Stephen Bernard vs M/S.Thomas Steaphen & Company Limited on 1 February, 2016

Author: Alexander Thomas

Bench: Alexander Thomas

IN THE HIGH COURT OF KERALA AT ERNAKULAM
(ORIGINAL JURISDICTION)

IN THE MATTER OF THE COMPANIES ACT, 1956

AND

IN THE MATTER OF M/S.THOMAS STEAPHEN AND COMPANY LIMITED
(IN LIQUIDATION)

COMPANY APPLICATION No.551/2013
IN
COMPANY PETITION NO.53 OF 2000
BEFORE

THE HONOURABLE MR.JUSTICE ALEXANDER THOMAS

MONDAY, THE 1ST DAY OF FEBRUARY 2016/12TH MAGHA 1937
***
PETITIONER:

STEPHEN BERNARD, S/O.VARGHESE STEPHEN,
REBIN DALE, PADINJAREKADAVIL, VELLIMON WEST.P.O,
KOLLAM

-Vs.-

RESPONDENTS/RESPONDENTS:

1. M/S.THOMAS STEAPHEN & COMPANY LIMITED
(IN LIQUIDATION), POST BOX NO.14, BEACH ROAD,
KOLLAM-01,REPRESENTED BY THE OFFICIAL LIQUIDATOR,
HIGH COURT OF KERALA.[CORRECTED AS PER THE
DIRECTION OF THE HIGH COURT DATED 1.2.2016]

2. OFFICIAL LIQUIDATOR, HIGH COURT OF KERALA,
ERNAKULAM.

Company Application under Rule 9 of the Company

(Court) Rules 1959, filed by the applicant above named

praying for an order that

(i) This Hon'ble Court may be pleased to direct the 2nd Respondent to refund the sum of Rs.25 lakhs deposited by the petitioner pursuant to the auction sale conducted by the 2nd Respondent with regard to the items of property enumerated under the Report No.30 of the Official Liquidator i.e. 8 Acres and 13 cents of land in Sy.No.125/4, Block No.25 of Mundakkal Village, Kollam Taluk.

P.T.O

-: 2 :-

(ii) This Hon'ble Court may be pleased to direct the 2nd Respondent to pay interest @ 9% per annum for the sum of Rs.25 lakhs deposited by the petitioner pursuant to the auction sale conducted by the 2nd Respondent with regard to the items of property enumerated under the Report No.30 of the Official Liquidator i.e.8 Acres and 13 cents of land in Sy.No.125/4, Block No.25 of Mundakkal Village, Kollam Taluk.

(iii) Issue any other order as this Hon'ble Court may deems just and proper on the facts and circumstances of this case.

This Company Application again coming on for orders on this day upon perusing the order dated 23.12.2015 and

upon hearing Sri.Liju V.Stephen and Smt.Indu Susan Jacob, Advocates for the applicant and Sri.K.Moni, Counsel for the Official Liquidator, the court passed the following:

bala P.T.O

ALEXANDER THOMAS, J.

C.A.No.551/2013 in C.P.No. 53/2000

Dated this the 1st day of February, 2016

O R D E R

The prayers in the aforecaptioned Company Application 551/2013 instituted in Company Petition 53/2000 are as follows:

> "(i) This Hon'ble Court may be pleased to direct the 2nd respondent to refund the sum of Rs.25 lakhs deposited by the petitioner pursuant to the auction sale conducted by the 2nd respondent with regard to the items of property enumerated under the Report No.30 of the Official Liquidator i.e.8 Acres and 13 cents of land in Sy. No.125/4, Block No.25 of Mundakkal Village, Kollam Taluk.
>
> (ii) This Hon'ble Court may be pleased to direct the 2nd Respondent to pay interest @ 9% per annum for the sum of Rs.25 lakhs deposited by the petitioner pursuant to the auction sale conducted by the 2nd respondent with regard to the items of property enumerated under the Report No.30 of the Official Liquidator i.e. 8 Acres and 13 cents of land in Sy. No.125/4, Block No.25 of Mundakkal Village, Kollam Taluk.
>
> (iii) Issue any other order as this Hon'ble Court may deems just and proper on the facts and circumstance of this case.

2. The aforecaptioned Company Petition, C.P.53/2000 was instituted for winding up of a company by name M/s.Thomas Stephen & Company Ltd. (in Liqn), Kollam. This Court had ordered winding up of the said company, pursuant to which, sanction was accorded by this Court to the Official Liquidator to effect sale of

- : 2 :-

various assets and properties of the company in question. One such property of the company is having an extent of 8 acres and 13 cents of land in Survey No.125/4 in Block No. 25 of Mundakkal Village, Kollam Taluk, Kollam Revenue District. The aforesaid landed property coming to 8 acres and 13 cents of land was put up for sale by invitation of tenders by the Official Liquidator, after getting sanction from this Court.

