Delhi High Court
Rajbir Singh & Anr vs Jaswant Yavdav on 14 May, 2018

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ RFA No. 404/2018

% 14th May, 2018

RAJBIR SINGH & ANR. ..... Appellants
Through: Mr. Yudhvir Singh, Advocate.

Versus

JASWANT YAVDAV ..... Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 19752/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA 404/2018 and C.M. Appl. No. 19751/2018 (for stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the judgment of the trial court dated 25.1.2018 by which the trial court though dismissed the suit for specific performance filed by the respondent/plaintiff with respect to the agreement to sell dated 21.10.2012 pertaining to subject land measuring 11 bighas 1 biswas,

out of Khasra no. 38//2/2(4-13), 9(4-16) and 8/2(1-12) situated in Village Mitraon, Tehsil Najafgarh, New Delhi, however the trial court decreed the suit in favour of the respondent/plaintiff for recovery of Rs.20 lacs which was paid by the respondent/plaintiff to

the appellants/defendants under the subject agreement to sell dated 21.10.2012. The total sale consideration for the agreement to sell was Rs.2,15,40,000/- out of which a sum of Rs.20 lacs was paid in advance as earnest money to the appellants/defendants by the respondent/plaintiff.

3. Trial court for decreeing the suit for recovery of money has considered this relevant aspect from paras 38 to 48 of the impugned judgment, and these paras read as under:-

> 38. Here, the court would refer to Section 74 of the Indian Contract Act, 1872 which lays down the law with respect to compensation for breach of contract where a sum is named or where penalty has been stipulated. The provision read as under:-
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> 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 name or, as the case may be, the penalty stipulated for.
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> 39. Apparently, even if a sum or a penalty is mentioned in a contract, the party suffering breach would be entitled to receive only reasonable compensation from the opposite party. The stipulation in the agreement

> to sell dated 21.10.2012(Ex PW1/6) inter alia clause 5 relates to the penalty clause as under:-
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> 5.That in case the second party violate the terms and condition of the agreement, then the First Party is also entitled to get the said amount of advance forfeited and the said transaction shall stand cancelled.
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> 40. Since the amount of earnest money was not a token or nominal amount but a substantial amount of Rs.20,00,000/-, this stipulation is to be treated as a penalty.
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> 41. The defendants can therefore not agitate as a right that the entire earnest money came to be forfeited to them and the plaintiff is not entitled to receive refund of the whole or any portion of the amount of Rs.20,00,000/-.
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> 42. For the party suffering the breach of contract/seller to retain any earnest money amount upon forfeiture, such loss has to be specifically

pleaded and proved.

43. The court would refer here to the decision of the Hon'ble High Court in Bhuley Singh Vs. Khazan Singh & Ors RFA no.422/11 dated 09.11.2011, which is not only relatable on facts but also refers to the principles laid upon by the Hon'ble Supreme Court in Fateh Chand Vs. Balkishan Dass, (1964) 1 SCR 515.

44. The relevant extracts from the decision in Bhuley Singh (supra) are 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/-. I may also note that nomenclature of a payment is not important and what is important is really the quantum of price which is paid. In the present case, the total price payable for the suit property is Rs.20,00,000/- and therefore 25% of the payment made stricto sensu cannot be an earnest money, though it has been called so. Only a nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow forfeiture of that amount to a nominal extent as held in the case of Fateh Chand (supra). For example can it be said that 100% of the price or 75%/80% of the price or 50% of the price is earnest money so that it can be forfeited. The answer surely is in the negative. Such high amounts called earnest money will be in the nature of penalty and thus hit by Section 74 of the Indian Contract Act, 1872 in view of Fateh Chand's case. The principles laid down in Fateh Chand's case; that forfeiture of a reasonable amount is not penalty but if forfeiture is of a large amount the same is in the nature of penalty attracting the applicability of Section 74; have been recently

reiterated by the Supreme Court in the case of V.K.Ashokan vs. CCE, 2009 (14) SCC 85.

6. I also cannot accept the argument as raised on behalf of the respondents/defendants that it was the duty of the appellant/plaintiff to plead that no loss was caused to the respondents/defendants and therefore the amount could not have been forfeited because once it is admitted that the respondents/defendants have received an amount, and it was their/defendants'/respondents' case that they were entitled to forfeit such amount, it was for the respondents/defendants therefore to plead and prove that they could forfeit such an amount. Thus unless, there are pleadings and proof as to entitlement to forfeit the amount on account of loss being caused there cannot be a forfeiture in view of the ratio of Fateh Chand's case.

7. Since in the facts of the present case, the Trial court has held the appellant/plaintiff guilty of breach of contract, therefore, the respondents/defendants are entitled to only forfeit a reasonable amount. In my opinion, a reasonable amount of Rs.50,000/- can, at best, be allowed to be forfeited out of an amount of Rs.5,00,000/- paid by the appellant/plaintiff to the respondents/defendants. At this stage, I also reject the argument of the respondents/defendants that they only received a sum of Rs.4 lacs because the agreement to sell dated 5.1.2007 itself mentions in so many words that the respondents/defendants have received Rs. 5 lacs and thus no evidence to contradict the terms of

a written document is permissible vide Section 92 of the Indian Evidence Act, 1872.

45. This court would summarize its understanding of the above principles governing section 74 as under :

a) If the earnest money is more than a token amount in comparison with the total consideration amount, the same is to be treated as a penalty in terms of Section 74 of the Contract Act.

b) Loss has to be pleaded and proved by the seller/defendant in order to seek forfeiture of earnest money amount.

c) Only a reasonable amount may be retained by the defendant as forfeiture of the earnest money in view of the penalty clause. In such a scenario, the plaintiff can seek refund of a substantial amount of earnest money, allowing for forfeiture of a reasonable sum to the defendants.

