Jinmangal Corporation vs Ahmedabad Urban Development Authority on 25 August, 2021

Author: J.B.Pardiwala

Bench: J.B.Pardiwala, Vaibhavi D. Nanavati

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6981 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

CIRCULATE THIS JUDGEMENT IN THE SUBORDINATE JUDICIARY.

==========

JINMANGAL CORPORATION
Versus
AHMEDABAD URBAN DEVELOPMENT AUTHORITY

==========

Appearance:
MR PARAS K SUKHWANI(8284) for the Petitioner(s) No. 1
MR MIHIR JOSHI SENIOR COUNSEL WITH MR HS MUNSHAW(495) for the Respondent(s) No. 1,2

==========

CORAM:HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 25/08/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA) C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 1 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> "(a) This Hon'ble Court be pleased to issue an appropriate writ, order or directions to quash and set aside order dated 05/03/2020 forfeiting Earnest Money Deposit of Rs.35,95,860/- paid for commercial plot in Chandkheda TPS No.22 final plot No.265 admeasuring 3411.00 sq. mtr.

Producing at Annexure-S.

(c) This Hon'ble Court may kindly be pleased to issue an appropriate writ, order or directions directing the respondents to issue fresh allotment letter for commercial plot in Chandkheda TPS No.22 final plot No.265 admeasuring 3411.00 sq. mtr with clarification that petitioner will deposit amount of GST of Rs.5,49,14,787 with authority concerned out of total consideration of Rs.35,99,96,940/- and remaining amount of Rs.30,50,82,153/- to be deposited with respondents.

(d) Pending admission, hearing and final disposal of this petition, the respondents be restrained from issuing allotment letter for commercial plot in Chandkheda TPS No.22 final plot No.265 admeasuring 3411.00 sq. mtr. to any other tenderer.

(e) The Hon'ble Court may please grant any other and further relief as may be deemed fit under the facts and circumstances of the case.

(f) This Hon'ble Court may please award the cost of the petition."

2 The facts giving rise to this writ application may be summarized as under:

3 The writ applicant is a partnership firm. It appears from the materials on record that the firm is in the business of development of land, etc. 4 The Ahmedabad Urban Development Authority (for short, "the AUDA") issued E-Tender Notice No.AUDA/Estate/E-Auction/ Plots/07676 dated 12th July 2019 for auction of plots.

5 The Tender Notice reads thus:

Plot No.	Details of plot	Plot area in sq. mt.	Up-set price (per sq. mt)	EMD in Rs.	Date of auction
1	Commercial plot in Vejalpur TPS no.5 FP no.237, Nr. Ramdevnagar Cross Road, Ahmedabad.	9529	1,65,738/-	1,57,93,175/-	Auction starts 11.00 hrs on 20.08.2019 Auction ends 12.00 hrs on 20.08.2019
2	Commercial plot in Vejalpur TPS no.4 FP no.198, Nr. Preranatirtha Derasar Road, Ahmedabad	3840	1,34,422/-	51,61,805/-	Auction starts 14.00 hrs on 20.08.2019 Auction ends 15.00 hrs Dt.20.08.2019
3	Commercial plot in Bopal TPS no.3, FP no.256, Nr. Sobo Centre, South Bopal Road, Ahmedabad	9000	84,980/-	76,48,200/-	Auction starts at 17.00 hrs on Dt. Dt. 20.08.2019 Auction ends at 18.00 hrs on Dt. 20.08.2019
4	Commercial plot in Chandkheda TPS no.22, FP no.265, Nr. Govt Engineering College, New C.G. Road, Ahmedabad	3411	1,04,540/-	35,65,860/-	Auction starts 11.00 hrs on 21.08.2019 Auction ends 12.00 hrs on 21.08.2019
5	Commercial plot in Thaltej TPS no.37, FP no.192, Zydus-Bagban-Sindhubhavan Road, Ahmedabad	6775	1,24,449/-	84,31,420/-	Auction starts 14.00 hrs on 21.08.2019 Auction ends 15.00 hrs on 21.08.2019
6	Commercial plot in Thaltej TPS no.38, FP no.292, Opp Zydus Hospital, Hebatpur Road, Ahmedabad	6233	1,20,866/-	75,33,578/-	Auction starts 17.00 hrs on 21.08.2019 Auction ends 18.00 hrs on 21.08.2019

6 The writ applicant herein participated in the Tender process and

offered its bid with respect to the commercial plot in Chandkheda TPS C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 No.22, F.P. No.265 situated near Government Engineering college, New C.G. Road, Ahmedabad. The upset price, as fixed, was Rs.1,04,540/- per sq. mtrs. The plot in question admeasures 3411 sq. mtrs. The Earnest Money Deposit, as prescribed, was

Rs.35,65,860/-.

7 It is not in dispute that the writ applicant was declared as the highest bidder so far as the plot in question is concerned. It is also not in dispute that the writ applicant deposited Rs.35,65,860/- towards the earnest money.

8 We shall now look into some of the conditions, as prescribed, in the Tender Notice:

> "3. Earnest Money Deposit ("EMD" or "Bid Security") a. A Bidder/ Applicant/s shall deposit, an EMD as mentioned in advertisement. The Bidder/ Applicant/s will have to provide the EMD and Tender fee by RTGS/NEFT' through (n)code web site http://e- auction.nprocure.com. Any Bid not accompanied by the Tender fee and/or EMD shall be summarily rejected by AUDA as non-responsive and applicant will not entitled to participate in auction process .
>
> b. EMD is collected in INR (Indian Rupee) only from Indian as well as International bidders. Hence international bidders from overseas are requested to ensure that the exact amount of EMD to be received by AUDA. Any less amount received from the bidder would not be considered. In case of refund sought by overseas bidders it would be refunded in INR only after deducting bank charges, as applicable, which are to be borne by the bidder. It is to be noted that international transactions are subject to Reserve bank of India/FEMA regulations.
>
> c. Save and except the tender fee, the EMD of unsuccessful Bidder/ Applicant/s will be returned by AUDA, without any interest and all other charges for the transfer of EMD shall be borne by the bidder, in accordance with the terms contained under this RFP. The refund of EMD thereof shall be in INR through RTGS in the account from where EMD has been paid.
>
> d. The Preferred Bidder's Bid Security will be adjusted against the first payment towards consideration for purchase of PLOT. AUDA shall be: entitled to forfeit and appropriate the EMD as mutually agreed C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 genuine pre-estimated compensation / damages to AUDA in the event of default made by the Bidder/ Applicants.
>
> e. AUDA will return the EMD and all the money paid by the Preferred Bidder, without interest, after 90 (Ninety) days to Bidder/ Applicant/s succeeded in auction, if AUDA cannot hand over the possession of plot due to any reason other than reasons beyond its control and /or the reasons attributable to such Applicant/s/ tenderer/ lessee.
>
> 4. Any addendum issued subsequent to this document, but before the Due Date, will be deemed to form part of the bidding documents;

5. During the registration period of auction process, Bidder/ Applicant/s are invited to - examine the location of plot and other related factors in details at their cost, such studies as may be required before submitting their respective Bids.

