

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

+ **RFA No. 31/2019**

% **16th January, 2019**

RENU SHARMA Appellant

Through: Mr. Mohit Kumar, Advocate
(9717268268)

versus

AMIT GOEL Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 1742/2019 (delay in re-filing)

1. For the reasons stated in the application, delay in re-filing is condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 31/2019 & CM No.1743/2019 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit

impugning the Judgment of the trial court dated 31.07.2018 by which the trial court has decreed the suit for a sum of Rs. 5,40,000/- out of the total amount of Rs. 6,00,000/- paid by the respondent/plaintiff/buyer to the appellant/defendant/seller under the Agreement to Sell dated 19.06.2013 with respect to the property being the second floor, D-50/36, Dilshad Colony, Delhi-110095.

3. I need not narrate the facts in detail because entering into of the agreement to sell and receipt by the appellant/defendant of the sum of Rs. 6,00,000/- under the agreement to sell is not disputed. The only issue is as to whether the appellant/defendant should be allowed to forfeit the amount of Rs. 6,00,000/- received by the appellant/defendant under the subject Agreement to Sell dated 19.06.2013.

4. The issue in this case is wholly covered by the judgment passed by this Court in the case of ***M.C. Luthra v. Ashok Kumar Khanna*** in ***RFA No.780/2017*** decided on 27.02.2018, ***248 (2018) DLT 161: 2018 (169) DRJ 418***, and this judgment has been referred to by the trial court in the impugned judgment. In ***M.C. Luthra's case (supra)***, this Court has with reference to the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of ***Fateh Chand v.***

Bal Kishan Das, AIR 1963 SC 1405 has held that even if there is breach of an agreement to sell by a buyer, the seller still cannot forfeit the price received under the agreement to sell except a nominal amount. This Court in *M.C. Luthra's case (supra)* has distinguished the judgment of the Hon'ble Supreme Court in the case of *Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345* by observing that the Constitution Bench Judgment ratio of the Hon'ble Supreme Court in *Fateh Chand (supra)* has been duly explained by the Hon'ble Supreme Court in the subsequent judgment in the case of *Kailash Nath Associates v. Delhi Development Authority & Another, (2015) 4 SCC 136*. Accordingly, in *M.C. Luthra's case (supra)*, it has been held that a seller such as the appellant/defendant herein cannot forfeit the amount received under an agreement to sell, once no loss is pleaded and proved to be caused, except only a nominal amount, taking that the buyer/plaintiff is guilty of breach of contract. An SLP filed against the judgment in *M.C. Luthra's case (supra)* has been dismissed by the Hon'ble Supreme Court vide Order dated 15.05.2018 in *SLP(C) No. 11702/2018*. The trial court has referred to these

aspects in detail while dealing with issue no. 1 from paras 9(a) to 9(o) of the impugned judgment, and these paras read as under:-

“9. My issue wise finding are as under

Issue no. 1: Whether the plaintiff is entitled to recover Rs. 6 lacs as prayed? OPP.

- a). The onus to prove this issue was upon the plaintiff.
- b). At the outset, it has been observed that the execution of agreement to sell dated 19.06.2013 is not disputed. It is also not disputed that a sum of Rs. 6 lacs was paid under the agreement to the defendant by the plaintiff.
- c). The assertion of the plaintiff in the plaint is that the property was stated to be situated on the 2nd floor whereas in reality it was situated on the 3rd floor and as such, he could not obtain loan for the same and could not fulfill his part of the agreement.
- d). It has been vehemently urged on behalf of the defendant that plaintiff is himself in breach of the agreement dated 19.06.2013. A specific suggestion was put to PW 1 that loan was not granted to him as he does not have sufficient income for getting loan of Rs. 52,50,000/-.
- e). In the facts of the case, the plaintiff has not disclosed on record the name of the bank from where he had applied for loan. The reason for which the loan was denied to him has also not been established on record. The plaintiff thus not been able to prove that the loan was refused to him as the property itself was situated on the 3rd floor whereas as per documents, it was situated on the 2nd Floor. However the question of the plaintiff being in breach of contract would not be of much consequence in view of the discussion in later part of the judgment.
- f). The contention of the defendant is that in as much as the plaintiff was in breach of the contract, the defendant has right to forfeit the earnest money. Reliance is placed on pronouncement in "*Satish Batra Vs. Sudhir Rawal*" CA no. 7588/12 decided on 18.10.2012, "*Fateh Chand Vs. Bal Kishan Das*" 1963 AIR 1405 to assert that the

earnest money can be forfeited. Reliance can also be placed upon pronouncement of "*Director of Settlements Vs. M. R. Appa Rao*" CA No. 2517 of 1999 decided on 20.03.2002 regarding the binding value of precedents.

