REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 193 OF 2015
[ARISING OUT OF SLP (CIVIL) NO.32039 OF 2012]

M/s. Kailash Nath Associates …Appellant

Versus

Delhi Development Authority & Anr. ...Respondents

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present appeal arises out of a public auction conducted by the Delhi Development Authority ("DDA") wherein the appellant made the highest bid for Plot No.2-A, Bhikaji Cama Place, District Centre, New Delhi for 3.12 Crores (Rupees Three Crores Twelve Lakhs). As per the terms and conditions of the auction, the appellant, being the highest bidder, deposited a sum of Rs.78,00,000/- (Rupees

Seventy Eight Lakhs), being 25% of the bid amount, with the DDA, this being earnest money under the terms of the conditions of auction. The relevant provisions in the conditions of auction read as follows:

> "(ii) The highest bidder shall, at the fall of the hammer, pay to the Delhi Development Authority through the officer conducting the auction, 25% of the bid amount as earnest money either in cash or by Bank Draft in favour of the Delhi Development Authority, or Cheque guaranteed by a Scheduled Bank as "good for payment for three months" in favour of the Delhi Development Authority. If the earnest money is not paid, the auction held in respect of that plot will be cancelled.
>
> (iii) The highest bid shall be subject to the acceptance of Vice-Chairman, DDA or such other officer(s) as may be authorized by him on his behalf. The highest bid may be rejected without assigning any reason.
>
> (iv) In case of default, breach or non-compliance of any of the terms and conditions of the auction or mis -representation by the bidder and/or intending purchaser, the earnest money shall be forfeited.
>
> (v) The successful bidder shall submit a duly filled-in application in the form attached immediately after the close of the auction of plot in question.
>
> (vi) When the bid is accepted by the DDA, the intending purchaser shall be informed of such acceptance in writing and the intending purchaser shall, within 3 months thereof, pay to the Delhi Development Authority, the balance 75% amount of the bid, in cash or by Bank Draft in favour of the Delhi Development Authority or by Cheque guaranteed by a Scheduled Bank as "good for payment for three months" in favour of the Delhi Development Authority. If the bid is not accepted, the earnest money will be refunded to the intending

purchaser without any interest unless the earnest money is forfeited under para 2 (iv) above."

3. On 18.2.1982, the DDA acknowledged the receipt of Rs.78,00,000/- (Rupees Seventy Eight Lakhs), accepted the appellant's bid and directed the appellant to deposit the remaining 75% by 17.5.1982. However, as there was a general recession in the industry, the appellant and persons similarly placed made representations sometime in May, 1982 for extending the time for payment of the remaining amount. The DDA set up a High Powered Committee to look into these representations. The High Powered Committee on 21.7.1982 recommended granting the extension of time to bidders for depositing the remaining amount of 75%. Based on the High Powered Committee's report, by a letter dated 11.8.1982, the DDA extended time for payment upto 28.10.1982 with varying rates of interest starting from 18% and going upto 36%.

4. Another High Powered Committee was also set up by the DDA in order to find out whether further time should be given to the appellant and persons similarly situate to the appellant.

5. The second High Powered Committee recommended that the time for payment be extended and specifically mentioned the appellant's name as a person who should be given more time to pay the balance amount. Despite the fact that on 14.5.1984 the DDA accepted the recommendations of the second High Powered Committee, nothing happened till 1.12.1987. Several letters had been written by the appellant to DDA from 1984 to 1987 but no answer was forthcoming by the DDA.

6. *Vide* a letter dated 1.12.1987, which is an important letter on the basis of which the fate of this appeal largely depends, the DDA stated as follows:

"WITHOUT PREJUDICE'
DELHI DEVELOPMENT AUTHORITY
VIKAS SADAN
I.N.A.

New Delhi-23……198… .

No.F.32(2)/82/Impl.-I/4

From: DIRECTOR (C.L)

DELHI DEVELOPMENT AUTHORITY

To,

M/s. Kailash Nath & Associates,
1006, Kanchanjanga Building,

18, Bara Khamba Road,
New Delhi-110001.

Sub: Regarding payment of balance premium in respect of Plot No.2-A situated in Bhikaji Cama Place Distt. Centre.

