

## (2) Baby Vedika Gulati (8 Years) vs Mr. Jayanta Mitra on 10 June, 2022

: IN THE COURT OF :  
Dr. V.K. DAHIYA  
ADDITIONAL DISTRICT JUDGE-01:  
SOUTH-WEST DISTRICT: DWARKA COURTS:  
NEW DELHI

Civil Suit No. 1931/2018 (1053/2018)

In the matter of:

- (1) Smt. Jyoti Gulati,  
W/o Late Mr. Pradeep Gulati
- (2) Baby Vedika Gulati (8 Years),  
Through her mother/plaintiff no. 1
- (3) Master Arnav Gulati (6 Years)  
Through his mother/plaintiff no. 1

All R/o  
A-3, DDA Flats, Block-D,  
Vasant Vihar, New Delhi-110057

.....Plaintiffs

Versus

Mr. Jayanta Mitra  
R/o B-606, Mahalaxmi Apartments,  
Plot No. 04, Sector-02,  
Dwarka, New Delhi-110075.

....Defendant

Date of Institution of Suit	:	10.10.2018
Date of reserving judgment	:	10.06.2022
Date of pronouncement	:	10.06.2022

Appearance :

1. Sh. Pawan Kumar Jakhu, Advocate ld. Counsel for the plaintiff
2. Sh. Amir Yadav, Advocate ld. Counsel for the defendant

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SUIT FOR RECOVERY OF Rs. 10,00,000/- INCLUSIVE OF INTEREST  
ALONG WITH PENDENTE LITE AND FUTURE INTEREST @ 24%  
P.A., DAMAGES AND PERMANENT INJUNCTION

J U D G M E N T :

1. The present suit has been filed by the plaintiffs seeking recovery of Rs. 10,00,000/- along with pendente lite and future interest at the rate of 24% p.a., damages and permanent injunction from defendant.

2. Relevant facts as emanating from the plaint, giving rise to the cause of action in favour of plaintiffs, for filing the present suit are reproduced here as under :

a) Plaintiff no. 1 is a widow and mother of two minor children namely Vedika Gulati (8 Years) (plaintiff no. 2) and Arnav Gulati (6 Years) (Plaintiff no. 3). Plaintiff no. 1 is filing this suit on behalf of herself and her minor children being only legal heirs of late Mr. Pradeep Gulati (in short, the deceased), who died Intestate on 27.07.2018.

b) That the husband of plaintiff no. 1 late Sh. Pradeep Gulati and the defendant had entered into an agreement to sell on 29.07.2018 qua property bearing no. B-606, Mahalaxmi Apartments, Plot no. 04, Sector-02, Dwarka, New Delhi-110075 (hereinafter referred to as suit property) which the defendant claimed to be the owner in possession of the same.

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c) As per the said agreement to sell (in short, the said agreement), the total sale consideration amount agreed for the purchase of the suit property was Rs. 1,16,00,000/- and the same was agreed to be paid by the deceased to the defendant within 30 days from the date of the signing of the said agreement.

d) That out of the total sale consideration of Rs. 1,16,00,000/- the deceased had paid a total sum of Rs. 10,00,000/- (Rs. 4,00,000/- through cheque and Rs. 6,00,000/- in cash) as Bayana/earnest money/token money to the defendant on 29.07.2018.

e) That the deceased had left no stone unturned to honour the spirit of the said agreement as he had applied for a home loan from the ICICI Bank and got the loan sanctioned for the amount of Rs. 53,06,189/- on 09.08.2018 and also purchased the stamp papers worth Rs. 5,60,000/- on 07.08.2018 to be paid as stamp duty for the execution of the sale deed of the suit property.

f) That unfortunately on 27.08.2018, the deceased after being in coma for some days, met with untimely death at the young age of 44 years.

g) That plaintiff no. 1 duly informed the defendant about the changed circumstances regarding the demise of the deceased. The plaintiffs were neither a contracting party nor having any contractual obligation towards defendant under the said agreement after the demise of the deceased but she holds a right to retrieve the amount of Rs. 10,00,000/- earnest money paid by the deceased in lieu of the purchase of the suit property.

h) That only after the demise of the deceased, the plaintiffs got to know about the entire deal and the said agreement and the payment of the said bayana/earnest money/token money paid by the deceased to the defendant.

