

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

% Date of decision: 2nd December, 2021

+ RFA 386/2021, CM APPL. 40822/2021 & 40823/2021

MR. VIRENDRA KUMAR AWASTHI Appellant
Through: Mr. Anil Kumar Gupta and Mr. Joney,
Advocates

versus

MR. MAHENDER KUMAR Respondent
Through: Mr. Syed Hasan Isfahani, Advocate

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM. No. 40823/2021 (for delay)

This is an application filed by the applicant / appellant seeking condonation of 20 days' delay in re-filing the present appeal. For the reasons stated in the application delay in re-filing the appeal is condoned.

Application stands disposed of.

RFA 386/2021

1. The challenge in this appeal filed by the appellant / defendant in the Suit is to a judgment / decree dated December 07, 2019, passed by the Addl. District Judge-01, South-West District, Dwarka Courts, New Delhi decreeing the Suit filed by the respondent / plaintiff herein for an amount of ₹6,00,000/- along with interest @ 6% *per annum* from the date of filing of the suit till its realization. The facts as noted from the record are, it was the case of the respondent / plaintiff before the Trial Court that he is known to the appellant / defendant through Roop Chand Gupta, Proprietor

of M/s. Gupta Property, Mehrauli Road, Palam. The appellant / defendant approached the respondent / plaintiff and claimed that he is the lawful owner and is in possession of residential plot bearing number RZF-757/28, an area measuring 100 Sq. Yds., which is part of Khasra No. 47/20 situated in Raj Nagar, Part-II, Palam Colony, New Delhi-77. According to the respondent / plaintiff the appellant / defendant allured him by representing that he is the sole owner of the suit property and wants to sell the same for total consideration of ₹60,11,000/- as he is in urgent need of money. The appellant / defendant further assured him that the chain of all sale documents of the suit property are with him and after execution of the agreement to sale, he will provide the copy of the entire sale documents so that the respondent / plaintiff can verify the genuineness of the documents. The respondent / plaintiff agreed to purchase the suit property for the aforesaid consideration, out of which ₹6,00,000/- was given by the respondent / plaintiff as advance money to the appellant / defendant, and an agreement to sell was executed between them in the presence of witnesses namely Sh. Suresh Chand Garg and Sh. Roop Chand Gupta on August 26, 2016, and the rest of the amount of sale consideration was to be paid at the time of execution of sale deed and after handing over the vacant and physical possession of the suit property on or before October 26, 2016.

2. It was the case of the respondent / plaintiff that when he asked the appellant / defendant to provide the sale documents, the appellant / defendant provided the photocopy of one registered sale deed of suit property dated May 12, 2016, which has been executed by the father of the appellant / defendant Sh. Shankar Lal Sant in

favour of the appellant / defendant and it transpired that appellant / defendant is the fourth owner of the property as the suit property was in the name of Sh. Ved Prakash, son of Maha Singh, resident of Village-Palam Colony, who sold the same to Smt. Indira, wife of Sh. Shankar Lal Sant and later on Smt. Indira executed a Will in favour of Sh. Sant Lal on September 23, 2011, and she expired on February 06, 2015.

3. It was the case of the respondent / plaintiff that when he came to know that the appellant / defendant is the fourth owner of the suit property, he requested the appellant / defendant to show the original sale documents executed by Sh. Ved Prakash in favour of Smt. Indira and death certificate of Sh. Indira and name of other legal heirs of Smt. Indira. But despite so many requests of the plaintiff / respondent, appellant / defendant failed to provide the photocopy of the complete chain of sale documents of the suit property.

4. It was the case of the respondent / plaintiff that on inquiries from neighbours of the appellant / defendant, he came to know that Smt. Indira expired intestate leaving behind 7 legal heirs, i.e., Shankar Lal Sant (husband); Brijesh Kumar (Son); Virender Kumar Awasthi (son); Mithlesh (Daughter); Ashok Kumar (Son); Ravi Sant (Son) and Kiran (Daughter). He contacted the other legal heirs of Late Smt. Indira and they confirmed the fact that Late Smt. Indira expired intestate and all the 7 legal heirs are having an equal share and are in physical possession of the suit property.