6. The Bidder / Applicant/s are encouraged to submit their respective Bids after visiting the plot site ascertaining for themselves the site conditions, market, connectivity, location, surroundings, climate, weather data, applicable laws and regulations, and any other matter considered relevant by them;"

"7. It shall be deemed that by submitting the Bid, the Bidder / Applicant/s has:

a. made a complete and careful examination of the RFP;

b. received all relevant information requested from AUDA;

c. acknowledged and accepted the risk of inadequacy, error or mistake in the information provided in the RFP or furnished by or on behalf of AUDA relating to any of the matters referred herein;

d. agreed to be bound by the terms and undertakings provided by it under and in terms hereof;

e. satisfied itself about all matters, things and information including matters referred herein necessary for obtaining lease of the plot and performance of all of its obligations relating thereto; and f. acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the RFP or ignorance of any of the matters referred herein shall not be a basis for any claim for compensation, damages, extension of time for performance of its obligations, loss of profits etc. from AUDA, or a ground for termination of the lease;"

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021

"General Conditions:

1. The bidder should pay the payments as below:

deposit 10% amount of the total consideration excluding EMD for purchase price of PLOT within 10 days of the Letter of Allotment ("LOA"):-

i. All other recurring payments of Lease Rent, Land Revenue etc. shall be paid by the lessee in advance as per the terms contained under the LOA at the time of final payment.

> ii. Deposit the balance 90% amount of the total consideration for purchase price of PLOT within 30 days from the date of LOA; However, for any special reason if the time period of depositing the amount shall be extended by the AUDA than for such additional days the interest shall be payable annually at the rate of 15% on the rest of the amount, but the tenure of such additional days shall not be increased more than 180 days in any case and in such cases the possession receipt and the physical possession of the land/plot will be handed over to the Preferred Bidder/Applicant/s by the AUDA after deposition of 100% amount.

iii. After completion of all the aforesaid compliances, the physical possession of plot shall be handed over to the lessee by AUDA;

iv. Upon receipt of all the payments and consideration as per the terms and conditions of this RFP and the LOA, the Preferred Bidder shall execute the Lease Deed (in the standard format of AUDA) with AUDA and the same shall be registered with the concerned Sub- Registrar of Assurances, in Duplicate. The original Deed shall be retained with Preferred Bidder/ lessee and Duplicate shall be handed over to the AUDA;

v. The payment of land revenue shall be paid in advance for first 20 years and thereafter the same shall be payable by the Lessee regularly every year from 1st January to 31st January. I/we further agree that in case-of any difference in land revenue is levied by any authority the same shall be paid by the lessee in addition to whatever paid in advance."

> "3. The deposited amount of the EMD shall be adjusted at the time of payment of 90% of total consideration payable by the bidder."

> "4. If the bidder succeed in the auction and fails in paying the C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 amount as per Sr. No.21(1) above, all amounts paid earlier by the bidder will be forfeited by the AUDA without assuming any liability whatsoever the case may be."

9 Thus, from the aforesaid, it is evident that the writ applicant was obliged to deposit 10% of the amount of total consideration excluding the EMD for the purchase price of the plot within 10 days of the Letter of Allotment (LOA). The balance 90% of the amount of total sale consideration towards the purchase price was to be deposited within 30 days from the date of LOA.

10 It appears that the writ applicant vide its letter dated 11 th September 2019 called upon the AUDA to clarify as regards the liability to pay the GST. The writ applicant requested the AUDA to grant 10 more days for the deposit of 10% of the total purchase price i.e. Rs.35,99,96,940/-. The Estate Officer, by letter dated 16 th September 2019, granted 10 days time to deposit 10% of the total purchase price.

11 It appears that apropos the clarification sought by the writ applicant as regards the liability towards the GST, the Estate Officer provided the opinion of a Chartered Accountant stating that on

long term lease agreement, the GST is exempted on premium. The Estate Officer informed the writ applicant to deposit 10% of the total purchase price within two days and the balance amount thereafter to be deposited within 20 days of the extended period.

12 The writ applicant was not convinced with the opinion of the Chartered Accountant engaged by the Estate Officer. The writ applicant came to know from his own Chartered Accountant that in view of a Notification, 18% GST was required to be paid from 1 st April 2019 in accordance with the reverse charge mechanism by the purchaser.

13 The writ applicant, vide letter dated 24 th September 2019, brought

to the notice of the AUDA the said Notification. The writ applicant once again requested the Estate Officer to extend the time for depositing 10% of the total purchase price.

14 It also appears that the writ applicant requested the AUDA to refer the issue of GST to the authority of advance ruling in accordance with the provisions of Section 97 of the Central GST Act, 2017 vis-a-vis the Gujarat SGST Act, 2017 so as to get the correct position of law determined. In such circumstances, the writ applicant requested the Estate Officer, AUDA to keep all demand / installment payable against allotment of the said plot in abeyance till the decision of authority of advance ruling.

15 The Estate Officer, vide its letter dated 19th November 2019, called upon the writ applicant to deposit 10% of the total purchase price within a period of three day; failing which the allotment of plot would stand cancelled and the earnest money would also stand forfeited.

16 In view of the aforesaid, the writ applicant once again vide its letter dated 6th December 2019, requested the AUDA to withdraw its notice dated 19th November 2019 and wait for the order from the authority for advance ruling.

17 Ultimately, the AUDA, vide its communication dated 5 th March 2020 [Annexure : S to the writ application, page : 114], cancelled the allotment of plot and forfeited the EMD to the tune of Rs.35,65,860/-.

18 In view of the aforesaid, the writ applicant has come up before

this Court with the present writ application.