3. Anx.A to the statement dated 25.11.2014 filed by the Official Liquidator in this Company Application, is the terms and conditions of the sale of the said immovable property in the tender bid invited by the Official Liquidator as per the sanction and orders of this Court. As per per Clause 3(1) of Annx.A terms and conditions, each tender shall be accompanied by an Earnest Money Deposit (EMD) of Rs.25 lakhs by means of a crossed Demand Draft drawn in favour of the Official Liquidator.

4. As per Clause 8(g) thereof, the tenderer, whose offer is accepted by the High Court of Kerala, shall deposit the entire balance amount within 30 days from the date of intimation of the acceptance of the same by way of Demand Draft drawn in any Nationalised Bank at Ernakulam in favour of the Official Liquidator,

- : 3 :-

etc. As per Clause 8(h), if the tenderer, whose offer is accepted, neglects or refuses to comply with any of the conditions, the deposit made by him and any other money paid by him, shall stand forfeited and the Official Liquidator will proceed to re-sell the assets at any point of time at his risk and cost. It is further stated that the loss if any caused on account of the re-sale of the assets will be recovered from the defaulted tenderer. The applicant in Company Application No.551/2013 was one of the tenderers, who participated in the tender bid invited by the Official Liquidator. It is common ground that the applicant herein had deposited an amount of Rs.25 lakhs as EMD on 10.2.2010 and that he happened to be the highest tenderer in the bid in question and his tender was confirmed by order of this Court on 24.2.2010. The applicant herein, being the highest tenderer, had submitted his bid for the property in question for an amount of Rs. 8,53,65,001/- (Rupees eight crores fifty three lakhs sixty five thousand and one only), While so, a Company Appeal as Company Appeal No.3/2009 was instituted by the ex-Directors of the company in question praying for avoidance of the winding up and for consideration of a revival scheme of the Company. A scheme was submitted before the Division Bench dealing with the

- : 4 :-

Company Appeal, for establishing an educational institution in the aforestated property of 8 acres and 13 cents of land. The Company Appeal was later dismissed by the Division Bench and Special Leave Appeal as SLA No.11159/2011 was filed by one of the aggrieved parties before the Apex Court and that the Apex Court had ultimately

dismissed the said Special Leave Appeal on 1.8.2011. It was the case of the applicant herein that after the tender bid, he came to know of the pendency of the aforestated Company Appeal. It is also not in dispute that the applicant herein was granted four extensions of time by the Division Bench in the Company Appeal for clearing off the balance sale consideration of Rs. 8,28,65,001/-, which is the balance amount after deducting the sale bid amount of Rs.8,53,65,001/- from the EMD amount of Rs.25 lakhs as balance sale consideration. The applicant did not pay the aforestated balance amount in the tender bid. Therefore, the Official Liquidator was constrained to cancel the tender bid, in which, the applicant had participated, after getting orders from this Court and thereafter a second tender bid was also attempted. It is submitted by the applicant herein that there was only single tenderer who participated in the second tender bid and the Official Liquidator was

- : 5 :-

constrained to cancel the said tender bid. Still further a third tender bid was again invited, in which, the highest tenderer had bid the said property for an amount of about more than Rs.17 crores. However, it is pointed out by the applicant that the said tenderer in the third tender bid also had secured various extensions of time even after the dismissal of Special Leave Appeal by the Supreme Court on 1.8.2011 and that he had ultimately paid the aforestated amount of about Rs.17 crores to the Official Liquidator only in 2015. The case of the applicant is that since his bid was more than Rs.8 crores, he was constrained to raise that money by securing loans from two nationalised banks and that the pendency of the Company Appeal had created a cloud in the mind of lending banks. It is pertinently pointed out by the learned counsel appearing for the applicant that the main prayer in the Company Appeal was for avoidance of the very winding up order against the Company in question and for sanction of a scheme for establishing an educational institution in the property in question having an extent of more than 8 acres of land. That though there was no stay in the Company Appeal, if the main prayer or a substantial part of the main prayer was granted by the Division Bench in the final appellate

- : 6 :-

order, then it would have certainly detrimentally affected the property in question, in which case, the applicant would have been put to irreparable injury and that it is in this context that the lending Bank authorities had consistently refused to grant any loan to the applicant and this is the main reason, by which the applicant was severely disabled for raising such huge amounts for fulfilling his contractual obligation in question. It is pointed out that the cloud in the matter was fully and finally removed only after the dismissal of Special Leave Appeal by the Apex Court on 1.8.2011 and even the highest bidder in the third tender process had ultimately paid the amount only in November 2015, long after the dismissal of the Special Leave Appeal. It is the specific case of the applicant that his plea, based on the pendency of the Company

Appeal, had disabled him from raising the money and further that even going by the facts admitted by the Official Liquidator, the Official Liquidator has secured more than Rs.17 crores of the property in question in the subsequent bid, as against the amount of just above Rs.8 crores offered by the applicant herein in the first tender bid and therefore, no loss or injury has been suffered by the Official Liquidator in this process and therefore, the action of the Official Liquidator in