5. It was also the case of the respondent / plaintiff that other legal heirs of Smt. Indira had claimed that the original documents executed by Sh. Ved Prakash in favour of Late Smt. Indira are with

them and those persons have not authorized the appellant / defendant to enter into or to execute any agreement to sell in respect of the suit property and the agreement to sell executed by the appellant / defendant is without their consent and the same is illegal.

6. It was also the case of the respondent / plaintiff that he reported the matter to the appellant / defendant and asked him to provide copies of the sale documents and to show the originals of such sale documents, on which the appellant / defendant became furious and started threatening the respondent / plaintiff that he is a Jail Superintendent in Delhi Police and can send the respondent / plaintiff behind the bars in a minute by registering a false criminal case against him and his family members.

7. It was also the case of the plaintiff / respondent, if he had the knowledge of the above facts at the time of execution of agreement to sell, he would not have entered into the said agreement. A legal notice dated September 19, 2016, was sent to the appellant / defendant thereby calling upon him to provide a 'no objection certificate' of all the legal heirs of Late Smt. Indira along with a self-attested copy of entire sale documents within three days on receipt of the legal notice so that respondent / plaintiff can verify the authenticity of the same from the concerned Department, failing which the agreement dated August 26, 2016, between the appellant / defendant and the respondent / plaintiff shall be deemed to be cancelled. The legal notice also stated that the respondent / plaintiff had also called upon the appellant / defendant that in case, he could not provide the 'no objection certificate' and self-attested copy of all the sale documents, he should refund the earnest money of ₹6,00,000/- to the respondent / plaintiff within three days on receipt

of the notice, failing which he shall be liable to pay interest on the above-said amount from August 26, 2016, till actual realization.

8. It must be stated here that the suit was filed under Order XXXVII CPC. Summons for appearance were issued. The appearance was filed by the appellant / defendant. An application seeking leave to defend the suit was filed on behalf of the appellant / defendant on October 6, 2017. The application seeking leave to defend was allowed and conditional leave to defend was granted to the appellant / defendant. A written statement was filed by the appellant / defendant stating that the respondent / plaintiff has concealed the fact that appellant / defendant is the sole owner of the suit property and acquired the title and ownership in the suit property through a registered sale deed against a total consideration of ₹38,80,000/- and once there is a registered sale deed of the suit property, the same becomes a self-acquired property of the appellant / defendant and in that case, the other legal heirs have no right or claim against the wishes of the appellant / defendant.

9. It was the case of the appellant / defendant that the suit property earlier belonged to Smt. Indira who purchased the suit property from the previous vendor namely Sh. Ved Prakash through an agreement to sell. Therefore the suit property became the self-acquired property of Late Smt. Indira who expired on February 06, 2015, leaving behind a Will dated September 23, 2011, in favour of Shankar Lal Sant. The Will had attained finality as the same was never challenged during the lifetime and even till date by anyone and through the said Will Shankar Lal Sant had become the exclusive owner of the suit property. The appellant / defendant

purchased the suit property from Shankar Lal Sant through a registered sale deed on May 19, 2016.

10. It was the case of the appellant / defendant that he had acquired the title in the suit property and after acquiring the said title and ownership, he was approached by the respondent / plaintiff for the purchase of the suit property, and the respondent / plaintiff after seeing all the relevant documents regarding the suit property and after being satisfied entered into the agreement to sell dated August 26, 2016, with appellant / defendant in the presence of attesting witnesses for a total consideration of ₹60,11,000/- out of which respondent / plaintiff paid a sum of ₹6,00,000/- as earnest money. It was stipulated through Clause 3 of the agreement to sale and purchase that the respondent / plaintiff shall pay the balance consideration of ₹54,11,000/- on or before October 26, 2016, and as per clause 6 of the said Agreement to sell, if the respondent / plaintiff fails to pay the balance amount, the earnest money would be forfeited and in case, the appellant / defendant does not execute the sale deed in favour of plaintiff / respondent, he would refund double the amount / money of the plaintiff / respondent. As per clause 7, the appellant / defendant shall hand over the photocopy of the original title documents pertaining to the suit property to the respondent / plaintiff at the time of execution of the sale deed.

