2025 INSC 617

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5822 OF 2025

@SPECIAL LEAVE PETITION (CIVIL) NO. 5630 OF 2023

K.R. SURESH **…APPELLANT**

VERSUS

R. POORNIMA & ORS. **…RESPONDENT(S)**

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Karnataka at Bengaluru dated 05.08.2021 in R.F.A. No. 386/2013 (SP) **("impugned judgment")** by which the High Court dismissed the appeal preferred by the appellant (original plaintiff) and thereby affirmed the judgment and order dated 24.11.2012 passed by the Court of V Additional City Civil and Sessions Judge at Bengaluru City, dismissing O.S. No. 3559/2008 instituted by the appellant herein for the specific performance of contract.

A. FACTUAL MATRIX

3. The position of the parties before this Court, the High Court and before the Trial Court is tabulated as follows: -

BEFORE THIS COURT	BEFORE THE HIGH COURT	BEFORE THE TRIAL COURT	REMARKS
Appellant	Appellant	Plaintiff	Original Purchaser/Agreement of Sale Holder
Respondent No. 1	Respondent No. 1	Defendant No. 1	Original Owner (by way of an unregistered Will)
Respondent No. 4	Respondent No. 4	Defendant No. 4	Husband of respondent no. 1 and GPA Holder
Respondent Nos. 2-3	Respondent Nos. 2-3	Defendant Nos. 2-3	Minor children of respondent no. 1 and respondent no. 4

Respondent No. 5	Respondent No. 5	Defendant No. 5	Subsequent Purchaser (wife of defendant no. 6)
Srinivas S.	-	Defendant No. 6	Subsequent Purchaser (Deceased through his LRs)
Respondent Nos. 6 and 7	Respondent Nos. 6(a) and 6(b)	-	Legal heirs of defendant no. 6

For the sake of convenience, the parties shall be referred to in terms of their status before the Trial Court.

4. The dispute arises from a claim for specific performance of the agreement of sale (hereinafter referred to as **"ATS"**) dated 25.07.2007 in respect of the property bearing Site No.307, situated at Kengeri Satellite Town Layout, Kengeri Hobli, Bangalore South Taluk (hereinafter referred to as **"suit property"**). The defendant no. 1 acquired absolute title over the suit property by way of an unregistered Will dated 12.11.2002 executed by her late mother.

5. The defendant nos. 1-4 executed an ATS dated 25.07.2007 in favor of the plaintiff for the purchase of the Suit Property for total sale consideration of Rs.55,50,000/-. The plaintiff issued two cheques dated 16.07.2007 of the amount of Rs.10,00,000/- each towards part payment of the sale consideration, the receipt of which was duly acknowledged by the defendant no. 1. The said ATS stipulated that the sale transaction shall be completed by payment of the balance sale consideration of Rs. 35,50,000/- within four months from the date of the ATS, pursuant to which the sale

deed was to be executed. The contents of the said ATS are extracted hereinbelow: -

"*ADVANCE SALE AGREEMENT*

This Advance Sale Agreement is executed on this Twenty fifth day of July, Two Thousand Seven (25-07-2007) -BY-

Smt. R. Poornima, daughter of Late Rathnamma also wife of Sri M.L. Harsha, aged about 32 years, and Sri Lakshmisha, husband of Smt. R. Poornima, aged about 39 years, and the children of Smt. Poornima and Sri M.L. Harsha, 1) Kum. H.R. Anusha, aged about 7 years, 2) Chi. H. Amogham aged about 3 years, both are minors represented by their mother and natural guardian Smt. R. Poornima, all are residing at House No.588, Postal Colony, Visveshwaranagara Layout, Mysore City-

IN FAVOUR OF:

Sri K.R. Suresh, aged about 42 years, son of Sri Rudrappa, residing at K. Gollahalli Village, K. Gollahalli Post, Kengeri Hobli, Bangalore South Taluk.

Whereas, the property mentioned in the schedule hereunder i.e Site bearing No.307, situated at Kengeri Ssatellite Town Layout, Kengeri Hobli, Bangalore South Taluk, the said property originally belonged to Smt. Rathnamma, the mother of Smt. R. Poornima, which is her self-acquired property. The said site was allotted to her on dated ___ by the Bangalore City Improvement Trust Board, represented by its Chairman, vide allotment letter No. __ KST/ __ which was allotted, Thereafter Lease-Cum-Sale Deed registered in the office of the Sub-Registrar, Bangalore South Taluk, registered in Book-1 volume 2414 pages 16 to 19 as Document No.5734/85-86, thereafter the possession certificate No.33.73-74 dated 16-11-1973 was issued, during her life time she was in possession and enjoyment of the said property as its absolute owner and the absolute sale deed executed in her favour on 05-03-1986, in the office of the Sub-Registrar, Bangalore South Taluk, vide Book-1 volume 2414 pages 95-96 as Document No.5734/85-86, during her life time she was enjoying the same peacefully as its absolute owner and on 12-12-2022 she has executed a WILL/TESTAMENT to her only daughter Smt. R. Poormima and on 26-12-2002 she passed away. After her death, her only daughter Smt. R. Poormima and we became the sole and absolute owners,

successors, title holders in possession and enjoying the said property. Khatha also got changed to the name of Smt. R. Poormima in the Town Municipal Office, Kengeri and enjoying the same happily.

In such a way we are in possession and enjoyment of the schedule property and we are in need of funds to meet our urgent necessities, hence we have sold the schedule property to you for total sum of Rs.55,50,000/ (Rupees Fifty-five lakhs Fifty Thousand only), out of the sale consideration Rs.20,00,000/- (Rupees Twenty Thousand only) I have received advance as hereunder:-

1. Rs. 10,00,000/- (Rupees Ten Lakhs only) through cheque bearing No.110581 dated 16-07-2007 drawn on Canara Bank, Yediyur Branch, Bangalore-560082.

2. Rs. 10,00,000/- (Rupees Ten Lakhs only) through cheque bearing No.110582 dated 16-07-2007 drawn on Canara Bank, Yediyur Branch, Bangalore-560082.

The remaining amount of Rs.35,50,000/- (Rupees Thirty-Five Lakhs Fifty Thousand only) we have agreed to receive the same at the time of registration. Within 4(four) months by paying the balance amount to us you can get registered sale deed either to your name or to the name of person as suggested by you.

The aforesaid property except you we have not encumbered the same in any manner to whomsoever, also in respect of said property except ourselves there are no any other title holders or successors, if any such dispute arisen in future the same will be solved by us out of our own expenses and for which we have agreed.

In the event failure on your part to pay the remaining amount within stipulated period, the advance amount paid by you will be forfeited. In the event failure on our part to execute the sale deed, even though you are ready to pay the balance sale consideration and get registration of sale deed, in such an event we agreed to pay the double amount of the advance which you have paid as compensation. Hence, we have executed this Advance Sale Agreement by affixing our signature.

SCHEDULE:-

All that part and parcel of the site bearing No.307, 5th Main Road, Kengeri Satellite Town Layout, Kengeri Hobli, Bangalore South Taluk, now comes under Kengeri Town Municipal limits, old Khatha No.129, present khatha No.130, present property No.307, which comes within the limits of Bruhat Bangalore Mahanagara Paluk, bounded on the;

East by: Road
West by: Site No.317 & 318
North by: Site No.308
South by: Site No.306
As bounded above measuring East-West 60-0 (sixty) feet, North South 40-0 (Forty) feet, together with house standing thereon is covered under this Advance Sale Agreement.