46. Seen in light of the above understanding of the law, this court holds that the plaintiff has breached the terms of the agreement to sell dated 21.10.2012. However, clause 5 of the agreement to sell is in the nature of penalty. The plaintiff can therefore recover a substantial measure of this earnest money amount whereas the defendant is entitled to retain a reasonable amount as forfeited. Since this conclusion follows from the position of law emerging from section 74 of the Contract Act and the principles laid down in Fateh Chand (supra) and followed by the

> Hon'ble High Court of Delhi in Bhuley Singh (supra), the defendant is entitled to retain such token amount even without filing a counter claim or set off.
> 47. The Court, following the analogy of the decision of the Hin'ble High Court in Bhuley Singh (supra), allows the plaintiff to recover the earnest money amount to the extent of Rs. 18,00,000/-.
> 48. Since the refund of this amount was a vested right of the plaintiff in light of section 74 of the Contract Act, he is entitled to receive a reasonable rate of interest upon the same. The court finds that the rate of 8 per cent per annum would meet the ends of justice in the present facts.

4. The same very aspect which is in issue in this appeal has been recently considered by this Court in the case of M.C. Luthra Vs. Ashok Kumar Khanna in RFA No. 780/2017 decided on 27.2.2018. In the case of M.C. Luthra (supra), with reference to the Constitution Bench judgment of the Supreme Court in the case of

Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1045, and as explained by the recent judgment of the Supreme Court in the case of Kailash Nath Associates Vs. Delhi Development and Another (2015) 4 SCC 136, this Court has held that there cannot be forfeiture of an amount paid under an agreement to sell once no loss is pleaded and proved by a proposed seller under an agreement to sell. For refunding of the amount of earnest money/advance price paid under the agreement to sell Courts are entitled to invoke the powers under Order VII Rule 7 CPC because it is only when the relief for specific performance is denied would the stage arise for the refund of the amount paid under the agreement to sell, inasmuch as, otherwise if the agreement to sell would have gone through and the suit for specific performance decreed then the advance price/earnest money would have become part of the total sale consideration payable to the

seller/defendant. In the case of M.C. Luthra (supra) the judgment of the Supreme Court in the case of Satish Batra Vs. Sudhir Rawal (2013) 1 SCC 345 has been explained and it was held that it is the ratio of the judgment of the Constitution Bench of five judges of the Supreme Court in Fateh Chand's case (supra) which will prevail and

as explained in the case of Kailash Nath Associates (supra). The relevant paras of the judgment in the case of M.C. Luthra (supra) are paras 3 to 17, and these paras read as under:-

> 3. Today counsel for the appellant/defendant/counter-claimant has, in spite of what is recorded in the order dated 12.9.2017 of appellant/defendant restricting the claim of forfeiture to a reasonable amount of Rs. 3 lacs out of Rs.9 lacs, argued by placing reliance upon the judgment of the Supreme Court in the case of Satish Batra Vs. Sudhir Rawal (2013) 1 SCC 345 that since the amount of Rs.9lacs was paid by the respondent/plaintiff to the appellant/defendant as earnest money, hence in accordance with the ratio in the case of Satish Batra (supra) the entire amount of Rs. 9 lacs can be forfeited by the appellant/defendant as permitted by Clause 8 of the agreement to sell. The impugned judgment of the trial court is therefore prayed to be set aside and the counter-claim of the appellant/defendant is prayed for being decreed for entitling the appellant/defendant to forfeit the entire amount of Rs.9 lacs received by the appellant/defendant from the respondent/plaintiff.
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> 4. There is no dispute between the parties that parties had entered into an agreement to sell dated 15.9.2005 for the appellant/defendant to sell the subject suit property to the respondent/plaintiff. The total sale consideration was Rs.31.50 lacs and it is not in dispute that at the time of entering into the agreement to sell the appellant/defendant received an amount of Rs.9 lacs with the amount of Rs.7 lacs being paid in terms of demand drafts and a sum of Rs.2 lacs being paid in cash. Disputes and differences arose between the parties as to who was guilty of breach of contract in not performing the agreement to sell dated 15.9.2005. Respondent/plaintiff filed the subject suit pleading that the appellant/defendant was guilty of breach of contract and that therefore in terms of Clause 8 of the subject agreement to sell dated 15.9.2005, the respondent/plaintiff was entitled from the appellant/defendant to double the amount of the money paid of Rs.9 lacs i.e an amount of Rs.18 lacs. The appellant/defendant prayed for the suit to be dismissed and sought a declaration that the appellant/defendant should be held entitled to forfeit the amount paid of Rs.9 lacs received by appellant/defendant under the agreement to sell, forfeiture being on account of breach of contract by the

respondent/plaintiff and as permitted by Clause 8 of the agreement to sell.

5. Trial court, after pleadings were complete, framed the following issues:-

1. Whether the defendant had discharged his all the liabilities raised against him by the concerned authority i.e. MCD/Society, bank by the stipulated dated i.e. 18.11.2005. If not its effect? OPD
2. Whether there is a cause of action in filing the present suit in favour of the plaintiff? OPD
3. Whether the plaintiff is entitled to double the amount of earnest money as claimed in the plaint? OPP
4. Whether the plaintiff was having sufficient funds available with him to perform the agreement? OPP
5. Whether the plaintiff is entitled to recover the suit amount from the defendant? OPP
6. Whether the defendant is entitled to forfeit the earnest money as claimed by defendant in the counter claim? OPD
7. Relief.

