Exports Ltd. – Ex. PW 1/11

xiii) Letter dated 17th February, 2011 addressed to M/s BTM Exports Ltd by Bank of India- Ex. PW 1/12

xiv) Statement of Bank Account of M/s BTM Exports Ltd. with Bank of India – Ex. PW 1/13

Defendants

i) Legal Notice dated 15th March, 2011 – Ex. DW 1/1

ii) Registration Form No. 3 from the Office of the Sub Registrar, Punjabi Bagh in the name of Sangeeta Sethi – Ex. DW 1/7

iii) AD Card, Postal and Courier Receipts addressed to Rajesh Gullah – Ex. DW 1/2 and 1/3.

iv) Reply dated 23rd March, 2011 to Legal Notice Dated 15th March, 2011 – Ex. DW 1/5

v) Rejoinder Notice dated 18th April, 2011 – Ex. DW 1/6

vi) Copy of Leave and License Agreement dated 26th February, 2004 entered into with Bharti Cellular Limited - Ex. DW 1/10

vii) Copy of Affidavit of Sangeeta Sethi dated 12th October, 2007 – Ex. DW 1/15

viii) Letter dated 7th December, 2010 from Sangeeta Sethi to Bharti Infratel Ltd. – Ex. DW 1/8

ix) Letter dated 2nd February, 2011 from Sangeeta Sethi to Bharti Infratel Ltd. – Ex. DW 1/9

x) Summons from the Economic Offences Wing to Sannil Sethi dated 3rd October, 2012

xi) Reply from Bharti Infratel to Sangeeta Sethi dated 19th September,

2012 – Ex. DW 1/16

- xii) Letter dated 29th November, 2012, from Sangeeta Sethi to Indus Towers Ltd. – Ex. DW 1/17
- xiii) RTI Reply dated 22nd October, 2013 – Ex. DW 1/20
- xiv) Emails dated 9th February, 2011, 23rd February, 2011, 26th February 2011 and 18th March, 2011 – Ex. DW 1/13

11. On behalf of the Plaintiff, Mr. Pawan Bindra, Ld. Counsel submitted that the clear understanding was that the mobile antenna would be removed and since the same was not removed prior to the last date for payment, the Defendants were in breach of the agreement. Thus, they were not entitled to forfeit the amount. He further submitted that the Plaintiff had the funds and means to purchase the suit property, which is clear from the loan sanctioned by Taneja Estates Developers and Finance Corporation Pvt. Ltd. Further, the Plaintiff had repeatedly made oral requests to the Defendants to remove the mobile tower. Since they did not do so, they cannot blame the Plaintiff for not making the payment. He places reliance on ***Kailash Nath Associates v. Delhi Development Authority* 2015 (1) SCALE 230** to submit that if no loss or injury is proved, forfeiture cannot be permitted, as Section 74 of the Indian Contract Act would be applicable.

12. On the other hand, Ld. Counsel for the Defendants submitted that the agreement provided that further payments would be made in instalments and that the Plaintiff had to make part payments of Rs.2,50,00,000/- per month. Instead of paying the said amount, the Plaintiff entered into speculative transactions in respect of the suit property. Ms. Sonali Malhotra, Ld. Counsel submits that the Defendants suffered losses as they had to rescind the contract with M/s Bharti Cellular Limited prematurely. The Defendants

were earning sum of Rs.16,000/- p.m. + 10% increase every five years, from the lease, which was to continue till March, 2014. Thus, the Defendants had to suffer immensely due to the Plaintiff's conduct. She relied upon ***Satish Batra v. Sudhir Rawal (2013) 1 SCC 345*** to argue that when parties are in breach, the earnest money can be forfeited.

13. The first and the foremost question that needs to be adjudicated is as to whether the removal of the mobile antenna was a pre-condition for the sale and registration of the building in favour of the Defendants. A perusal of Clause 8 of the agreement shows that the terms of the said clause are quite vague and ambiguous. The words "*as per the legal procedure*" and "*before the registration of the building*" are not clear. However, what is clear from the evidence is that there is not a single communication written by the Plaintiff calling upon the Defendants, prior to the last date, to remove the said antenna. In fact, the first notice on record is by the Defendants dated 15th March, 2015 which is exhibited as Ex.PW-1/5, wherein the Defendants categorically state that the Plaintiff failed to pay the balance sale consideration. In response to this notice, the Plaintiff sent a reply that the antenna had to be removed prior to 12th March, 2011. The submission of Defendants is that the Defendants were merely to initiate the regular procedure for the removal of the fixed antenna, but the same was not a pre-condition for the payment of the balance sale consideration and execution of the "regular documents" as per clause 1.