WITNESSES:-
1.
2.
3. *VENDOR*
PURCHASER"

6. It is the case of the plaintiff that upon approaching the bank on 20.09.2007 for a loan to purchase the suit property, he was instructed by the bank advocate to secure the original title documents and a probate certificate from the defendant no. 1, as the defendant no. 1 had acquired title over the suit property by virtue of an unregistered Will. Accordingly, the plaintiff requested the defendant nos. 1 and 4 respectively to obtain the probate certificate from the competent court to establish absolute and marketable title over the suit property. However, despite allegedly promising to furnish the required documents, the defendant no. 1 failed to do so. Further, the plaintiff purports to have repeatedly approached the defendant nos. 1 and 4 respectively between 20.09.2007 and 18.02.2008, orally expressing his readiness and willingness to complete the sale transaction, yet the defendants did not come forward to perform their part of the contract.

7. It is the case of the plaintiff that having no other alternative left, he ultimately issued a legal notice dated 18.02.2008 through his advocate, expressing his readiness and willingness and calling upon defendant nos. 1-4 to execute the sale deed by receiving the balance sale consideration. Thereafter, the plaintiff claims to have discovered that the defendant no. 1 was attempting to alienate the suit property in favour of the defendant nos. 5 and 6 respectively while the ATS dated 25.07.2007 was subsisting.

8. The defendant no. 1 issued a reply dated 15.03.2008 denying the allegations levelled in the legal notice dated 18.02.2008, stating that the advance amount of Rs.20,00,000/- paid by the plaintiff stood forfeited and consequently, the ATS stood cancelled on account of the default by the plaintiff in making the payment for the balance sale consideration within the specified four-months.

9. Aggrieved by the foregoing, the plaintiff instituted original suit being O.S. No. 3559 of 2008 before the Trial Court, praying for the following: (i) an order directing defendant no. 1 to execute the sale deed in favour of the plaintiff; (ii) deliver the possession of the suit property in favour of the plaintiff and; (iii) a declaration to the effect that the subsequent sale deed dated 15.02.2008 in favour of the defendant nos. 5 and 6 respectively is not binding on the plaintiff.

10. It is the case of the defendant nos. 1-4 that they were in urgent need of the sale consideration money to avail of the One-Time Settlement (for short, "**OTS**") benefit from the Indian Overseas Bank K.R. Mohalla, Mysore Branch which was time-bound for 3 months, thereby making time the essence of the contract. The defendant nos. 1-4 denied having ever agreed to produce the probate or the original title deeds as contended by the

plaintiff. Furthermore, they have contended that owing to the plaintiff's non-performance of the contract, they suffered substantial losses.

11. Pursuant to this, the defendant nos. 1-4 terminated the ATS and forfeited the advance paid by the plaintiff, going by the express covenant of the ATS. According to the defendants, at no point of time during the validity of the ATS did the plaintiff convey or express his readiness and willingness to complete the transaction. The defendants have also asserted that the plaintiff instituted the suit long after termination of the ATS.

12. The defendant nos. 5 and 6 respectively in their written statement took the stance that they are *bona fide* purchasers of the suit property for a valuable consideration of Rs.38,40,000/- through registered sale deed dated 15.02.2008. They averred that they had no knowledge of the prior ATS between the plaintiff and the defendant nos. 1-4. Further, they argued that the suit filed by the plaintiff was not maintainable against them as the sale deed in their favor was not challenged by the plaintiff.

i. JUDGMENT OF THE TRIAL COURT

13. Upon appreciation of the oral as well as documentary evidence on record, the Trial Court *vide* its judgment and order dated 24.11.2012 dismissed the O.S. No. 3559/2008 filed by the plaintiff on the ground that the plaintiff had not approached the Court with clean hands. The Trial Court framed the following issues for its consideration:

> *"1. Whether the plaintiff proves the due execution of agreement of sale dated 25.7.2007 for sale of suit property for total consideration amount of Rs.55,50,000/- and paid the earnest money of Rs.20,00,000/-?*
> *2. Whether the plaintiff is always ready and willing to perform his part of the contract?*

3. Whether the first defendant proves the termination of agreement of sale dated 25.7.2007?
4. Whether defendant No. 5 and 6 prove that they are bonafide purchasers of the suit property for valuable consideration?
5. Whether plaintiff is entitled for relief claimed in the suit?
6. What order or decree?"

14. The findings recorded by the Trial Court in its judgment and order can be better understood in five parts:

(i) **First**, on the issue of time being the essence of the contract, the Trial Court recorded that the defendant nos. 1-4 were acting under a necessity wherein they required the sale consideration money urgently to discharge the loan availed for the purpose of their business expansion which was in the nature of an OTS facility, a fact which the plaintiff was cognizant of as per his testimony. The Trial Court held that the defendants proved that time was the essence of the contract and hence, it was the bounden duty of the plaintiff to complete the transaction within the specified period.

(ii) **Secondly**, the Trial Court, while examining the issue of the unregistered Will and probate, noted that the defendant no. 1, as the sole legal heir of her mother, became the absolute owner of the suit property upon her mother's demise. The Court also underscored the settled law that a Will need not be registered and lack of such registration does not impute its authenticity, thus making the procurement of probate unnecessary. Additionally, there was nothing on record to indicate that the advocate for the bank insisted for a probate certificate. The plaintiff claimed to have forgotten the name of the said advocate and had no opinion in writing to rely upon. Further, neither the legal advisor nor DW2 (defendant no. 4) was examined on the issue of probate, leading to an adverse inference

against the plaintiff. The Court held that in the absence of any recitals in the ATS requiring the defendants to furnish original title deeds to the bank within four months, the plea taken by the plaintiff was false, frivolous, and concocted.

(iii) **Thirdly**, on the issue of readiness and willingness to perform, the Trial Court recorded that the plaintiff did not produce any bank passbook, account extracts, ITR or other documents, to establish that he had sufficient finances to pay the balance sale consideration within the stipulated four-month period. The plaintiff, in his oral evidence, admitted that he had no funds in his bank account and lacked documentary evidence to substantiate possession of the required amount. Further, in his oral evidence, the plaintiff categorically conceded that his legal notice dated 18.02.2008 was issued only after the four-month period had lapsed. In view of these facts, the Court concluded that the plaintiff failed to prove his readiness and willingness to perform the ATS.

(iv) **Fourthly**, the Trial Court held that the defendant nos. 1-4 were not required to notify the plaintiff about the lapse of the four-month period or the subsequent sale of the suit property to the defendant nos. 5 and 6 respectively, as no such obligation was stipulated in the ATS. It further ruled that the defendant no. 1 had the absolute legal right to alienate the suit property. The Court, relying on the testimony of DW1 (defendant no. 6), found the defendant nos. 5 and 6 respectively to be *bona fide* purchasers of the suit property, who were unaware of the prior ATS and its cancellation. Consequently, the allegation of collusion between the defendant nos. 1 and 4 & the

defendant nos. 5 and 6, as regards the subsequent sale of the suit property, was found baseless.