6. Trial court has by the impugned judgment held that none of the parties are guilty of breach of contract. Trial court has held that besides none of the parties being guilty of breach of contract, the respondent/plaintiff is found to have filed the suit before the due date fixed for performance as per the agreement to sell, and that therefore the respondent/plaintiff cannot seek double the amount of earnest money paid of Rs.9 lacs i.e the respondent/plaintiff's suit for the claim of Rs.18 lacs will fail. Trial court however decreed the suit for a sum of Rs.9 lacs being the amount paid under the agreement to sell by holding that there cannot be forfeiture of the amount paid under an agreement to sell because the amount of Rs.9 lacs paid under the agreement to sell could not be categorized as earnest money. The relevant paras of the impugned judgment also show that the trial court has held that the appellant/defendant has failed to prove any loss on account of the breach of contract and further that the amount received of Rs.9 lacs is not earnest money under the contract because terms of the agreement to sell did not indicate that this amount of Rs.9 lacs was given as guarantee for due performance of the obligations. The relevant observations of the trial court in this regard are contained in paras 34 to 42 of the impugned judgment and these paras read as under:-

> 34. So far as counter claim of defendant for claiming that earnest amount of plaintiff is liable to be forfeited, law is well settled. If we go through the terms of the agreement Ex.PW1/1, stipulation in the shape of Clause 8 regarding forfeiture of earnest money cannot be termed as a penalty. Consequences for breach of the contract are provided in Chapter VI of the Contract Act which contains three sections, namely, section 73 to section 75. As per Section 73 of the Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach,

which naturally arose in usual course of things from such

breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this section is that a mere breach of contract by a defaulting party would not entitle other side to claim damages unless said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered.

35. Section 74 of the Act entitles a party to claim reasonable compensation from the party who has broken the contract which compensation can be pre-determined compensation stipulated at the time of entering into the contract itself. Thus, this section provides for pre-estimate of the damage or loss which a party is likely to suffer if the other party breaks the contract entered into between the two of them. In Fateh Chand v. Balkishan Das, 1964 (1) SCR 515, Supreme Court has held: 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.

36. 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 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 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.

37. Thus, section 74 of Contract Act 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 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.

38. In Maula Bux v. Union of India (UOI), 1970 (1) SCR 928, it was held: Forfeiture of earnest money under a contract for sale of property -- movable or immovable --if the amount is reasonable, does not fall within Section 74. That has been decided in several cases: Kunwar Chiranjit Singh v. Har Swarup, A.I.R.1926 P.C.1; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi, I.L.R. All.166; Muhammad Habibullah v. Muhammad Shafi, I.L.R. All. 324; Bishan Chand v. Radha Kishan Das, I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

39. In Shree Hanuman Cotton Mills and Others v. Tata Air Craft Limited, 1969 (3) SCC 522, Apex Court elaborately discussed the principles which emerged from the expression earnest money. Apex Court, considering the scope of the term earnest, laid down certain principles, which are as follows:

> From a review of the decisions cited above, the following principles emerge regarding earnest
>
> (1) It must be given at the moment at which the contract is concluded.
>
> (2) It represents a guarantee that the contract will be fulfilled or, in other words, earnest is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

> (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
> (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the
> earnest.

40. In Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd., 1995 (1) SCC (Suppl.) 751, Apex Court held that the forfeiture of the earnest money was legal. In V. Lakshmanan v. B.R. Mangalgiri and Others, 1995 (2) SCC (Suppl.) 33, Supreme Court held as follows:

> The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the

contract was that respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount.

41. 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 the 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.

42. In view of the legal proposition as discussed above, in facts and circumstances of the case while I have already held that both the parties cannot be held guilty for non compliance of terms of agreement, therefore, defendant to my mind is also not entitled for forfeiture of entire earnest amount. In peculiar facts and circumstances of the case while I decide the issue no. 1 that defendant has discharged all his liabilities, therefore, plaintiff is not entitled for double of the amount as claimed. Therefore, plaintiff to my mind is entitled for recovery of only Rs.9 lacs admittedly paid by him to defendant as earnest money however, plaintiff is entitled for such recovery of amount with interest @12 % from the date of filing of the suit till realization. Above said issues

are being accordingly decided.
(underlining added)

7. Before this Court on behalf of the respondent/plaintiff it is argued that even if respondent/plaintiff is held to be guilty of breach of contract, but since no loss is pleaded and proved by the appellant/defendant to

have been suffered by him on account of the breach of contract by the respondent/plaintiff, therefore the appellant/defendant cannot forfeit the entire amount of Rs.9 lacs and that the appellant/defendant can forfeit only a nominal amount or a reasonable amount out of the total amount received by the appellant/defendant of Rs.9 lacs. Reliance is placed by the counsel for the respondent/plaintiff upon the Constitution Bench judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405. Reliance is also placed by the counsel for the respondent/plaintiff upon a recent judgment of the Supreme Court in the case of Kailash Nath Associates Vs. Delhi Development Authority and Another (2015) 4 SCC 136 to argue that Supreme Court in this judgment of Kailash Nath Associates (supra) has clarified with reference to the ratio of Fateh Chand's case (supra) that when what is forfeited pursuant to a clause in a contract being an agreement to sell then that act of forfeiture is one falling under Section 74 of the Indian Contract Act, 1872 and that Section 74 of the Contract Act would only apply if the contract is of such a nature that loss cannot be proved on account of breach of contract but if the loss can be proved then it/loss must be proved failing which earnest money cannot be forfeited. Putting it in other words it is argued that it is held by the Supreme Court in the case of Kailash Nath Associates (supra) that on forfeiture being effected of earnest moneys paid under the contract, the said act of forfeiture is an act which falls under Section 74 of the Contract Act because forfeiture is taking place of a liquidated amount fixed as per the contract between the parties, but eventuality of such a clause of forfeiture coming into application would only be where contract is such by its nature that the loss cannot be proved; unlike those contracts where it is possible to prove the loss caused; and that breach of an agreement to sell/purchase of immovable property is a type of contract where loss can be proved, and that once loss is not pleaded and proved to be caused to the appellant/defendant, then earnest money amount cannot be forfeited. It is also argued on behalf of the respondent/plaintiff that amount of forfeiture if results in forfeiture taking place then if the forfeited amount is in the nature of a penalty amount, then the Courts will not allow forfeiture of the liquidated amount/earnest money which is in the nature of penalty and that Courts will only grant reasonable compensation lesser than the total amount of earnest money which is a penalty amount.

