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COMPARATIVE STUDY OF THE CONCEPT OF EARNEST MONEY WITH REFERENCE TO DIFFERENT COUNTRIES AND JUDICIAL PRONOUNCEMENT

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MEANING OF EARNEST MONEY

"Earnest money is part of the purchase price when the transaction goes forward." In some cases, when the parties enter into the contract, they intentionally use the word "advance" but mere misdescriptional nomenclature will not conclude the matter. What may be called "advance" may be "deposit" and what may be termed as "deposit" may ultimately be proved to be "advance". In either case, the cardinal rule of interpretation of the contract is to find out whether the actual intention of the parties will be applicable. And such an intention can be gathered by the express terms of the contract or from the conduct and by the surrounding circumstances incidental to such a contract. But this is not considered as the sole guide for the purposes of determination of the fact whether the amount should be treated as "earnest money", or it is just a "deposit". If by pleadings or proof, it is established that the amount given by the depositor as earnest money for the due performance of the contract only then it can be forfeited by the deposit notwithstanding the breach of the contract by the depositor: this proposition, however, is subject to the doctrine of reasonableness.[1]

According to Earl Jowitt[2], " Giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds".[3]

As observed by the judicial committee in Charanjit Singh v. Har Swarup[4], "Earnest-money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vender."

Similarly, in *HUDA* v. *Kewal Krishan Goel*[5], this Court quoted the following observations of Hamilton, *Sumner and Leivesley* v. *John Brown & Co.*[6], with regard to the meaning of "earnest": "Earnest" … meant something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver or if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited.'[7]

[1] Krishna Chandra v. Sanat Kumar, ILR 44 Cal. 162.
[2] The dictionary of English Law, 689.
[3] Maula Bux v. Union of India, (1969) 2 SCC 554, 558: AIR 1970 SC 1955
[4]Charanjit Singh v. Har Swarup AIR 1926 PC I
[5]HUDA v. Kewal Krishan Goel(1996) 4 SCC 249
[6]Sumner and Leivesley v. John Brown & Co(1909) 25 TLR 745
[7]Villayati Ram Mittal (P) Ltd. v. Union of India, (2010) 10 SCC 532

BASIC FEATURES OF EARNEST MONEY

♣ It must be given at the moment when the contract is concluded.

♣ It must be the part of the purchase price when the transaction is carried out.

♣ It must be present as a guarantee that the contract will be fulfilled or, in other words, it can be said that it must be given to bind the contract.

♣ It is only forfeited when the transaction falls through by reason of the fault or failure of the purchaser.

♣ Moreover, on default omitted by the purchaser, the seller is entitled to forfeit the earnest money, [8] unless there is anything contrary in the terms of the contract.

Thus, in a given contract if a sum is paid under the heading "deposit" or "earnest money" or has to be interpreted as such, according to the intention of the parties, and is made forfeitable in case of breach, even the courts have to adjudge the reasonable compensation to which the party would be entitled to, in such circumstances. The above mentioned features were laid down by the Supreme Court in the case of Hanuman Cotton Mills after reviewing various decisions noted in the judgement, which includes that of the Privy Council rendered in Chiranjit Singh's case.[9] Precisely, it can be said that features of "earnest money" serves basically two purposes:

♣ Firstly, it moves in part payment of the purchase money for which it is deposited; and

♣ Secondly, but primarily, it is the security for the performance of the contract.[10]

DIFFERENCE BETWEEN EARNEST MONEY AND SECURITY DEPOSIT

Security Deposit — Money deposited by or for the tenant with the landlord, to be held by the landlord for the following purposes: (1) to remedy tenant defaults for damage to the premises (be it accidental or intentional), for failure to pay rent due or for failure to return keys at the end of the tenancy; (2) to clean the dwelling so as to place it in as fit a condition as when the tenant commenced possession, considering normal wear and tear; and (3) to compensate for damages caused by a tenant who wrongfully quits the dwelling unit. The security deposit is not regarded as liquidated damages, but rather is a fund held in trust for the tenant that the landlord can use to offset damages caused by the tenant. A security deposit is not taxable to the landlord until applied to remedy any tenant defaults. Neither can the tenant take the deposit as a tax deduction. Some states require security deposit monies to be placed in an interest bearing account in trust for the lessee.

The tenant's claim to the security deposit monies is superior to all claims of the landlord's creditors. An exception is claims of a trustee in bankruptcy.

[8] Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., AIR 1970 SC 1986, at.p.1994 : (1970) 2 S.C.J. 420 : (1970) 2 S.C.A. 482.

[9] Chiranjit Singh v. HarSwarup, AIR 1926, PC 1

[10] Narendra Kumar Nakhat v. M/s Nandi Hasbi Textile Mills Ltd., AIR 1997, Kant. 185, at.p.187: 1997 (1) Kant. L.J.755.

Under the Uniform Residential Landlord and Tenant Act, the security deposit may not exceed one month's rent. The landlord must return the security deposit, less any authorized retained portion, to the tenant no later than 14 days after the termination of the rental agreement. The landlord must give written notice to the tenant setting forth the grounds for and evidence supporting any claimed retention of any portion of the security deposit. Certain states require landlords to return security deposits to tenants within a specified time period and to account for all claims to any part of the deposits; disputes over security deposits may be handled expeditiously in small claims court, which provide for penalties in the event a landlord fails to comply with the regulations. Difficulties in the accounting and administration of security deposits have led some authorities to advocate their abolition. Although the Uniform Residential Landlord and Tenant Act preserves the security deposit, it limits the amount (one month's rent) and prescribes penalties for its misuse. The act does not limit the prepayment of rent, as distinguished from security deposits; nor does it require the landlord to pay interest on the security deposits.