(v) **Lastly**, on the issue of forfeiture of advance money, the Trial Court held that the advance money, being primarily a security for the due performance of the ATS, was rightfully forfeited by the defendant nos. 1-4 in view of the plaintiff's failure to perform and the resultant huge loss sustained by the defendant nos. 1-4. The Court also took note of the fact that the ATS contained explicit recitals regarding forfeiture. In light of the aforesaid, it was held that the plaintiff was not entitled to a refund of the advance money.

B. IMPUGNED JUDGMENT

15. Aggrieved by the judgment and order of the Trial Court, the appellant/plaintiff, preferred First Appeal before the High Court in R.F.A. No. 386/2013 (SP).

16. A Division Bench of the High Court dismissed the appeal and thereby affirmed the judgment and decree passed by the Trial Court on the following four grounds:

(i) **First**, the High Court held that, in the absence of any obligation under the ATS for the defendant no. 1 to furnish probate certificate before executing the sale deed, time was the essence of the contract. Thus, the plaintiff, having failed to pay the balance sale consideration within the stipulated four-month period, committed breach of the conditions specified in the ATS. Further, the Court took note of the fact that it was only after a lapse of three months from the expiry of the stipulated four-month period that the plaintiff

issued legal notice dated 18.02.2008 to the defendant no.1 calling upon her to execute the ATS. The relevant observations read as under:

> *"14. […] There is no recital in the agreement of sale that the defendant No.1 was required to furnish the probate certificate from the competent Court before executing the sale deed in favour of the plaintiff upon receipt of the balance sale consideration. […] In the absence of requirement for furnishing probate certificate, the contention of the plaintiff that the defendant No.1 failed to perform her part of the contract is not acceptable having regard to the fact that it was well within his knowledge that the defendant No.1 acquired the suit property by virtue of the will executed in her favour by her mother, and the same was acted upon and her name was entered in the concerned revenue records.*
>
> *15. The sale transaction was required to be completed within four months from the date of execution of sale agreement. The plaintiff failed to perform his part of the contract by coming forward to pay the balance sale consideration within four months as specified in the sale agreement. It is only after expiry of three months from the said date, the plaintiff issued the legal notice to the defendant No.1 calling upon her to execute the sale agreement."*

(ii) **Secondly**, the High Court observed that the plaintiff, in his cross-examination, admitted that he did not possess any documents to establish his ability to pay the balance sale consideration. Further, the application moved by the plaintiff for production of additional documents, to show his 'readiness', was rejected by the Court, on the ground that any prior lacuna could not be allowed to be filled up at the appellate stage. Pursuant to the aforesaid, the High Court held that the plaintiff, having failed to prove his readiness and willingness to perform his part of the contract under Section 16(c) of the Specific

Relief Act, 1963 (for short, "**the 1963 Act**"), was not entitled to the relief of specific performance. The relevant observations read as under:

> *"17. PW1 in his cross-examination has clearly admitted that he has no documents to show that he possessed the requisite amount to pay the balance sale consideration. The documents sought to be produced by the plaintiff by way of additional evidence also discloses that the plaintiff did not possess the requisite amount from the date of execution of sale agreement till filing of the suit or had the capacity to raise the requisite amount to pay the balance sale consideration. Further, the said additional documents cannot be permitted to be produced to fill up the lacuna before the Appellate Court and the same cannot be considered and accordingly, the application for production of additional documents is rejected.*
>
> *18. [...] In view of the aforesaid proposition of law enunciated by the Hon'ble Supreme Court and Division Bench of this Court, it is held that plaintiff having failed to prove that he had the requisite funds to pay the balance consideration is not entitled for relief for granting the decree for specific performance under Section 16(c) of the Specific Relief Act, 1963."*

(iii) **Thirdly**, the High Court held that the defendant no. 1 failed to prove the termination of the ATS in favour of the plaintiff, as no documentary evidence to substantiate the same was placed on record. However, the defendant nos. 5 and 6 respectively were deemed *bona fide* purchasers for value, in view of the fact that the sale deed dated 15.02.2008 was executed in their favour only after the expiry of the four-month period in the ATS. Additionally, it is an admitted position of the plaintiff that he had obtained the certified copy of the sale deed executed in favor of the defendants nos. 5 and 6 respectively at the time of filing of the suit. On account of the

plaintiff's omission to challenge the said sale deed, the Court held that the suit was not maintainable against the defendant nos. 5 and 6 respectively. The relevant observations read as under:

> *"19. The defendant No.1 in her reply notice dated 15.3.2008 -Ex.P.13 has stated that the sale agreement was terminated on the ground that the plaintiff has failed to perform his part of the contract by paying the balance sale consideration within the specified time vide letter. However, the defendant No.1 has not placed any documentary evidence to substantiate the said claim. Hence, it is held that the defendant No.1 has failed to prove that the sale agreement was terminated.*
>
> *20. […] The sale deed executed in favour of defendants No.5 and 6 after expiry of four months specified for completion of sale transaction cannot be held to be executed during subsistence of the sale agreement. Hence, the defendants No.5 and 6 are held to be bonafide purchasers for value.*
>
> *21. The plaintiff in the cross-examination has admitted that he obtained the certified copy of the sale deed executed in favour of defendants No.5 and 6 at the time of filing of the suit. However, the plaintiff for the reasons best known to him has not challenged the sale deed. In the absence of challenge to the same, the suit filed by the plaintiff against defendants No.5 and 6 is not maintainable."*

(i) **Lastly**, the High Court recorded that the plaintiff had not sought for an alternative prayer for refund of the advance sale consideration in the suit as mandated by Section 22 of the 1963 Act. In view of the requirements under Sub-section 2 of the said Section, it was held that, in the absence of a specific claim for refund of advance money, the plaintiff was not entitled to such refund. The relevant observations read as under:

"22. The plaintiff has not sought for an alternative prayer for refund of the advance sale consideration in the suit as required under Section 22 of the Specific Relief Act, 1963. In the case of Sukhwinder Singh (supra), the Hon'ble Supreme Court has held that the plaintiff therein is entitled for refund of advance sale consideration from the defendant No.2 - the purchaser of suit property from the defendant No.1 who had remained absent since the defendant No.2 benefited from the property. However, the defendants No.5 and 6 cannot be directed to repay the advance sale consideration and compensate the plaintiff since the plaintiff had not sought for alternative prayer for refund of earnest money in the suit as was done in the case before the Hon'ble Supreme Court. In the absence of alternative prayer for refund of earnest money, the prayer for refund of earnest money cannot be granted in view of Section 22 of the Specific Relief Act. Sub-Section 2 of Section 22 of the said Act specifies that no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed. In the absence of such a claim, the plaintiff is held not entitled for refund of earnest money."

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

17. Mr. Anand Sanjay M. Nuli, the learned Senior Counsel appearing for the appellant/plaintiff, submitted that the defendant no. 1 failed to obtain the promised probate certificate with respect to the suit property despite multiple requests from the plaintiff. It was further submitted that the defendant no. 4 has specifically admitted that between 18.02.2008 and 20.02.2008, the plaintiff voluntarily offered to pay an additional Rs.10,00,000/- beyond the agreed sale consideration of Rs.55,50,000/-. The learned Senior Counsel contended that the aforesaid admission proved the readiness and willingness of the plaintiff to fulfill his part of the contract.