- : 7 :-

forfeiting the entire Rs.25 lakhs deposited by the applicant in the tender bid, is illegal, unjust and inequitable. It is further pointed out that in the affidavit dated 11.12.2015 filed by the Official Liquidator it has been clearly admitted that the aforestated EMD amount of Rs.25 lakhs deposited by the applicant was actually deposited by the Official Liquidator in a bank and it has earned interest thereon coming to Rs.10,89,965/- (Rupees ten lakhs eighty nine thousand nine hundred and sixty five only). Therefore, it has been prayed by the applicant that necessary directions may be given to the Official Liquidator to refund the aforestated EMD amount of Rs.25 lakhs to the applicant and further that the interest amount earned in the fixed deposit of Rs.25 lakhs coming to Rs.10,89,965/- should also be refunded to the applicant, by invoking doctrine of accretion.

5. As far as the first issue of refund of the EMD amount of Rs.25 lakhs is concerned, this Court had considered the matter in detail and had passed a detailed order dated 25.12.2015 holding that the matter of issue regarding the claim of refund of EMD amount of Rs.25 lakhs is in favour of the applicant going by the well established principles laid down by the Apex Court in cases as in

- : 8 :-

M/s.Kailash Nath Associates v. Delhi Development Authority and Anr. reported in (2015) 4 SCC 136 and that the said amount of Rs.25 lakhs should be paid to the applicant by the Official Liquidator within two weeks, etc. The said order dated 23.12.2015 passed by this Court in this Company Application, reads as follows:

"The petitioner herein is the highest bidder in a sale process conducted by the Official Liquidator. By way of EMD, he deposited an amount of 25lakhs, but, later he committed default. The property was accordingly sold afresh in auction, and the second sale fetched an additional amount of 9 crores. That sale stands confirmed also. Now the petitioner seeks the amount of 25 lakhs deposited by him as EMD. As required by the Court, the Official Liquidator filed an affidavit showing the loss sustained due to the default committedTheby the petitioner, and also the gain made on the other side. petitioner relies on the principles laid down in M/s.Kailashnadh Associates v. Delhi Development Authority and another [2015/1 SCJ 401]. The Official Liquidator's affidavit shows that due to the default committed by the petitioner he sustained a loss of 72,944/-. But at the same time, the Official

> Liquidator stands gained to the tune of 10,89,965/- by way of interest accrued on the amount of 25 lakhs deposited by the Official Liquidator. On 09.12.2015, this Court observed that the Court will have to balance between the default on the one side, and the loss on the other side. The loss sustained by the Official Liquidator stands very much compensated. When he lost 72,944/-, he gained another amount of 10,89,965/-. No doubt, the EMD amount can very well be returned to the petitioner. But, the petitioner claims a portion of the interest gained by the Official Liquidator also. This matter requires hearing. As regards the EMD amount of 25 lakhs, the position settled in the decision cited supra can be followed. But, when the petitioner claims a fraction of the interest gained by the Official Liquidator, the Court will have to hear and decide whether such a claim can be allowed, and also to what extent such a claim can be allowed. However, as an interim measure, the Official Liquidator is directed to release EMD amount of 25 lakhs to the petitioner within two weeks. As regards the claim for interest, the petitioner will proceed, and both sides will be heard."

6. In the aforestated order this Court specifically held that the consideration of the matter was limited to the aspect of refund

- : 9 :-

> of the EMD amount of Rs.25 lakhs and that the issue as to whether the interest amount accrued thereon is to be refunded to the petitioner will be decided separately in this Company Application proceedings.

7. Heard Sri.Liju.V.Stephen, learned counsel appearing for the applicant and Sri. K.Moni, learned Standing Counsel appearing for the Official Liquidator.

8. It is common ground that two distinct, but inter-related, issues have come up for consideration in this Application. The first issue is as to the tenability of the claim of the applicant in the matter of refund of the EMD amount of Rs.25 lakhs. In case the first issue is decided in favour of the applicant, then the second issue arises as to tenability of the claim of the applicant in the matter of direction to pay the admitted amount of Rs.10,89,965/-, which has accrued in the fixed deposit of the aforestated EMD amount of Rs.25 lakhs, to the applicant. Since there has already been a detailed adjudication on the first issue, the said matter need not be adjudicated on merits again. The only limited issue to be examined by this Court is as to whether the said order rendered by this Court on 23.12.2015, amounts in any way to be an error

- : 10 :-

> apparent on the face of the record so as to invoke review jurisdiction of this Court. It is only from that limited perspective that the matters in relation to that issue are to be now considered by this Court.