g). Per contra, the assertion of the plaintiff is that notwithstanding that the plaintiff was in breach of contract, the law does not recognize unjust enrichment. It is urged that Rs. 6 lacs is a substantial amount and the defendant cannot be allowed to forfeit the same. The plaintiff has placed reliance upon "*M. C. Luthra Vs. Ashok Kumar*" RFA no. 780/17 decided on 27.02.2018, "*Uma Kapoor and Anr. Vs. Kapil Aggarwal*" 2014 (145) DRJ119 (DB), "*Kiri Associates Pvt. Ltd. Vs. Pramod Kumar Mittal and Another*" 231 (2016) Delhi Law Times 292.

h). There is no dispute with the proposition laid down in Director of Settlement Supra. This court is bound by the precedents laid down by the Superior Courts. Fateh Chand Supra is a constitution bench decision. It was held in Fateh Chand Supra as follows: -

" Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases

(i) where the contract names a sum to be paid in case of breach and `ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by s. 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 tile case. jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according, to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the

contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether s. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. 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 s. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "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 s. 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. (emphasis supplied)

i). It has been held in *Fateh Chand supra* that Section 74 of Indian Contract Act would apply even to forfeiture of money already delivered under a contract and the courts have been enjoined not to enforce penalty clause but only to award reasonable compensation.

j). The proposition has been further clarified by the pronouncement in *M/s Kailash Nath Associates vs Delhi Development Authority & Anr* CIVIL APPEAL NO. 193 OF 2015 on 9 January, 2015 as follows:

"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:-

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.

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.

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.

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

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

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.

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."

k). Similarly in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, it was held:

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

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

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the

compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

l) Similarly it was held in V.K. Ashokan Vs. Assistant Excise Commissioner and Others (2009) 14 SCC 85 as under:-

"66. There is another aspect of the matter which cannot be lost sight of. If damages cannot be calculated and the terms of the contract provides therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a reasonable sum only could be recovered which need not in all situations even be the sum specified in the contract."

m). It is thus well settled that in absence of proof of damages, only a reasonable amount can be allowed to be forfeited in terms of section 74 Contract Act. Reliance can also be placed on pronouncement in Bhuley Singh Vs. Khazan Singh & Ors. in RFA No. 422/2011 decided on 9.11.2011 and the relevant Para 5 of the judgment reads as under:-

"5. In my opinion, the appeal deserves to be allowed as the appellant/plaintiff has rightly claimed a lesser relief of Rs.5,00,000/- instead of a sum of Rs.10,00,000/- as claimed in the plaint and which he is surely entitled to under Order 7(7) CPC. The Trial Court had framed a specific issue being issue no.2 as to whether plaintiff was entitled to recover Rs.5,00,000/- from the respondents/defendants paid against the receipt dated 5.1.2007 and therefore the argument of the counsel for the respondents/defendants that no issue was framed has no force. Once there was a specific issue, this issue could well have been urged so that the appellant/plaintiff could claim a sum of Rs.5,00,000/- from the respondents/defendants which was paid under the agreement to sell as an earnest amount on the basis of the undisputed position that the respondents/defendants did not plead or prove that loss had been caused to them so as to entitle them to forfeit the amount

paid to them under the Agreement to Sell. The Constitution Bench of the Supreme Court in the case of Fateh Chand (supra) makes it more than clear that a mere breach of contract by a buyer does not entitle the seller to forfeit the amount as received, unless, loss is proved to have been caused to the prospective sellers/defendants/respondents. The Supreme Court in the judgment of Fateh Chand (supra) allowed forfeiture of amount of Rs.1,000/- out of the amount paid of Rs.25,000/-."