i) That the plaintiffs also issued a legal notice dated 20.09.2018 to the defendant for recovery of Rs. 10,00,000/□ and requested him to return the said amount of bayana/earnest money/token money within seven days of receipt of the notice, but the defendant replied with confirmation of the forfeiture of the said amount of bayana/earnest money/token money through his reply dated 24.09.2018.

j) That the defendant has been threatening the plaintiffs to sell the suit property to some other person or create a third party interest in some form or way anytime before without paying earnest money of Rs. 10,00,000/□ to the plaintiffs in order to evade his legal liabilities.

k) That due to the said act of the defendant, the plaintiffs have suffered huge immense mental, physical, reputation, financial damages which the plaintiffs assess to the tune of Rs. 2,00,000/□ apart CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 4 of 31 from the amount of the recovery i.e. Rs. 10,00,000/□ along with interest @ 24% till its realization & therefore, the total amount claimed is Rs. 1,20,000/□ along with interest @ 24% p.a from the date of execution of the said agreement till its realization.

3. Summons for settlement was issued to the defendant and the same was served upon him and written statement was filed on his behalf on 07.01.2019 and interalia submitted that as per the said agreement "the expression and words of the seller and the buyer shall mean and include their legal heirs, successors, assignees, nominees, executors, administrators and any other legal representatives respectively, therefore, the plaintiffs being the legal heirs of the deceased, should have performed the obligations arising out of the said agreement.

4. It is further submitted that the clause 9 of said agreement provide that, in the event of breach of any clause of the said agreement by the buyer, the seller shall have the right to terminate the said agreement and forfeit the advance/earnest money which is received by him. The deceased was suffering from cancer and this fact was well within the knowledge of the plaintiffs and as such the plaintiffs are in possession of the said agreement & other said documents including the medical report of the deceased and perusal of the same depicts that the deceased was suffering from cancer even before entering into the said agreement.

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5. It is further submitted that defendant is not taking any advantage of the said situation in as much as though the last date to execute the sale deed was 27.08.2018, but on the humanitarian ground, the defendant extended the execution of the last date of sale deed till 22.09.2018 by giving a written legal notice dated 05.09.2018. The defendant wanted to buy a large house of 3 BHK plus study in Dwarka after selling his property and therefore, he approached Mr. S.P. Sharma, Proprietor of M/s Shakti Associates, Sector□2, Dwarka to sell the suit property and buy a new house. Thereafter,

Mr.Amit Sharma offered to buy a 2 BHK + study room for the deceased and he was introduced through Mr. Kamal Malik @ Vicky, a broker to Mr. S.P. Sharma. Mr. S.P. Sharma, introduced defendant to the deceased through Mr.Sanjay Kalra and Mr.Amit Sharma who played an active role in the entire deal. Mr.Amit Sharma is a direct selling agent of ICICI Bank and a meeting was held at the residence of Mr.Sanjay Kalra at Flat no.243, plot no.29B, Prabhavi Apartments, Sector 10, Dwarka for sale/purchase of the suit property.

6. It is further stated that Mr.Sanjay Kalra and Mr.Amit Sharma are brother in law of the deceased, the defendant and broker Mr. S.P. Sharma visited the deceased and it was briefed that the deceased was suffering from jaundice, but in fact he was at the last stage of cancer, which fact was revealed, at a later stage, and the said fact was not disclosed to the defendant intentionally with ulterior motive of the relatives of the deceased in collusion with each other.

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7. It is further submitted that the said meeting arranged by Mr.Amit Sharma, was attended by Mr.Amit Sharma, Mrs. Amit Sharma, Mr. Sanjay Kalra, Mrs. Sanjay Kalra, the deceased, plaintiff no.1, Mrs. S.P.Sharma, Mr. Kamal Malik, Mrs. Mahua Mitra and defendant on 23.07.2018. The suit property was agreed to be sold for an amount of Rs.1,16,00,000/- and all the terms and conditions were formulated and Rs.1,00,000/- was given as token money to defendant on 23.07.2018. It is further submitted that the home loan of the deceased was pre sanctioned and the remaining amount of Rs.9,00,000/- was paid on 29.07.2018 when the said agreement was entered into between the parties and the said agreement was witnessed by three persons namely Mr. S.P.Sharma, Mr. Kamal Malik and Mr. Amit Sharma. The deceased was bed ridden and he signed the said agreement on bed and the deceased also never informed that he was suffering from cancer.

