2022 LiveLaw (SC) 1026

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SURYA KANT; J., BELA M. TRIVEDI; J.
14.12.2022
CIVIL APPEAL NO. 921 OF 2022 [Arising out of Special Leave Petition (C) No. 22191 of 2019]
Desh Raj & Ors. *versus* **Rohtash Singh**

Specific Relief Act, 1963; Section 22(2) - Unless a plaintiff specifically seeks the refund of the earnest money at the time of filing of the suit or by way of amendment, no such relief can be granted to him. The prayer clause is a sine qua non for grant of decree of refund of earnest money. *(Para 31)*

Indian Contract Act, 1872; Section 74 - All pre-estimated amounts which are specified to be paid on account of breach by any party under a contract are covered by Section 74 of Contract Act - In a scenario where the contractual terms clearly provide the factum of the pre estimate amount being in the nature of 'earnest money', the onus to prove that the same was 'penal' in nature squarely lies on the party seeking refund of the same. Failure to discharge such burden would treat any pre-estimated amount stipulated in the contract as a 'genuine pre-estimate of loss'. *Referred to Fateh Chand v Balkishan Das (1964) 1 SCR 515 , Kailash Nath Associates v DDA (2015) 4 SCC 136 , Satish Batra v Sudhir Rawal (2013) 1 SCC 345 and ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 (Para 35)*

Specific Relief Act, 1963 - Indian Contract Act, 1872; Section 55 - Defense under Section 55 of Contract Act is valid against anyone who is seeking the relief of specific performance. *Citadel Fine Pharmaceuticals v Ramaniyam Real Estates Private Ltd (2011) 9 SCC 147 and Saradamani Kandappan v S. Rajalakshmi (2011) 12 SCC 18*

(Arising out of impugned final judgment and order dated 15-05-2019 in RSA No.1847/2017 passed by the High Court of Punjab & Haryana at Chandigarh)

For Petitioner(s) Mr. Siddharth Mittal, AOR Mr. Prabhat Kumar, Adv. Mr. Kshitiz Chauhan, Adv. Mr. Sahil Amarnath, Adv. Ms. Shilpa G.Mittal, Adv.

For Respondent(s) Ms. Sonali Joon, Adv. Mr. Gaurav Bhatt, Adv. Mr. Karunakar Mahalik, AOR

J U D G M E N T

Surya Kant, J.

1. Leave Granted.

2. The present appeal is directed against the judgment dated 15.05.2019 passed by the High Court of Punjab and Haryana whereby a second appeal preferred by the Appellants was dismissed and judgment and decree of the Trial Court as well as the First Appellate Court were affirmed. The decree entitled the Respondent for the recovery of earnest money, which constituted of partly paid sale consideration in lieu of the concerned agreements to sale along with requisite interest. The factual matrix is succinctly discussed before delving into the issue of law regarding breach of contractual terms which requires adjudication before us.

A. FACTS

3. The subject matter of the original suit was a property measuring 23 Kanals 4 Marlas bearing Khewat No. 226, Khatoni No. 225, Rect. No. 27, Kila No 3 min (2-9), 4 min (4-15), 7(8-0), 14(4-0) situated in the revenue estate of Village Tigra, Tehsil and District Gurgaon

(hereinafter, 'Concerned Property') which the Appellants jointly owned to the extent of their respective shares.

4. Two separate agreements to sell were entered between the present parties for the Concerned Property on 17.02.2004 (hereinafter, 'Sale Agreements'). In the first agreement, Appellant Nos. 1 to 4 agreed to sell their share to the extent of 4/5th of the Concerned Property while in the second agreement, Appellant No. 5 agreed to sell the remaining 1/5th share to the Respondent which accrued to her and her minor son. It must be noted that the material terms of both agreements are identical except that in the second agreement, Appellant No. 5 was contractually bound to secure the permission under The Hindu Minority and Guardianship Act, 1956 to sell the share of the minor.

5. Under the Sale Agreements, the sale consideration was set at the rate of Rs 79,00,000/- per acre. Accordingly, the Respondent is stated to have paid Rs 22,90,000/- in total as part payment of the sale consideration which was in the nature of earnest money. As per Clause 4 of Sale Agreements, the earnest money could be confiscated by the Appellants if the sale deed was not executed on prescribed date, i.e. 16.08.2004 (hereinafter, 'Date of Execution'). Furthermore, as per Clause 8 of the Sale Agreements, the Respondent was also liable to secure all the necessary No Objection Certificates (hereinafter, 'NOC'). Additionally, he had to also intimate the Appellants regarding the grant of NOCs well before the Date of Execution, failing which the agreement was deemed to be cancelled.