19 The reliefs prayed for by the writ applicant in the present writ

application are in two parts: [i] first, the writ applicant wants this Court to issue an appropriate writ, order or directions to the AUDA to issue fresh allotment letter for the plot in question with a clarification that the writ applicant shall deposit the amount of GST of Rs.5,49,14,787/- with the authority out of the total consideration of Rs.35,99,96,940/-, and [ii] secondly, the balance amount of Rs.30,50,82,153/- shall be accepted by the AUDA. To put it in other words, the writ applicant wants that his liability of Rs.5,49,14,787/- towards the GST to be adjusted from the total consideration of Rs.35,99,96,940/-. It is important to note that the amount of total sale consideration of Rs.35,99,96,940/- is on the basis of the price quoted by the writ applicant himself at the rate of Rs.1,05,540/- per sq. mtrs. for a plot admeasuring 3411 sq. mtrs. If the amount of GST is to be included in the total purchase price, then the figure would be much less than at Rs.1,05,000/-.

20 The second part of the relief is with respect to the forfeiture of the Earnest Money Deposit of Rs.35,65,860/-. According to the writ applicant, if the relief in terms of para 18 (c), as referred to above, is not granted, then atleast, the AUDA may be directed to refund the amount of Rs.35,65,860/- towards the Earnest Money Deposit.

SUBMISSIONS ON BEHALF OF THE WRIT APPLICANT:

21 Mr. Sukhwani, the learned counsel appearing for the writ

applicant vehemently submitted that the AUDA is solely responsible for creating unnecessary confusion which has ultimately led to the present litigation. Mr. Sukhwani has a very serious grievance to redress against the AUDA as regards misleading his client on the issue of the liability C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 towards the GST. According to Mr. Sukhwani, the AUDA misled his client by saying that there would be no GST liability on the transaction in question. According to Mr. Sukhwani, his client had to bring it to the notice of the AUDA that he is liable to pay the GST to the tune of Rs.5,49,14,787/-. According to Mr. Sukhwani, had his client known about his liability towards the GST, he would have offered his price towards the purchase of the plot accordingly. Mr. Sukhwani would submit that as on date also, his client is ready and willing to deposit Rs.35,99,96,940/-, but the said amount should be inclusive of the liability towards the GST. In other words, according to Mr. Sukhwani, the amount of Rs.5,49,14,787/- should be deducted from the amount of Rs.35,99,96,940/- and the AUDA should be asked to accept the balance amount towards the total purchase price.

22 Mr. Sukhwani further submitted that if this Court is not inclined to grant the relief, as aforesaid, then, in such circumstances, the AUDA be directed to refund the Earnest Money Deposit to the tune of Rs.35,65,860/-.

23 As regards the refund of the Earnest Money Deposit, the contention canvassed by Mr. Sukhwani on behalf of his client is that the AUDA has neither pleaded nor proved any loss to the extent of Rs.35,65,860/- or any part thereof. According to Mr. Sukhwani, if the plot is to be re-auctioned as on date, then perhaps, the AUDA may fetch around Rs.2 Crore more than the offer made by his client.

24 Mr. Sukhwani would submit that when the stipulation in the contract is in the nature of securing the parties and on its breach, the amount deposited (EMD) is forfeited, then such stipulation could be said to be in the nature of penalty and not the genuine pre-estimated C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 damages.

25 It is argued that if the AUDA is permitted to forfeit the EMD of Rs.35,65,860/-, then the same would amount to unjust enrichment to the AUDA as the AUDA has neither pleaded nor proved any loss to the extent of Rs.35,65,860/-.

26 All the aforesaid submissions of Mr. Sukhwani as regards the refund of the earnest money is based on Section 74 of the Contract Act.

27 Mr. Sukhwani, in support of his aforenoted submissions, has placed reliance on the following case law:

> [1] Kailash Nath Associates vs. Delhi Development Authority [2015 (4) SCC 136] [2] Fateh Chand vs. Balkishan Dass [AIR 1963 SC 1405] [3] Maula Bux vs. Union of India [AIR 1970 SC 1955] [4] K. P. Subbarama Sasra and others vs. K. S. Raghavan and others [AIR 1987 SC 1257] [5] M/s. Variety Body Builders vs. The Union of India AIR 1973 GUJARAT 256 [6] An unreported order passed by this Court dated 16 th July 2012 in the case of ONGC vs. Nobel Steel [First Appeal No.2972 of 2000 with First Appeal No.1635 of 2001] [7] Punjab National Bank and others vs. Atmanand Singh and C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 others [2020 (6) SCC 256] [8] An unreported order passed by this Court dated 24 th April 2015 in the case of Pooja Construction Co vs. Mahuva Nagarpalika and [Special Civil Application No.4272 of 2015]

28 In such circumstances referred to above, Mr. Sukhwani prays that at least, the AUDA be directed to refund the Earnest Money Deposit.

```
        SUBMISSIONS ON BEHALF OF THE AUDA:
29      On the other hand, this writ application has been vehemently
```

opposed by Mr. Mihir Joshi, the learned Senior Counsel assisted by Mr. Hemant Munshaw, the learned counsel appearing for the AUDA submitting that the claim of the writ applicant for refund of the Earnest Money Deposit is not sustainable in law. Mr. Joshi would submit that the earnest money deposited by the writ applicant stood forfeited strictly in accordance with the terms and conditions of contract.

30 Mr. Joshi would submit that Section 74 of the Contract Act would not apply in the present case. He would submit that once it is shown that the terms of contract are clear and there is failure on the part of the writ applicant to perform the contract, the forfeiture of earnest money becomes automatic and Section 74 of the Contract Act cannot be invoked by the writ applicant to contend that the forfeiture is in the nature of penalty and the Court has a discretion to restrict the same to the actual damage caused.

31 Mr. Joshi would submit that the position of law as regards the claim for refund of the earnest money in the matter of the present type has been abundantly made clear by the Supreme Court in its decision in C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 the case of Kailash Nath Associates (supra). Mr. Joshi submitted that the Supreme Court while summarizing its final conclusions in para 43 has stated in so many words that if forfeiture takes place under the terms and conditions of a public auction before the agreement is reached, Section 74 would have no application. Such observations of the Supreme Court, according to Mr. Joshi, clinches the issue.

32 Mr. Joshi submitted that there is no term in the Tender document which could be said to be contrary to any of the provisions of the Indian Contract Act. He would submit that the Indian Contract Act merely provides that a person can withdraw his offer before its acceptance like the one in the present case. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money would stand forfeited for not entering into contract or if some act is not performed like in the present case the deposit of 20% of the total purchase price within 10 days, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest be returned to him.

