

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

+ **RFA No. 678/2006**

% **26th November, 2018**

PRAVEEN TALWAR

..... Appellant

Through: Mr. Rajat Navet, Mr. Kushagra
Pandit and Mr. Mukul Gupta,
Advocates (9811177277)

versus

NARESH KUMAR MITTAL & ORS.

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no. 3 in the suit impugning the Judgment of the trial court dated 28.09.2006 by which the trial court has decreed the suit filed by the respondent no. 1/plaintiff against the appellant/defendant no. 3 for recovery of double the amount of earnest money paid by the respondent no.1/plaintiff to

the appellant/defendant no. 3 under the Agreement to Sell dated 16.05.1997.

2. The facts and issues need not be narrated in detail, noting that there was admittedly an Agreement to Sell dated 16.05.1997 whereby the appellant/defendant no. 3 agreed to sell to the respondent no.1/plaintiff the subject/suit property being Flat No. B-41, Lawyers' Co-operative Group Housing Society, Manu Apartments, Mayur Vihar Phase-1, Delhi-110091. The total sale consideration was fixed at Rs. 30,25,000/-, out of which the respondent no.1/plaintiff paid a sum of Rs. 2,00,000/- to the appellant/defendant no. 3. Pleading that it was the appellant/defendant no. 3 who was guilty of breach of contract and that the respondent no.1/plaintiff always ready and willing to perform his part of the contract including by making the balance payment of Rs. 28,25,000/, the subject suit was filed for seeking double the amount of earnest money as is provided in the last clause of the Receipt-cum-Agreement dated 16.05.1997, and which reads as under:-

“Both the parties have agreed upon the above agreement, further the seller is liable to pay Rs.4,00,000/- if he fails to fulfil the above commitments as well as the amount paid by the buyer will be forfeited if he fails to fulfil the above commitments”

3. Learned counsel for the appellant/defendant no. 3 has argued that the mere fact and assuming that the appellant/defendant no. 3 was guilty of breach of contract, that in itself would not entitle the respondent no. 1/plaintiff to double the amount of earnest money, inasmuch as the law is that damages fixed of a sum of Rs. 2,00,000/- i.e. the amount of Rs. 2,00,000/- over and above the price paid of Rs. 2,00,000/-, are liquidated damages falling under Section 74 of the Indian Contract Act, 1872, and that under Section 74 of the Contract Act there cannot be a claim for liquidated damages in case the nature of contract is such that damages can otherwise be assessed and the same are thereafter proved. It is argued that in case of breach of an agreement to sell, specific amount of damages caused can always be proved by the buyer by showing the higher price of the property on the date of the breach, and the difference in the contract price with the higher price on the date of breach would be the specific amount of damages which can be awarded in case the seller is found guilty of breach of contract, but in the present case, the respondent no. 1/plaintiff has failed to prove the specific amount of damage caused and hence the respondent no. 1/plaintiff is not entitled to damages for

an amount of Rs. 2,00,000/- merely because a contractual clause provides so. Reliance in support of the argument urged on behalf of the appellant/defendant no. 3 is placed upon the judgment delivered by this Court in the case of ***Ram Mehar v. Murari Lal (2011) 183 DLT 769*** which is argued to be on all fours with the facts and issues in the present case. Reliance is also placed upon the judgment passed by this Court in the case of ***M.C. Luthra v. Ashok Kumar Khanna (2018) 248 DLT 161***, which in detail lays down the ratio that there cannot be a claim of damages unless and until damages are pleaded to have been caused and proved in accordance with law during trial. The facts in the case of ***M.C. Luthra (supra)*** were that a seller wanted to forfeit the earnest money, a position which is exactly opposite to the facts of the present case, wherein the seller is not forfeiting the money by applying the principles of liquidated damages under Section 74 of the Contract Act, but the buyer is seeking double the amount of earnest money paid as liquidated damages. An SLP filed against the judgment in the case of ***M.C. Luthra (surpa)*** has been dismissed by the Hon'ble Supreme Court vide Order dated 15.05.2018 in ***SLP (C) 11702/2018***.