8. It is further submitted that pursuant to the said deal, the defendant entered into agreement to sell dated 08.08.2018 for purchase of flat no. S 219, Vivekanand CGHS, Plot No.02, Sector 5, Dwarka, New Delhi and paid a sum of Rs.11,00,000/- as earnest money. The defendant was contacted by Mr.Jai Prakash Pandey, a Representative of ICICI Bank to verify the sale documents of defendant and thereafter, defendant came to know that the deceased had applied for bank loan for purchase of the suit property. Mr.Amit Sharma called Mr. S.P. Sharma on phone within one week and after 4 CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 7 of 31 5 days, Mr. S.P. Sharma contacted Mr.Sanjay Kalra to know further development and to fix the date of registration of the suit property. It was disclosed on 09.08.2018 that the deceased was hospitalized and deal may be delayed.

9. It is further submitted that the defendant was informed that the deceased was suffering from jaundice at the time of entering the said transaction and on 09.08.2018, Mr. S.P. Sharma called Mr.Sanjay Kalra and disclosed that the deceased had gone into comma. On hearing this, Mr. S.P. Sharma became suspicious and asked for the medical documents of the deceased, and came to know that the deceased was suffering from last stage of cancer and the deceased thereafter died. It is further submitted that on account of the concealment of the facts, the defendant suffered a loss of Rs.11,00,000/- after entering into the said agreement to sell dated 08.08.2018 for purchase of the

said property and for non-fulfillment of the terms of the said contract, the earnest money of the defendant stood forfeited.

10. Replication was filed on behalf of plaintiffs refuting the contents of the plaint and denying the averments made in the statement of defendant.

11. Pleadings were complete and following issues were framed on the basis of pleadings:

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(i) Whether the plaintiffs are entitled to amount of Rs.

10,00,000/- along with pendente lite and further interest at the rate of 24% p.a. from the date of filing of the suit till its realization? OPP

(ii) Whether the defendant is entitled to forfeit the earnest money as per clause 9 of agreement to sell dated 29.07.2018? OPD

(iii) Whether the plaintiffs have performed their part of contract/agreement to sell dated 29.07.2018? OPP

(iv) Whether the suit is bad for non-joinder of the necessary parties? OPD

(v) Whether the agreement to sell dated 29.07.2018 stands frustrated on the demise of Sh. Pradeep Gulati ? OPP

(vi) Relief."

12. Thereafter, matter was listed for recording of plaintiffs evidence. Smt. Jyoti Gulati appeared as PW1 and tendered her evidence by way of affidavit Ex. PW-1/A and has been examined, relied upon the following documents:-

(i) Ex. PW-1/1 the photocopy of agreement to sell dated 29.07.2018.

(ii) Ex. PW-1/2 is the photocopy of cheque bearing no. 107609 dated 29.07.2018 of Rs. 4,00,000/- in favour of Jayanta Mitra.

(iii) Ex. PW-1/3 is the photocopy of home loan sanction letter by the ICICI Bank dated 09.08.2018.

(iv) Ex. PW-1/4 is Mark X.

(v) Ex. PW-1/6 is the photocopy of legal notice dated 20.09.2018 issued by the deponent.

(vi) Ex. PW-1/7 is the reply dated 24.09.2018 to the legal notice.

(vii) Ex. PW□/8 (OSR) and Ex. PW□/9 are the photocopies of Aadhar Card of the deponent herself and her two minor children.

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13. Sh. Gagan Khanna was examined as PW2. He is examined, cross examined and discharged. Thereafter plaintiffs evidence was closed.

14. Thereafter, matter was listed for recording of defendants evidence. Sh. Jayanta Mitra has been examined as DW1 and has tendered his evidence by way of affidavit Ex. DW□/A and relied upon the following documents:□

(i) Ex. DW□/1 i.e. copy of legal notice dated 05.09.2018.

(ii) Mark A i.e. copy of agreement to sell dated 08.08.2018.

15. Ms. Mahua Mitra has been examined as DW2 and tendered her evidence by way of affidavit Ex. DW□2/A, cross examined and discharged. Further, DW□3 tendered his evidence by way of affidavit Ex. DW□3/A, cross examined and discharged. Defendants evidence was closed vide separate statement of Sh. Jayanta Mitra recorded on 19.05.2022 and matter was listed for final arguments.