8. The issue before this Court is that whether it is the ratio of the judgment of the Supreme Court in the case of Satish Batra (supra) which

has to be applied or it is the ratio of the judgments of the Supreme Court in the cases of Fateh Chand (supra) and Kailash Nath Associates (supra) which have to be applied. Also, if the ratio in the case of Satish Batra (supra) applies, then it is to be decided to what extent can the appellant/defendant be held entitled to forfeit the amount i.e whether appellant/defendant can forfeit the entire amount of Rs.9 lacs or only a lesser amount can be allowed to be forfeited by the appellant/defendant, and what is that lesser amount.

9. The facts of the judgment of the Supreme Court in the case of Satish Batra (supra) are quite similar to the facts of the present case because in the said case the Hon'ble Supreme Court was dealing with a fact situation as to whether when a contract being an agreement to sell contains a clause of forfeiture then in such cases the seller on breach by the buyer under an agreement to sell is entitled to forfeit the amount of earnest money simply because a clause of forfeiture is so provided under the agreement to sell. Supreme Court in the case of Satish Batra (supra) on account of a clause of forfeiture existing in the agreement to sell in that case allowed forfeiture of an amount of Rs.7 lacs out of the total sale consideration of Rs.70 lacs i.e 10% of the amount received under the agreement to sell was held to be in the nature of earnest money being capable of forfeiture by the seller because the clause in the agreement to sell so provided for. Supreme Court in the case of Satish Batra (supra) distinguished the judgment of the Constitution Bench of the Supreme Court in the case of Fateh Chand (supra) and relied upon the subsequent judgments of the Supreme Court in the cases of Shree Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited (1969) 3 SCC 522 and Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others (2004) 3 SCC 711 for holding that the earnest money in an agreement to sell can always be forfeited without pleading and proving any requirement of the seller having suffered any loss. The relevant paras of the judgment of the Supreme Court in the case of Satish Batra (supra) are paras 5 and 8 to 17 and these paras read as under:-

5. We have heard the learned Counsel on either side at length. Facts

are undisputed. The only question is whether the seller is entitled to retain the entire amount of Rs. 7,00,000/- received towards earnest money or not. The fact that the purchaser was at fault in not paying the balance consideration of Rs. 63,00,000/- is also not disputed. The question whether the seller can retain the entire amount of earnest money depends upon the terms of the agreement. Relevant clause of the Agreement for Sale dated 29.11.2005 is extracted hereunder for easy reference:

"e) If the prospective purchaser fail to fulfill the above condition.

The transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulated above. The purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will get 4% Commission from the faulting party."

The clause, therefore, stipulates that if the purchaser fails to fulfill the conditions mentioned in the agreement, the transaction shall stand cancelled and earnest money will be forfeited. On the other hand, if the seller fails to complete the transaction, the purchaser would get double the amount of earnest money. Undisputedly the purchaser failed to perform his part of the contract, then the question is whether the seller can forfeit the entire earnest money.

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8. We are of the view that the High Court has completely misunderstood the dictum laid down in the

above mentioned judgment in Fateh Chand Case and came to a wrong conclusion of law for more than one reason, which will be more evident when we scan through the subsequent judgments of this Court.

9. In Shree Hanuman Cotton Mills v. Tata Air Craft Limited, this Court elaborately discussed the principles which emerged from the expression "earnest money". That was a case where the Appellant therein entered into a contract with the Respondent for purchase of aero scrap. According to the contract, the buyer had to deposit with the company 25% of the total amount and that deposit was to remain with the company as the earnest money to be adjusted in the final bills. Buyer was bound to pay the full value less the deposit before taking delivery of the stores. In case of default by the buyer, the company was entitled to forfeit unconditionally the earnest money paid by the buyer and cancel the contract. The Appellant advanced a sum of Rs. 25,000/- (being 25% of the total amount) agreeing to pay the balance in two installments. On Appellant's failure to pay any further amount, Respondent forfeited the sum of Rs. 25,000/-, which according to it, was earnest money and cancelled the contract. Appellant filed a suit for recovery of the said amount. The trial Court held that the sum was paid by way of deposit or earnest money which was primarily a security for the performance of the contract and that the Respondent was entitled to forfeit the deposit amount when the Appellant committed a breach of the contract and dismissed the suit." (Shree Hanuman Cotton Mills case) The High Court confirmed the decision taken by the trial Court. This Court, considering the scope of the term "earnest", laid down certain principles, which are as follows: (Shree Hanuman Cotton Mills case) 21. From a review of the decisions cited above, the following principles emerge regarding "earnest"

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

10. In Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd., this Court following the judgment of the Privy Council in Har Swaroop and Shree Hanuman Cotton Mills, held that the forfeiture of the earnest money was legal. In V. Lakshmanan v. B.R. Mangalgiri, this Court held as follows: 5.The question then is whether the Respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that Respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the Appellant, as part of the contract, they are entitled to forfeit the entire amount.

11. In HUDA v. Kewal Krishan Goel, the question that came up for consideration before this Court was, where a land is allotted, the allottee deposited some installments but thereafter intimated the authority about his incapacity to pay up the balance installments and requested for refund of the money paid, was the allotting authority entitled to forfeit the earnest money deposited by the allottee or could be only entitled to forfeit 10% of the total amount deposited by the allottee till the request is made? Following the judgment in Shree Hanuman Cotton Mills, this Court held that (Huda case) 12. ... the allottee having accepted the allotment and having made some payment on installments basis, then made a request to surrender the land, has committed default on his part and, therefore, the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited, as held by the High Court." In that case, this Court took the view that the earnest money represented the guarantee that the contract would be fulfilled.