6. The Appellants state that as per the Sale Agreements, requisite permission under The Hindu Minority and Guardianship Act, 1956 was obtained by them before the Date of Execution. The same was communicated to the Respondent via notice dated 10.07.2004. Their case is that in furtherance of the agreements, Appellants appeared before the Sub-Registrar, Gurgaon on the Date of Execution but the Respondent failed to appear before the Sub-Registrar for the purpose of executing the sale deed and payment of balance sale consideration.

7. The Appellants served legal notices dated 18.08.2004 on the Respondent giving an additional opportunity to him to appear before the Sub-Registrar on 01.09.2004 to execute the sale deed as per the terms of the Sale Agreements. It is pertinent to note that in the legal notices, it was explicitly mentioned that time was the essence of the contract. It was also clearly stated that as per the agreements, the Appellants were bound to forfeit the earnest money and treat the agreements as cancelled. Still, they were extending last opportunity to the Respondent to perform his contractual obligations.

8. It appears that 01.09.2004 was declared a holiday, hence the Appellants appeared before the Sub-Registrar on 31.08.2004 as well as on 02.09.2004. The Respondent, however, failed to appear for execution and registration of the sale deed, because of which the Appellants forfeited the earnest money and treated the Sale Agreements as cancelled. All appearances of the Appellants before the Sub-Registrar were marked by way of their respective affidavits.

9. The situation remained dormant until January 2006 when the Respondent, the original plaintiff, initiated a suit seeking relief of specific performance of Sale Agreements and other consequential reliefs. However, during the pendency of the suit before the Trial Court, State of Haryana initiated acquisition proceedings vide notification dated 12.12.2008 issued under Section 4 of Land Acquisition Act, 1894. Consequently, the subject land was acquired by the State vide award dated 23.11.2011. Due to this

subsequent event, the Respondent sought and was permitted by the trial court to amend the plaint.

10. In the amended plaint, the Respondent took the stand that hewas always ready and willing to execute the Sale Agreements and that the Appellants were the ones who did not furnish the required documents for the necessary sanction and grant of NOCs. Apart from the relief of specific performance, he additionally prayed that a decree of permanent injunction be passed to the effect that the Concerned Property cannot be sold to any third party, possession must be granted to him along with a declaration that the Sale Agreements were still binding. In the alternative, he sought that a money decree of Rs 2,29,10,000/- be passed in his favour on the estimated land value along with requisite interest and costs.

11. In response, the defence set up by the Appellants was that it was the Respondent who was at fault for not executing the sale deed within the agreed time period and that the suit must be dismissed for his willful non-performance. The Appellants specifically took the stance that the suit was filed after inordinate delay and as a tactic to grab the land because of the subsequent increase in its commercial value.

12. After perusal of both the documentary as well as oral evidence,the Trial Court concluded that both the parties were equally responsible for rendering the Sale Agreements as unenforceable. While it hesitantly accepted the stance of both the parties in respect to the contention that they were present before the Sub-Registrar on the Date of Execution, it held that the same was meaningless as the Appellants were at fault for not taking effective steps in procuring the NOC under Section 7A of Haryana Development and Regulation of Urban Areas Act of 1975 (hereinafter, 'HUDA Act'). However, the Trial Court then went on to hold that the Sale Agreements were either way rendered impossible to perform in view of the land acquisition proceedings and proceeded to grant decree of recovery of earnest money on the priciple of unjust enrichment. The First Appellate Court upheld the decree granted by Trial Court on entirely identical reasons.

13. The High Court in its impugned judgment made two observations which are pertinent to note – *first* that no evidence was led by the parties to prove whether they took requisite steps to obtain the NOC under Section 7A of HUDA Act and; *second* that presence of Appellants before the Sub-Registrar on 31.08.2004 or 01.09.2004 when last opportunity to execute the sale deed was granted to Respondent, was doubtful as the evidence of marking their presence was not proved and that legal notices dated 18.08.2004 were not served on the Respondent. The High Court, thus, went on to uphold the decree passed by the courts below, noting that in view of the acquisition proceedings, the alternate relief of recovery of earnest money was legally correct.