11. It was the case of the appellant / defendant that the respondent / plaintiff has not filed any documentary proof that he was ready with payment and since the respondent / plaintiff was not in a position to arrange the balance consideration, he had started avoiding the execution of the sale deed and stopped responding to the calls of the appellant / defendant and did not even reach the

office of the Sub-Registrar on the stipulated date, i.e., October 26, 2016, on which date, the appellant / defendant waited for him in the office of the concerned Sub-Registrar.

12. Following issues were framed by the Trial Court based on the pleadings:

- “1. Whether the earnest money amounting to Rs.6,00,000/- paid by plaintiff to defendant vide agreement dated 26.08.2016 stands forfeited as plaintiff failed to pay the balance sale consideration on or before 26.10.2016, as claimed ? OPD*
- 2. Whether the plaintiff is entitled to recover the suit amount from the defendant ? OPP*
- 3. If the answer to issue no. 2 is in affirmative, whether the plaintiff is entitled to interest thereupon, if so at what rate and for which period ? OPP*
- 4. Relief.”*

13. In support of his case, the respondent / plaintiff had relied upon his affidavit being Ex.PW1/1 and had relied upon the following documents:

1. Agreement to sale dated August 26, 2016, as Ex.PW1/A
2. Copy of the sale deed dated May 17, 2016, as Ex.PW1/B
3. Copy of Will dated September 23, 2011, as Ex.PW1/C
4. Copy of legal notice along with postal receipt Ex.PW1/D.

14. Similarly, appellant / defendant had proved the following documents:

1. Sale deed dated May 19, 2016, between Virender Awasthi and Shankar Lal Sant as Ex.DW1/A.

2. General Power of Attorney dated March 27, 1985, by Ved Prakash in favour of Smt. Indira as Ex.DW1/B.
3. Will dated September 23, 2011, by Smt. Indira in favour of Sh. Shankar Lal Sant as Ex.DW1/C.
4. Agreement to Sale dated August 26, 2016, between the respondent / plaintiff and appellant / defendant as Ex.DW1/D.

15. On the above issues, the findings of the Trial Court are the following:

1. The sale transaction is admitted by the parties including the payment of ₹6,00,000/- as advance (bayana) money for the purchase of the said property.
2. Bare perusal of agreement to sell specially Clauses 3 & 7 makes it clear that at the time of execution of sale deed the appellant / defendant was to hand over the actual, physical and vacant possession of the suit property as well as original title documents pertaining to the suit property at the time of execution of the final document (sale deed).
3. The sale deed was agreed to be executed in favour of the respondent / plaintiff by the appellant / defendant on or before October 26, 2016, but appellant / defendant never came forward to show that he is the exclusive owner and in possession of the suit property and further failed to supply the complete chain of sale documents of the sale property to the respondent / plaintiff inasmuch as it is the right of the respondent / plaintiff as a vendee to satisfy himself about the clear and undisputed title and exclusive possession of the suit property from the vendor / appellant / defendant and

it is the duty of the appellant / defendant to perform. But the appellant / defendant never came forward to perform the terms of the agreement to sell.

4. The title of the appellant / defendant is not free from doubt inasmuch as PW3 brother of the appellant / defendant appeared as a witness and testified that his mother never executed any Will and when PW3 came to know that a Will has been written on a plain paper and is not a genuine Will, all the legal heirs raised objections that without their consent the appellant / defendant cannot sell the suit property and in this regard PW3 along with other legal heirs of deceased Indira got lodged a complaint on October 24, 2016, with a reminder dated September 19, 2016 (Mark A & B) respectively. The complaint dated October 24, 2016, has been proved as Ex.PW4/1 and the objection dated September 19, 2016, filed by PW3 and his sister Kiran Kumari as Ex.PW4/3. PW4 Sh. Raj Kumar, an official from the Office of the Sub-Registrar also proved notices dated November 10, 2016, as Ex.PW4/2 issued by the Sub-Registrar.