12. This Court, again, in Videocon Properties Ltd. v. Bhalchandra Laboratories, dealt with a case of sale of immovable property. It was a case where the Plaintiff-Appellants had entered into an agreement with the Respondents-Defendants on 13.5.1994 to sell the landed property owned by the Respondents and a sum of Rs. 38,00,000/- was paid by the Appellants as deposit or earnest money on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the words used in the agreement alone would not be determinative of the character of the "earnest money" but really the intention of the parties and surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned.

13. In that case, on facts, after interpreting various clauses of the agreement, the Court held as follows:(Bhalchandra case) 15. Coming to the facts of the case, it is seen from the agreement dated 13.5.1994 entered into between parties - particularly Clause 1, which specifies more than one enumerated categories of payment to be made by the purchaser in the manner and at stages indicated therein, as consideration for the ultimate sale to be made and completed. The further fact that the sum of Rs. 38 lakhs had to be paid on the date of execution of the agreement itself, with the other remaining categories of sums being stipulated for payment at different and subsequent stages as well as execution of the sale deed by the Vendors taken together with the contents of the stipulation made in Clause 2.3, providing for the return of it, if for any reason the Vendors fail to fulfill their obligations under Clause 2, strongly supports and strengthens the claim of the Appellants that the intention of the parties in the case on hand is in effect to treat the sum of Rs. 38 lakhs to be part of the prepaid purchase-money and not pure and simple earnest money deposit of the restricted sense and tenor, wholly unrelated to the purchase price as such in any manner. The mention made in the agreement or description of the same otherwise as "deposit or earnest money" and not merely as earnest money, inevitably leads to the inescapable conclusion that the same has to and was really meant to serve both purposes as envisaged in the decision noticed supra. In substance, it is, therefore, really a deposit or payment of advance as well and for that matter actually part payment of purchase price, only. In the teeth of the further fact situation that the sale could not be completed by execution of the sale deed in this case only due to lapses and inabilities on the part of the Respondents - irrespective of bonafides or otherwise involved in such delay and lapses, the

amount of rupees 38 lakhs becomes refundable by the Vendors to the purchasers as of the prepaid purchase price deposited with the Vendors. Consequently, the sum of rupees 38 lakhs to be refunded would attract the first limb or part of Section 55(6)(b) of the Transfer of Property Act itself and therefore necessarily, as held by the learned Single Judge, the Defendants prima facie became liable to refund the same with interest due thereon, in terms of Clause 2.3 of the agreement Therefore, the statutory charge envisaged therein would get attracted to and encompass the whole of the sum of rupees 38 lakhs and the interest due thereon.

14. In the above mentioned case, the Court also held as follows: (Bhalchandra case) 14. ...Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be baked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by the party concerned, who paid it.

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 the 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.

16. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011.

17. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs. 7,00,000/- as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The High Court has, therefore, committed an error in reversing the judgment of the trial court.

10. A reference to aforesaid paras of the judgment of the Supreme Court in the case of Satish Batra (supra) shows that there was a clause in the agreement to sell which was held by the Supreme Court to entitle forfeiture of earnest money, and this clause was as is reproduced in Para 5 of the judgment of the Supreme Court in the case of Satish Batra (supra), and therefore in the case of Satish Batra (supra) it was held that earnest money paid under an agreement to sell can be forfeited without

complying with the requirement of the seller pleading and proving that he has suffered a loss on account of breach of the agreement to sell by the buyer. It also needs to be noted that in Para 14 of the case of Satish Batra (supra) reference is made to the ratio of the judgment of the Supreme Court in the case of Videocon Properties Ltd.'s (supra) that words used in an agreement are not determinative of the character of the sum (received by a seller under an agreement to sell) and what is the character of the amount paid depends upon the intentions of the parties and the surrounding circumstances. The Supreme Court therefore held that whether or not an amount called as earnest money under the contract is or is not earnest money will have to be decided as per the facts and circumstances of each individual case.

11. In the present case, the Agreement to Sell (Ex.PW1/1) entered into between the parties reads as under:-

AGREEMENT TO SELL AND PURCHASE This agreement is executed at Delhi, on this 15/09/2005 BETWEEN Sh. M.C. Luthra s/o Sh. Mangal Das Luthra R/o H. No.691, Sector-V R.K. Puram, New Delhi (hereinafter called the PARTY NO.1) AND Sh. Ashok Kumar Khanna S/o Sh. Sant Ram Khanna R/o D-32, Fateh Nagar, New Delhi (hereinafter called the PARTY NO.2) The expression of both the Parties wherever they occur in the body of this agreement shall means, and include their respective heirs, legal representative, administrators, executors, successors, and assigns.

Whereas the Party No.1 is the exclusive owner of Flat No.D-504 Chankaya Cooperative Group Housing Society, Sector-4, Plot No.23 Dwarka, New Delhi.

The aforesaid property is free from all kind encumbrances such as prior sale gifts, mortgage, litigation, disputes, stay orders, attachments, notifications, acquisitions, charges liens, sureties etc. Whereas the party No.1 for his bonafide needs and requirements has agreed to sell the aforesaid property for a total sale consideration of Rs.31,50,000/- (Rupees Thirty one lakhs & Fifty Thousands only) and Party No.2 has agreed to purchase the same on the following terms and conditions of this agreement:-

NOW THIS AGREEMENT WITNESSETH AS UNDER:-

1. That the Party No.2 has paid an amount of Rs.7,00,000/- (Rupees Seven Lakhs on 15.9.2005) as earnest money and balance amount of Rs. 2,00,000/- (Rs. Two lakhs only) will be paid by 23.9.2005.

2. The balance sale consideration amount of Rs.22,50,000/- (Rupees Twenty two lakhs and fifty thousands only) will be paid latest by 18/11/2005 (18th November 2005)

3. All liabilities up to the date of finalization of deal will be paid by Party No.1 and the same will be paid by Party No.2 after finalization of the deal.

4. That the Party No.1 shall not create any charges over the said property after the execution of this agreement and Party No.1 has no right to sell it to anybody else after the signing of this agreement.