4. Since the judgment in the case of *Ram Mehar (supra)* is a short judgment of four paragraphs, and would wholly cover the issue in question with regard to the disentitlement to double the amount of earnest money, simply because a clause in the agreement to sell provides that entitlement, in favour of the appellant/defendant no. 3, the said judgment is reproduced as under:-

“1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 11.1.1999, and by which judgment the Court below while holding the appellant/defendant guilty of breach of contract however did not award specific performance of the contract, but passed a money decree for double the amount of price paid of Rs.50,000/-, i.e. a sum of Rs.1 lakh with interest @ 18% per annum pendente lite and future. Learned counsel for the appellant in the appeal confines his relief to the aspect that the trial Court has fallen into an error in granting double the amount of advance price paid inasmuch as before an additional sum of Rs. 50,000/- could be awarded as damages, it was necessary for the respondents/plaintiffs to plead and prove that the loss was caused on account of the breach. It is argued that the trial Court could not have on the basis of a clause in the Agreement to Sell entitling payment of double the amount passed such a decree inasmuch as the same would be violative of the Section 74 of the Contract Act, 1872 as the clauses such as the subject clause are clauses in terrorem.

2. Learned counsel for the respondents has however pleaded with the Court that at least some damages ought to be granted. This request made by the learned counsel for the respondents, is a request which I cannot accept inasmuch as before damages can be granted, the damages have to be pleaded and proved in accordance with law. Counsel for the respondents does not dispute that there is no pleading or proof with respect to any loss having been caused to the respondents/plaintiffs. I have had an occasion to consider the issue with respect to entitlement to damages and validity of a clause entitling double the payment as being violation of Section 74 of the Contract Act, 1872 in the judgment of *Dilip Kumar Bhargava Vs.*

Urmila Devi Sharma & Ors. decided on 31.3.2011 in RFA No.129/2011. Paras 3 to 7 of this judgment are relevant and the same read as under:-

“3. Learned counsel for the appellant relies upon the Constitution Bench decision of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass, (1964) 1 SCR 515; AIR 1963 SC 1405** and more particularly its paras 8,10,15 and 16 which read 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)

4. 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 MANU/SC/0258/1963 : [1964]1SCR515 : [1964]1SCR515 . 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."

5. 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 become 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)

6. A contract pertaining to breach of an Agreement to Sell is a contract where loss can be calculated, the loss ordinarily being the lesser value of the immovable property on the date of the contract. Such contracts of Agreements to Sell, being contracts where damages can be calculated, even if, there is a provision of forfeiture of a huge amount of Rs.5 lacs, the same would be a Clause in terrorem. The Clause being in the nature of a penalty or in terrorem, such forfeiture of a huge amount cannot be allowed unless damages are actually proved, the law being that Section 74 only provides the outer limit of damages which can be awarded. The court always awards reasonable compensation depending upon the outer limit of compensation/damages which are prescribed under the contract, and which are in the nature of liquidated damages under Section 74 of the Contract Act. The present case, and other similar cases of breaches of Agreements to Sell, must be distinguished from those class of cases where loss cannot be proved and which contracts were the subject matter before the Supreme Court in the cases reported as *O.N.G.C. Vs. Saw Pipes Ltd., 2003 (5) SCC 705* and *Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd. AIR 1962 SC 1314 (1)*.

7. On reading of the aforesaid decisions of the Supreme Court it becomes clear that there cannot be forfeiture of an amount which is paid by a buyer under an Agreement to Sell to the respondents, even if, the buyer is guilty of breach of contract because the seller who has received monies, cannot forfeit the monies unless he has suffered loss in the bargain. A seller ordinarily suffers loss under an Agreement to Sell only if value of the property decreases as per the breach committed by the buyer/plaintiff/appellant and in the present case no loss has been pleaded or proved by the respondents. Even assuming therefore that the appellant/plaintiff is guilty of breach of contract, the respondent no.1, at best, can forfeit only a reasonable amount and not an amount of Rs.10 lacs out of the total sale consideration of Rs.55 lacs. It could not be argued with any conviction by the learned counsel for the respondent no.1/defendant no.1 that there are any pleadings in the trial court that the respondent no.1/defendant no.1 has been caused loss in any manner including by the value of the property having gone down. It is because of lack of any pleadings in this behalf that the respondent no.1/defendant no.1 led no evidence as to any fall in the value of

the property by a specific amount of Rs.10 lacs so as to entitle him to forfeit the amount of Rs.10 lacs received as advance price.”