5. From the testimony of the PW3 & PW4 it can be safely concluded that certain objections were raised about the Will allegedly executed by Smt. Indira in favour of Shankar Lal Sant father of the appellant / defendant and on the basis of the said Will, father of the appellant / defendant had executed the Will dated May 19, 2016 Ex.PW1/A. It is not the case of the appellant / defendant that all the objections raised by other legal heirs of Smt. Indira are

rejected by the Sub-Registrar and no legal proceedings are pending in respect of the title of the suit property. The respondent / plaintiff is a vendee and has a right to seek a title free from all encumbrances in respect of the suit property from the appellant / defendant. The appellant / defendant despite service of legal notice Ex.PW4/D has failed to respond before the date fixed for the execution of the sale deed as per the terms and conditions of the agreement to sell and replied after two weeks from the expiry of the stipulated date for execution of the sale deed as per agreement to sale between the parties. Therefore the appellant / defendant failed to prove on record that he was having a hassle-free title in the suit property and being in exclusive possession of the suit property he was and is ready and willing to transfer the suit property in the name of the plaintiff / respondent.

16. On the financial capacity of plaintiff / respondent, Trial Court held that, first of all, the appellant / defendant has to prove that he was ready and willing to transfer the undisputed title of the suit property in the name of the respondent / plaintiff coupled with the transfer of exclusive possession of the suit property to the plaintiff / respondent. The appellant / defendant had pleaded and tried to prove that the respondent / plaintiff failed to appear before the Sub-Registrar, but neither the appellant / defendant has proved on record that he visited the office of the Sub-Registrar for getting the suit property registered in the name of the respondent / plaintiff or he ever tried to contact the respondent / plaintiff to clear his doubts regarding the ownership and possession of the appellant /

defendant over the suit property or the appellant / defendant is having a clear and undisputed title in the suit property.

17. On the ready and willing to perform his part of the contract, the Trial Court held the respondent / plaintiff has not shown any evidence either documentary or oral to prove that he was having the capacity to the tune of ₹54,00,000/- to pay the remaining sale consideration to the appellant / defendant, nor the respondent / plaintiff has led any evidence to prove that he has ever visited the office of the Sub-Registrar, but such readiness and willingness will only be seen when the appellant / defendant could have performed his part of the contract that the appellant / defendant is having a clear and undisputed title and possession of the suit property. The Trial Court also held that even if it is presumed that the respondent / plaintiff had failed to perform his part of the contract and also not having the capacity to pay the remaining sale consideration even then the appellant / defendant has no right to forfeit the money of ₹6,00,000/- in view of the position of law.

18. The submission of Mr. Anil Kumar Gupta, learned counsel appearing for the appellant / defendant is primarily that the Trial Court has failed to appreciate that the respondent / plaintiff did not had sufficient amount to pay the balance of sale consideration and as such in the absence of the same, the entire claim of the respondent / plaintiff ought to have been rejected. That apart, the Trial Court has not appreciated the fact that it is the case of the appellant / defendant that he had already furnished a complete set of documents of title in his favour and he has already undertaken to deliver the original documents to the respondent / plaintiff at the

time of execution of the sale deed on receipt of the balance sale consideration.

19. That apart, the Trial Court had wrongly relied upon the evidence of PW3, real brother of the appellant / defendant who had categorically stated that he has not filed any civil or partition suit in respect of the suit property except a complaint in the office of the Sub-Registrar and he does not have any document in respect of the suit property. Thus on the statement of this witness, the Trial Court should have disbelieved the entire plaintiff's / respondent's case and ought to have dismissed the suit with cost.

20. The Trial Court further has failed to appreciate that PW4 Raj Kumar who was from the Office of the Sub-Registrar, though he proved the objections raised by PW3 with the Sub-Registrar who has also proved the notice dated November 10, 2016, whereby the objectors were required to appear before the Sub-Registrar but did not appear pursuant to the said notice. This makes it clear that the objectors had no case at all neither do they have any document of title in their possession nor do they have any right to object to the legally executed sale deed in favour of the appellant / defendant by the father. He also stated that the appellant / defendant had shown the original title deed before the Trial Court who had observed that "original seen and returned". Even the objector who raised objection before the Sub-Registrar had categorically stated in his testimony that he does not have any document and he has not filed any suit against the appellant / defendant. Because the Trial Court has also not appreciated the law inasmuch the entire judgment of the Trial Court is based upon

surmises and conjectures and the conclusion could not have been arrived at in the manner done by the Trial Court.