16. I have heard the counsel for the parties and with their assistants have gone through the record.

17. My issue wise findings in the matter are as under :

Issue no. (i), (ii), (iii) & (v) These issues are overlapping each other and are disposed off vide this common order. In order to prove these issues CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 10 of 31 plaintiff no.1 appeared as PW1 and has tendered her evidence by way of affidavit as Ex.PW□/A. Examination□in□chief by way of affidavit as well as cross□examination of PW1 is not being reproduced for the sake of brevity. PW1 testified that the deceased entered into the said agreement for purchase of the suit property for a total sum of Rs.1,16,00,000/□out of which Rs.10,00,000/□was paid as earnest money/bayana to the defendant. The deceased left no stone unturned to honour said agreement in letter & spirit in as much as he availed home loan for amount of Rs.53,06,189/□and also purchased stamp papers worth Rs.5,60,000/□to be paid as stamp duty for the execution of sale deed for purchase of suit property. The aforesaid conduct of the deceased clearly prove that he was ready and willing to perform all terms and conditions of the said agreement. Thereafter, deceased met with untimely death and plaintiff no.1 alongwith plaintiff no.2 and 3 being her minor children had succeeded as legal heirs of deceased.

18. She further testified that plaintiff no.1 was neither a contracting party nor having any contractual obligation towards defendant under the said agreement after demise of the deceased but she has

right to recover the amount of Rs.10,00,000/- PW1 further testified that she issued legal notice dated 20.09.2018 seeking recovery of Rs.10,00,000/- with request to defendant to return the said amount. However, defendant replied through letter dated 24.09.2018 whereby it was informed that the said amount of Rs.10,00,000/- has been forfeited by the defendant. Plaintiff no.1 also demanded CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 11 of 31 Rs.2,00,000/- as loss suffered by plaintiffs on account of mental, physical, financial damages.

19. In her cross-examination, PW1 admitted that the said agreement Ex.PW1/1 came to her knowledge after she received legal notice and otherwise, Mr.Sanjay Kalra had also informed her about the said agreement. The said agreement was never executed in her presence. She did not know about sanction of any loan in the name of deceased by ICICI bank. She stated that she purchased the stamp paper for an amount of Rs.4,80,000/- and Rs.80,000/- and the same had been refunded to her. She did not remember whether she received legal notice dated 05.09.2018. She further testified that she was not present at the time of execution of the said agreement. She was not able to tell whether the deceased had disclosed the factum of his disease to the defendant. She did not know whether after signing the said agreement, the defendant entered into another agreement to sell for purchase of some other property.

20. Defendant appeared as DW1 and has tendered his evidence by way of affidavit as Ex.DW1/A. Examination-in-chief by way of affidavit as well as cross-examination of DW1 is not being reproduced for the sake of brevity. DW1 testified that suit property was sold to the deceased for a sum of Rs.1,16,00,000/- out of which Rs.10,00,000/- was paid as earnest money/bayana money. The said deal for purchase of suit property was struck through Mr. S.P. Sharma.

CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 12 of 31 DW1 wanted to sell the suit property and purchase a new house. Thereafter, DW1 contacted Mr. S.P. Sharma, Proprietor of M/s Shakti Associates to sell the suit property and for buying a new house. Mr.Amit Sharma offered to buy the suit property for the deceased. He was introduced through Mr. Kamal Malik @ Vicky, a broker to Mr. S.P. Sharma who introduced DW1 to the deceased. The deceased was also introduced as prospective buyer through Mr.Sanjay Kalra and Mr.Amit Sharma and meeting was arranged at the residence of Mr.Sanjay Kalra for purchase of the suit property. Mr.Sanjay Kalra and Mr. Amit Sharma are brother-in-law of the deceased. The said meeting was also attended by Mrs. Amit Sharma, Mrs. Sanjay Kalra, deceased, Mrs. Jyoti Gulati (plaintiff no.1), etc. Defendant also provided all the relevant documents for smooth culmination of the deal. DW1 further testified that on 09.08.2018, it was informed that deceased was hospitalized and the deal may get delayed.