14. From the documents and evidence on record, it is clear that the Plaintiff was well aware of the antenna which was installed and that the Defendants were earning rental from the said arrangement. The evidence does not show any communication by the Plaintiff expressing his readiness

and willingness, as also availability of funds. The fact, that the Plaintiff entered into at least two speculative transactions i.e. an agreement to sell with Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh, who thereafter entered into an MOU with M/s BTM Exports, shows that the Plaintiff was trying to raise funds for completing the transaction.

15. Moreover, the letter filed by the Defendants on record, including the e-mails, shows that the Defendants had taken steps to bring an end the lease with M/s Bharti Cellular Limited, though the Defendants did not produce any witnesses from M/s Bharti Cellular Limited. The letters on record, as also the e-mails, including one original letter of M/s Bharti Cellular Limited dated 19th September, 2012 which is exhibited as Ex.DW-1/6 shows that the Defendants had made efforts to remove the antenna. The relevant clause in the agreement clearly does not stipulate that the non-removal of the antenna was to happen prior to payment of sale consideration and also the registration of sale deed in favour of the Defendants. The non-removal of the antenna did not go to the root of the matter.

16. The agreement clearly mentions that part payments would be made by the Plaintiff “as fixed verbally”. However, when cross-examined on this aspect, the Plaintiff stated as under:

“I had given Rs. 1 crores at the time of the agreement. There was no time schedule for the next payment. It was to be made before the registration of the sale deed. The original agreement brought by me today copy of which is Ex. PW 1/2 is with me from the beginning. I can read and understand English. It is correct that I was required to make part payment from time to time as mentioned at portion A to A on Ex. PW 1/2. I do not remember on which date, month or year I went to make part payment for the first time after execution of the

agreement however, it is mentioned in my affidavit.”

PW-1's oral testimony does not inspire confidence as the said witness has repeatedly stated that he does not remember several crucial facts, including:

- As to whether he had informed his lawyer that he had visited that Defendants' house several times;
- As to whether he had sent a legal notice or filed any legal proceedings;
- As to whether he had demanded the title documents from the Defendants;
- The names of the banks where he had bank accounts or whether the said accounts are in operation;
- Whether he had the mobile numbers of Defendants and whether any messages were sent by him;
- Whether he had got any slip made at the Sub-Registrar office which he claimed to have visited on 11th March, 2011;
- As to whether anyone had accompanied him to the Sub-Registrar office;
- Whether the antenna was removed in December, 2012;
- Whether his statement was recorded in the EOW pursuant to his police complaint.

17. His oral testimony goes to show that he was not coming clean and also that his evidence lacks credibility. Even the so called SMSs, which he claims to have sent, placed on record seem to be draft messages created on his phone, rather than 'SENT' messages. The alleged loan sanction letter dated 17th January, 2011, which is exhibited as Ex.PW-1/8 is also quite

nebulous inasmuch as PW-2 could not produce any authorization from the company, and also could not produce the application filed by the Plaintiff seeking the loan facility. He did not produce the valuation report. He did not bring any documents to show on what basis the loan was sanctioned and he could not produce the original files of his company with respect to sanctioning of the loan.

18. The Plaintiff himself has produced an MOU dated 31st January, 2011 (Ex.PW-1/11) entered into between Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh with M/s BTM Exports. As per this MOU, the property was to be used as a guest house. The police complaint placed on record by DW-1 shows that he had clearly admitted that he had entered into an agreement to sell with Mr. Ajminder Pal Singh and Mr. Gurinder Pal Singh

19. His statement in the letter written to the police dated 17th June, 2013 reads as under:

“...Sir, this whole mess was not only effecting my hard earned money paid to them towards advance but my respectful reputation in the business circle was also being tarnished for no fault on my part as in view of the representation & assurances of the said Smt. Sangeeta Sethi, and Shri Sannil Sethi, I have further entered into a sale transaction of the said property and have already received an amount of Rs.1,50,00,000/- from the prospective buyer, which as on date I stand to loose. Thus I am slated to loose 2.5 Crores in the real sense as 1 crore has been paid by me and 1.5 Crores I need to refund to the prospective buyer.”

In her evidence, DW-1 clearly said that the process for the removal of antenna had started before 15th March, 2011. On the other hand, the Plaintiff had entered into an agreement to sell with third parties who had further

entered into an MOU for a guest house, but had failed to even write a single letter to the Defendants calling upon the Defendants to remove the antenna. The absence of any communication whatsoever from the Plaintiff to the Defendants either in respect of the payments to be made or in respect of the removal of the mobile antenna clearly shows that the Plaintiff did not have adequate funds to make the payment of balance sale consideration, and was only looking for an excuse to resile from the contract. The removal of the antenna was not understood to be a pre-condition upon the Defendants to remove the same. The Plaintiff has not been able to prove any oral or written communication of such a requisition made by him. The agreement is clear i.e. the last date for execution is 12th March, 2011, failing which, the Defendants would be entitled to forfeit the amount. The Plaintiff is clearly in breach due to the non-payment of the balance sale consideration.