14. The aggrieved Appellants are before this Court.

B. CONTENTIONS

15. We have heard learned counsel for parties and perused the documents produced on record.

16. Mr. Siddharth Mittal, learned counsel for the Appellants, contended - *Firstly*, that all the courts below have failed to note that time was the essence of contract as per the Sale Agreements under Section 55 of The Indian Contract Act, 1872. (hereinafter, 'Contract Act'). He submitted that the contractual performance of Sale Agreements needed to be mandatorily effectuated by the Respondent on or before the Date of Execution. He stated that the Appellants reiterated the same stance in their legal notices dated 18.08.2004. *Secondly,* the High Court has completely overlooked the fact that at the relevant period of

time, i.e. Date of Execution, there was no necessity to procure NOC under Section 7A of HUDA Act. He submitted that the land was 'agricultural land' on the Date of Execution of Agreements and was first time included within the limits of Municipal Corporation, Gurugram through notification dated 02.06.2008. *Thirdly*, under Clause 8 of the Sale Agreements, it was the Respondent and not the Appellants, responsible to procure relevant NOCs. Hence, the onus to prove that steps were taken to obtain NOCs under Section 7A of HUDA Act was on the Respondent which he miserably failed to discharge.

17. The composite essence of all the above-mentioned arguments by Mr. Mittal is that non-performance of contractual obligations on the part of Respondent by the stipulated time resulted in lawful exercise of right of termination by the Appellants and the consequent forfeiture of earnest money as stipulated under the Sale Agreements which was in accordance with the settled law in ***Satish Batra v Sudhir Rawal***.[1]

18. On the contrary, Ms. Sonali Karwasra Joon, learned counsel for the Respondent, argued that – *Firstly*, the Appellants were unwilling and they failed to perform their contractual obligations, especially regarding securing NOC under Section 7A of HUDA Act. She forcefully argued that Clause 8 of the Sale Agreements ought to be interpreted to mean that only such sanction or NOCs which the Respondent could obtain unilaterally, was his contractual obligation. In other words, she argued that securing NOC under Section 7A of HUDA Act was solely the responsibility of the Appellants, irrespective of the onus fastened on the Respondent under Clause 8 of the Sale Agreements. She heavily relied upon the observations of the High Court regarding the Appellant's doubtful appearance before the Sub-Registrar and noneffectuation of service of legal notices dated 18.08.2004, to support the claim of willful non-performance on behalf of the Appellants. *Secondly,* she argued, that the Sale Agreements had been rendered impossible as the State of Haryana lawfully acquired the suit land. Hence, all the courts below have rightly directed the refund of the earnest money with interest. Additionally, she argued that the amount in question cannot be forfeited contrary to the settled principles enunciated by the Constitution Bench of this Court in ***Fateh Chand v Balkishan Dass***[2]which bars forfeiture of earnest money when it is 'penal' in nature. *Thirdly,* she highlighted that the second appeal, which confirmed the decree passed in favor of Respondent, was heard ex-parte. *Finally,* she drew our attention to the fact that during the acquisition proceedings, the Appellants were successful in obtaining release of land measuring 8 Marlas out of the acquired land as noted in the award dated 23.11.2011. She stated that as per the available revenue records, the said property was still in possession of the Appellants who are guilty of suppression of material facts. It must be noted that the Respondent on coming to know about the factum of release, had directly approached this Court against the First Appellate Court's decision via SLP (C) No 11901 of 2022 but the same was disposed of with liberty to approach the High Court in the second appeal under Section 100 of the Code of Civil Procedure, 1908.[3]

19. We now examine these contentions of both sides.

C. ANALYSIS

C.1 WHETHER TIME WAS THE ESSENCE OF THE CONTRACT?

20. Before venturing into the aforementioned issue, we must highlight that throughout the entire dispute, Appellants have taken a consistent stand of time-bound performance

---

[1] *Satish Batra v Sudhir Rawal* (2013) 1 SCC 345.

[2] *Fateh Chand v Balkishan Dass* (1964) 1 SCR 515.