21. Even the judgments *Vandana Jain vs. Rita Mathur and Ors.*, MANU/DE/1496/2018; *Satish Batra vs. Sudhir Rawal*, MANU/SC/0887/2012; *Fateh Chand vs. Balkishan Das*, MANU/SC/0258/1963; *Kailash Nath Associates vs. Delhi Development Authority*, MANU/SC/0019/2015, so relied upon by the Trial Court have no applicability in the facts of this case inasmuch as it could not have directed the return of ₹6,00,000/- which has been given by the respondent / plaintiff who concedingly has not shown readiness and willingness to execute the sale deed and hence was liable to be forfeited.

22. Mr. Gupta has also submitted that the judgments referred to and relied upon by the Trial Court in awarding the amount of ₹6,00,000/- to the respondent / plaintiff herein are untenable as the said judgments do not contemplate, the earnest money / advance need to be refunded back to the purchaser, rather they say that the seller is also within his right to forfeit part of the amount before returning the balance. In other words, the complete amount of earnest money / advance could not have been directed to be refunded. He seeks the setting aside of the impugned judgment / decree.

23. On the other hand, Mr. Syed Hasan Isfahani, learned Counsel appearing for the respondent / plaintiff would submit that there is no illegality in the impugned judgment / decree as the Trial Court has rightly held that the appellant did not have a clear and undisputed title and possession of the suit property. He highlighted the fact that the brother of the appellant himself

appeared as PW3 to highlight the fact that his mother only executed the Will and all the legal heirs raised an objection that without their consent the appellant / defendant cannot sell the suit property and in fact, the legal heirs had lodged a complaint with the Sub-Registrar which has been proved before the Trial Court and some of the objections of the legal heirs have been accepted do demonstrate that there is a doubt on the competency of the appellant / defendant to sell the suit property and the respondent / plaintiff was within his right to seek a title, free from all encumbrances, is justified. According to Mr. Ishafani, the Trial Court had only directed to refund of the amount of ₹6,00,000/- with interest to the respondent / plaintiff which is the advance / earnest money that was given to the appellant / defendant and as such there is no illegality. According to him, the Trial Court has rightly relied upon the judgments in holding that the appellant / defendant has no right to forfeit the advance / money of ₹6,00,000/-. He also stated that the appellant / defendant had failed to prove any loss caused to him because of the non-execution of the sale deed. He seeks the dismissal of the appeal.

24. Having heard the learned Counsel for the parties and perused the record, I note that the Trial Court while allowing the Suit, which was for recovery of ₹6,00,000/-, had given findings which I have already reflected in Para 15 above. That apart it is also seen from the record that the sale of the property by Shankar Lal Sant, the father of the appellant / defendant is also doubtful inasmuch as the cheques purported to have been tendered by the appellant / defendant have not been encashed as per the deposition

of the appellant / defendant dated November 21, 2019, which I reproduce as under: -

$$xxxx$$

The three cheques of Rs.12 lakhs each as mentioned towards the sale consideration of the suit property in sale deed never encashed.....

xxxx”

25. Even the Trial Court in paragraph 23 of the impugned judgment dated December 07, 2019, has stated as under: -

“23. The plaintiff is claiming an amount of Rs. 6,00,000/- paid as earnest money in terms of agreement to sell Ex.PW1/A by contending that defendant has failed to perform his part of contract in as much as the other legal heirs of Smt. Indira have disputed the title and possession of the defendant over the suit property and apart from that the cheque which are termed as sale consideration of the sale deed by Shankar Lal Sant in the name of Defendant is a sham transaction as the said cheques detailed in the sale deed was never encashed from the account of defendant in terms of statement of account of defendant proved by PW2 as Ex.PW2/1. Therefore, neither the title of the suit property nor its possession thereof was with the defendant and defendant failed to perform his part of contract.”