3. Accordingly, since the trial Court has granted double the amount of earnest money/advance price paid without any pleading and proof of damages, the appeal deserves to be allowed to a limited extent that the decree which will be passed in favour of the respondents/plaintiffs will not be for Rs.1 lakh but will be for Rs.50,000/-. The trial Court has granted interest @ 18% per annum pendente lite and future. In the facts and circumstances of the case and in the interest of justice where the appellant/defendant has taken benefit of retaining with him the amount of Rs.50,000/-, it is necessary that interest be granted from the date of payment of the amount of Rs.50,000/- i.e. 22.1.1989 and therefore I grant interest @ 18% per annum simple in favour of the respondents/plaintiffs and against the appellant/defendant from 22.1.1989 till payment.

4. Accordingly, the appeal is allowed by modifying the impugned judgment and decree whereby a decree of Rs.50,000/- is passed in favour of the respondents/plaintiffs and against the appellant/defendant alongwith interest @ 18% per annum simple from 22.1.1989 till payment. In case, the payment under the subject money decree is not made within a period of three months from today, then, the interest will become 24% per annum simple from 22.1.1989 till payment inasmuch as already 21 years have passed and appellant has still retained this amount with him. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back. The bank guarantee will be discharged in favour of the appellant/defendant once the amount in terms of today's judgment is paid to the respondents/plaintiffs.”

5. In the facts of the present case, it is seen that the respondent no.1/plaintiff has not led any evidence whatsoever as to the damages, which if and would have been suffered by the respondent no.1/plaintiff on account of the stated breach of the agreement to sell by the appellant/defendant no. 3. The nature of the contract of the agreement to sell is such that liquidated damages cannot be claimed

under Section 74 of the Contract Act because first damages have to be caused and such damages then have to be proved, and once there is no evidence led by the respondent no. 1/plaintiff with respect to the loss caused to the respondent no. 1/plaintiff on account of the stated breach of the agreement to sell by the appellant/defendant no. 3, consequently the respondent no. 1/plaintiff would only be entitled to return of the earnest money of Rs. 2,00,000/-, but not for an amount of Rs. 4,00,000/- which would include a sum of Rs. 2,00,000/- as damages.

6. This Court would further note that with respect to the aspect of loss having been caused for entitlement of forfeiture of an amount of advance price paid, which was the subject matter of the decision in the case of *M.C. Luthra (supra)*, is on the identical principle that there cannot be a claim for loss under a contract being an agreement to sell, unless and until the loss is pleaded and proved, and a fixed figure of liquidated damages therefore cannot be claimed simply because the same is provided under an agreement to sell.

7. This Court may also note that whether the case falls under Section 73 or Section 74 of the Contract Act, depends on the nature of the contract. In case the contract is of such a nature where

damages cannot be proved, and on this count there are pre-fixed liquidated damages, then the liquidated damages provided the same are not in the nature of penalty are awarded if loss has been caused but this loss cannot be assessed and quantified in view of the nature of the contract. If however the loss can be quantified, then the case falls under Section 73, and not under Section 74 of the Contract Act, though parties may choose to label the clause as a clause of liquidated damages falling under Section 74 of the Contract Act. This aspect has also been dealt with by this Court in the case of *Airports Authority of India v. R.K. Singhal*, AIR 2012 Delhi 51; 2011 (185) DLT 648, and the relevant portion from para 3 and 7 to 9 of this judgment read as under:-

“3. The only issue therefore which is required for determination by this Court is whether taking as correct that the respondent/plaintiff was guilty of breach of contract can the amount paid of Rs.1,35,000/- be forfeited by the appellant/defendant on the ground that the same was an earnest money deposit without pleading and proving that any loss was caused to the appellant/defendant.

forfeiture can take place. The relevant observations of the Supreme Court in the aforesaid judgment of *Fateh Chand (supra)* are as under:-

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xxx

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7. In view of the ratio of the decisions of the Supreme Court in the aforesaid judgments, it is trite that if losses can be proved, then, a clause of liquidated damages is void. I may hasten to add that there are two types of contracts. One set of contracts are those contracts