18. Mr. Nuli submitted that the defendant nos. 1-4, exhibiting *mala fide* intent, sold the suit property to the defendant nos. 5 and 6 respectively for Rs.38,40,000/- within just two months after the expiry of the stipulated four-month period. It was argued that the purported cancellation of the ATS was allegedly effected *via* a letter from the defendant nos. 1-4, though the said letter was never produced before the Trial Court. Further, he asserted that no prior notice had been served on the plaintiff before forfeiting the advance sale consideration or executing the sale deed in favour of the defendant nos. 5 and 6 respectively.

19. The learned Senior Counsel for the appellant/plaintiff submitted that the plaintiff, as an alternative to the relief of specific performance, is entitled to a refund of the advance money paid by him. Mr. Nuli relied upon the judgments of this Court in ***Desh Raj v. Rohtash Singh***, reported in (**2023) 3 SCC 714** and ***Kamal Kumar v. Premlata Joshi***, reported in **(2019) 3 SCC 704,** to argue that the relief of refund of advance money can be granted under Prayer (C) of the plaint which beseeches the Court to pass any order as it deems fit, despite there being no specific prayer to that effect.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENT NOS. 1-4

20. Ms. Supreeta Sharanagouda, the learned Counsel for respondent/defendant Nos. 1-4, submitted that the plaintiff, in his cross-examination, admitted that he had no documents to show that he possessed the requisite amount to pay the balance sale consideration. Further, it was argued that the additional documents sought to be produced by the plaintiff

also disclosed his financial incapacity from the date of execution of the ATS until the filing of the suit. The learned Counsel, relying upon ***Pydi Ramana v. Davarasety Manmadha Rao***, reported in **(2024) 7 SCC 515**, asserted that the plaintiff failed to show his "readiness" and "willingness" to perform the contract.

21. Ms. Sharanagouda argued, that having regard to the fact that the balance sale consideration of Rs.35,50,000/- was to be paid within four months from the date of the execution of the ATS, time was evidently the essence of the contract. This was further established by the very purpose of the sale, which was the urgent business requirement of the defendant nos. 1 and 4, that got frustrated owing to the failure of the plaintiff to pay the balance consideration on time.

22. The learned Counsel further contended that pursuant to the recitals in the ATS, there was consensus between the parties with respect to the forfeiture of advance money in the event of the purchaser's default in fulfilling the terms of the agreement.

E. SUBMISSIONS ON BEHALF OF THE RESPONDENT NOS. 5-7

23. Mr. Dhawesh Pahuja, the learned Counsel appearing for the respondent nos. 5-7 herein, submitted that the original defendant nos. 5 and 6 fall under the exception carved out by Section 19(b) of the1963 Act, having purchased the suit property in good faith and without notice of the prior ATS in favour of the plaintiff. It was argued that the factum of the prior ATS was suppressed and could not be discovered even on thorough due diligence, considering that the ATS was unregistered. An encumbrance

certificate was placed on record to substantiate the same, which did not reveal any prior agreement in relation to the Suit Property.

24. The learned Counsel argued that the defendant nos. 5 and 6 respectively issued a legal notice dated 05.05.2008 against defendant nos. 1-4 soon after receiving objections regarding transfer of *Khata* from Bruhat Bengaluru Mahanagara Palike (for short, "**BBMP**"). It was asserted that only in the reply dated 23.05.2008 to the said legal notice that the defendant nos. 5 and 6 respectively were informed about the prior ATS dated 25.07.2007 and the eventual lapse of the said ATS on 25.11.2007 due to the default on part of the plaintiff.

25. In the last, it was argued that it would be too much to ask the *bona fide* purchasers to refund Rs.20,00,000/- to the appellant/plaintiff. Such a liability ought to be fastened upon the party guilty of suppression, i.e. the respondent/defendant nos. 1-4.

F. ANALYSIS

26. In view of the order dated 20.03.2023 passed by this Court, we are limiting our consideration in this matter solely to the issue of refund of earnest money.

27. 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 appellant (original plaintiff) is entitled to the refund of the amount of Rs.20,00,000/- purportedly paid as "advance money"?

28. We intend to answer the aforesaid question in two parts, carefully delineating the following:

i. Validity of the Forfeiture of Advance Money; and

ii. Law on the Alternative Relief of Refund of Earnest Money under Section 22 of the 1963 Act.

29. At the cost of repetition, we deem it necessary to state that there existed an explicit forfeiture clause in the ATS, which stipulated that the advance money paid would stand forfeited in the event of default by the buyer in fulfilling the terms of the contract. Similarly, in case of default on part of the seller, the advance money was to be doubled and paid back to the buyer. Pursuant to the aforesaid forfeiture clause, the respondent nos. 1-4 herein forfeited the advance money on account of the default by the appellant in paying the balance sale consideration of Rs.35,50,000/- within the stipulated four-month period.

i. Validity of the Forfeiture of Advance Money

a. Difference between Earnest Money and Advance Money

30. At the outset, it is pertinent to distinguish between "advance money" and "earnest money". The said terms are often used interchangeably. The distinction becomes all the more essential, given that the ATS explicitly refers to the forfeited sum as "advance money".

31. Here, we consider it apposite to refer to the meanings of the said terms. The word "advance" means money in whole or in part, forming the consideration of an agreement paid before the same is completely payable. On the other hand, the word "earnest" stands for a sum of money given for

the purpose of binding a contract, which is forfeited if the contract does not go off and adjusted in price if the contract goes through. [**See:** P Ramanatha Aiyar in "*Advanced Law Lexicon*", 7th Edn.]

32. The principles governing the scope of "earnest money" were succinctly explained in the case of ***Shree Hanuman Cotton Mills v. Tata Air Craft Ltd.,*** reported in **(1969) 3 SCC 522**, reproduced as under:

> *"**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 that 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.'"*
>
> (Emphasis supplied)

33. In the case of ***Videocon Properties Ltd. v. Bhalchandra Laboratories*** reported in **(2004) 3 SCC 711,** while assessing the difference between "advance" and "earnest"**,** this Court took the view that the words used in the agreement alone cannot be determinative of the true nature of the amount advanced. Instead, the intention of the parties and the surrounding circumstances serve as more apt indicators. Further, the Court observed that earnest money fulfils a dual purpose: first, it operates as part-payment of the purchase price and; secondly, as security for the performance of the contractual obligations. Thus, its true character and purpose can only be

canvassed on a close reading of the agreement, and the relevant contextual factors. The relevant observations are reproduced hereinbelow:

> *"**14.** […] Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part-payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."*
>
> (Emphasis supplied)

34. In ***Satish Batra v. Sudhir Rawal***, reported in **(2013) 1 SCC 345,** this Court emphatically held that it is only the "earnest money", paid as a pledge for the due performance of the contract, that can be forfeited by the seller on account of the buyer's default. In the same vein, earnest money can also be doubled and paid back to the buyer if the contract falls through due to the seller's default. An amount which is in nature of an "advance" or serves as part-payment of the purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. The Court further held that despite the existence of an outright forfeiture clause, it shall not apply if the amount stipulated in the contract is found to be only in the nature of part-payment of the purchase price. Consequently, the forfeiture of "advance money" as part of earnest money can only be justified if the terms of the contract are clear and explicit to that effect. The relevant observations are reproduced hereinbelow:

> *"**6.** […] In Chiranjit Singh v. Har Swarup [(1926) 23 LW 172 : AIR 1926 PC 1] it has been held that (LW p. 174) the earnest money is part of the purchase price when the transaction goes*

forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. […]

xx xx xx

10. *In DDA v. Grihsthapana Coop. Group Housing Society Ltd. [1995 Supp (1) SCC 751], this Court following the judgment of the Privy Council in Har Swarup [(1926) 23 LW 172 : AIR 1926 PC 1] and Shree Hanuman Cotton Mills [(1969) 3 SCC 522] , held that the forfeiture of the earnest money was legal. In V. Lakshmanan v. B.R. Mangalagiri [1995 Supp (2) SCC 33] this Court held as follows : (SCC p. 36, para 5)*

> *"5. The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount."*

xx xx xx

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."*

(Emphasis supplied)

35. A forfeiture clause identical to the one in the present ATS was found in the case of ***Satish Batra*** *(supra).* It provided for the forfeiture of earnest money

in case of the purchaser's default, as well as the payment of double the amount of earnest money in case of the vendor's default. This Court allowed the forfeiture of the earnest money, which was held to be security for the due performance of the contract, by the seller when the transaction fell through on account of the purchaser's fault. The relevant forfeiture clause and observations are reproduced hereinbelow:

> ***"5.*** *[...] The question whether the seller can retain the entire amount of earnest money depends upon the terms of the agreement. The relevant clause of the agreement for sale dated 29-11-2005 is extracted hereunder for easy reference:*
>
> > *"(e) If the prospective purchaser fails to fulfil the above condition, the transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulated above, the purchaser will get DOUBLE the amount of the earnest money. In both conditions, the DEALER will get 4% commission from the faulting party."*
>
> *The clause, therefore, stipulates that if the purchaser fails to fulfil the conditions mentioned in the agreement, the transaction shall stand cancelled and earnest money will be forfeited. On the other hand, if the seller fails to complete the transaction, the purchaser would get double the amount of earnest money. Undisputedly, the purchaser failed to perform his part of the contract, then the question is whether the seller can forfeit the entire earnest money.*
>
> *xx xx xx*
>
> ***17.*** *We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs.7,00,000 as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. [...]*"
>
> (Emphasis supplied)

36. A three-Judge Bench of this Court, of which one of us (J.B. Pardiwala, J.) was a part, reiterated the distinction between "earnest" and "advance" in

Central Bank of India v. Shanmugavelu, reported in **(2024) 6 SCC 641,** thus stating that "earnest" differs from "advance money", though the former can be treated as part-payment of the sale consideration if the contractual terms are duly honoured. In other words, earnest money is adjusted against the total sale consideration if the contract goes through. The relevant observations are reproduced hereinbelow:

> *"**84.** 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 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. […]"*
>
> (Emphasis supplied)

37. From the above exposition of law, it becomes amply clear that the amount of Rs.20,00,000/- termed as "advance money" in the ATS, was essentially "earnest money". In other words, it was in the nature of a guarantee for the due performance of the contract. In a fashion akin to earnest money, the said amount was paid at the very execution of the ATS. It was meant to be adjusted against the total sale consideration of Rs.55,50,000/- if the transaction was carried out, which is evident from the ATS clause that states the balance sale consideration to be as Rs.35,50,000/-. Further, it was liable to be forfeited in the event that the transaction fell through by reason of the default on part of the purchaser. Consequently, when the appellant-purchaser failed to comply with the contractual stipulation of paying the balance sale consideration within a period of four months from the date of

the agreement, the respondent nos. 1-4 (vendors) were justified in forfeiting the advance money.

38. We consider it apposite at this juncture to take note of the conditions that make time the essence of a contract. Such conditions were precisely outlined by this Court in ***Chand Rani v. Kamal Rani***, reported in **(1993) 1 SCC 519,** which are reproduced hereunder:

> *"**25.** From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:*
>
> *1. From the express terms of the contract;*
> *2. from the nature of the property; and*
> *3. from the surrounding circumstances, for example: the object of making the contract."*
>
> (Emphasis supplied)

39. This Court recently reaffirmed the principles for deeming whether time is of the essence in a contract in ***Welspun Specialty Solutions Ltd. v. ONGC***, reported in **(2022) 2 SCC 382**. It held that the determination must be made by reading and analysing the contract in its entirety, taking into account the surrounding circumstances. An explicit clause stating that time is of the essence is not, by itself, sufficient. The Court further observed that any provision allowing extensions under a contract effectively negates such a clause, thereby indicating that time is not of the essence. The relevant observations are reproduced hereinbelow:

> ***"34.** In order to consider the relevancy of time conditioned obligations, we may observe some basic principles:*
>
> *(a) Subject to the nature of contract, general rule is that promisor is bound to complete the obligation by the date for completion stated in the contract. [Refer to Percy*

Bilton Ltd. v. Greater London Council [Percy Bilton Ltd. v. Greater London Council, (1982) 1 WLR 794 (HL)]]

(b) That is subject to the exception that the promisee is not entitled to liquidated damages, if by his act or omissions he has prevented the promisor from completing the work by the completion date. [Refer Holme v. Guppy [Holme v. Guppy, (1838) 3 M & W 387 : 150 ER 1195]]

(c) These general principles may be amended by the express terms of the contract as stipulated in this case.

35. *It is now settled that "whether time is of the essence in a contract", has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same."*

(Emphasis supplied)

40. Having regard to the aforesaid authorities, the intention of the parties and the surrounding circumstances in the present case, it can be sufficiently inferred that the inclusion of the forfeiture clause in the ATS was intended to bind the contracting parties and ensure the due performance of the contract. This is particularly significant given the stipulated four-month period for completing the sale transaction and the primary object of executing the ATS, being the urgency of the respondent nos. 1–4 regarding the OTS, which was known to the appellant, as recorded by the Trial Court. The findings of the Trial Court, along with the impugned judgment affirming that time was of the essence, further substantiate the said intent.

41. Furthermore, the appellant neither sought any extension for performing his part of the contract nor was any extension of time granted by the respondent nos. 1-4. On the contrary, within two months of the stipulated period's expiry, the respondent nos. 1–4 proceeded with a distress sale of the suit property to the respondent nos. 5–7 (subsequent purchasers), further underscoring the urgency underlying the contract.

b. <u>Permissible Extent of Forfeiture</u>

42. The issue at hand may be looked at from another angle. Having reached the aforesaid conclusion that the forfeiture of advance money by the respondent nos. 1-4 herein was lawful, it appears fitting to determine whether they were entitled to the entire amount of Rs.20,00,000/-.