[3] *Rohatash Singh v Deshraj* (SLP (Civil) No. 11901 of 2022, 11 July 2022).

being an essence of the contract. They have maintained that sale deed was needed to be executed necessarily on the Date of Execution as agreed between the parties. It is unfortunate that all the courts below have failed to render a finding on this aspect despite the fact that this was one of the key defenses taken by the Appellants in respect of the prayer seeking specific performance.

21. In this respect, we must now take note of Section 55 of Contract Act which stipulates the aftermath in case of failure to perform contractual obligations at fixed time. The provision states –

55. Effect of failure to perform at fixed time, in contract in which time is essential.

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.-If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.--If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the nonperformance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

22. The Sale Agreements in the present case clearly indicate the intention of the parties to treat time-bound performance as an essential condition. They stipulate that in case the sale deed was not executed on the Date of Execution, the Sale Agreements were liable to be treated as cancelled, and the earnest money was to be forfeited. Even in the legal notices dated 18.08.2004, through which last opportunity was extended to Respondent to execute the sale deed, the factum of time being an essential condition for performance was reiterated. On the other hand, no evidence or communication has been brought on record by the Respondent to contradict the defense of time-bound performance taken by the Appellants.

23. At this juncture, we must note the decision of this Court in ***Citadel Fine Pharmaceuticals v Ramaniyam Real Estates Private Ltd*** [4] and ***Saradamani Kandappan v S. Rajalakshmi***[5] wherein it was held that defense under Section 55 of Contract Act is valid against anyone who is seeking the relief of specific performance. The facts of the instant case make the observations in ***Saradamini Kandappan***[6] even more pertinent, which are to the following effect -

"36. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The

[4] *Citadel Fine Pharmaceuticals v Ramaniyam Real Estates Private Ltd* (2011) 9 SCC 147, para 53.

[5] *Saradamani Kandappan v S. Rajalakshmi* (2011) 12 SCC 18.

[6] ibid.

assumption was that grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

x-x-x-x

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam [(1997) 3 SCC 1] :

(i) The courts, while exercising discretion insuits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The courts will apply greater scrutiny andstrictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in partperformance, where equity shifts in favour of the purchaser."

(Emphasis Applied)

24. Hence on the dual factual premise that it was the clear intention of the parties to treat time as the essence of the contract and that there was an undue delay on behalf of the Respondent to institute the suit, the relief of specific performance cannot be granted. We must clarify that this finding also holds true for the land subsequently released in favor of the Appellants.

C.2 WHETHER IT WAS PROVED THAT APPELLANTS WERE WILLFULLY AVOIDING PERFORMANCE OF THEIR CONTRACTUAL OBLIGATIONS?

25. The courts below have harped on the inability of the Appellants to procure the necessary NOC under Section 7A of HUDA Act, to hold that they were non-cooperative and willfully avoiding the performance of their contractual obligation. However, as the learned counsel for Appellants rightfully pointed out, the evidence on record clearly indicates that they gave duly signed blank proformas and relevant documents to the Respondent in order to obtain any necessary sanction or NOCs. This was done in order to fulfil the obligation under Clause 8 of the Sale Agreements which stated –

"8. That the Second Party will be liable to secure all the necessary NOC and the said NOC will be intimated to the First Party by way of Registered Post before the date 16.08.2004 fixed for registration of sale deed. If the Second Party fails to secure the required NOC

then this agreement to sell will be deemed to be cancelled. The cost incurred for securing the NOC will be borne by the Second Party."[7]

(Emphasis Applied)

26. A bare reading of this clause, in our opinion, clearly spells out the intention of the parties in respect of Respondent's liability for obtaining the required NOC. We are bound to interpret the contractual terms in their literal sense and hence, we expressly reject the Respondent's contention that this clause should be interpreted to construe that his obligation was limited to NOCs which he could obtain unilaterally. Additionally, since Respondent has led no evidence to indicate that he took any proactive steps to obtain the purported NOC necessary to execute the sale deed, we must hold that the plea of non-cooperation against the Appellants in respect of obtaining the NOC are not made out by the Respondent.

27. However, even assuming in arguendo, that Respondent had fulfilled his contractual obligation under under Clause 8 of the Sale Agreements by taking all necessary steps necessary to obtain NOC under Section 7A of HUDA Act, we find merit in the Appellants' contention that no such NOC was required in the first place as the Concerned Property was agricultural land on the Date of Execution. In this respect, learned counsel for the Appellants correctly pointed out that the Concerned Property was brought under the Municipal Corporation of Gurugram vide notification dated 02.06.2008 only.