where it is not possible to estimate and prove the losses. One of such contracts was the contract which was the subject matter of a Constitution Bench decision of the Supreme Court in the case of *Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314 (1) wherein the Supreme Court allowed liquidated damages where the contract was as managing agents with a return of percentage of profits of 21 years and on which managing agency agreement having been wrongly terminated it would not have been known that how much would have been earned as share of profits over 21 years once the contract was found to be illegally terminated. Therefore claim of liquidated damages was allowed. Other set of contracts are those contracts which were the subject matter of the decision of the Supreme Court in the case of *O.N.G.C. Vs. Saw Pipes Ltd., 2003 (5) SCC 705* wherein with respect to contract for construction of an oil rig, the Supreme Court said that liquidated damages can be claimed because it cannot be estimated and proved that what would be the loss on account of the delayed construction of an oil rig because what would have been the losses were dependent on factors such as amount of production (including prices of crude oil at different times) of oil which could not be exactly estimated. In the case of *O.N.G.C. Vs. Saw Pipes Ltd. (supra)* the Supreme Court has also referred to a case of delay in construction of a toll road and said that in such contracts again there is an entitlement to liquidated damages because what would have been the loss caused by number of days of delay in construction of toll roads cannot be estimated as how many vehicles which would have passed cannot be exactly arrived at and hence therefore the clause with respect to liquidated damages is not in the nature of penalty.

8. In the present case, surely losses which were caused to the appellant/defendant, with respect to the sale of machine in question could very well have been proved because if the appellant/defendant was forced to sell the machine for an amount lesser than Rs.4,00,000/- (the price at which the respondent/plaintiff agreed to buy the same) then, by difference of receipt of lesser price such loss could have been pleaded and proved and hence, subject to the upper limit of the earnest money deposited, such loss could well have been claimed by the appellant/defendant. Admittedly, the appellant/defendant in the facts of the present case has neither pleaded nor proved any loss having been caused to it on account of breach of contract by the respondent/plaintiff.

9. The Trial Court has therefore rightly held that since such loss has not been pleaded and proved, the appellant/plaintiff was bound to refund the earnest money/advance price which was received by the appellant in the auction conducted on 19.12.1998. The relevant observations of the Trial Court in this regard are contained in para 13, and the same reads as under:-

“13. The question that arises next is whether the defendant could have legally forfeited the earnest money. Needless to say that the clause providing for forfeiture of earnest money was a penal clause. A clause in the nature of penalty could not have been enforced in its entirety by reason of Section 74 of the Indian Contract Act. There is nothing to suggest that the amount of penalty was a genuine pre-estimate of damages likely to be suffered by the defendant in the event of breach of contract on the part of bidder. Section 74 lays down that the party complaining of breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the defaulting party a reasonable compensation not exceeding the amount of penalty stipulated for. The words “whether or not actual damages or loss is proved to have been caused thereby” have been considered in several cases and it has been held that these words merely exempt the complaining party from proving the actual loss or damage. These words do not at all convey that compensation is to be awarded in all cases whether some loss or damage has been occasioned or not. Thus, a compensation can be awarded only when the complaining party has suffered some loss or damage as a result of breach of contract by the other party. It is another matter that it is not obligatory to adduce positive evidence of such damage or loss. If there has been no damage or loss in consequence of breach of contract, the question of awarding or claiming compensation does not arise. In the present case, the defendant has nowhere alleged in the Written Statement that it suffered any loss as a result of plaintiff’s failure to deposit the balance auction money. Therefore, the forfeiture of earnest money cannot be justified.”

(Underlining Added)

8. In view of the aforesaid discussion, the impugned judgment awarding double the amount of earnest money paid, is illegal and at best, the trial court could have only passed a money decree for recovery of the earnest money being Rs. 2,00,000/-. The counsel for the appellant/defendant no. 3 does not dispute that the appellant/defendant

no.3 is ready to pay the amount of Rs. 2,00,000/- to the respondent no.1/plaintiff.

9. This appeal is accordingly allowed. The impugned Judgment of the trial court dated 28.09.2006 is set aside. The respondent no.1/plaintiff is held entitled to a money decree only for a sum of Rs. 2,00,000/-.

10. It is noted that the trial court has not granted any interest to the respondent no.1/plaintiff and he has not filed any appeal against that part of the judgment which has not granted any interest to the respondent no.1/plaintiff.

11. The appellant/defendant no. 3 has already deposited a sum of Rs. 2,00,000/- in this Court, and therefore this amount deposited in this Court alongwith the accrued interest be released to the respondent no.1/plaintiff in full and final satisfaction of the impugned judgment and decree dated 28.09.2006.

12. The appeal is accordingly allowed and disposed of as stated above.

NOVEMBER 26, 2018/ib

VALMIKI J. MEHTA, J