Sir,

With reference to the above subject, I am directed to inform you that your case for relaxing the provisions of Nazul Rules, 1981, to condone the delay for the payment of balance premium in installments was referred to the Govt. of India, Min. of Urban Development. Before the case is further examined by the Govt. of India, Min. of Urban Development, you are requested to give your consent for making payment of balance amount of 75% premium within the period as may be fixed alongwith 18% interest charges p.a. on the belated payment. Further the schedule of payment and conditions if any will be as per the directions issued by the Ministry of Urban Development, Govt. of India. It is, however, made clear that this letter does not carry any commitment.

Your consent should reach to this office within 3 days from the date of issue of this letter.

Dated 1.12.87

Yours faithfully,

Sd/
DIRECTOR (C.L)"

7. The appellant replied to the said letter on the same day itself in the following terms:

"KAILASH NATH & ASSOCIATES

Tel.: 3312648, 3314269
1006, KANCHENJUNGA,
18, BARAKHAMBA ROAD,
NEW DELHI-II0001

Regd. Ack. Due.

December 1, 1987.

The Director (C.L.),
Delhi Development Authority,
Vikas Sadan, I.N.A.,
New Delhi-l 10023.

Subject: Payment of balance premium in respect of plot No.2-A Bhikaji Cama Place Distt. Centre, New Delhi.

Dear Sir,

We are thankful to you for your letter No. F.30(2)/82-Impl.- I/4 dated nil received by us this afternoon, on the above subject.

We hereby give our consent that we shall make the payment of the balance amount of 75% premium within the period as may be fixed as per the schedule of payment and conditions, if any imposed, as per the directions issued by the Ministry of Urban Development, Govt. of India, alongwith 18% interest charges per annum on the belated payment.

We now request you to kindly convey us your formal approval to our making the said payment in installments as requested for.

Thanking you,

Yours faithfully
For KAILASH NATH & ASSOCIATES,
Sd/

Partner

Advance copy sent through Special Messenger."

8. The Central Government informed the DDA *vide* a letter dated 1.3.1990 that the land auctioned to the appellant was not Nazul land and, therefore, the Central Government would have nothing further to do with the matter. Meanwhile, the appellant filed Writ Petition No.2395 of 1990 in the Delhi High Court in which it claimed that persons similar to the appellant, namely, M/s. Ansal Properties and Industries Private Limited and M/s Skipper Tower Private Limited had been allowed to pay the balance 75% premium and were in fact allotted other plots. Pleading Article 14, the appellant stated that they were entitled to the same treatment.

9. By a judgment and order dated 2.9.1993, the Delhi High Court held that as the auction was held as per terms and conditions of the auction, a dispute regarding the same is a matter of contract and cannot be gone into in proceedings under Article 226 of the Constitution. It was further observed that on facts, the Court found no force in the contention raised on behalf of the appellant regarding discrimination. An SLP against this order was also dismissed on 16.12.1993 by the Supreme Court stating that the appellant is at

liberty to take whatever steps are permitted to the appellant under law to challenge forfeiture of earnest money, which had been done by a letter of 6.10.1993. This letter is also important for the correct determination of this appeal and is set out hereinbelow:-

"REGD.A.D.

DELHI DEVELOPMENT AUTHORITY
VIKAS SADAN
I.N.A.

New Delhi-23, 6.10.1993

No.F.32(2)/82/CL/3816

From: DY. DIRECTOR (CL).

To,

M/s. Kailash Nath & Associates,
1006, Kanchanjanga Building,
18, Bara Khamba Road,
New Delhi-l10001.

Subject: Plot No.2-A in Bhikaji Cama Place Distt. Centre.

Sir,

Consequent upon your failure to deposit the balance 75% premium of the aforesaid plot and dismissal of C.W.P. No. 2395 of 1990 by the Hon'ble High Court, Delhi, I am directed to inform you that the bid/ allotment of the said plot in your favour has been cancelled and earnest money amounting to Rs.78,00,000/- deposited by you at the time of auction has been forfeited.

Yours faithfully,

Sd/
(JAGDISH CHANDER)
DEPUTY DIRECTOR (CL)"

10. The appellant then filed a suit for specific performance on 17.2.1994 and in the alternative for recovery of damages and recovery of the earnest amount of Rs.78,00,000/- (Rupees Seventy Eight Lakhs). Shortly after the suit was filed, on 23.2.1994, the DDA re-auctioned the premises which fetched a sum of Rs.11.78 Crores (Rupees Eleven Crores Seventy Eight Lakhs).