33 Mr. Joshi would submit that the writ applicant is not justified in blaming the AUDA for the so-called confusion as regards the liability towards the GST. Mr. Joshi invited the attention of this Court to the Tender Notice wherein it has been specifically stated that any query or clarification sought by the bidder would have to be sent at the E-mail address stated therein latest by 30 th July 2019. It has been clarified in the said Notice that no queries would be entertained thereafter. Mr. Joshi would submit that the issue with regard to the GST came to be raised much after the expiry of the stipulated date i.e. 30 th July 2019. Mr. Joshi C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 also invited the attention of this Court to a portion of the "DISCLAIMER", wherein it has been stated that the information provided to the bidder was on a wide range of matters, some of those may depend upon the interpretation of law. The AUDA clarified that the information furnished was not an exhaustive account of the statutory requirements and should not be regarded as a complete or authoritative statement of law. The AUDA also clarified that it accepted no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed therein.

34 In such circumstances referred to above, Mr. Joshi prays that there being no merit in the writ application, the same be rejected.

ANALYSIS:

35 Having heard the learned counsel appearing for the parties and

having gone through the materials on record, the only question that falls for our consideration is whether the writ applicant is entitled to the refund of the Earnest Money Deposit.

36 Before we proceed to answer the aforesaid question, we may clarify that we were inclined and willing to give one chance to the writ applicant to abide by his offer by persuading the AUDA not to go for a re-auction of the plot in question and accept the amount of Rs.35,99,96,940/-. However, the writ applicant insisted that his offer should be inclusive of the amount to be paid towards the GST liability. To this, the AUDA outright declined. In such circumstances, we are now left to only consider the question with regard to the refund of the Earnest Money Deposit.

37 As noted above, the entire argument or the edifice of the argument of Mr. Sukhwani as regards his claim of refund of the earnest C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 money is based on Section 74 of the Contract Act. We must first try to understand what is Section 74 of the Contract Act and its scope.

38 Section 74 reads as under:

> "74. Compensation for breach of contract where penalty stipulated for
>
> --When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception--When any person enters into any bail-bond, re-cognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.
>
> Explanation--A person who enters into a contract with the Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.
>
> Illustrations
>
> (a) A contracts with B to pay B rs.1,000 if he fails to pay B rs.500 on a given day. A fails to pay B Rs.500 on that day. B is entitled to recover from A such compensation,

not exceeding Rs.1,000, as the Court considers reasonable.

(b) A contracts with B that if A practises as a surgeon within Calcutta, he will pay B Rs.5,000. A practises as surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs.5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the every of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable to its terms.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

39 The aforesaid section came to be amended by Act VI of 1899 which added certain words to the section and illustrations [(d), (e), (f) and (g)] as also the Explanation. Prior to the amendment the first paragraph of the section read as follows: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named".

The Amendment Act came into force on the 1 st of May 1899 and applied to "every contract in respect of which any suit is instituted, or which is put in issue in any suit" after that date. There has been a conflict of decisions as to the meaning of these words. They have been construed on the one hand to comprise two cases, namely, (i) the case of C/SCA/6981/2021 JUDGMENT DATED:

25/08/2021 any contract in respect of which any suit may be instituted after the commencement of the Act; and (ii) the case of any contract which is put in issue in any suit after the commencement of the Act though the suit may have been instituted before the Act. On the other hand, it has been held that the Act of 1899 only applies to the suits instituted after the commencement of that Act."

The section, prior to the amendment, did away with the distinction between a penalty and liquidated damages. The terms of the section were broad enough to include the cases of liquidated damages and penalty and a wide discretion was given to the courts in the assessment of damages even in cases where the parties to the contract had, in anticipation of the breach, expressly determined by agreement what should be the sum payable as damages for the breach. The section was introduced to obviate difficulties which existed in distinguishing the liquidated damages from penalty in English law; the effect of it was that the courts were not bound to award the entire amount of damages agreed upon by the parties in anticipation of the breach. The only restriction was that the court could not decree damages exceeding the amount previously agreed upon by the parties. Accordingly, a plaintiff was not entitled to recover simpliciter the sum mentioned in the contract whether as penalty or as liquidated damages. He must prove the damages he had suffered and would be entitled to the amount he succeeded in actually proving not exceeding the sum mentioned". But this simplicity of the law was disturbed by the practice of the courts in giving relief in certain cases by invoking their equitable jurisdiction. The Amendment Act was passed with a view to bringing all those cases within the scope and operation of the section, at the same time interfering as little as possible with its letter and spirit. It is a mistake to think that the section only speaks of agreements that are unreasonable, C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 it speaks of all agreements in which the damages to be paid for the breach of contract are stated as a certain sum of money or are otherwise specified. The effect of such a stipulation is that the damages awarded cannot exceed the sum of money or other matters specified, but, on the other hand, can exceed the actual damages or loss proved. The section is as much applicable to consent decree as to any contracts. With regard to the section the following is the intention of the legislature; (i) the plaintiff must prove his damage in a general sense; (ii) the contract made by the parties estimating their damages is in itself evidence; (iii) if there is no other evidence of damage this evidence alone will be considered sufficient in certain cases; (iv) the sum named is not conclusive evidence, i.e., if there be other evidence or circumstances showing that it is excessive, the court will not consider itself bound by it;

(v) if, on the other hand, the evidence and circumstances indicate that the damage equals or may equal or is likely to exceed the amount named, the court will abide by it; and (vi) in case where other evidence shows that it is unreasonable, the plaintiff will have to prove his damages irrespective of the figure. The section applies only to cases where the plaintiff omits to prove that he has sustained any actual loss or damage at all. Even where the liquidated damages are entered in a contract itself as Payable in the event of breach, then the damages payable, when a breach occurs, are to be assessed in the ordinary way subject to the fixed amount as a maximum. It is for the plaintiff to prove the exact amount of damages which he has suffered and that amount only can be awarded' 'The section applies, as stated therein, when a contract has been broken, if a contract for sale provides for alternative modes whereby a purchaser may pay either by instalments or by a lump sum, it may be a question whether there is any breach until the purchaser has wholly failed to pay

and not merely failed to pay in one mode.

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 Both Sections 73 and 74 respectively provide for reasonable compensation, and Section 74 contemplates that the maximum reasonable compensation may be the amount which may be fixed in the contract.

Section 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 the 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." [See : Dutt on contract Fifth Edition].