5. That all the expenditure regarding registration shall be borne by the Party No.2.

7. That the Party No.1 will deliver the vacant physical possession of the said property at the time of full and final payment and registration of concerned documents in favour of the purchaser.

8. If the Party No.1 could not execute this agreement to sell then the Party No.1 will pay the double amount of the earnest money to Party No.2 and if Party No.2 fails to pay the balance consideration amount within the due date then the amount of earnest money will be forfeited by Party No.1.

9. That Party No.1 has given his/her/their consent to the above condition without any reservation.

10. That Party No.2 hereby, further confirms and declares that this agreement is IRREVOCABLE and shall be final and binding on them, their heirs, executors, administrators and assigns.

11. That both the parties will pay a commission of NIL% each to M/s xxx IN WITNESS WHEREOF BOTH THE PARTIES HAVE PUT THEIR RESPECTIVE HANDS ON THIS AGREEMENT IN PRESENCE OF THE FOLLOWING WITNESSES:-

WITNESSES:- sd/-
1. sd/- PartyNo.1
(SELLER)
2. sd/- sd/-
(PURCHASER) PartyNo.2
(emphasis added)

12.(i) Clause 8 of the agreement to sell in the present case entitling forfeiture of earnest money is no doubt similar to the clause which existed in Satish Batra's case (supra), however a reference to Clause 1 of the agreement to sell shows that earnest money is only Rs.7,00,000/- and not Rs.9,00,000/-. It is only Rs.7,00,000/- which is stated as earnest money in Clause 1 of the agreement to sell and with respect to the other amount of Rs.2,00,000/- it is stated that this is the 'balance amount'.

Clause 2 of the agreement to sell then states that the 'balance sale consideration' amount would be Rs.22,50,000/- i.e parties understood that in case the agreement to sell goes through then what has been paid in terms of Clause 1 of the agreement to sell of Rs.7,00,000/- as earnest money will become part of the price to be paid under the agreement to sell.

(ii) Therefore in my opinion in the facts of the present case appellant/defendant cannot contend that earnest money amount was Rs.9,00,000/- and therefore this Court holds that the earnest amount is Rs.7,00,000/-.

13.(i) The issue to be decided then is that how much amount should the appellant/defendant be held entitled to forfeit. As already stated above in Satish Batra's case (supra) besides holding that what is earnest money depends on facts and circumstances of each case, and in Satish Batra's case (supra) ten percent of the total sale consideration being Rs.7 lacs was held in terms of the contractual clause

to be entitled for being forfeited as earnest money as in Satish Batra's case (supra) the sale consideration was Rs.70,00,000/-. When we see the facts of the present case it is seen that the total sale consideration is Rs.31,50,000/- and ten percent of which amount would therefore come to Rs.3,15,000/-. As already observed in Satish Batra's case (supra) by referring to the ratio of Videocon Properties Ltd.'s case (supra) that merely because the amount is called as earnest money it will not automatically become earnest money and what is to be taken as the earnest money amount will depend upon the facts and circumstances of each case with the intentions of the parties.

(ii) With respect to the amount being called as earnest money and whether merely by that itself that the amount is called as earnest money it will become earnest money, it is seen that what is material is not label of the amount but the substance which has to be seen in view of the observations made in Para 14 of the judgment of the Supreme Court in Videocon Properties Ltd.'s case (supra), which has been reproduced above. I have also in the judgment in the case of Shri Sunil Sehgal vs. Shri Chander Batra and Others, CS(OS) No. 1250/2006 decided on 23.9.2015 similarly held and have observed as under:-

> "9. In the present case, defendants have led no evidence of any loss caused to them, and therefore, assuming that plaintiff is guilty of breach of contract, yet, the defendants cannot forfeit the amount of Rs.15 lacs lying with them. A huge amount of Rs.15 lacs out of the total sale consideration of Rs.79,50,000/- cannot in law be called earnest money. By giving a stamp of earnest money' to advance price, the latter cannot become the former. What is to be seen is the substance and not the label. Only a nominal amount can be said to be earnest money and not an amount of Rs.15 lacs out of Rs.79.50 lacs, by noting that if suppose an amount of Rs. 30 lacs or 40 lacs would be called as earnest money by the parties, that would not take away the fact that such amount cannot be earnest money but would in fact be part of the price to be paid for sale." (underlining added)
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> (iii) I have also similarly held in the judgment passed in the case of 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:-
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> "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/-. I may also note that nomenclature of a payment is not important and what is important is really the quantum of price which is paid. In the present case, the total price payable for the suit property is Rs.20,00,000/- and therefore 25% of the payment made stricto sensu cannot be an earnest money, though it has been called so. Only a nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow forfeiture of that amount to a nominal extent as held in the case of Fateh Chand (supra). For example can it be said that 100% of the price or 75%/80% of the price or 50% of the price is earnest money so that it can be forfeited. The answer surely is in the negative. Such high amounts called earnest money will be in the nature of penalty and thus hit by Section 74 of the Indian Contract Act, 1872 in view of Fateh Chand's case. The principles laid down in Fateh Chand's case; that forfeiture of a reasonable amount is not penalty but if forfeiture is of a large amount the same is in the nature of penalty attracting the applicability of Section 74; have been recently reiterated by the Supreme Court in the case of V.K.Ashokan vs. CCE, 2009 (14) SCC 85." (underlining added) I therefore hold that the appellant/defendant can at best seek to forfeit, in accordance with the ratio in Satish Batra's case (supra), a sum of Rs. 3 lacs, and not a sum of Rs. 9 lacs as is claimed by the appellant/defendant, but even this amount of Rs. 3 lacs cannot be allowed to be forfeited and the reasons are given hereinafter.