20. The question that thereafter arises is as to whether the Defendants are entitled to forfeit the entire amount or the Plaintiff is entitled to a refund. The Defendants relied on *Satish Batra v. Sudhir Rawal (2013) 1 SCC 345* wherein the Supreme Court held that the earnest money could be forfeited when the transactions fails. However, subsequently in *M/s Kailash Nath Associates v. Delhi Development Authority (supra)* the Supreme Court has clearly held that in respect of forfeiture of earnest money, Section 74 would be applicable. In this case, the Supreme Court was dealing with a case wherein the DDA had taken a deposit of Rs.78 lakhs as the earnest money. There was a clause in the contract that if there is any breach by the intending purchaser, the earnest money would be forfeited. The Supreme Court held that the conduct of the DDA in forfeiting the earnest money was arbitrary, firstly because there was no breach of contract and secondly, since DDA

was not put to any loss, for it to insist on a contractual stipulation allowing forfeiture of such a huge amount, without any loss would be arbitrary. The Supreme Court after considering Section 74 as also the judgment in ***Fateh Chand v. Balkishan Dass 1964 (1) SCR 5105*** and ***Maula Bux v. Union of India 1970 1 SCR 928*** holds as under:

“40. From the above, it is clear that this Court held that Maula Bux'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 Chand'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 Chand'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.

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."

21. From the above, it is clear that under Section 74, damage or loss being caused is a sine qua non for even earnest money to be forfeited, and only reasonable compensation can be awarded. In point no.7 above, the categorical observation is that Section 74 would apply to cases of forfeiture of earnest money under a contract. The judgement in **Kailash Nath (supra)**

is subsequent to *Satish Batra (supra)* and has interpreted both *Maula Bax (supra)* and *Fateh Chand (supra)*. It has been held in *Kailash Nath (supra)* that the ratio of *Fateh Chand* is that in respect of all contracts, naming amounts to be paid in case of breach, Section 74 would be applicable. Admittedly, in *Fateh Chand*, the forfeiture of earnest money was conceded and was not challenged. The forfeiture of the entire earnest money can only be upheld only if damage or loss is difficult impossible to prove. It is not alleged by the Defendant, that the damage or loss is impossible to prove but what is alleged is that since the breach is by the Plaintiff and the terms of the contract are clear, the entire earnest money can be forfeited. The additional condition in Section 74 is that such an amount can be considered to be a genuine pre-estimate, only if the loss or damage cannot be proved. The forfeiture of earnest money is not a mechanical process, if the conditions in Section 74 have to be fulfilled. The evidence by the Defendants in the present case, falls short of justifying the forfeiture of the entire sum of Rs. 1 crore. The Court, in such cases, can only award reasonable compensation, with the amount specified, being the maximum amount.

22. In the present case, the clause relating to removal of antenna is vague and ambiguous, however, in view of the conduct of the Plaintiff, it is held that the Plaintiff was unable to demonstrate readiness and willingness. The Plaintiff has also paid a huge sum of money i.e. Rs.1 crore in the year 2010. This fact is not disputed. The question is whether forfeiture of Rs.1 crore would be reasonable compensation to the Defendants.

23. There is no doubt that the Defendants had to terminate or prematurely close their arrangement with M/s Bharti Cellular Limited. The agreement was to come to an end in 2014 but was put to an end in

December, 2012. The Defendants lost the lease amount of Rs.16,000/- per month which had thereafter increased to Rs. 17,600/- for a period of 15 months. The letter and e-mails of M/s Bharti Cellular Limited shows that the Defendants were in correspondence with them. The Plaintiff's conduct has also been far from being bonafide. The Plaintiff, entered into various transactions with third parties, simply on the basis of the agreement to sell with the Defendants. Though the Plaintiff was entitled to seek the sale deed in favour of its nominee, that did not mean that the Plaintiff could enter into transactions in respect of the suit property without informing the Defendants who were the owners. Further the Plaintiff subjected the Defendants to police complaints and caused harassment to the Defendants. Moreover, the Defendants have been subjected to harassment through police complaints as also unnecessary litigation, despite the fact that the Plaintiff did not have adequate funds.

24. Considering the overall facts and circumstances, it is held that a sum of Rs.50 lakhs would be refundable to the Plaintiff, however, without any interest, inasmuch as the Plaintiff has been held to be in breach in the present case.

24. The Plaintiff is also not entitled to relief of permanent injunction. However, Defendants are directed to refund the sum of Rs.50 lakhs within a period of six weeks. If the amount is not refunded within the period of six weeks, simple interest @10% per annum would be liable to be paid.

25. The suit is decreed in the above terms.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 27, 2018/Rahul