40 Mr. Sukhwani would submit that Section 74 applies not only to the cases where the aggrieved party is seeking to receive some amount on breach of contract, but also to the cases where upon breach of contract an amount received under the contract is sought to be forfeited. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture the Court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract as liable to forfeiture.

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021

41 We are not impressed with the submission canvassed on behalf of

the writ applicant that when the stipulation in the contract is in the nature of securing the performance and on its breach the amount deposited (EMD) is forfeited, then such stipulation is in the nature of penalty and not the genuine pre-estimated damages. To understand the true purport of Section 74 of the Contract Act, it is necessary to first consider Section 73 of the Contract Act.

42 Section 73 of the Contract Act, 1872 deals with the compensation for loss or damage caused by breach of contract. The same is extracted below:

> "Section 73 - Compensation for loss or damage caused by breach of contract.--When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be

likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.--In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

43 The principles underlying Section 73 are well settled. The classic case dealing with remoteness of damages is Hadley vs. Baxendale, C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 (1843-60) ALL ER Rep 461, wherein it was observed:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made where communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the circumstances been known, the parties might have provided for the breach of contract by special terms as to the damages in that case, thus it would be very unjust to deprive them"

44 The above principles were explained and clarified by the Court of Appeal in Victoria Laundry (Windsor) Ltd vs. Newman Industrial Ltd., 1949 (1) ALL ER 997 as under:

"i) it is well settled that the governing purpose of damage is to put the party whose rights have been violated in the same position, so far as money can do it, as if his rights had been observed.

ii) In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss as actually resulting as was at time of the contract reasonably foreseeable as liable to result from the breach.

iii) What was at that time reasonably to foreseeable depends on the knowledge then possessed by the party who later commits the breach.

iv) For this purpose, knowledge possessed is of two kinds one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ordinary course of thing and consequently what loss is liable to result C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 from a breach of contract in that ordinary course. This is the subject matter of first rule in Hadley vs. Baxndale. But to this knowledge, which a contract breaker is assumes to possess, whether he actually possesses or not, there may have to be added in a particular case, knowledge which he actually possesses of special circumstances outside the ordinary course of thing of such a kind that a breach on those special circumstances would be liable to cause more loss. Such a case attracts the operation of the second rule so as to make additional loss also recoverable.

v) In order to make the contract breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.

vi) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given State of knowledge the defendant could as a reasonable man, forces that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough if the loss for some factor without which it would not have occurred is a serious possibility or a real danger.

45 The above principles apply to grant of compensation under Section 73 of the Contract Act. This is clear from the decision of the Supreme Court in Karsandas H. Thacker vs. Saran Engineering Co. Ltd. [AIR 1965 SC 1981]. The Supreme Court held that when a party commits breach of contract, the other party is entitled to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Remote and indirect loss or damage sustained by reason of the breach will not entitle the party complaining breach, to any compensation. Referring to the facts of the case and Illustration (k) to Section 73 of the Contract

Act, the Supreme Court held:

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 "On account of the non-delivery of scrap iron, he could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. This means that he did not stand to pay a higher price than what he was to pay to the respondent and therefore he could not have suffered any loss on account of the breach of contract by the respondent. The actual loss, which, according to the appellant, he suffered on account of the breach of contract by the respondent was the result of his contracting to sell 200 tons of scrap iron for export to the Export Corporation. It may be assumed that, as stated, the market price of scrap iron for export on January 30, 1953, was the price paid by the Export Corporation for the purchase of scrap iron that day. As the parties did not know and could not have known when the contract was made in July 1952 that the scrap iron would be ultimately sold by the appellant to the Export Corporation, the parties could not have known of the likelihood of the loss actually suffered by the appellant, according to him, on account of the failure of the respondent to fulfill the contract.

Illustration (k) to Section 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties."

46 Damages can be awarded only for the loss directly suffered on account of the breach and not for any remote or indirect loss sustained by reason of the breach of contract. The general rule is that where two parties enter into a contract and one of them commits breach, the other party will be entitled to receive as damages in respect of such breach of contract, such sum as may fairly and reasonably be considered arising naturally, that is according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If any special circumstances about the dependency of the performance of other contract/s by the party complaining of the breach, on the performance of the contract in dispute by the party in breach, had been communicated C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 to the party in breach, and thus known to both parties at the time of entering into the contract, then the damages for the breach of the contract in dispute, may include the compensation for the loss suffered in regard to such other dependent contracts. But, on the other hand, if the special circumstances were not made known to the party breaking the contract, the party breaking the contract, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally and directly and not any remote or unknown loss or damage.

47 What would be a 'penalty' under Section 74 of the Contract Act was explained by the Supreme Court of India in K. P. Subbarama Sastri and others vs. K. S. Raghavan and others (1987) 2 SCC 424 as under:

> "The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promiser so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty."

48 The privy council in Kunwar Chiranjit Singh vs. Har Swarup (1925 LW 172), while dealing with the concept of earnest money, had observed as follows:

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee".

49 The above referred decision of the Privy Council has been referred C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 to and relied upon by the High Court of Bombay in the case of Dinanath Damodar Kale vs. Malvi, Mody, Ranchhoddas and Co reported in 1930 AIR (Bom) 213. The Court observed as under:

> "6. Turning to the law in England we have a series of decisions showing that a deposit by way of earnest in a contract for the sale of land is distinguishable from a penalty for breach of the contract. The cases cited to us by the appellant's counsel are all cases in which either an instalment of the price or a part payment was by the terms of the contract to be forfeited on breach by the purchaser. If any authority be needed to show what the law in England is it may be found in the passage in Halsbury, Vol. XXV, p. 398, para 681, which was cited to us by respondents' counsel. There it is clearly laid down that there is a distinction between a deposit and a penalty. This distinction was referred to by the majority of the Bench in the case of Bishan Chand v. Badha Kishan Das (1897) I.L.R. 19 All. 489, where it was stated that a deposit is a payment actually made or advanced and therefore Sections 73 and 74 of the Indian Contract Act have no application in such a case and are not intended to apply to it. These sections show what is the compensation to the seller, who is not responsible for the breach. They contemplate a case in which he is seeking to recover compensation for the breach. They do not contemplate a case in which a sum of money has been paid by way of earnest. Nor is the Indian Contract Act necessarily exhaustive (see P. B. & Co. v. Bhagwandas (1909) I.L.R. 34 Bom. 193, s.c. 11 Bom. L.R. 335).
>
> 7. Furthermore, it is to be noted that in this particular contract there was a specific condition of the sale by auction that the deposit was to be forfeited in case of default

> by the purchaser and we think that such a clause is not unreasonable and must be given effect to. Our own High Court Rules regarding the sale by the Sheriff's office (Rule 391) specifically allow a deposit to be forfeited and the mere fact that the word "may" is used in that Rule cannot be taken to mean that only such sum out of the deposit can be forfeited as the Court may think proper as damages following the failure of the buyer to complete the sale."