21. In his cross-examination, DW1 admitted that said agreement was executed by all the parties on 28.07.2018 and there is no signature of plaintiff no.1 on the said agreement. He also admitted that earnest money was paid in cash as well as by cheque. DW1 testified that he placed on record the documents Mark A to prove that he suffered loss on account of said transaction as he received only Rs.5,00,000/- out of Rs.11,00,000/- which he paid as earnest money for purchasing some other immovable property. DW1 admitted that he had sent agreement termination notice to the deceased after having knowledge about the disease with which he was suffering.

22. During the course of arguments, ld. counsel for the plaintiff has contended that the amount of Rs.10,00,000/- received by defendant for the said agreement is admitted and the fact that the deceased also availed a per sanctioned loan of Rs.53,00,000/- is also admitted. However, the deceased died and thereafter, said transaction could not be fructified on account of the "Doctrine of Frustration" as provided u/s 56 of Indian Contract Act. Plaintiff no.1 was unable to take forward the deal as she was not in position to pay the entire amount required for buying the contract/the said agreement, therefore, has become void. Otherwise also, there is no embargo that a physically ill person cannot enter into an agreement as long as he is having sound and conscious mind to understand the terms of the agreement.

23. It is further contended that there is no breach of any terms of the said agreement in the present case before or after account of death of the deceased. The defendant cannot resort to unjust enrichment. The defendant has deposed contrary to his pleadings in as much as defendant has testified that if the deceased had survived, defendant would have continued with the said deal as the deceased had fulfilled all the conditions during his life time, however, he pleaded otherwise in the written statement that deceased has not performed his part of the said agreement. It is further contended that defendant is entitled to forfeit the earnest money by virtue of Section 74 of the Contract Act. In this regard, reliance has been placed on judgment CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 14 of 31 passed by the Hon'ble High Court of Delhi in case titled as Rajesh Gupta Vs. Ram Avtar, 2022 Live Law (Del)482.

24. He further contended that an unregistered agreement to sell can only be used as an evidence for Collateral purpose. In this regard, he relied upon judgment titled as Avinash Kumar Chauhan Vs. Vijay Krishna Mishra (2009) 2 SCC 532.

25. Per contra, ld. Counsel for defendant during the course of arguments, has contended that pursuant to the said agreement (Ex.PW1/1), defendant entered into another agreement to sale and purchase dated 08.08.2018 (Mark A) for purchase of another flat for an amount of Rs.1,38,000/- and Rs.11,00,000/- was paid as advance money but could not honor the deal for want of money which he was to get from the deceased, on the sale of suit property and the buyer had returned only Rs.5,00,000/- but forfeited Rs.6,00,000/- and thus, defendant suffered a loss of Rs.6,00,000/- and therefore, defendant has also forfeited the earnest money/bayana money of Rs.10,00,000/- It is further contended that PW1 during her cross examination, has admitted that Mr.Sanjay Kalra and Mr.Amit Sharma are her brothers-in-law and Mr.Amit Sharma is a witness to the said agreement and brother of the deceased was also present at the meeting held in the office of Mr. S.P. Sharma few days prior to the death of the deceased. They all refused to honour the deal, and offered the defendant to sell the suit property to someone else, and return the earnest money so CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 15 of 31 received by the defendant and said fact has been proved in the testimony of DW1 and DW3. The presence of Mr.Sanjay Kalra has also been proved in the testimony of DWs.



26. It is further contended that plaintiff no.1 has not placed on record any medical documents of the deceased which are prior to the said agreement dated 29.07.2018 and the said agreement was to be performed by 28.08.2018 however, the deceased died on 27.08.2018 and plaintiff no.1 was served upon with legal notice dated 05.09.2018 (Ex.DW1/1) which was replied on 24.09.2018 (Ex.PW1/6) and plaintiff no.1 was granted 25 days more time till 23.09.2018 on humanitarian ground. However, as per clause 5, 9 and 10 of said agreement (Ex.PW1/1), defendant was entitled to forfeit the earnest money which the defendant has already forfeited.

27. It may be noted that the transaction has been admitted between the parties in as much as the said agreement was entered into for a total sum of Rs.1,16,00,000/□by the deceased and defendant the sum of Rs.10,00,000/□as paid the earnest money/bayana money to the defendant has been forfeited by the defendant.