9. It is by now too well settled by various decisions of the Apex Court as in the Constitution Bench ruling in the celebrated case, Fateh Chand v. Balkishan Dass reported in AIR 1963 SC 1405 and other rulings that whenever damages or compensation is claimed, pursuant to a breach of contract, the same would come under the purview of Sec.74 of the Indian Contract Act and that the amount covered by the forfeiture clause in a contract cannot be forfeited in a case involving breach of contract, unless and until a legal injury is suffered and established by the party concerned. In Fateh Chand's case supra, a Constitution Bench (five-Judges Bench) of the Apex Court held that Sec.74 of the Indian Contract Act 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

- : 11 :-

> as a stipulation naming liquidated damages and binding between the parties. A stipulation in a contract 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 principles applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. It would be profitable to refer to paras 8, 10 and 15 of the ruling in Fateh Chand's case supra, which read as follows:
>
> "8. The claim made by the plaintiff to forfeit the amount of Rs.24,000/- may be adjudged in the light of S. 74 of the Indian Contract Act, which in its material part provides:
>
> "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".

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.

- : 12 :-

xxx xxx xxx

10. 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 contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of 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 tosection award compensation according to settled principles. The 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 damage"; 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.

xxx xxx xxx

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or where there is a stipulation by way of penalty. But the application of 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

- : 13 :-

be ascertained having regard to the conditions existing on the date of the breach."

10. Yet again in the well known case between Maula Bux v.

Union of India reported in (1969) 2 SCC 554, the Apex Court has held in paras 5 to 7 thereof, as follows:

> "5. 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; Roshan Lal v. Delhi Cloth and General Mills Company Ltd. Delhi [ILR 33 All 166] Muhammad Habibullah v. Muhammad Shafi [ILR 41 All 324]; Bishan Chand v. Radhakishan Das[ILR 19 All 490] These cases are easily explained, for forfeiture of 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.
>
> 6. Counsel for the Union, however, urged that in the present case Rs 10,000 in respect of the potato contract and Rs 8500 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
>
> - : 14 :-
>
> 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.
>
> 7. 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.' In a matter very recently decided, the Apex Court in the case Kailash Nath Associates & Anr. v. DDA & Anr. reported in (2015) 4 SCC 136, has made an extensive consideration of law in this regard settled by the Apex Court in various rulings and has held in paras 40 and 43 to 47 as follows:

> "40. From the above, it is clear that this Court held that Maula Bux case [(1969) 3 SCC 522] was not, on facts, a case that related to earnest money. Consequently, the observation in Maula Bux[(1969) 3 SCC 522] 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 five Judges in Fateh Chand case [AIR 1963 SC 1405] 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 case [AIR 1963 SC 1405] 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.
>
> - : 15 :-
>
> xxx xxx xxx
>
> 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. damage43.3.loss caused by a breach of contract, damage or loss Since Section 74 awards reasonable compensation for or caused is a sine qua non for the applicability of the section.

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.

proved43.6. The expression "whether or not actual damage or loss is 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.

44. The Division Bench has gone wrong in principle. As has

- : 16 :-

> 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 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.

45. A great deal of the argument before us turned on notings in files that were produced during cross-examination of various witnesses. We have not referred to any of these notings and, consequently, to any case law cited by both parties as we find it unnecessary for the decision of this case.

46. Mr Sharan submitted that in case we were against him, the earnest money that should be refunded should only be refunded with 7% per annum and not 9% per annum interest as was done in other cases. We are afraid we are not able to agree as others were offered the refund of earnest money way back in 1989 with 7% per annum interest which they accepted. DDA having chosen to fight the present appellant tooth and nail even on refund of earnest money, when there was no breach of contract or loss caused to it, stands on a different footing. We, therefore, turn down this plea as well.

47. In the result, the appeal is allowed. The judgment and order [(2007) 98 DRJ 9] of the Single Judge is restored. The parties will bear their own costs."

11. Anx.A produced along with the counter affidavit dated 25.11.2014 filed by the Official Liquidator in this case forms the terms and conditions of the sale of the immovable property in question. Clauses 3, 8(g) & 8(h) of Anx.A Terms and Conditions provide as follows:

> "3. EARNEST MONEY DEPOSIT: Each Tender shall be accompanied by Earnest Money Deposit of Rs.25 lakhs by means of a crossed Demand Draft drawn in favour of the Official Liquidator, High Court of Kerala payable at Ernakulam.
>
> xxx xxx xxx
>
> - : 17 :-
>
> 8. GENERAL TERMS & CONDITIONS:
>
> a).....
>
> xxx xxx xxx
>
> of Kerala shallThe
> g) tenderer whose offer is accepted by the High Court
>
> deposit the entire balance amount within 30 days from the date of intimation of the acceptance of the same by the Hon'ble High Court of Kerala by way of Demand Draft drawn in any Nationalised Bank at Ernakulam in favour of the Official Liquidator, High Court of Kerala, Ernakulam
>
> h) If the tenderer whose offer is accepted neglects or refuses to comply with any of the conditions, the deposit made by him and any other money paid by him shall stand forfeited and the Official Liquidator will proceed to re-sell the assets at any time at his risk and cost. The loss if any caused on account of the re-sale of the assets will be recovered from the defaulted tenderer."