(Emphasis supplied) 50 However, subsequently, in Fateh Chand (supra), the Supreme Court while dealing with the scope of Section 74 of the Contract Act held as follows:

> "Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief' as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court, is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

51 This was further explained in Maula Bux (supra), wherein the Supreme Court has explained the law relating to forfeiture as follows:

> "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. Hat Swarup; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi; Muhammad Habibullah v. Muhammad Shafi; Bishan Chand v. Radha Kishan Das; These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to. imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

52 However, a slight shift in the law relating to forfeiture was noticed by the Supreme Court in Satish Batra vs. Sudhir Rawal (2013) 1 SCC 345, wherein after a review of the entire case law starting from Fateh Chand (supra), Videocon Properties Limited vs. Bhalchandra Laboratories [2004 (3) SCC 711] and the Shree Hanuman Cotton Mills vs. Tata Air Crafts Ltd. [1970 AIR 1986], the Court laid down the principles regarding the earnest money as follows:

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 "21. From a review of the decisions cited above, the following principles emerge regarding "earnest":

> (1) It must be given at the moment at which the contract is concluded.
>
> (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
>
> (3) It is part of the purchase price when the transaction is carried out.
>
> (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
>
> (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

53 The Supreme Court also took note of the judgements in Delhi Development Authority vs. Grihshapana Cooperative Group Housing Society Ltd [1995 Supp (1) SCC 751], V. Lakshmanan vs. B. R. Mangalagiri [1995 Supp (2) 33], Huda vs. Kewal Krishnan Goel [1996 (4) SCC 249]. After referring to the aforesaid judgements, the Supreme Court concluded as follows:

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

54 The difference between an earnest or deposit and an advance part payment of price is now well established in law. Earnest is something given by the Promisee to the Promisor to mark the conclusiveness of the C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 contract. This is quite apart from the price. It may also avail as a part payment if the contract goes through. But even so it would not lose its character as earnest, if in fact and in truth it was intended as mere evidence of the bargain. An advance is a part to be adjusted at the time of the final payment. If the Promisee

defaults to carry out the contract, he loses the earnest but may recover the part payment leaving untouched the Promisor's right to recover damages. Earnest need not be money but may be some gift or token given. It denotes a thing of value usually a coin of the realm given by the Promisor to indicate that the bargain is concluded between them and as tangible proof that he means business. Vide Howe v. Smith (1884) 27 Ch.D. 89.

55 The practice of giving earnest is current in the present day commercial contracts. An advance is made and accepted by way of deposit or guarantee for the due performance of the contract. The distinction between a deposit and a part payment is thus described by Benjamin on sales at page 946:

> "A deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do so. As regards the recovery of part payments the question must depend upon the terms of the particular contract. If the contract distinguishes between the deposit and instalments of price and the buyer is in default, the deposit is forfeited and that is all. And in ordinary circumstances, unless the contract otherwise provides, the seller, on rescission following the buyer's default, becomes liable to repay the part of the part of the price paid."

56 In Halsbury's Laws of England, third edition, volume XXXIV, page 118 the distinction between the two is thus pointed out:

> "Part of the price may be payable as a deposit. A part payment is to be distinguished from a deposit or earnest.
>
> C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price. Accordingly, if the buyer is unable or unwilling to accept and pay for the goods the seller may repudiate the contract and retain the deposit. If the seller is unable or unwilling to deliver the goods, or to pass a good title thereto, or the contract is voidable by the buyer for any reason, the buyer may repudiate the contract and recover the deposit. The buyer may also recover it where, without the default of either party, the contract is rescinded by either party pursuant to an express power in the contract in that behalf."

57 In Cheshire and Fifoot on Contracts (fifth edition) at pages 496- 497 the position is thus summed up:

> "Where, therefore, it has been agreed that a sum of money shall be paid by the one to the other immediately or at certain stated intervals, the question whether in the event of rescission repayment will be compelled depends upon the proper construction of the contract. The object that the parties had in view in providing for the payment must first be ascertained.

> Where the intention was that the money should form a part payment of the full amount due, then, as we have seen, if the contract is rescinded for the payer's default the payee is required at law to restore the money, subject to a cross-claim for damages. If, on the other hand, the intention was that the money should be deposited as earnest or as a guarantee for the due performance of the payer's obligation, the rule at common law is that if the contract is rescinded by reason of his default the deposit is forfeited to the payer and cannot be recovered.
>
> In the latter case, however, and also where it has been expressly agreed that a part payment shall be forfeited in the event of the payer's default, equity is prepared within limits to grant relief against the forfeiture."

58 The observations of Mellish, L.J., in Ex parte Barrell: In re Parnell 10 Ch. App. 512 assume importance. His Lordship observed that even when there is no clause in the contract as to the forfeiture of the deposit if the purchaser repudiates the contract, he cannot have back the money if it was a deposit, as the contract has gone off through his default. It is characteristic of a deposit to entail forfeiture if the depositor commits breach of his obligation. On the contrary it is inherent in a part payment C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 of price in advance that it should be returned to the buyer if the sale does not fructify. The buyer is not disentitled to recover, even if he is the party in breach, because breach of contract on the part of the buyer would only entitle the seller to sue for damages but not to forfeit the advance. A specific forfeiture clause might operate to defeat the buyer's right of recovery of even an advance payment. But equity might step in to relieve the buyer from forfeiture. If the amount forfeited cannot stand the test of a genuine pre-estimate of damages, it would be unconscionable for the seller to retain it. The question whether the amount is a deposit (earnest) or a part payment cannot be determined by the presence or absence of a forfeiture clause. Whether the sum in question is a deposit to ensure due performance of the contract or not is not dependent on the phraseology adopted by the parties or by the presence or otherwise of a forfeiture clause. The proportion the amount bears to the total sale price, the need to take a deposit intended to act in terrorem, the nature of the contract and other circumstances which cannot be exhaustively listed have to be taken into account in ascertaining the true nature of the amount. In essence the question is one of proper interpretation of the terms of a contract.