28. On the other hand, it is the contention of the plaintiffs that the said amount cannot be forfeited in as much as the plaintiff no.1, after said demise of deceased, cannot get the sale deed executed due to paucity of funds and the said transaction cannot sail through on CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 16 of 31 account of impossibility/doctrine of frustration and plaintiffs are entitled to recover the amount of Rs.10,00,000/□paid as earnest money/bayana.

29. It is pertinent to mention here that entitlement of defendant for forfeiture of said amount of earnest money in terms of the said agreement Ex.PW1/1 is based on Section 73 and 74 of the Indian Contract Act by way of liquidated damages. It may be noted that Section 74 provides for compensation for loss or damages suffered by a party by way of liquidity damages and the said provision is reproduced 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. Explanation. □A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

XXXXX

30. Otherwise also, even if plaintiff has also committed the breach of the terms and conditions of the said agreement, even then the question arises as to whether the defendant is entitled to forfeit the said amount. In this regard, it may be noted that the section 74 of the Contract Act lays down the principle for asking the other defaulting parties, the liquidity damages or penalty.

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31. The basic principle with regard to the claim of liquidated damages is as follows:

(1) no claim for such damages is maintainable unless the promisee is proved to have sustained loss due to the default of the promisor;

(2) whatever the quantum of the loss so sustained, the claim cannot exceed the sum stipulated in the contract; (3) only reasonable sum can be awarded as damages which in a given situation may be less than the sum stipulated; (4) what is reasonable sum depends on facts; (5) court may proceed on the assumption that the sum stipulated that the sum stipulated reflects the genuine pre-estimate of the parties as to the probable loss and such clause was intended to dispense with the proof thereof and (6) it will always be open to the promisor to show that no loss was suffered or that the estimate so made is falsified by the change in the situation or that the loss suffered was less.

32. A bare perusal of the abovesaid principle of law depicts that even if the plaintiff has failed to perform his part of the contract, though not proved by defendant, even then, the defendant is not entitled to ask for liquidity damages or could invoke the clause of the said agreement by way of forfeiture of the said amount either as a penalty or by way of liquidated damages. The mandate of section 74 of Indian Contract Act is that the defaulting party is to pay the reasonable damages not exceeding the amount so named only to the other party. The amount cannot be recovered by the other party from the party in default by way of the penalty in as much as the damages as penalty CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 18 of 31 only are prohibited by virtue of section 74 of the Indian Contract Act. In this regard, though not quoted reliance is placed upon Nar Singh Prasad vs Shailender Kumar Mishra judgment passed in RFA No.702/2017 by Hon'ble High Court of Delhi, wherein it has been observed as under :

"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:

43.1. 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.

43.2. 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.

43.3. 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.

CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 19 of 31 43.4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

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

43.6. 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.

43.7. 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."

33. It is noted that law with regard to Section 74 of the Indian Contract Act has been interpreted variedly by the superior courts on the basis of the nature of the contract and the relevant facts and circumstances. One of the earliest case law under Section 74 of the Indian Contract Act is titled Fateh Chand Vs. Bal Kishan Dass, AIR 1963 SC 1405 wherein the plaintiff made a claim to forfeit a sum of Rs. 25,000 which consisted of Rs. 1,000/— as an earnest money and an amount of Rs. 24,000/— which the defendant paid against the delivery of possession of immovable property. The plaintiff's above claim was based on his contractual entitlement however no evidence was lead by the plaintiff (therein) to prove that any active loss was caused to him CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 20 of 31 due to the breach committed by the defendant. It was further observed that section 74 of the Indian Contract Act does not justify the award of compensation when in consequence of the breach, no legal injury has resulted at all, and, in all cases, where there is stipulation in the nature of the penalty for forfeiture of an amount deposited, the court has jurisdiction to award such some only as it considerable reasonable, but not exceeding the amount specified in the contract as liable to be forfeiture.

34. It may also be relevant to observe that the Hon'ble Supreme Court in Maula Bux Vs. Union of India 1969 (2) SCC 554 has observed that the expression "whether or not actual damage or loss is proved to be have been caused thereby" is intended to cover different classes of contract which comes before the court and in case of breach of some contract, it may be impossible for the court to assess the compensation arising from breach, while in other cases, compensation can be calculated in accordance with the established rules. Where the court is enable 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 the reasonable compensation, but not if the sum named is in the nature of the penalty. Where the loss in terms of money can be determined, the parties claiming compensation must prove the loss suffered by him.