From a reading of the terms and conditions, more particularly, aforestated Clauses 3, 8(g), 8(h) etc., it can be seen that EMD of Rs.25 lakhs will also form part of sale consideration if the agreement for sale of the property comes into being and and in the instant case, Clause 8(g) of Anx.A makes it clear beyond any doubt that the tenderer, whose offer is accepted, had to deposit the entire balance amount within 30 days. Therefore, once the tender of the highest tenderer is accepted, then the agreement for sale of the immovable property stands concluded, as between the successful tenderer and the Official Liquidator and the EMD amount of Rs.25 lakhs will form part of the sale consideration and the contractual

- : 18 :-

> obligation of the highest tender is to clear off only the entire balance amount, which is the tender bid amount as deducted by deposit of Rs.25 lakhs referred to in Clause

3. Therefore, obviously the issue relating to the invocation of Clause 8(h) regarding forfeiture is after coming into force of the contract between the parties and the said forfeiture in the instant case is not a matter which comes within the pre-contractual realm, that is, the stage before the coming into being contract or agreement for the immovable property in question as between the parties concerned. Since the matter relating to the forfeiture envisaged in Clause 8(h) is eminently in the post-contractual realm consequent on the breach of contract and not in the pre-contractual realm, then certainly Sec.74 of the Indian Contract Act comes into play. Sec.74 of the Indian Contract Act reads as follows:

"Sec.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 damagethe loss is proved to have been caused thereby,reasonable or to receive from party who has broken the contract 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.

xxx xxx xxx"

- : 19 :-

Therefore, going by the legal principles well settled by the Apex Court in a catena of cases referred to in the aforestated rulings, more particularly in Kailash Nath's case supra, it is beyond shadow of doubt that whenever damages or compensation is claimed, a forfeiture clause is invoked in a matter falling eminently within the realm of the stage after the conclusion of the contract or sale for agreement between the parties consequent on the breach of contract, then such a forfeiture clause is in fact a peremptory clause and the same can be invoked only if the legal injury is suffered and established by the party concerned. In the instant case, it is admitted in the pleadings of the Official Liquidator that the tender bid amount of the applicant herein was just above Rs.8 crores and that the tender bid amount of the highest tenderer in the subsequent bid was more than Rs.17 crores [viz.Rs. 17,77,37,511/- (Rupees seventeen crores, seventy seven lakhs, thirty seven thousand five hundred and eleven only)] and that they have actually received the entire sale consideration of more than Rs.17 crores from the said subsequent tenderer. The Official Liquidator obviously has no case that the amount of Rs.25 lakhs is genuine pre-estimate of the damages, which has been worked out

- : 20 :-

> reasonably as between the parties. By the re-sale of the property the Official Liquidator has indisputably secured an extra margin amount of more than Rs. 9 crores compared to the failed tender bid amount of the applicant herein. Moreover, it is clearly and specifically averred in the additional affidavit dated 11.12.2015 filed by the Official Liquidator in the instant case that "Since the property could be sold by the Official Liquidator for an amount which is more than two times higher than the amount offered by the petitioner herein, it cannot be said that any loss has been caused to the company in connection with the re-sale of the assets of the company. As such the applicant cannot be called upon to make goods the loss."

12. The learned Standing Counsel appearing for the Official Liquidator has placed strong reliance on the ruling of the Apex Court in the case National Thermal Power Corporation Ltd. (NTPC) v. Ashok Kumar Singh & Ors. reported in (2015) 4 SCC 252. A reading of the judgment in the NTPC's case would make it clear that therein the NTPC has floated two tenders on 17.10.2012 and 19.11.2012 for construction of a shed and boundary wall. The respondent contractor concerned had submitted two separate tenders in response to the said tender notices enclosing therewith

- : 21 :-

> an amount of Rs.4.41 lakhs and Rs. 3.34 lakhs respectively towards the EMD. Tenders were in two parts, one technical and the other, commercial. While the technical bids were opened and found to be in compliance, the financial bids were yet to be opened, at which point of time, the respondent contractor had moved an application addressed to the competent officer of the NTPC withdrawing the bids submitted by him and asking for being excluded from consideration, besides praying for refund of the EMD deposited with the bids. This was followed by a representation on 1.5.2013, whereby the respondent contractor had again asked for the refund of the EMD amounts deposited by him. Condition No.2 of the special conditions of the contract therein provided as follows:
>
> "2. The earnest money shall be forfeited on the following grounds:
>
> (a) On revocation of the tender or,
>
> (b) On refusal to enter into a contract afterward to a contractor or,
>
> (c) If the work is not commenced after the work is awarded to a contractor."