11. The learned Single Judge by a judgment and order dated 10.9.2007 dismissed the appellant's suit for specific performance and damages but ordered refund of the earnest money forfeited together with 9% per annum interest. The learned Single Judge held:-

> *"65. Defendant No.1 instead of following the aforesaid course, found merit in the representations received not only from the plaintiff but such similar situated parties. It is in view thereof that the matter went as far as setting up of two committees to repeatedly examine the matter and to come to a conclusion. The case of defendant no.1 was that the material produced by the plaintiff and such similar persons gave rise to a cause to extend the time for making the payment subject to certain terms and conditions. However, in view of the perception of defendant no.1 that the consent of UOI, defendant no.2, would be required, the land being Nazul land, the file was forwarded to defendant no.2. The matter did not rest at this since thereafter UOI did grant such consent but*

sent back the file of the plaintiff only on account of the fact that the land in question was not Nazul land. The net effect of this is that there was no permission required from the UOI and the decision taken by defendant no.1 to extend the time period for making the payment, thus, stood as it is.

66. In my considered view, it is not open for defendant no.1 to state that while it recommended the case of other similarly situated parties in case of Nazul land to the Government and obtained permission for grant of extension of time, in case of non-Nazul land where such permission was not required, a different parameter was required to be followed. It may be mentioned at the cost of repetition that the plaintiff was a party which volunteered to pay interest @18% per annum unlike some of the other parties. There is merit in the contention of learned Counsel for the plaintiff that defendant no.1 after treating the contract as subsistent having extended time for making the payment was at least required to give a notice to the plaintiff to perform the agreement prior to terminating the agreement and could not straightaway terminate the same. This conclusion can draw strength from the observations in Halsbury Laws of England (supra) referred to aforesaid as also in Webb v. Hughes (supra). It is clearly a case where there has been waiver of the time being essence of the contract by conduct of the parties and, thus, defendant no.1 was required to give notice on the day appointed for completion of the contract failing which only termination could take place.

67. There were numerous communications exchanged between the parties. The recommendations of the two high-powered committees constituted by defendant no.1 made its recommendations which were accepted by defendant no.1 vide its resolution dated 14.5.1984 (Ex. DW2/P-4). Having accepted the recommendations, in the case of the plaintiff defendant no.1 was required to do nothing further but mistakenly referred the case to

UOI for its approval assuming the case to be one of Nazul land. Plaintiff sent repeated reminders vide letters dated 9-12-1985 (Ex.P-11), 20-10-1986 (Ex.P-12), 10-12-1986(Ex.P-13), 10-02-1987 (Ex.P-14), 11-04-1987(Ex.P-16), 10-08-1987(Ex.P-17) and 10-10-1987 (Ex.P-18) calling upon defendant no.1 to give an offer of deposit of balance 25% of the premium so as to bring the total payment equivalent to 50% of the total premium and for release of the possession of the land to the plaintiff for purpose of construction. Defendant no.1 vide its letter received on 1.12.1987 by the plaintiff (Ex.P-19) sought the consent of the plaintiff to abide by the recommendations of the high-powered committee and the consent was duly given on the even date (Ex.P-20). Thereafter no offer was made to the plaintiff and without any notice of compliance for payment, the letter of cancellation dated 6.10.1993 (Ex.P-26) was issued. It appears that defendant no.1 itself was not aware of the land being non-Nazul land as the first communication was addressed to the plaintiff only on 1.3.1990.

68. The present case is one where defendant no.1 has not even suffered a loss. The plot was to be purchased by the plaintiff at Rs.3.12 crores and it was finally sold to a third party at Rs.11.78 crores, i.e. almost three and a half times the price. During this period defendant no.1 continued to enjoy the earnest money of the plaintiff of Rs.78.00 lacs.

69. In view of the prolonged period, exchange of communications, the plaintiff making various offers but not complying with the initial terms, defendant no.1 taking its own time in the decision making process, I am of the considered view that the plaintiff is entitled to the refund of the earnest money of Rs.78.00 lacs but no further amount is liable to be paid to the plaintiff."

12. DDA appealed against the Single Judge's judgment to a Division Bench of the Delhi High Court. The Division Bench set aside the judgment of the Single Judge holding that the forfeiture of the earnest money by the DDA was in order.