35. The above said interpretation in the Maula bux (supra) case given by Hon'ble Supreme court of India does not dilute the ratio of law in Fateh Chand case, otherwise, it further clarified that there may be different classes of contract to which the law laid down in Fateh Chand (supra) case may not apply. Such different classes of contract are the ones where it may be impossible for the court to assess compensation arising from breach and such situations the some named by the parties, if it be regarded as a genuine pre-estimate may be taken into consideration as a measure of reasonable compensation. However, where a party suffering breach was in a position to prove its loss, and the situation be different and law laid down in Fateh Chand (supra) would be apply.

36. It may also be noted that the ratio of the law laid down in the case of Fateh Chand (supra) and Maula Bux (Supra) was followed in the later judgment, however, in the case of Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd (2003) 5 SCC 705. The Hon'ble Supreme Court of India was faced with different class of contract as propounded in Maula Bux (Supra) case and in that case the appellant (therein) entered into a contract with respondent (therein) for purchase of casing pipes, the delivery of which was to be completed by the respondent within the specified time, failing which liquidated damage would be payable. The respondent delayed the supply of casing pipes and appellant cleared the bills of the respondent after deducting the liquidated damages. The arbitrator found such CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 22 of 31 deduction of liquidated damages as legal in as much as appellant (therein) could not prove its specific loss vis-à-vis the delay in supply of the casing pipes. However, the Hon'ble Supreme Court of India upheld the deduction of the such liquidated damages by the appellant (therein) holding the such deduction as a pre-estimated damages agreed upon between the parties, in case, there is a delay in the supply of the casing pipes.

37. It may be noted that the Hon'ble High Court of Delhi in case of Rajesh Gupta (supra) has taken into consideration all the case law wherein the mandate the section 74 of the Contract Act has been considered and in para 41 has observed as under: "A Coordinate Bench of this Court had also considered the aforesaid issue in M.C. Luthra v. Ashok Kumar Khanna [RFA No.780/2017 decided on 27.2.2018] and observed as under:

"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 Signature Not Verified Digitally Signed Signing Date:19.05.2022 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 CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta

Mitra Page no. 23 of 31 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 CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 24 of 31 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. 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 CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 25 of 31 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 case (supra)." If a party to a contract dies before he has performed the contract that, by itself, does not put an end to the obligation to perform the same. The promisee can bind the representative of the promisor in case of the death of the promisor before the performance."

38. With the abovesaid principle of the law, I would like to advert to the facts of the abovesaid case. It may be noted that the defendant has failed to lead any evidence to prove that he has suffered losses on account of the non-performance of the term and condition of the said agreement by the deceased or by the plaintiff no.1. in as much as the defendant has led evidence by way of document as mark A i.e. the agreement between the defendant and vendor of the said property. The defendant has neither summoned the vendor nor prove the said agreement to sell in respect of the said property entered into between the defendant and the said vendor.

39. It may also be relevant to note here that the contention of the plaintiff no. 1 is that the said agreement stood frustrated by virtue of section 56 of the Indian Contract Act appears to be attracted but the same is fallacious in as much as the "doctrine of frustration" has no applicability to the facts of the present case as there is no physical impossibility of the performance of the said agreement. This principle CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 26 of 31 is not restricted to just physical impossibilities, it also applies to cases where the very reason/object why the parties entered into contract fails to materialise. A party to a contract can be excused from the performance if performance depends on the existence of that person or if the party becomes so ill that they will be able to perform their obligations. Therefore, where a contract requires personal performance by the provisor, his death or incapability will put an end to the contract. In addition to it, the legal heirs of the deceased/ executant of an agreement/ contract are bound by terms and conditions of the agreement so entered into between the executant and non-executant, therefore, this contention is hereby rejected and issue no. (v) is decided in favour of defendant and against the plaintiff.

40. So far as, issue no. (iii) regarding readiness and willingness on behalf of the plaintiffs to perform a part of the contract of the deceased as per the terms and conditions of the said agreement is concerned, suffice is to say that plaintiff no. 1 issued the legal notice as Ex. PW1/6 stating therein

that the plaintiffs are not bound by the terms and conditions of the said agreement entered into between the deceased and defendant as plaintiffs are neither the signatory of the said agreement nor they are benefited in any manner by the said sale transaction. The plaintiffs also sought the recovery of Rs. 10 lacs given as advance by the deceased to the defendant. The plaintiffs therefore, can be said to have never come forward to perform the part of the said agreement to be performed by the deceased so far as the CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 27 of 31 terms and conditions of the said agreement are caused.