59 We would like to refer to a decision of the Court of Appeal in England in Stockloser v. Johnson (1954) 1 All. E.R. 630 and particularly to the observations of Denning, L.J., which, if we may say so with respect, has set out the legal position succinctly and with great clarity. The facts of that case need not be set out and it would be sufficient to refer only to the principle of law laid down by the Court of Appeal. At page 637 Denning L.J., observes thus:

> "It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescind* the contract or treats it as at an end owing to the buyer's default, then the buyer is

> entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see Palmer v. Temple 112 E.R. 1304, Mayson v. Clouet (1924) A.C. 980, Dies v. British and International Mining and finance Corporation Ltd. (1939) I.K.B. 724 and Williams on Vendor and Purchaser fourth ed., Volume 2, page 1006. (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause) then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit."

60 Therefore, it is clear that the forfeiture can be justified if the terms of the contract are clear and explicit. If it is found that the earnest money was paid in accordance with the terms of the Tender for the due performance of the contract by the Promisee, the same can be forfeited in case of non-performance by him or her.

61 Having regard to the terms of contract in the case on hand, more particularly, clause 21(4), the same would implicitly demonstrate that the writ applicant was obliged to deposit 10% amount of the total consideration excluding the EMD for the purchase of the plot within 10 days of the Letter of Allotment; failing which the entire amount paid earlier by the writ applicant would stand forfeited by the AUDA without assuming any liability whatsoever the case may be. As pointed out by the Supreme Court in Satish Batra (supra) once it is shown that the terms of the contract are clear and there is a failure on the part of the party to perform the contract or the party withdraws his offer, the forfeiture of earnest money becomes automatic and Section 74 of the Contract Act cannot be invoked by the appellant to contend that the forfeiture Clause is in the nature of penalty and the Court has a discretion to reduce the C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 same to the actual damages caused.

62 We may now look into the decision of the Supreme Court in the case of Kailash Nath Associates (supra). This decision has been relied upon by both the sides. However, this decision supports the case put forward by the AUDA. The Supreme Court on a conspectus of its earlier decisions on the subject including Fateh Chand (supra) and Maula Bux (supra) laid down the following proposition of law on compensation for breach of contract under Section 74 of the Contract Act. We quote:

> "1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

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

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021

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."

63 Thus, the Supreme Court in so many words has observed that Section 74 undoubtedly would apply to the cases of forfeiture of earnest money under a contract. However, if such forfeiture takes place under the terms and conditions of a public auction before the agreement is reached, Section 74 would have no application. In the case on hand, indisputably, the writ applicant failed to comply with the terms of the Tender and withdrew himself from the offer thereby entailing the consequences of getting the Earnest Money Deposit forfeited in accordance with the terms and conditions of the Tender Notice referred to above. In such circumstances, the principle of unjust enrichment as sought to be canvassed by Mr. Sukhwani would also pale into insignificance.

64 There is a reason for Mr. Sukhwani to place strong reliance on the decision of the Supreme Court in the case of Kailash Nath Associates (supra).

65 In sum and substance what is held by the Constitution Bench of the Supreme Court in the cases of Fateh Chand (supra) and the recent judgment in Kailash Nath Associates (supra) is that whenever there is a breach of contract then earnest money which is forfeited because of the breach, whether by a plaintiff or a defendant in a contract, the forfeiture is of that amount which are in fact liquidated damages specified under a contract and that for claiming damages under a contract, whether liquidated under Section 74 of the Contract Act or unliquidated under Section 73 of the Contract Act, the existence of loss is a sine qua non. In C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 other words, if no loss is caused to a seller who has in his pocket the monies of buyer, then the seller

can only forfeit a nominal amount unless the seller has pleaded and proved that losses have been caused to him on account of the breach of contract by the buyer. Once there is no pleading of loss suffered by a seller under an agreement to sell, then large amounts cannot be forfeited though so entitled to a seller under a clause of an agreement to sell/contract entitling forfeiture of 'earnest money' because what is forfeited is towards loss caused, and that except a nominal amount being allowed to be forfeited as earnest money, any forfeiture of any amount, which is not a nominal amount, can only be towards loss if suffered by the seller. Thus if there is no loss which is suffered by a seller then there cannot be forfeiture of large amounts which is not a nominal amount, simply because a clause in a contract provides so. The following has been held in the judgment in the case of Kailash Nath Associates (supra):

> (i) As per the facts existing in the case of Kailash Nath Associates (supra) the Single Judge of the High Court had held that since no damages were suffered by the DDA therefore the 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 the amount tendered as earnest money could be forfeited because and simply the 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) The 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 C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 awarded (where there is breach of contract) only if loss or damage is suffered i.e where there is no loss or damage suffered as a result of breach of contract no compensation can be awarded as law does not provide for a windfall i.e large amounts though called contractually as earnest money cannot be forfeited unless loss is pleaded and proved to have been suffered. These observations have cross-reference to Para 34 of the judgment of Kailash Nath Associates's case (supra) where with reference to the para of Fateh Chand's case (supra) it is held that the language of Section 74 of the Contract Act that 'whether or not damage or loss is proved to have been caused by breach' is the language that such language only discharges proof of actual loss but that does not justify award of compensation where in consequence of breach no injury/loss has at all resulted.

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

(v) The language of Section 74 of the Contract Act that "whether or not actual loss or damage is proved to have been caused thereby" means only that where it is difficult or impossible to prove loss caused by the breach of contract then the liquidated damages/amount (being the amount of earnest

money) can be awarded vide Para 43(6) of Kailash Nath Associates's case (supra) but where nature of contract is such that loss caused because of breach can be assessed and so proved then in such cases loss suffered must be proved to claim the liquidated damages of earnest money. This finding has cross reference to Para 37 of judgment in Kailash Nath Associates's case (supra) where the C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 observations of Supreme Court in Para 67 of the case of ONGC Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705 are quoted that liquidated damages are awarded where it is difficult to prove exact loss or damage caused as a result of breach of contract.