13. Shri Paras Kuhad, learned Senior Advocate appearing on behalf of the appellant, urged that time may have been of the essence under the original terms and conditions of the auction. However, time had been extended on several occasions and, therefore, ceased to be of the essence. In answer to the letter dated 1.12.1987, the appellant promptly replied and said it would be willing to pay the entire 75% with 18% interest and, therefore, there was no breach of contract on the part of the appellant. Further, since the DDA sold the plot for 11.78 Crores (Rupees Eleven Crores Seventy Eight Lakhs), there was no loss caused to the DDA and, hence forfeiture of earnest money would not be in accordance with the agreement or in accordance with law.

14. Shri Amarendra Sharan, learned Senior Advocate appearing on behalf of the DDA, rebutted these contentions and added that the case was covered by the judgment in **Shree Hanuman Cotton Mills &**

Anr. v. Tata Aircraft Ltd., 1970 (3) SCR 127. He argued further that since the letter of 1.12.1987 had been issued under a mistake of fact, it would be void under Section 20 of the Contract Act and the said letter should, therefore, be ignored. If it is ignored, then the termination of the contract and the forfeiture of earnest money are completely in order as the appellant was in breach. The fact that the DDA ultimately sold the plot for a much larger sum, according to learned counsel, would be irrelevant inasmuch as the contractual term agreed upon between parties would entitle him to forfeit earnest money on breach without any necessity of proving actual loss.

15. Having heard learned counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited under sub-clause (iv) set out hereinabove, only in the case of default, breach, or non-compliance of any of the terms and conditions of the auction, or on misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the appellant, the DDA extended time at

least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any misrepresentation here by the bidder. Therefore, under sub-clause (iv), without more, earnest money could not have been forfeited.

16. The other noticeable feature of this case on facts is that DDA specifically requested the appellant to give their consent to make the balance payable along with 18% interest charges on belated payment. This was on the footing that the Nazul Rules of 1981 would be relaxed by the Central Government. The reason why the letter is marked "without prejudice" and the DDA made it clear that the letter does not carry any commitment, is obviously because the Central Government may not relax the provision of the Nazul Rules, in which case nothing further could be done by the DDA. If, however, the Central Government was willing to condone the delay, DDA would be willing to take 75% of the outstanding amount along with 18% interest.

17. Mr. Sharan argued that since the Central Government ultimately found that this was not a Nazul land, the letter was obviously based on a mistake of fact and would be void under Section 20 of the Contract Act. We are afraid we are not able to accept this plea. Long after the Central Government informed DDA (on 1.3.1990) that the property involved in the present case is not Nazul land, the DDA by its letter of 6.10.1993 cancelled the allotment of the plot because the appellant had failed to deposit the balance 75%. DDA's understanding, therefore, was that what was important was payment of the balance 75% which was insisted upon by the letter dated 1.12.1987 and which was acceded to by the respondent immediately on the same date. Further, Mr. Sharan's argument that since the letter was "without prejudice" and since no commitment had been made, they were not bound by the terms of the letter also fails to impress us. The letter was without prejudice and no commitment could have been given by the DDA because the Central Government may well not relax the Nazul Rules. On the other hand, if the Central Government had, later on, relaxed the Nazul Rules, DDA could not be heard to say that despite this having been done, DDA would yet cancel the allotment of the plot. That this could not have been done is clear because of the

aforesaid construction of the letter dated 1.12.1987 and also because DDA is a public authority bound by Article 14 and cannot behave arbitrarily.

18. It now remains to deal with the impugned judgment of the Division Bench.

19. The Division Bench followed the judgment of **Tilley v. Thomas,** (1867 3 Ch.A 61) and distinguished the judgment in **Webb v. Hughes,** V.C.M. 1870. It further went on to follow **Anandram Mangturam v. Bholaram Tanumal,** ILR 1946 Bom 218 and held:

> *"The decision holds that the principle of law is that where, by agreement, time is made of the essence of the contract, it cannot be waived by a unilateral act of a party and unless there is consensus ad-idem between the parties and a new date is agreed to, merely because a party to a contract agrees to consider time being extended for the opposite party to complete the contract, but ultimately refuses to accord concurrence would not mean that the party has by conduct waived the date originally agreed as being of the essence of the contract."* (At para 32)

20. In our judgment, **Webb's** case would directly apply to the facts here. In that case, it was held:

> *"But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is*

no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated."