28. The Respondent in his counter affidavit has taken a stance that the Concerned Property was an 'urban area' as per Section 2(o) of the HUDA Act, which includes lands situated within five kilometres of a notified municipal area. However, this stand cannot sustain for the reason that neither he raised such plea before the courts below nor adduced any evidence to suggest that on the Date of Execution, the Concerned Property was within the five kilometre radius of Municipal Area as specified under Section 2(o) of the HUDA Act.

29. Finally, we must shift our attention to the High Court's observation that the presence of Appellants before the Sub-Registrar was doubtful on 31.08.2004 and 02.09.2004 as the affidavits of their presence were not proved in the evidence. In contrast, the Trial Court has found that these affidavits were duly proved in the cross examination of the Appellants and the said finding of fact was affirmed by the First Appellate Court. The High Court, therefore, ought not to have made any fact based observations especially when the records of the courts below were not requisitioned to reach an independent conclusion to hold that the said finding of fact by the two courts was contrary to the record. The re-appreciation of evidence is ordinarily impermissible and beyond the scope of a second appeal. Even otherwise, the presence of Appellants before the Sub-Registrar on the Date of Execution is not disputed. In this backdrop where time was the essence of the contract, we conclude that the Respondent has failed to prove that the Appellants were willfully avoiding the performance of their contractual obligations.

C.3 WHETHER RESPONDENT WAS ENTITLED TO RECOVERY OF EARNEST MONEY?

30. The final aspect of this dispute is with respect to the relief granted by the courts below to the Respondent in the form of recovery of earnest money with requisite interest.

[7] Under the Sale Agreements, 'First Party' refers to the present Appellants while 'Second Party' refers to the present Respondent.

However, before inquesting into this issue we must take note of the following relevant clauses of the Sale Agreements -

"1. That it has been decided that date of execution of this agreement to sell is 16.08.2004 [Sixteen August Two Thousand Four].

x-x-x-

4. <u>That if the Second Party is not able to execute the sale deed on the prescribed date then the First Party will be entitled to confiscate the earnest money</u>"

[Emphasis Applied]

31. Firstly, we may refer to Section 22 of the Specific Relief Act of 1963 (hereinafter, 'SRA Act') which provides that any person suing for the specific performance of the contract for the transfer of property may ask for - *(a)* possession or partition and separate possession of the property in addition of such performance OR *(b)* such person may seek any other relief to which he is entitled to "including the refund of any earnest money or deposit paid or made by him" in case his claim for specific performance is refused. However, sub-Section (2) thereof puts a caveat that the abovementioned reliefs shall not be granted by the court unless "it has been specifically claimed". The proviso to subSection (2) further says that even if such relief was not specifically claimed in the plaint, it is the discretion of the Court to permit the plaintiff to amend the plaint "at any stage of the proceedings" and allow him to include the claim for refund of the earnest money or deposit paid. The relevant part of the provision of SRA Act reads as follows -

<u>22. Power to grant relief for possession, partition, refund of earnest money, etc.—</u>

(1) Notwithstanding anything to the contrarycontained in the Code of Civil Procedure,1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for--

(a) possession, or partition and separate possession, of the property in addition to such performance; or (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) <u>No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed:</u>

<u>Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.</u>

(Emphasis Applied)

On a plain reading of the above reproduced provision, we have no reason to doubt that the plaintiff in his suit for specific performance of a contact is not only entitled to seek specific performance of the contract for the transfer of immovable property but he can also seek alternative relief(s) including the refund of any earnest money, provided that such a relief has been specifically incorporated in the plaint. The court, however, has been vested with wide judicial discretion to permit the plaintiff to amend the plaint even at a later stage of the proceedings and seek the alternative relief of refund of the earnest money. The litmus test appears to be that unless a plaintiff specifically seeks the refund of the earnest money at the time of filing of the suit or by way of amendment, no such relief can be granted to him. The prayer clause is a sine qua non for grant of decree of refund of earnest money.

Applying these principles to the facts of the case in hand, we find that the Respondent has neither prayed for the relief of refund of earnest money in the original plaint nor he sought any amendment at a subsequent stage. In the absence of such a prayer, it is difficult to accept that the courts would suo-moto grant the refund of earnest money irrespective of the fact as to whether Section 22(2) of SRA Act is to be construed directory or mandatory in nature.