The special conditions of the contract therein, subject to which only the intending bidders, could have submitted their bids, clearly and categorically provided that the earnest money accompanying the bid shall be forfeited in any one of the three contingencies referred to

- : 22 :-

in condition No.2 and one of these contingencies was the revocation of the tender, which would, in the context in which the special provision is made, imply any withdrawal of the bid/tender by the bidder concerned. The Apex Court held that forfeiture of earnest money when it is made for breach of auction/tender conditions at pre-contractual stage, when no contract has yet come into existence, does not infringe any statutory right under the Indian Contract Act, 1872 since earnest/security is given and taken in such cases to ensure that a contract comes into existence and that a tenderer has a right to withdraw his offer, but he will have no right to claim refund of earnest money, if the said offer is subject to the condition that earnest money will be forfeited, if offer is withdrawn. On this basis, it was held that the matter was only in the realm of the pre-contractual stage and no agreement between the parties had come into being and that the tenderer had all the right to withdraw his tender bid, but he was certainly bound by the condition that he will have no right to claim refund of the earnest money if the tender bid/offer is withdrawn and that therefore he is bound to forfeit the earnest money, if the offer is withdrawn going by the tender conditions. It is to be noted that in NTPC's case

- : 23 :-

supra the Apex Court has clearly and cogently held that the facts of the matter in relation to the withdrawal of the bid was only at the pre-contractual stage and therefore forfeiture of earnest money in such a case does not infringe any statutory right under the Contract Act, 1872 for earnest/security is given and taken in such cases only to ensure that a contract comes into existence. The legal principles laid down by the Apex Court in NTPC's case supra do not apply in the facts of the instant case insofar as the applicant herein had not only submitted the tender and had also deposited the earnest money and his highest tender bid was accepted by the competent authority concerned and the agreement clearly provides that once the highest tender bid is accepted, then the tenderer, whose tender has been confirmed in the due process, will have to pay the balance amount of the sale consideration. This clearly shows that the deposit of Rs. 25 lakhs made by the applicant forms part of the sale consideration of the agreement for sale that has come into being between the parties after the confirmation of the tender bid. Therefore, the matter in this case eminently falls within the post- contractual stage consequent on the breach of contract and therefore, the principles in Sec.74 of the Contract Act would clearly

- : 24 :-

be applicable in the facts of this case. Therefore, it is only to be held that the legal principles envisaged by the Apex Court in NTPC's case supra do not have any application in the facts and circumstances of this case. Moreover, the Official Liquidator does not have a case that the deposit amount of Rs.25 lakhs is a genuine pre-deposit of the damages reasonably arrived at by the parties.

13. In that regard, It would be pertinent to refer to the wholesome legal principles laid down by the Apex Court in para 43.1 of Kailash Nath's case reported in (2015) 4 SCC 136, 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." It is only after the contract has come into being, the question of breach of contract arises. In the instant case, the contract has been concluded and thereafter there has been breach and default on the part of the applicant in fulfilling his contractual obligations. Therefore, it is a matter coming within the post-contractual realm.

- : 25 :-

Admittedly the Official Liquidator has paid the aforestated amount of Rs. 25 lakhs to the applicant herein, in full compliance with the directions issued by this Court in the order dated 23.12.2015. So also, it is brought to the notice that no Company Appeal has been filed by the Official Liquidator to impugn the legality and correctness of the order dated 23.12.2015 passed by this Court.

14. Therefore, in the light of these aspects, it is only to be held that the view taken by this Court in its order dated 23.12.2015 as regards the direction to refund the aforestated amount of Rs.25 lakhs to the applicant herein cannot be said to be vitiated by any error apparent on the face of the record. On the other hand, this Court is only of the considered opinion that the said order is legally correct and proper, more so, in the light of the legal principles well settled by the Apex Court in the aforestated rulings.

15. The next and only other subsisting issue to be considered and decided by this Court is as to the tenability of the claim of the applicant herein for the refund of the interest amount of Rs. 10,89,965/-, which has accrued on the amount of Rs. 25 lakhs which was deposited as fixed deposit by the Official Liquidator in a bank. The applicant herein essentially claims for the

- : 26 :-

aforestated interest amount by placing reliance on the doctrine of accretion. It has been clearly admitted in the pleadings of the Official Liquidator that the aforestated amount of Rs. 25 lakhs, which was deposited by the applicant as EMD, was in fact placed as a fixed deposit by the Official Liquidator in a nationalised bank and that the said deposit of Rs.25 lakhs has generated an interest income of Rs. 10,89,965/-. It is not very clear as to whether the aforestated amount of Rs.10,89,965/- referred to in page No.3 of the additional affidavit dated 11.12.2015 filed by the Official Liquidator is the amount generated as interest income, after clearing the tax deduction at source (TDS) liability on the said amount to the Income Tax Department.

16. The applicant has placed reliance on the decision of Bombay High Court in the case R.K.Jewellers v. Union of India, rendered on 4.5.2010 by the Bombay High Court in Writ Petition No.2777/2003. The applicant also places reliance on the ruling of the Apex Court in the case Alok Shankar Pandey v. Union of India reported in (2007) 3 SCC 455, paras 8 and 9 thereof.