n). Reliance can also be placed on recent pronouncement in Vandana Jain vs Rita Mathur And Ors. RFA No.38/2018 decided on 20 April, 2018 to similar effect wherein it was held as follows: -

"14. At this stage this Court would like to observe with all humility that there are apparently two views which the Supreme Court has taken in its line of cases as regards entitlement to forfeit earnest moneys. Whereas one view is the view which is the view taken by no less than a Constitution Bench judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405 that forfeiture of earnest money can only be of a nominal amount, and which was a sum of Rs. 1,000/- out of the total sale price of Rs. 1,12,500/- in Fateh Chand's case (supra), and that Supreme Court in this judgment has laid down the ratio that whenever a seller forfeits an amount paid by a buyer under an agreement to sell then the source of right of forfeiture arises only because of Section 74 of the Contract Act. It is held in Fateh Chand's case (supra) that where a seller pleads that there is a breach of contract by the buyer and the seller seeks to forfeit an amount as paid by the buyer for being appropriated as designated liquidated loss amount of damages as per contractual clause, then the act of forfeiture is one which falls under Section 74 of the Contract Act. Forfeiture of an amount paid under the agreement is by a seller who already has with him moneys in his pocket and therefore there is no requirement to file a suit to recover any amount from the buyer, however the law with respect to entitlement of forfeiture arises only because the forfeited

amount is liquidated damages under Section 74 of the Contract Act. That the forfeiture of earnest money is nothing but forfeiture of liquidated damages is clearly so clarified by the recent judgment of the Supreme Court in the case of Kailash Nath Associates Vs. Delhi Development Authority and Another, (2015) 4 SCC 136"

o). To reiterate, the constitution bench judgment in Fateh Chand supra is binding upon this court. In Kailash Nath Associates's case (supra) Supreme Court has now clarified that a forfeiture of an earnest money necessarily falls under Section 74 of the Contract Act that is to say before forfeiture can take place it must be necessary that loss must be caused. Also, Supreme Court has further clarified in Kailash Nath Associates's case (supra) that it is very much possible that forfeiture of an amount can be in the nature of penalty and if the amount which is allowed to be forfeited under the contract is in the nature of penalty then Courts are empowered to treat the amount of liquidated damages (earnest money) as one in the nature of penalty clause and that earnest money amount only represents the upper limit of damages which are allowed to be forfeited in terms of the forfeiture clause, and actual forfeiture only of a lesser and a reasonable amount should be allowed instead of the large amount/penalty as stated under a contract as being entitled to be forfeited and that too merely because a contractual clause allows such a forfeiture. The proposition would apply irrespective of the fact that breach is alleged upon the part of the plaintiff in the present case. The ratio in Fateh Chand and Bhuley Singh supra can be adverted to on this point. It is pertinent to mention that in Fateh Chand also the buyer was held to be in breach of contract forfeiture of earnest money was allowed in Fateh Chand as it was conceded."

5. In fact, in my opinion, the trial court in the present case could not even have directed forfeiture of the 'nominal' amount of Rs. 60,000/- inasmuch as first of all Rs. 60,000/- is not a nominal amount, with the further fact that admittedly the appellant/defendant subsequently to the subject Agreement to Sell sold the suit property at

a profit of an amount of Rs. 58,000/-, i.e. Rs. 58,000/- higher than the price which was agreed to between the appellant/defendant and the respondent/plaintiff in terms of the Agreement to Sell dated 19.06.2013. Once the appellant/defendant has sold the property, which was subject matter of the Agreement to Sell between the parties to a third person at a profit of Rs. 58,000/-, then in such a scenario, the trial court has been more than liberal in favour of the appellant/defendant by allowing the appellant/defendant to forfeit a sum of Rs. 60,000/- out of the sum of Rs. 6,00,000/-. In fact, the trial court has again been very liberal in favour of the appellant/defendant by only granting 6% rate of interest.

6. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed. Pending Applications, if any, are disposed of.

JANUARY 16, 2019/ib

VALMIKI J. MEHTA, J