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 and relevant paras of this judgment are paras 30 to 44 which read as under:-

> 30. We now come to the reasoning which involves Section 74 of the Contract Act. The Division Bench held:
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> "38. The learned Single Judge has held that the property was ultimately auctioned in the year 1994 at a price which fetched DDA a handsome return of Rupees 11.78 crores and there being no damages suffered by DDA, it could not forfeit the earnest money
>
> 39. The said view runs in the teeth of the decision of the Supreme Court reported as AIR 1970 SC 1986 Shree Hanuman Cotton Mills & Anr. V. Tata Aircraft Ltd. which holds that as against an amount tendered by way of security, amount tendered as earnest money could be forfeited as per terms of the contract.
>
> 40. We may additionally observe that original time to pay the balance bid consideration, as per Ex.P-I was May 18, 1982 and as extended by Ex. P-8 was October 28, 1982. That DDA could auction the plot in the year 1994 in the sum of Rupees 11.78 crore was immaterial and not relevant evidence for the reason damages with respect to the price of property have to be computed with reference to the date of the breach of the contract."

31. Section 74 as it originally stood read thus:

> "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, 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."

32. By an amendment made in 1899, the Section was amended to read:

> 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. Explanation.--A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception.--When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the

> performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein. Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads Of the consequences of breach of contract. It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through nonfulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

34. In Fateh Chand v. Balkishan Das, 1964 SCR (1) 515, this Court held:

> "The section is clearly an attempt to eliminate 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 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. ....
>
> 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 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 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."(At page 526, 527) 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."(At page 530)

35. Similarly, in Maula Bux v. Union of India (UOI), 1970 (1) SCR 928, it was held:

> "Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases :Kunwar Chiranjit Singh v. Har Swarup, A.I.R.1926 P.C.1; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi, I.L.R. All.166; Muhammad Habibullah v. Muhammad Shafi, I.L.R. All. 324; Bishan Chand v. Radha Kishan Das, I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "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". It is true that 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, and 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 contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."(At page 933,934)

36. In Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Limited, 1970 (3) SCR 127 it was held:

"From a review of the decisions cited above, the following principles emerge regarding "earnest":

(1) It must be given at the moment at which the contract is concluded (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest" (At page 139) "The learned Attorney General very strongly urged that the pleas covered by the second contention of the appellant had never been raised in the pleadings nor in the contentions urged before the High Court. The question of the quantum of earnest deposit which was forfeited being unreasonable or the forfeiture being by way of penalty, were never raised by the appellants. The Attorney General also pointed out that as noted by the High Court the appellants led no evidence at all and, after abandoning the various pleas taken in the plaint, the only question pressed before the High Court was that the deposit was not by way of earnest and hence the amount could not be forfeited. Unless the appellants had pleaded and established that there was unreasonableness attached to the amount required to be deposited under the contract or that the clause regarding forfeiture amounted to a stipulation by way of a penalty, the respondents had no opportunity to satisfy the Court that no question of unreasonableness or the stipulation being by way of penalty arises. He further urged that the question of unreasonableness or otherwise regarding earnest money does not at all arise when it is forfeited according to the terms of the contract.

In our opinion the learned Attorney General is well founded in his contention that the appellants raised no such contentions covered by the second point, noted above. It is therefore unnecessary for us to go into the question as to whether the amount deposited by the appellants, in this case, by way of earnest and forfeited as such, can be considered to be reasonable or not. We express no opinion on the question as to whether the element of unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the respondents would have had an opportunity of meeting such a claim."(At page 142)

37. And finally in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, it was held:

> "64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [AIR 1963 SC 140: (1964) 1 SCR 515 at p. 526] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. 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.

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.

67.....In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre- estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be

against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

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."

38. It will be seen that when it comes to forfeiture of earnest money, in Fateh Chand's case, counsel for the appellant conceded on facts that Rs.1,000/- deposited as earnest money could be forfeited. (See: 1964 (1) SCR Page 515 at 525 and 531).

39. Shree Hanuman Cotton Mills & Another which was so heavily relied by the Division Bench again was a case where the appellants conceded that they committed breach of contract. Further, the respondents also pleaded that the appellants had to pay them a sum of Rs.42,499/- for loss and damage sustained by them. (See: 1970 (3) SCR 127 at Page 132). This being the fact situation, only two questions were argued before the Supreme Court: (1) that the amount paid by the plaintiff is not earnest money and (2) that forfeiture of earnest money can be legal only if the amount is considered reasonable. (at page 133). Both questions were answered against the appellant. In deciding question two against the appellant, this Court held:-

> "But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. As mentioned earlier, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law. Nor have they raised any contention that the amount of deposit is so unreasonable and therefore forfeiture of the entire amount is not justified. The decision in Maula Bux's [1970]1SCR928 had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being forfeited. Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which were under consideration, were paid as earnest money. It is under those circumstances that this Court proceeded to consider the applicability of Section 74 of the Contract Act. (At page 143)"

40. From the above, it is clear that this Court held that Maula Bux's case was not, on facts, a case that related to earnest money. Consequently, the observation in Maula Bux that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of 5 Judges in Fateh Chand's case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in Fateh Chand's case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only when a contract has been broken.

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."

(emphasis added)

15. In sum and substance what is held by the Constitution Bench of the Supreme Court in the cases of Fateh Chand (supra) and the recent judgment in Kailash Nath Associates (supra) is that whenever there is a breach of contract then earnest money which is forfeited because of the breach, whether by a plaintiff or a defendant in a contract, the forfeiture is of that amount which are in fact liquidated damages specified under a contract and that for claiming damages under a contract, whether liquidated under Section 74 of the Contract Act or unliquidated under Section 73 of the Contract Act, existence of loss is a sine qua non. In other words, if no loss is caused to a seller who has in his pocket monies of buyer, then the seller can only forfeit a nominal amount unless the seller has pleaded and proved that losses have been caused to him on account of the breach of contract by the buyer. Once there is no pleading of loss suffered by a seller under an agreement to sell, then large amounts cannot be forfeited though so entitled to a seller under a clause of an agreement to

sell/contract entitling forfeiture of 'earnest money' because what is forfeited is towards loss caused, and that except a nominal amount being allowed to be forfeited as earnest money, any forfeiture of any amount, which is not a nominal amount, can only be towards loss if suffered by the seller. Thus if there is no loss which is suffered by a seller then there cannot be forfeiture of large amounts which is not a nominal amount, simply because a clause in a contract provides so. The following has been held in the judgment in the case of Kailash Nath Associates (supra):-

(i) As per the facts existing in the case of Kailash Nath Associates (supra) the Single Judge of the High Court had held that since no damages were suffered by DDA therefore DDA could not forfeit the earnest money. (Para 30 of Kailash Nath Associates's case (supra)).