17. The Supreme Court has considered the applicability of the doctrine of accretion in the case Standard Chartered Bank v.

- : 27 :-

Custodian, reported in (2000) 6 SCC 427. Therein, the Apex Court dealt with the issues arising out of the provisions of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992, wherein the custodian appointed under the said Act had called upon the Standard Chartered Bank to either hand over the shares and securities to the custodian or the Bank should obtain an appropriate direction from the Court in case the Bank was claiming any title to the said shares held by them by way of security. The said notice was subject matter of adjudication before the Special Court, which after trial, rendered the judgment holding that bonus shares and dividend and interest accrued on the original shares pledged with the bank were not themselves the subject matter of the pledge and must be handed back by the bank to the custodian. The Standard Chartered Bank being aggrieved by the said direction of the Special Court, had taken up the matter before the Apex Court in an appeal. The Supreme Court, while adjudicating upon the rights of the bank, held that in respect of the pledged stock, rights shares were subscribed and obtained by the bank and bonus shares and dividend and interest were also received by it. On this factual basis, the Supreme Court considered the issues firstly, as to

- : 28 :-

whether these accretions form part of the pledged property and, secondly, if they do not, then whether the Special Court should have directed the bank to hand them over to the custodian. The Apex Court, while adjudicating upon the aforesaid issues, relied upon the Privy Council judgment in the case of Motilal Hirabhai v. Bai Mani,

reported in AIR 1925 PC 86, wherein the Privy Council held that bonus shares were received as arising out of and appertaining to the original shares and that it was impossible to contend that the right to these shares could be differentiated from the right to the original shares. On this logic, holding against the findings of the Special Court, the Apex Court held that dividend and interest, which were received by the bank and which were relatable to the pledged stocks should also be regarded as accretions thereto. In Standard Chartered Bank's case supra the Apex Court considered the scope of Secs.163, 172 and 176 of the Indian Contract Act. While considering the scope of Sec.163 of the Indian Contract Act, the Apex Court observed that in absence of a contract to the contrary, the bailee is bound to deliver to the bailor or according to his directions, any increase or profit, which may have accrued from the bailed goods.

- : 29 :-

18. Sec.163 of the Indian Contract Act, 1982, along with its illustration given thereunder, reads as follows:

"Sec.163: Bailor entitled to increase or profit from goods bailed. - In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A."

The Apex Court in order to buttress its view with clarity, relied upon the aforestated illustration given in Sec.163 that if a calf is born to a cow, then the bailee is bound to deliver the calf as well as the cow to the bailor. While considering the scope of Secs.172 and 176 of the Indian Contract Act, it was held by the Apex Court in Standard Chartered Bank's case supra as follows:

"The section not only gives the pawnee the right to retain the goods pledged as collateral security but also entitled the pawnee to sell the pledged goods after giving the pawnor reasonable notice of the same. If the proceeds of the sale are less than the amount due, the pawnor continues liable to pay the balance. On the other hand if the proceeds realized on the sale being made are grater than the amount due the pawnee is under an obligation to pay over the surplus to the pawnor."

The Supreme Court also referred to the authoritative book on the subject, Story on Law of Bailment (para 292), wherein reads as follows:

'"By the pledge of a thing, not only the thing itself is pledged,

- : 30 :-

> but also, accessory, the natural increase thereof. As if a flock of sheep are pledged, the young, afterwards born, are also pledged."
>
> (Emphasis supplied) This passage has been relied upon by Chitty on Contract, 28th Edn. at p.162 where it is noted that: "If during the pledge there is an increase in the value of the thing pledged, the pledgee is entitled to the increase as part of his security." (Emphasis supplied)'
>
> 19. Accordingly, it was held by the Apex Court in Standard Chartered Bank's case supra that where shares and debentures were pledged with the bank, the bonus shares and dividend accrued on the pledged shares were accretions to the pledged stocks forming part of the pledged property and hence such accretions are required to be returned only when the pledged goods are returned.

That in the case of pawner's default in payment of the debt, pawnee has also a right to sell the accretion along with the original goods pledged after giving reasonable notice to the pawner. The Apex Court had accordingly ordered to set aside the judgment of the Special Court on this count.

20. The Bombay High Court in the judgment rendered on 4th May, 2010 in the case M/s.R.K.Jewellers v. Union of India in Writ Petition No.2777/2003 by relying on the ruling of the Apex Court in Standard Chartered Bank's case supra held that the doctrine of accretion is applicable to the facts of that case as well, wherein