21. Based on the facts of this case, the Single Judge was correct in observing that the letter of cancellation dated 6.10.1993 and consequent forfeiture of earnest money was made without putting the appellant on notice that it has to deposit the balance 75% premium of the plot within a certain stated time. In the absence of such notice, there is no breach of contract on the part of the appellant and consequently earnest money cannot be forfeited.

22. **Tilley v. Thomas,** (1867 3 Ch.A 61) would not apply for the reason that the expression "without prejudice" was only used as stated above because the Central Government may not relax the Nazul Rules.

23. In **Anandram Mangturam v. Bholaram Tanumal,** ILR 1946 Bom 218, two separate judgments were delivered, one by Chief Justice Stone and the other by Chagla,J. as he then was. Stone C.J. held:-

"In my judgment, reading the correspondence as a whole, it at no stage passed from the melting pot of negotiations to crystallize as an agreement to extend the time for the performance of the contract. The attitude of the purchaser throughout the correspondence was: "Satisfy us that you are doing your best to obtain the goods from your suppliers and we will then consider fixing a new date for delivery of the goods to us". On the other hand the attitude of the vendors throughout the correspondence was to avoid the purchaser's demand and to simply say: "You know that we cannot effect delivery from our suppliers and until we do so we cannot deliver the goods to you". There was never in my judgment any consensus ad-idem, no agreement, express or implied, to extend the time either to any particular date or to the happening of some future event. Mere forbearance in my opinion to institute proceedings or to give notice of rescission cannot be an extension of the time for the performance of a contract within the meaning of s. 63 of the Contract Act." (at 226 & 227)

Chagla, J. in a separate judgment held:-

"Under s. 55 of the Indian Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but it is clear to my mind that the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under s. 63 of the Indian Contract Act, the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But it is clear again that such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time.

Therefore it is only as a result of the operation of s. 63 of the Indian Contract Act that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee." (at 229)

24. The aforesaid judgment would apply in a situation where a promisee accedes to the request of the promisor to extend time that is fixed for his own benefit. Thus, in **Keshavlal Lallubhai Patel and Ors. v. Lalbhai Trikumlal Mills Ltd** 1959 SCR 213, this Court held:-

"The true legal position in regard to the extension of time for the performance of a contract is quite clear under s. 63 of the Indian Contract Act. Every promisee, as the section provides, may extend time for the performance of the contract. The question as to how extension of time may be agreed upon by the parties has been the subject-matter of some argument at the Bar in the present appeal. There can be no doubt, we think, that both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit."

25. However, such is not the position here. In the present case, the appellant is the promisor and DDA is the promisee. In such a situation, DDA can certainly unilaterally extend the time for payment under Section 63 of the Contract Act as the time for payment is not for

DDA's own benefit but for the benefit of the appellant. The present case would be covered by two judgments of the Supreme Court. In **Citi Bank N.A.** v. **Standard Chartered Bank,** (2004) 1 SCC Page 12, this Court held:

> *"50. Under Section 63, unlike Section 62, a promisee can act unilaterally and may*
>
> *(i) dispense with wholly or in part, or*
>
> *(ii) remit wholly or in part,*
>
> *the performance of the promise made to him, or*
>
> *(iii) may extend the time for such performance, or*
>
> *(iv) may accept instead of it any satisfaction which he thinks fit."*

26. Similarly in **S. Brahmanand v. K.R. Muthugopal,** (2005) 12 SCC 764 the Supreme Court held:

> *"34. Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence*

or, in some cases, even by evidence of conduct including forbearance on the part of the other party. [See in this connection the observations of this Court in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd., 1959 SCR 213 : AIR 1958 SC 512, para 8. See also in this connection Saraswathamma v. H. Sharad Shrikhande, AIR 2005 Kant 292 and K. Venkoji Rao v. M. Abdul Khuddur Kureshi, AIR 1991 Kant 119, following the judgment in Keshavlal Lallubhai Patel (supra).] Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article. Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd. [AIR 1953 Trav Co 161] was a similar instance where the contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time was fixed for its performance" and held that what was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said article because of the supervening circumstances of the case."(at Page 777)