43. At this juncture, we deem it appropriate to take note of Section 74 of the Indian Contract Act, 1872 (for short, "**the 1872 Act**"). Section 74 of the 1872 Act deals with the compensation for loss or damage caused by a breach of the contract when a particular sum of liquidated damages or penalty is already set forth under the terms of the contract. It further provides that such compensation must be reasonable and it cannot, in any circumstance, exceed the amount stipulated in the contract. The same is extracted below:

> *"**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.*
> *[...]"*

44. A conjoint reading of Section 74 of the 1872 Act and the principles underlying forfeiture clauses was undertaken in the case of ***Fateh Chand v. Balkishan Dass***, reported in **1963 SCC OnLine SC 49**. This Court held that Section 74 of the 1872 Act will apply to every covenant involving a penalty, whether it is for a future payment on breach of the contract or the forfeiture of a sum already paid. Ergo, a forfeiture clause in a contract would ordinarily fall within the ambit of the words *"any other stipulation by way of penalty"*. Further, it was held that supplying evidence of a loss incurred by the vendor on account of the breach of contract by the buyer would be mandatory to justify forfeiture, and only a reasonable amount, commensurate with such loss, can be forfeited. The relevant observations are extracted hereinbelow:

> "***14.*** […] *The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression 'contract contains any other stipulation by way of penalty' is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited*.
>
> *xx xx xx*
>
> ***16.*** *There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the*

property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs. 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. […]"

(Emphasis supplied)

45. It is imperative to mention herein that in ***Fateh Chand*** (*supra),* this Court, while setting "earnest money" apart from a "penalty", held that insofar as forfeiture of earnest money is concerned, Section 74 of the 1872 Act will not apply. The relevant observations are reproduced hereinbelow:

"7. The Attorney General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs 1000 which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs 24,000 out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney General that the amount of Rs 24,000 was not of the nature of earnest money. The agreement expressly provided for payment of Rs 1000 as earnest money, and that amount was paid by the defendant. The amount of Rs 24,000 was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no

reason why the parties would not have so named it in the agreement of sale. […]"

(Emphasis supplied)

46. To the same effect is the decision of this Court in ***Maula Bux v. Union of India***, reported in **(1969) 2 SCC 554,** wherein it was held that forfeiture of earnest money is not deemed as penal and that Section 74 of the 1872 Act will only apply where the forfeiture is in the nature of a penalty. The relevant observations are extracted hereunder:

> ***"5.*** *Forfeiture of earnest money under a contract for sale of property — movable or immovable — If the amount is reasonable, it does not fall within Section 74.* That has been decided in several cases: *Chiranjit Singh* v. *Har Swarup* [*Chiranjit Singh* v. *Har Swarup*, 1925 SCC OnLine PC 63 : (1926) 23 LW 172] ; *Roshan Lal* v. *Delhi Cloth & General Mills Co. Ltd.* [*Roshan Lal* v. *Delhi Cloth & General Mills Co. Ltd.*, 1910 SCC OnLine All 98 : ILR (1911) 33 All 166] ; *Mohd. Habib-Ullah* v. *Mohd. Shafi* [*Mohd. Habib-Ullah* v. *Mohd. Shafi*, 1919 SCC OnLine All 87: ILR (1919) 41 All 324] ; *Bishan Chand* v. *Radha Kishan Das* [*Bishan Chand* v. *Radha Kishan Das*, 1897 SCC OnLine All 52 : ILR (1897) 19 All 489 : 1897 AWN 123]. *These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty*."
>
> (Emphasis supplied)

47. In ***Shanmugavelu*** (*supra)*, this Court emphasized upon the fundamental difference between the forfeiture of "earnest money" and forfeiture of "any other amount", wherein the former constitutes a general forfeiture clause, while the latter qualifies as a penal clause. A clause for forfeiture of earnest money thus, only intended as a deterrent to ensure due performance of the

contractual obligations, will not be deemed penal in the ordinary sense. The relevant observations are reproduced hereunder:

> ***"81.*** *Even otherwise, what is discernible from the abovereferred decisions of Fateh Chand [Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49 : AIR 1963 SC 1405] , Maula Bux [Maula Bux v. Union of India, (1969) 2 SCC 554] and Satish Batra [Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345 : (2013) 1 SCC (Civ) 483] is that there lies a difference between forfeiture of any amount and forfeiture of earnest money with the former being a penal clause and the latter a general forfeiture clause. A clause providing for forfeiture of an amount could fundamentally be in the nature of a penalty clause or a forfeiture clause in the strict sense or even both, and the same has to be determined in the facts of every case keeping in mind the nature of contract and the nature of consequence envisaged by it.*
>
> ***82.*** *Ordinarily, a forfeiture clause in the strict sense will not be a penal clause, if its consequence is intended not as a sanction for breach of obligation but rather as security for performance of the obligation. This is why Fateh Chand [Fateh Chand v. Balkishan Dass, 1963 SCC OnLine SC 49 : AIR 1963 SC 1405] Maula Bux [Maula Bux v. Union of India, (1969) 2 SCC 554] and Satish Batra [Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345 : (2013) 1 SCC (Civ) 483] held that forfeiture of earnest money deposit is not a penal clause, as the deposit of earnest money is intended to signify assent of the purchaser to the contract, and its forfeiture is envisaged as a deterrent to ensure performance of the obligation."*
>
> (Emphasis supplied)

48. A different view was taken by this Court in ***Kailash Nath Associates v. DDA***, reported in **(2015) 4 SCC 136,** wherein it held that Section 74 of the 1872 Act applies to the forfeiture of earnest money deposit. It further held that proof of actual damage or loss is a *sine qua non* for invoking the said section and thereby, only a reasonable amount will be permissible for forfeiture upon the breach of contract. The relevant observations are reproduced hereinbelow:

*"**43.** […]*

xx xx xx

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

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

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

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

***43.7.** Section 74 will apply to cases of forfeiture of earnest money under a contract. […]"*

(Emphasis supplied)

49. This Court expounded on the question of loss in ***Lakshmanan v. B.R. Mangalagiri***, reported in **1995 Supp (2) SCC 33,** holding that when the contract falls through due to the default on part of the appellant-purchaser, and the resulting loss suffered by the respondent-vendors exceeds the amount forfeited under the contract, the forfeiture cannot, by any measure, be seen as unjustified. The relevant observations are extracted below:

***"5.** The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount. In this case even otherwise, we find that the respondents had suffered damages, firstly for one year they were prevented from enjoying the property and the appellant had cut off 150 fruit-bearing coconut trees and sugarcane crop was destroyed for levelling the land apart from cutting down other trees. Pending the appeal, the respondents sought for and were granted permission by the court*

for sale of the property. Pursuant thereto, they sold the land for which they could not secure even the amount under contract and the loss they suffered would be around Rs 70,000. Under those circumstances, their forfeiting the sum of Rs 50,000 cannot be said to be unjustified. The appeal is accordingly dismissed with costs."