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

66 We find similar ratio in the case of V. K. Ashokan vs. Assistant Excise Commissioner and Others [(2009) 14 SCC 85] [paras 66 to 71 of this judgment] reads as under:-

> "66. There is another aspect of the matter which cannot be lost sight of. If damages cannot be calculated and the terms of the contract provides therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a reasonable sum only could be recovered which need not in all situations even be the sum specified in the contract. (See Maula Bux vs. Union of India and Shree Hanuman Cotton Mills vs. Tata Air Craft Ltd.)
>
> 67. Section 74 of the Contract Act reads as under: "74. Compensation for breach of contract where penalty stipulated for-When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."
>
> C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021
>
> 68. There are authorities, no doubt coloured by the view which was taken in English cases, that Section 74of the Contract Act would have no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, e.g.,. Natesa Aiyar v. Appavu Padayachi, Singer Manufacturing Company v. Raja Prosad; Manian Patter v. The Madras Railway Company, but this view no longer is good law in view of the judgment of this Court in Fateh Chand vs. Balkishan Das.
>
> 69. This Court in Fateh Chand case observed at pp. 526-27 (of SCR):

"10. Section 74 of the Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty. ... The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. The Court also observed: (AIR p. 1411, para 11)

11. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression the contract contains any other stipulation by way of penalty' comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. and that,

14. ... There is no ground for holding that the expression contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited. (AIR p. 1412, para 14)

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

71. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

(See Maula Bux and Saurabh Prakash v. DLF Universal Ltd.)" (emphasis added)

67 Mr. Sukhwani may be justified in arguing that in Satish Batra (supra), all the judgements of the Supreme Court referred to and relied upon 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 judgement of the larger Bench of the Supreme Court which will prevail over the judgement of a Bench strength of lesser number of Judges. Although in Kailash Nath Associates (supra), the Supreme Court has taken the view that a forfeiture of an earnest money necessarily falls under Section 74 of the Contract Act i.e. before the forfeiture can take place it must be necessary that loss must have been caused, yet the Supreme Court clarified that such principle would not apply if such forfeiture takes place under the terms and conditions of a public auction before the agreement is reached, Section 74 would have no application.

68 At this stage, we may also refer to and rely upon a decision of the Supreme Court in the case of National Highway Authority of India vs. C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 Ganga Enterprises [2003 (7) SCC 410], wherein the Supreme Court has observed as under:

> "8. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted." [Emphasis supplied]

69 The aforesaid dictum as laid by the Supreme Court applies with all force having regard to the facts of the present case and the nature of the dispute. In fact, the part of the observations on which emphasis has been supplied clinches the issue we are called upon to decide.

70 Mr. Sukhwani would also argue that the action of the AUDA in forfeiting the Earnest Money Deposit could not be said to be in accordance with the terms of the contract and therefore, his client is justified in complaining that the AUDA committed breach of contract in forfeiting the EMD. According to Mr. Sukhwani, the terms of contract could be said to be subject to the mandatory provisions of Section 74 of C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 the Contract Act. In other words, according to Mr. Sukhwani, the action of the AUDA must be based on the provisions of Section 74 of the Contract Act. Its nature must therefore be determined in the light of the provisions of Section 74 of the Contract Act. We would have appreciated such argument of Mr. Sukhwani provided the provisions of Section 74 of the Contract Act are regarded as the implied terms of contract. Action contrary to Section 74 may then be said to be action which is a breach of an implied term of contract, but the meaning of an "implied term" is not so wide as to include the provisions of any statute which may apply to the conduct of the contracting parties. Normally "terms will be implied where they are necessary to effectuate the intention of the parties or where they are required by statute". (Sutton and Shammom on Contracts, 7th Edition page 94). Examples of statutory implied terms may be gathered from the Sale of Goods Act. Such terms may either be implied subject to contract to the contrary or may be compulsorily implied notwithstanding the terms of a contract to the contrary. But Section 74 of the Contract Act does not purport to modify expressly the terms of a contract or to imply terms in a contract. It is generally an independent provision of law under which the Court has power to decide what reasonable compensation may be paid to a party for breach of contract whether or not loss is caused to him. Just as Section 73 of the Contract Act is not regarded as an implied term of the contract but is rather regarded as the remedy given by law to a person seeking compensation for breach of contract and indicating the amount of compensation which may be so claimed. Section 74 is a supplementary provision dealing with penal clauses in contract and statutorily resolving the distinction between the liquidated damages and penalty. Neither any principle nor authority was brought to our notice why Section 74 should be regarded as an implied term of the contract.

71 In the aforesaid context, we may refer to a Division Bench decision

of the Calcutta High Court in the case of M/s. India Government Mint and others vs. M/s. Shreebhumi Steel Pvt Ltd [MAT 359 of 2010 with CAN 3276 of 2020 decided on 4 th October 2010], wherein the Court has observed thus:

> "So far as the principles relating to implied terms are concerned, the position has been stated in Chitty on Contracts, 28th Edn., Chapter 13 which reads as follows :
>
> "A term will not, however, thus be implied unless the court is satisfied that both parties would, as reasonable men, have agreed to it had it been suggested to them... the court will only imply a term if it is one which must necessarily have been intended by them, and in particular will be reluctant to make and implication where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them.
>
> A term ought not to be implied unless it is in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. "The touchstone is always necessity and not merely reasonableness"..... A term will not be implied if it would be inconsistent with the express wording of the contract." (emphasis in original)."

72 If we accept the entire case put up on behalf of the writ applicant, then it presupposes that money paid in advance, may it be by way of earnest money or may it be in the nature of part satisfaction of the total consideration, is, as a rule, refundable by the Promisor unless it is proved and established that he is entitled to certain damages as contemplated under Section 73 of the Contract Act or to liquidated damages as contemplated under Section 74 of the Indian Contract Act or unless there is any specific stipulation between the parties as to the forfeiture of such money paid in advance. In other words, it assumes that as a rule any sum named in a contract as money paid in advance is penal and, therefore, hit by Section 74 of the Contract Act. We are of the view that either on principle or on law such an assumption is not justified. In C/SCA/6981/2021 JUDGMENT DATED: 25/08/2021 our opinion, the doctrine of forfeiture in the case of earnest money is based on a principle completely independent of the consideration that are laid down in Section74 of the Contract Act. In fact, an earnest money, belonging as it does to a class of its own, namely, that of deposit, is regulated and controlled by consideration which are peculiar to that class alone. Therefore, where the agreement is unequivocal and it is specifically agreed upon thereunder that what has been paid in advance towards a contract is nothing but an earnest money, as understood in law, then it has to be dealt with in the light of the principles which apply to such deposits and not in the light of those that generally apply to restitution, penalty or liquidated damages.

73 We have also looked into all other decisions relied upon by Mr. Sukhwani including some of the orders of this High Court, however, they are of no avail to the writ applicant.

74 For all the foregoing reasons, this writ application fails and is hereby rejected.

(J. B. PARDIWALA, J) (VAIBHAVI D. NANAVATI,J) CHANDRESH