27. Coming to the application of Article 14, the Division Bench in paragraph 37 stated:-

"37. Now, in India, reasonableness in State action is a facet of Article 14 of the Constitution of India and in the field of contract would have a considerable play at the precontract stage. Once parties have entered into a

contractual obligation, they would be bound by the contract and the only reasonableness would be of the kind envisaged by the Supreme Court in the decision reported as AIR 1963 SC 1144 T.P. Daver v. Lodge Victoria No.363 SC Belgaum & Ors. On the subject of a member of a club being expelled, and the relationship being a contract as per the rules and regulations of the club, adherence whereto was agreed to by he who became a member of the club and the management of the club, the Supreme Court observed that in such private affairs, it would be good faith in taking an action which is rooted in the minds of modern men and women i.e. in a modern democratic society and no more. The decision guides that where a private affair i.e. a contract is so perverted by a party that it offends the concept of a fair-play in a modern society, alone then can the action be questioned as not in good faith and suffice would it be to state that anything done not in good faith would be unreasonably done."

28. It will be noticed at once that **T.P. Daver v. Lodge Victoria No. 363, S.C. Belgaum,** 1964 (1) SCR 1, is not an authority on Article 14 at all. It deals with clubs and the fact that rules or bye-laws which bind members of such clubs have to be strictly adhered to. On the other hand in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.,** (2004) 3 SCC 553 at paras 22 and 23, the Supreme Court held:

"22. We do not think the above judgment in VST Industries Ltd. [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd.[(2001) 1 SCC

298 : 2001 SCC (L&S) 227] against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions; failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty, if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was the first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari Shrilekha Vidyarthi v. State *of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24)*

> *"The impact of every State action is also on public interest. … It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."*

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act

fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

29. Based on the facts of this case, it would be arbitrary for the DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs.78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused. It is clear, therefore, that Article 14 would apply in the field of contract in this case and the finding of the Division Bench on this aspect is hereby reversed.

30. We now come to the reasoning which involves Section 74 of the Contract Act. The Division Bench held:

"38. The learned Single Judge has held that the property was ultimately auctioned in the year 1994 at a price which fetched DDA a handsome return of Rupees 11.78 crores and there being no damages suffered by DDA, it could not forfeit the earnest money.

39. The said view runs in the teeth of the decision of the Supreme Court reported as AIR 1970 SC 1986 Shree Hanuman Cotton Mills & Anr. V. Tata Aircraft Ltd. which holds that as against an amount tendered by way of security, amount tendered as earnest money could be forfeited as per terms of the contract.

40. We may additionally observe that original time to pay the balance bid consideration, as per Ex.P-I was May 18, 1982 and as extended by Ex. P-8 was October 28, 1982. That DDA could auction the plot in the year 1994 in the sum of Rupees 11.78 crore was immaterial and not relevant evidence for the reason damages with respect to the price of property have to be computed with reference to the date of the breach of the contract."

31. Section 74 as it originally stood read thus:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

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

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

compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

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

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

> *"The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.*
>
> *….*
>
> *Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation*

according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."(At page 526, 527)

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."(At page 530)

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

> *"Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases :Kunwar Chiranjit Singh v. Har Swarup, A.I.R.1926 P.C.1; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi, I.L.R. All.166; Muhammad Habibullah v. Muhammad Shafi, I.L.R. All. 324; Bishan Chand v. Radha Kishan Das, I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.*
>
> *Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation". It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of*

contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

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

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

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

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

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

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

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

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest" (At page 139)

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

In our opinion the learned Attorney General is well founded in his contention that the appellants raised no

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

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

"64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand case [AIR 1963 SC 140: (1964) 1 SCR 515 at p. 526] wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum

is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.

67*……..In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of*

penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

68. *From the aforesaid discussions, it can be held that:*

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

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

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

> ***"****But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. As mentioned earlier, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law. Nor have they raised any*

contention that the amount of deposit is so unreasonable and therefore forfeiture of the entire amount is not justified. The decision in Maula Bux's [1970]1SCR928 had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being forfeited. Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which were under consideration, were paid as earnest money. It is under those circumstances that this Court proceeded to consider the applicability of Section 74 of the Contract Act. (At page 143)"

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

forgotten that as has been stated above, forfeiture of earnest money on the facts in **Fateh Chand's** case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

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

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found *inter alia* in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the Section.
4. The Section applies whether a person is a plaintiff or a defendant in a suit.
5. The sum spoken of may already be paid or be payable in future.
6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages – namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.

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. The 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 of the Single Judge is restored. Parties will bear their own costs.

…..……J.
(Ranjan Gogoi)

…..……J.
(R.F. Nariman)

New Delhi;
January 09, 2015.