(Emphasis supplied)

50. We may as well refer to a recent judgment of this Court in ***Godrej Projects Development Ltd. v. Anil Karlekar***, reported in **2025 SCC OnLine SC 222,** wherein this Court examined one-sided and unconscionable forfeiture clauses. It was held that a forfeiture clause, if found to be unfair and unreasonable, cannot be enforced by this Court. Further, while citing the clause providing for "forfeiture of earnest money deposit" in ***Satish Batra*** *(supra)*, it held that the said clause could not be said to be one-sided and accordingly, upheld the same. The relevant observations are extracted as under:

"26. *In the case of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly[8], this Court, by taking recourse to Article 14 of the Constitution of India, has held that the courts will not enforce an unfair and unreasonable contract or an unfair and unreasonable clause in a contract, entered into between Parties who are not equal in bargaining power. It will be relevant to refer to the following observations of this Court in the said case:*

> *"**89.** […] It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction."*

xx xx xx

> ***33.*** *Insofar as the judgment in the case of Satish Batra (supra) is concerned, the clause providing for "forfeiture of earnest money deposit" cannot be said to be one-sided. […]*
>
> ***34.*** *It can thus be seen that in the aforesaid case though the term in the Agreement provided for forfeiture of the earnest money in the event the prospective purchaser fails to fulfill the conditions, it also provided for payment of double the amount of earnest money by the vendor to the purchaser in case the vendor fails to complete the transaction. As such, the said term cannot be said to be one-sided."*
>
> (Emphasis supplied)

51. On a conspectus of the aforementioned authorities, it is evident that a clause for the forfeiture of earnest money is not penal in the ordinary sense, rendering Section 74 of the 1872 Act, inapplicable. In the present case, the stipulated amount under the ATS was in the nature of an earnest money deposit and thus, Section 74 of the 1872 Act cannot apply to the same. Further, the forfeiture clause was fair and equitable rather than one-sided and unconscionable, as it imposed liabilities on both the appellant-purchaser and respondent-sellers, wherein the seller was obligated to pay twice the advance amount paid by the buyer in case of his default.

52. Even, for argument's sake, if we have to apply the principle under Section 74 of the 1872 Act to the present case in line with ***Kailash Nath*** *(supra)*, the forfeiture of the entire amount of advance money by the respondent nos. 1-4 would still be justified on the ground that there was breach of contract by the appellant, which led to financial losses for the respondent nos. 1-4. Such losses, as specifically pleaded and proved by the evidence led before the Trial Court, far exceeded the amount forfeited under the ATS, a position that was duly noted and accepted by the Trial Court.

ii. <u>Law on the Alternative Relief of Refund of Earnest Money under Section 22 of the 1963 Act</u>

53. The High Court denied the relief of refund of advance money to the appellant herein, having regard of the fact that the appellant had not sought for an alternative prayer for refund of the advance sale consideration in the suit as mandated by Section 22(2) of the 1963 Act.

54. Before we proceed to answer the question formulated by us in para 27, we deem it necessary to examine Section 22 of the 1963 Act. It reads thus:

> *"**22. Power to grant relief for possession, partition, refund of earnest money, etc.—** (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—*
>
> *(a) possession, or partition and separate possession, of the property, in addition to such performance; or*
>
> *(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.*
>
> *(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:*
>
> *Provident that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.*
>
> *(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."*

55. Sir Frederick Pollock, 3rd Baronet, in *Pollock & Mulla: The Indian Contract and Specific Relief Acts,* 16th Edn., has discussed the object and

scope of Section 22 of the 1963 Act and the alternative relief of refund of earnest money deposit, as follows:

> ***"[s 22.6.2] Refund of Earnest Money or Deposit***
>
> *[…] The relief of refunding of earnest money or deposit cannot be granted unless specifically claimed. Further such a plea cannot be considered in a second appeal, particularly when the issue of execution of the agreement has been held as not having been proved.*
>
> *Refund of amounts paid may also be ordered when specific performance has been refused on the ground of unexplained delay by the plaintiff in approaching the Court. It is also open to a plaintiff to give up his prayer for specific performance at the hearing, or before the hearing, and ask for return of the earnest money or deposit.*
>
> *Where a clause entitling forfeiture of earnest money is contained in the agreement, it would not be refundable to the plaintiff who has failed to perform his part of the contract. Forfeiture of earnest money should not be allowed where the vendor has not suffered any loss, but has actually gained, viz., on account of frustration of contract. Where the value of land had considerably increased after the sale agreement, the Court, while refusing a decree for specific performance, ordered a refund of the earnest amount on the ground that the plaintiff did not suffer any loss, but had gained due to the default of the plaintiff.*
>
> *xx xx xx*
>
> ***[s 22.7] Pleadings and Amendment to Pleadings***
> *Section 22 enacts a rule of pleading. It enables the plaintiff to ask for possession in the suit for specific performance and empowers the Court to provide, in the decree itself, that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession. If the said relief is not claimed in the plaint, the Court shall permit the plaintiff at any stage of the proceedings, including execution proceedings, to amend the plaint on such terms as it deems proper. The purpose is to avoid multiplicity of suits. This provision overrides the provisions of*

Order VI, rule 17 of CPC, 1908. Omission to seek alternative relief is not a ground to reject the plaint.

A plaintiff may amend the plaint to include a claim for refund to advance money paid to the defendant. The amendment may be made at any stage of the proceeding, including the appellate stage. The option vests with the plaintiff to claim alternative relief, and unless he claims such a relief, the Court is not empowered to grant it."

(Emphasis supplied)

56. The expression *"at any stage of the proceeding"* has been judicially interpreted to include the appellate stage as well, as affirmed by a catena of High Court decisions. This interpretation entails that that an amendment of the plaint to incorporate a prayer for the alternative relief of refund of earnest money may be sought even during the first appeal from the original decree passed in a suit for specific performance. The non-obstante clause attached to Section 22(1) of the 1963 Act grants it an overriding effect, thereby excluding the operation of the Code of Civil Procedure, 1908. Further, the use of the word "*shall*" in the proviso to Section 22(2) imposes a mandate upon the court to allow the amendment of plaint, as sought by the party, at any stage. [See: ***Sahida Bibi v. Sk. Golam Muhammad*, 1982 SCC OnLine Cal 59; *Tarit Bhowmik v Mukul Day*, 2014 SCC Cal 5361**]

57. In ***Manickam v. Vasantha,*** reported in **2022 SCC OnLine SC 2096**, this Court was dealing with the question of whether the executing court could deliver possession in execution of a decree where no specific prayer for possession had been made in a suit for specific performance. It held that the proviso appended to Sub-section (2) of Section 22 of the 1963, which mandates the Court to allow an amendment of the plaint at any stage of the

proceeding to include a claim for such relief under Clause (a) or (b) of Section 22(1), renders the provision directory in nature. The Court opined that Section 22(2) is qualified by the phrase "*in an appropriate case",* referring to situations where such relief does not necessarily flow from a decree for specific performance of a sale agreement. Accordingly, if such relief under Clause (a) or (b) of Section 22(1) appears as a necessary implication of the decree for specific performance, a specific prayer for claiming such relief would not be required. In light of these principles, this Court held that the relief of possession was inherently included in a decree for specific performance and need not be specifically pleaded. Furthermore, it reiterated that the words "*at any stage of the proceeding"* have a wide amplitude, encompassing both the appellate stage and execution proceedings. The relevant observations are reproduced hereinbelow:

> ***"22.*** *The Bombay High Court in a judgment reported as Lotu Bandu Sonavane v. Pundalik Nimba Koli held that relief of possession is to be claimed "in an appropriate case". It means a case in which the relief does not necessarily flow from the decree for specific performance of the agreement of sale. If such a relief is ancillary to and necessarily flows from a decree for specific performance, then it is not necessary to specifically seek such a relief and the bar of S. 22(2) would not be attracted. If the defendant is in possession of the property agreed to be sold and the decree directs a specific performance of the agreement of sale, the defendant is bound to execute the sale deed as per the decree and to put the plaintiff in possession of the property as contemplated by S. 55(1)(f) of the Transfer of Property Act. In such a case it is not necessary to specifically claim the relief of possession in the suit.*
>
> *xx xx xx*
>
> *9. The term "proceeding" is a very wide and comprehensive term and it includes execution proceeding also. The expression "at any stage of the proceeding" gives widest permission to the Court to allow amendment*

at any stage of the proceeding including execution of the decree. The amendment can be allowed even in an appeal arising out of the order passed by the executing Court rejecting the prayer for permission. The proviso recognises the well settled position that the Court passing a decree for specific performance retains control over the subject matter as long as anything remains to be done in the case."

xx xx xx

26. *The matter can be examined from another angle as well. Section 22(2) of the Act, though is worded in negative language, "no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed", but the proviso takes out the mandatory nature from the substantive provision of sub-section (2) when the plaintiff is allowed to amend the plaint on such terms as may be just for including the plaint for such relief "at any stage of the proceeding". "At any stage of the proceeding" would include the proceeding in suit or in appeal and also in execution. The proviso to sub-section (2) of Section 22 of the Act contemplates that the Court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including a claim for such relief. The said proviso makes the provision directory as no penal consequences follow under sub-section (2) of Section 22. […]*

xx xx xx

29. *To examine whether a provision is directory or mandatory, one of the tests is that the court is required to ascertain the real intention of the legislature by carefully attending to the whole scheme of the statute. Keeping in view the scheme of the statute, we find that Section 22(2) of the Act is only directory and thus, the decree-holder cannot be non-suited for the reason that such relief was not granted in the decree for specific relief.*

30. *The defendant in terms of the agreement is bound to handover possession of the land agreed to be sold. The expression "at any stage of proceeding" is wide enough to allow the plaintiffs to seek relief of possession even at the appellate stage or in execution even if such prayer was required to be claimed. This Court in Babu Lal has explained the*

circumstances where relief of possession may be necessary such as in a suit for partition or in a case of separate possession where the property conveyed is a joint property. In the suit for specific performance, the possession is inherent in such suit, therefore, we find that the decree-holders are in fact entitled to possession in pursuance of the sale deed executed in their favor."

(Emphasis supplied)

58. It is thus a settled position of law that the plaint may be amended at any stage of the proceedings to enable the plaintiff to seek an alternative relief, including that of refund of earnest money, and the courts have been vested with wide judicial discretion to permit such amendments. However, under Section 22 of the 1963 Act, the courts cannot grant such relief *suo moto*, since the inclusion of the prayer clause remains a *sine qua non* for the grant of such a relief. In other words, when an "*appropriate case"* exists for seeking the said relief under this provision, it must be specifically sought either in the original plaint or by way of an amendment. This has been emphatically held by this Court in ***Desh Raj v. Rohtash Singh***, reported in **(2023) 3 SCC 714.** The relevant observations are reproduced hereunder:

"35. *On a plain reading of the above-reproduced provision, we have no reason to doubt that the plaintiff in his suit for specific performance of a contact is not only entitled to seek specific performance of the contract for the transfer of immovable property but he can also seek alternative relief(s) including the refund of any earnest money, provided that such a relief has been specifically incorporated in the plaint. The court, however, has been vested with wide judicial discretion to permit the plaintiff to amend the plaint even at a later stage of the proceedings and seek the alternative relief of refund of the earnest money. The litmus test appears to be that unless a plaintiff specifically seeks the refund of the earnest money at the time of filing of the suit or by way of amendment, no such relief can be granted to him. The prayer clause is a sine qua non for grant of decree of refund of earnest money.*

> ***36.*** *Applying these principles to the facts of the case in hand, we find that the respondent has neither prayed for the relief of refund of earnest money in the original plaint nor he sought any amendment at a subsequent stage. In the absence of such a prayer, it is difficult to accept that the courts would suo motu grant the refund of earnest money irrespective of the fact as to whether Section 22(2) of the SRA Act is to be construed directory or mandatory in nature."*
>
> (Emphasis supplied)

59. The judgment in ***Desh Raj*** *(supra)* has been relied upon by the learned counsel appearing for the appellant herein. However, it is difficult to understand how this judgment furthers their case. On the contrary, this judgment clearly contradicts their position, stating in unequivocal terms that, in the absence of a prayer for the relief of refund of earnest money, such relief cannot be granted by this Court.

60. Another judgment which has been relied upon by the learned counsel for the appellant in reference to the issue of refund of earnest money, is the case of ***Kamal Kumar v. Premlata Joshi***, reported in **(2019) 3 SCC 704**. Notably, the ruling in this case also stands contrary to the arguments advanced by the appellant on account of the fact that the relief of refund of earnest money was denied therein. The relevant observations are extracted hereunder:

> ***"9.*** *In the case at hand, we find that the two courts below have gone into these questions in the light of pleadings and evidence and recorded a categorical finding against the plaintiff holding that the plaintiff was neither ready nor willing to perform his part of the contract and, therefore, he was not entitled to claim the relief of specific performance of the contract against the defendants in relation to the suit land. It was also held that the plaintiff was not entitled to claim any relief of refund of earnest*

money because it was liable to be adjusted as agreed between them."

(Emphasis supplied)

61. Applying these principles to the facts of the case at hand, we find ourselves unable to accept the submissions of the appellant that, in the absence of a specific prayer for the refund of advance money paid by them, Prayer (c) of the plaint which specifies the grant of "such other relief(s) as the Hon'ble Court deems fit in the facts and circumstances of the case in the interest of justice", can be construed to include a prayer for such an alternative relief.

62. The reasoning set forth in the case of ***Manickam*** (*supra)* as regards the relief of possession under Section 22(1)(a) of the 1963 Act, can be appropriately imported in the present case to say that the relief of refund of earnest money under Section 2 2(1)(b) is not a relief that automatically flows from a decree for specific performance of a sale agreement and must, therefore, be explicitly sought.

63. In our considered opinion, the law contained under Section 22(2) of the 1963 Act is adequately broad and flexible to allow the appellant to seek an amendment of the plaint for the said relief, even at the appellate stage. However, no such application for an amendment of the plaint was moved either before the trial court or during the course of the first appeal before the High Court. That is to say, the appellant never prayed for the refund of the advance money. Here, it would be redundant to state that the law aids the vigilant, not those who sleep over their rights.

E. CONCLUSION

64. For all the foregoing reasons, we have reached the conclusion that the forfeiture of advance money by the respondent nos. 1-4 was justified. In such circumstances, we are not inclined to grant the relief of refund of advance money to the appellant.

65. We are unable to find any kind of perversity or illegality in the impugned judgment passed by the High Court. As a result, the present appeal stands dismissed.

66. Parties shall bear their own costs. Pending application(s), if any, stand disposed of.

…….J.

(J.B. PARDIWALA)

…….J.

(R. MAHADEVAN)

New Delhi

May 02, 2025