26. Reading the above with the objection of PW3, brother of the appellant / defendant with regard to the Will; complaint made to the Sub-Registrar would surely mean that there is doubt about the competency of the appellant / defendant to sell the suit property to the plaintiff / respondent. The Trial Court had rightly held that there is a doubt on the competency. The conclusion arrived at by the Trial Court is justified. It follows on preponderance of probability there is a doubt on the competency of the appellant / defendant to sell the suit property and the respondent / plaintiff

was within his right to seek a title, in property free from all encumbrances. The Supreme Court in ***M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors.***, MANU/SC/1538/2019, and ***Municipal Corporation, Hyderabad vs. Sunder Singh***, MANU/SC/7735/2008, has settled a law that the Standard of Proof in a civil dispute is governed by preponderance of probability. The relevant paragraphs of the above-mentioned judgments are reproduced hereunder.

i. The relevant paragraph in ***M. Siddiq (D) thr. L.Rs. (supra)*** is reproduced hereunder: -

“506. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. "Phipson on Evidence" formulates the standard succinctly: If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.¹¹⁴ In Miller v. Minister of Pensions (1947) 2 ALL ER 372, Lord Denning, J (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms:

(1)... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

(emphasis supplied)

ii. Similarly, the Supreme Court in ***Municipal Corporation, Hyderabad (supra)*** has in paragraph 16 held as under: -

“16. The standard of proof applicable in a civil suit is the preponderance of probability. The question had been determined having regard to the fact that the predecessor-in-interest of the respondent confined its case only to 1250 square yards of land. The effect of the judgment of the earlier suit has been taken note of. The High Court furthermore noticed the contention that Dhan Singh should have been paid compensation for the entire 2750 square yards of land, but the fact remains that they had never claimed any compensation for any land beyond 1250 square yards and in the said factual backdrop, it was held:

We have carefully analysed the evidence regarding possession which consists of both documentary and oral evidence. These documents relate to the period 1928 to 1954. Ex.D/7 of the year 1928 gives indication that the Sarfekhas was collecting some rents on the Jumerath Bazar area and the City Improvement Board was requesting the Sarfekhas Authorities to hand over all such rents collected by them, and they have also informed the Sarfekhas that the property belonged to the City Improvement Board. In the year 1929, some merchants in hide and skins would appear to have been using portion of the land on the bank of the river Musi for conducting their trade.”

(emphasis supplied)

Mr. Ishafani is right in contending that what has been awarded by the Trial Court is the refund of ₹6,00,000/- which was given as earnest money / advance to the appellant / defendant.

27. In view of my above finding, it is clear that the appellant / defendant has failed to establish his competency to sell the suit property to the plaintiff / respondent and as such, he is required to refund the amount so received. No doubt, there is a stipulation in

the agreement that in case the second party, i.e., the respondent / plaintiff fails to pay the balance sale consideration to the first party, i.e., the appellant / defendant, within the said stipulated date of October 26, 2016, in respect of the said portion of the property, the advance money paid by the respondent / plaintiff shall be forfeited. The said stipulation would not come into play in the facts of this case and I agree that the conclusion of the Trial Court in that regard. That being so, the law with regard to the forfeiture of the earnest money / advance is quite well-settled by the Supreme Court in the case of ***Kailash Nath Associates (supra)*** wherein the Supreme Court in paragraphs 42, 43 and 44 has held as under: -

“42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

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.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the Appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall."

28. In view of the aforesaid position of law and as conceded by Mr. Gupta that the appellant / defendant has not pleaded the case of having suffered a loss in view of the non-execution of the sale deed by the plaintiff / respondent, the Trial Court is justified in awarding the amount of ₹6,00,000/- in favour of the plaintiff / respondent. Hence the challenge by the appellant / defendant to the impugned judgment / decree is without any merit. No submission has been by Mr. Gupta with regard to the rate of interest granted by the Trial Court in favour of the plaintiff / respondent.

29. In view of my above discussion, the appeal, is dismissed. No costs.

CM APPL. 40822/2021

In view of my order above, this application is dismissed.

V. KAMESWAR RAO, J

DECEMBER 02, 2021/jg

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