41. However, the question arises as to whether even if the plaintiff failed to perform part of the contract / said agreement to be performed by the deceased in terms of the said agreement, the defendant is entitled to forfeit the Rs. 10 lacs given as earnest / advance money by the deceased for the purchase of the suit property. In this regard, suffice is to say that the defendant failed to prove any loss suffered by the defendant on account of the failure of the part of the plaintiff no. 1 or the deceased to perform his/her parts of the contract as per the terms and conditions of the said agreement.

42. It may be noted that Section 74 and 73 of the Indian Contract Act provides that merely breach of a contract is not actionable unless and until loss is caused to the aggrieved party. There can be forfeiture of an amount paid to the contract only when an aggrieved party is caused loss so is the ratio laid down in *Fateh Chand (supra)* and *Kailash Chand Associates*. In the present case, as is seen from the admitted facts on record has pleaded as per his written statement that he has suffered loss, however, no evidence has been led as to how loss has been caused to the defendant on account of the failure by the plaintiff to perform their part of the said agreement. Therefore, even assuming that there is some breach on the contract on the part of the plaintiff, yet since no loss has been caused to the defendant which is proved, therefore, in accordance with the ratio of abovesaid CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 28 of 31 judgments, the defendant could not have forfeited the amount of Rs. 10 lakhs received as earnest money from the deceased. Otherwise defendant was only entitled to forfeit a nominal amount as the earnest money and not the total amount of Rs. 10 lakhs, which is also a part and parcel of the advance money, in as much as defendant in written statement has pleaded that the deceased has given defendant an amount of Rs. 1 lakh and, thereafter, the remaining amount of Rs. 9 lakhs was given at the time of execution of the said agreement. Though not quoted, reliance is placed upon *Rajbir Singh & Anr. v. Jaswant Yadav & Anr.* Judgment passed in RSA No. 404/2018, wherein it has been observed as under :

"7. All the judgments of the Supreme Court which have been relied upon in *Satish Batras* 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 CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 29 of 31 are allowed to be forfeited in terms of RFA No.404/2018 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. "

43. As a sequel to the above discussion, it can be safely concluded that even if plaintiff failed to perform their part of the contract in terms of the said agreement, defendant is also not entitled to forfeit the earnest money/ advance money of Rs. 10 lacs as per the dicta of the law laid down by the superior courts as discussed in the forgoing the paras of this judgments and defendant is only entitled to forfeit a nominal amount of Rs. 1 lakhs out of total advance money of Rs. 10 lakhs. In view of the above, the suit of the plaintiff is decreed for an amount of Rs. 9 lakhs. The issue no. (I) is decided in favour of the plaintiff and against the defendant.

44. So far as the interest is concerned, the plaintiff has claimed interest @ 24% per annum, however, plaintiff has led no evidence, in this regard. Therefore, interest of justice would met, if interest @ 9% is granted to the plaintiff.

Issue no. (iv)

45. The onus to prove this issue is on the defendant. However, defendant has not led any evidence in this regard and has CS No. 1931/2018 (1053/2018) Jyoti Gulati & Ors. v. Jayanta Mitra Page no. 30 of 31 failed to prove this issue. This issue is accordingly decided in favour of the plaintiffs and against the defendant.

Relief :

46. In view thereof, suit of the plaintiffs is "decreed" as follows :

a) Decree in the sum of Rs. 9,00,000/□(Rupees Nine Lakhs Only) alongwith pendente lite and future interest @ 9% p.a. from the date of filing of the present suit till its realization, is passed in favour of plaintiffs and against defendant.

b) Plaintiff is also entitled to cost.

Decree sheet be prepared accordingly.  
File be consigned to record room.

VIJAY

Digitally  
signed by  
VIJAY KUMAR



Announced in the open court on  
10th Day of June 2022

KUMAR  
DAHIYA

DAHIYA  
Date:  
2022.06.25  
11:00:32  
+0530

(V.K. DAHIYA)  
ADDL.DISTRICT JUDGE-01 (SOUTH WEST)  
DWARKA DISTRICT COURTS: NEW DELHI.

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