- : 31 :-

> the amount seized was invested in a fixed deposit by the Revenue. Interest earned thereon was held to be nothing but accretion to the original investment i.e. amount seized from the petitioners therein and applying same logic, it was held that the interest, which was received by the Revenue, was relatable to the seized amounts from the petitioners therein, which were invested in the fixed deposits by the Revenue. Accordingly, it was held by the Bombay High Court that the petitioners therein were entitled to accrued interest on the seized amount and that the respondents therein were not justified in refusing to pay the said amount of interest and that there is no justification in retaining the amount of interest earned on the seized amount, especially on the touchstone of the doctrine of accretion, which was held to be squarely applicable to the facts of that case. In that case, the Enforcement Directorate officials had seized cash amount of Rs. 85 lakhs and cheque for Rs. 5,21,490/- from the petitioners therein under Sec. 37 of the Foreign Exchange Regulation Act, 1973 ("FERA") and show-cause notice dated 9.11.1999 alleging contravention FERA provisions were contested by the notices and after fulfledged investigation, by an order dated 28th February, 2001, the petitioners therein were exonerated and
>
> - : 32 :-

> ultimately, on 5th April, 2002 and 23rd May, 2002, the seized amounts were released to the petitioners therein by bankers cheques without any payment of interest accrued thereon. In that case the seized amounts were earlier deposited in fixed deposits with the Bank, which had earned interest amount in question. In the light of these aspects, the Bombay High Court held that the petitioners therein would be fully entitled to the accrued interest on the seized amount and that the respondents were not justified in refusing to pay the said amount of interest and that there is no justification on the part of the respondents therein in retaining the amount of interest earned on the seized amount in the light of doctrine of accretion.

21. The Apex Court in the case Alok Sbanker Pandey's case reported in (2007) 3 SCC 545, has held in paras 8 and 9 as follows:

> "8. We are of the opinion that there is no hard-and-fast rule about how much interest should be granted and it all depends on the facts and circumstances of each case. We are of the opinion that the grant of interest of 12% per annum is appropriate in the facts of this particular case. However, we are also of the opinion that since interest was not granted to the appellant along with the principal amount, the respondent should then in addition to the interest at the rate of 12% per annum also pay to the appellant interest at the same rate on the aforesaid interest from the date of payment of instalments by the appellant to the respondent till the date of refund of this amount, and the entire amount mentioned above must be paid to the appellant within two months from the date of this judgment.
>
> - : 33 :-
>
> 9. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence, equity demands that A should not only pay back the principal amount but also the interest thereon to B."

22. The facts in the instant case have clearly revealed that the amount of Rs.25 lakhs paid by the applicant as EMD was in fact placed in a fixed deposit in a nationalised bank by the Official Liquidator and the said fixed deposit amount of Rs. 25 lakhs has earned a total interest income of Rs. 10,89,965/- (Rupees ten lakhs eighty nine thousand nine hundred and sixty five only). However, it is to be noted that the Official Liquidator has clearly averred in the additional affidavit dated 11.12.2015 that the applicant herein is liable to compensate the actual loss suffered by the Official Liquidator in connection with the sale of assets of the company, such as publication expenses of the tender notification in newspapers, TA/DA for the officials deputed for arranging inspection of the assets, printing and stationery of notice, etc. The averments in this regard in the said affidavit dated

11.12.2015 read as follows:

"4. .... However, he is liable to compensate the loss suffered

- : 34 :-

by the Official Liquidator in connection with the sale of assets of the company such as publication expenses of the tender notices in newspapers, T.A. and D.A. to the officials deputed for arranging inspection of the assets, printing and stationery, postage of tender notice etc. Since the officials deputed in this regard were government servants, their DA and TA has been paid off from the government fund and nothing was debited towards the companies account. Similarly the tender forms were also distributed to the intending tenderers on payment of Rs. 500/- and as such the printing and stationery and postage expenses have been met outThe of the funds so realised on distribution of the tender forms. benefit accrued to the Official Liquidator from the amount of Rs.25,00,000/- deposited as EMD by the applicant and forfeited by the Official Liquidator is the interest income accrued on investing the said amount in interest bearing Fixed Deposit Receipts. The loss sustained by the Official Liquidator and the benefit accrued from the amount of Rs.25,00,000/- are as shown below.

Amount expended by the Official Liquidator for Publication of tender notices in News Papers	Interest income received on depositing the amount of Rs. 25,00,000/- in Fixed Deposit Receipts
Rs. 72,944/-	Rs. 10,89,965/-"

23. The learned counsel appearing for the applicant does not appear to have any serious objections in this Court issuing directions to enable the Official Liquidator to retain the aforestated amount of Rs.72,994/-. Moreover, it is not fully known as to whether the interest amount of Rs. 10,89,965/- is the amount after deducting the tax deducted at source payable to the Income Tax Department. Accordingly, it is ordered that the Official Liquidator will refund the aforestated accrued interest amount of Rs.10,89,965/- after deducting the expenditure amount of

- : 35 :-

Rs. 72,994/- and the Tax Deduction at Source amount, in case TDS amount has not been deducted. The amounts so due to the applicant shall be refunded to him by the Official Liquidator within 2 weeks from the date of production of a certified copy of this order.

With these observations and directions, the aforecaptioned Company Application stands finally disposed of.

Sd/-

sdk+ ALEXANDER THOMAS, JUDGE

///True copy///

P.S. To Judge.