32. We may now advert to the contention raised on behalf of the Respondent that even if the respondent is held responsible for breach of contract, the forfeited amount was 'penal' in nature and was hit by Section 74 of The Contract Act as has been interpreted by the Constitution Bench in ***Fateh Chand***.[8] Section 74 of the Contract Act says that -

74. Compensation for breach of contract where penalty stipulated for—

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

(Emphasis Applied)

33. Learned Counsel for the respondent submitted that merely because an amount is stipulated as earnest money would not justify its forfeiture. Instead, reliance was placed on ***Fateh Chand***[9] to state that the courts were duty bound to ascertain reasonable compensation in each case. In this respect, it would be prudent for our analysis to extract the following paragraphs from ***Fateh Chand***[10]which are relied upon by the respondent -

"11. …. 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….

x-x-x-

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."

---

[8] *Fateh Chand* (n 2).

[9] *Fateh Chand* (n 2).

[10] *Fateh Chand* (n 2).

(Emphasis Applied)

34. Per contra, the Appellants have heavily relied on the following passage of the decision of this Court in ***Satish Batra***[11] to justify the forfeiture of earnest money -

"15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply."

In sum and substance, the Appellants contend that forfeiture of sum is justified when it is - *(a)* clearly stipulated as earnest money; *(b)* forms part of sale consideration and *(c)* intended to be in the nature of 'guarantee for the due performance of the contract', and (d) the binding agreement between the parties provides its forfeiture in the event of breach of contract.

35. In our considered opinion, Section 74 of Contract Act primarily pertains to the grant of compensation or damages when a contract has been broken and the amount of such compensation or damages payable in the event of breach of contract, is stipulated in the contract itself. In other words, all pre-estimated amounts which are specified to be paid on account of breach by any party under a contract are covered by Section 74 of Contract Act as noted by this court in ***Kailash Nath Associates v DDA***[12]. In ***Fateh Chand***[13], the Constitution Bench ruled that Section 74 dispenses with proof of "actual loss or damage" and attracts intervention by Courts where the pre-estimated amount is 'penal' in nature. We may at this juncture also note the following observations made by this court in ***ONGC Ltd. v. Saw Pipes Ltd.***[14] -

"64. …. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. <u>But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach</u>…."

(Emphasis Applied)

Hence, in a scenario where the contractual terms clearly provide the factum of the pre estimate amount being in the nature of 'earnest money', the onus to prove that the same was 'penal' in nature squarely lies on the party seeking refund of the same. Failure to discharge such burden would treat any pre-estimated amount stipulated in the contract as a 'genuine pre-estimate of loss'.

---

[11] Satish Batra (n 1).

[12] *Kailash Nath Associates v DDA* (2015) 4 SCC 136, para 43.7.

[13] *Fateh Chand* (n 2).

[14] *ONGC Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 705.

36. The Respondent in the instant case has neither pleaded for refund of the earnest money nor has he claimed any damages or penalty from the Appellants. From the perusal of the records, it is conspicuous that Respondent never raised any concern that the pre estimated amount was 'penal' in nature and instead his sole objective was to gain titular rights over the Concerned Property on the strength of Sale Agreements.

D. CONCLUSION

37. In light of the above discussion, we must conclude that the decree granted by the courts below was hinged on a logical fallacy wherein the Appellants were held to be unjustly enriched on the premise that the contract was rendered impossible to perform due to acquisition proceedings. On the contrary, the contract automatically stood terminated as per the stipulated contractual terms. The Sale Agreements should have been rightly held to be terminated instead of being declared impossible to perform.

38. Furthermore, we deem it appropriate to hold that the forfeiture was justified and within the confines of reasonable compensation as per Section 74 of Contract Act in light of the fact that during the entirety of proceedings – *firstly* the nature of forfeiture was never contested by the Respondent and *secondly* the Respondent never prayed for the refund of earnest money. Consequently, the judgments rendered by the Courts below deserve to be set aside and the suit is liable to be dismissed. Ordered accordingly.

39. The appeal stands allowed along with any pending applications in the above terms. No order as to costs.

© All Rights Reserved @LiveLaw Media Pvt. Ltd.
*Disclaimer: Always check with the original copy of judgment from the Court website. Access it here