(ii) The Division Bench of the High Court however set aside the judgment of the Single Judge by holding that amount tendered as earnest money can be forfeited because and simply forfeiture of amount called as earnest money can be forfeited in terms of the contract. (Para 30 of Kailash Nath Associates's case (supra) reproducing Para 39 of the Division Bench judgment of the High Court).

(iii) Supreme Court in the case of Kailash Nath Associates (supra) as per Para 44 of its judgment holds that the Division Bench of the High Court had gone wrong in principle because compensation can be awarded (where there is breach of contract) only if loss or damage is suffered i.e where there is no loss or damage suffered as a result of breach of contract no compensation can be awarded as law does not provide for a windfall i.e large amounts though called contractually as earnest money cannot be forfeited unless loss is pleaded and proved to have been suffered. These observations have cross-reference to Para 34 of the judgment of Kailash Nath Associates's case (supra) where with reference to the para of Fateh Chand's case (supra) it is held that the language of Section 74 of the Contract Act that 'whether or not damage or loss is proved to have been caused by breach' is the language that such language only discharges proof of actual loss but that does not justify award of compensation where in consequence of breach no injury/loss has at all resulted.

(iv) Earnest money is an amount to be paid in case of breach of contract, and named in contract as such, and that forfeiture of earnest money is covered under the entitlement to liquidated damages under Section 74 of the Contract Act vide Para 40 in the case of Kailash Nath Associates (supra).

(v) The language of Section 74 of the Contract Act that "whether or not actual loss or damage is proved to have been caused thereby" means only that where it is difficult or impossible to prove loss caused by the breach of contract then the liquidated damages/amount (being the amount of earnest money) can be awarded vide Para 43(6) of Kailash Nath Associates's case (supra) but where nature of contract is such that loss caused because of breach can be assessed and so proved then in such cases loss suffered must be proved to claim the liquidated damages of earnest money. This finding has cross reference to Para 37 of judgment in Kailash Nath Associates's case (supra) where the observations of Supreme Court in Para 67 of the case of ONGC Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705 are quoted that liquidated damages are awarded where it is difficult to prove exact loss or damage caused as a result of breach of contract.

(vi) Even where liquidated damages can be awarded under Section 74 of the Contract Act because loss or damages cannot be proved in a contractual breach yet if the liquidated damages (earnest money) are a penalty amount by its nature i.e prescribed liquidated damages figure is unreasonable, then for the liquidated damages amount or earnest money amount forfeiture cannot be granted/allowed and that only reasonable amount is allowed as damages with the figure of liquidated damages being the upper limit vide Para 43(1) of Kailash Nath Associates's case (supra).

16. Similar ratio as has been laid down by the Supreme Court in Kailash Nath Associates's case (supra) was also the ratio of the judgment of the Supreme Court in the case of V.K. Ashokan Vs. Assistant Excise Commissioner and Others (2009) 14 SCC 85 and paras 66 to 71 of this judgment reads 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. (See Maula Bux vs. Union of India and Shree Hanuman Cotton Mills vs. Tata Air Craft Ltd.)
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> 67. Section 74 of the Contract Act reads as under: "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."

68. There are authorities, no doubt coloured by the view which was taken in English cases, that Section 74of the Contract Act would have no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, e.g.,. Natesa Aiyar v. Appavu Padayachi, Singer Manufacturing Company v. Raja Prosad; Manian Patter v. The Madras Railway Company, but this view no longer is good law in view of the judgment of this Court in Fateh Chand vs. Balkishan Das.

69. This Court in Fateh Chand case observed at pp. 526-27 (of SCR):

> 10. Section 74 of the 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: (AIR p. 1411, para 11) 11. 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 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 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, 14. ... 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. (AIR p. 1412, para

14)

70. Forfeiture of earnest money under a contract for sale of property whether movable or immovable, if the amount is reasonable, would not fall within Section 74. That has been opined in several cases. (See Kunwar Chiranjit Singh v. Har Swarup; Roshan Lal v. Delhi Cloth and General Mills Co. Ltd.; Mohd. Habib-ullah v. Mohd. Shafi ; Bishan Chand v. Radha Kishan Das.) These cases have explained that forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies.

71. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. (See Maula Bux and Saurabh Prakash v. DLF Universal Ltd.)"

(emphasis added)

17. All the judgments of the Supreme Court which have been relied upon in Satish Batra's case (supra) are of a Bench strength lesser than the Constitution Bench strength of the Supreme Court in Fateh Chand's case (supra) and the law is well settled that it is the judgment of the larger Bench of the Supreme Court which will prevail over the judgment of a Bench strength of lesser number of judges. Also, as already stated above, in the recent judgment 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 i.e 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.

5. In view of the aforesaid facts and the position of law, there is no illegality in the impugned judgment which directs refund of the advance price/earnest money paid to the appellants/defendants by the respondent/plaintiff under the subject agreement to sell, inasmuch as there is no dispute that appellants/defendants have not pleaded or proved any loss caused to them on account of any alleged breach of the agreement to sell by the respondent/plaintiff.

6. Dismissed.

MAY 14, 2018 VALMIKI J. MEHTA, J
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