The lease should clearly specify whether a payment is a security deposit or an advance rental. If it is a security deposit, the tenant is not entitled to apply it as discharge of the final month's rent. If it is an advance rental, the landlord will have to pay taxes on it when received. Many state laws specifically state that the security deposit is not to be construed as payment of the last month's rent by the tenant. When the lessor sells the property, the sales contract should cover the appropriate accounting of security deposit monies (i.e., debit seller and credit buyer).

Earnest Money Deposit — The cash deposit (including initial and additional deposits) paid by the prospective buyer of real property as evidence of good-faith intention to complete the transaction; called bargain money, caution money, hand money, or a binder in some states. The amount of earnest money deposited rarely exceeds 10 percent of the purchase price, and its primary purpose is to serve as a source of payment of damages should the buyer default. Earnest money is not essential to make a purchase agreement binding if the buyer's and seller's exchange of mutual promises of performance (that is, the buyer's promise to purchase and the seller's promise to sell at a specified price and terms) constitutes the consideration for the contract. Thought should be given to placing the money in an interest-bearing account for the buyer's benefit, which can be done by the parties agreeing in writing to place it with a neutral third party such as an escrow company.

The deposit, or earnest money, is usually given to the broker at the time the sales contract is signed. The broker's authority to hold this money on behalf of the seller should be specifically set forth in the listing, because such authority is not implied in law. The broker has the responsibility under the license laws to deposit this money into a client trust account or neutral escrow; or with the knowledge and consent of both parties, the broker may hold the earnest money until the offer has been accepted. The broker may not, however, commingle this money with the broker's own general funds.

When the transaction is consummated, the earnest money is credited toward the down payment. If the seller defaults, the broker should check with the buyer before returning the earnest money. The buyer may not want the earnest money returned directly to the seller if he or she wishes to sue the seller for specific performance.

There is some uncertainty as to exactly who owns the earnest money once it is put on deposit. Until the offer is accepted, the money is, in a sense, the buyer's. Once the seller accepts the offer, however, the buyer may not get the money back, even though the seller will not be entitled to it until the transaction is completed. At this point, the money does not belong to the broker either, for it must be deposited in a special trust account maintained especially for such purposes. This uncertain nature of earnest money deposits makes it absolutely necessary that such funds be properly protected pending final decision on how they are to be disbursed.

DIFFERENCE BETWEEN EARNEST MONEY AND ADVANCE DEPOSIT

Civil Code of the republic of Lithuania article 6.98
"Earnest money shall be deemed to be a monetary amount issued by one contracting party from the payments due to be paid by him under a contract to the other party to prove the conclusion of the contract and secure its performance. The earnest money cannot be used for securing a preliminary contract, likewise a contract that must be concluded in the obligatory notarial form. "

Meanwhile, we can't find definition of advance in Civil Code of the republic of Lithuania. Only of other Civil Code articles we can define that advance – part of its price, paid to person who undertakes to sell an object (thing).

In Lithuanian Supreme Court civil case no. 3K-7-23 / 2000 found that earnest performs several functions:

1. Payment – earnest in the amount, with debtor need to pay to creditor
2. Probative – earnest transferred to the award show. This feature means that the agreement on the earnest of a complementary nature, if not the principal obligation, it can not be an agreement on the earnest.
3. Security – earnest shall be communicated to the obligation (contract) to ensure compliance. Agreement on earnest parties understand that if the contractor is responsible for failure to earnest given country, this earnest remains the second party, and if the contract is responsible for failure to earnest receiving countries, it is required to pay to the second party to double earnest amount.

Lithuanian Supreme Court found that the presence of these three features capable of distinguishing the earnest of advance payment. The advance, as earnest, performs the function of a payment (credited to future payments) may carry out evidential function (both valid claim, as well as an agreement to conclude the contract in the future). But unlike the earnest, the advance has never been completed security function, if country paid an advance, is entitled to claim a refund on all contractual obligations in cases of non-compliance, and the party received an advance, under any circumstances, do not get it back double.

The Karnataka High Court in K.C.N Gowda and Bros. v. MalakaramTekchand and Sons[11], has explained the difference. Das Gupta, C.J., speaking for the Bench observed that there is fundamental difference between "earnest money" and "part payment of price" and that has to be decided in each case whether or not a payment was made by way of earnest or by way of advance i.e., part payment of price. The nomenclature "earnest" or "advance" does not matter and the right of forfeiture has no application to money received as such part payment.

FUNCTION OF EARNEST MONEY IN DIFFERENT CIVIL LAW COUNTRIES

Germany: The German Civil Code provides:[12]

Section 336. If, on entering into a contract, something is given as earnest, this is deemed to be proof of the conclusion of the contract. In case of doubt the earnest is not deemed to be a forfeit.

Section 337. The earnest shall, in case of doubt, be credited on the performance due from the giver, or, when this cannot be done, shall be returned on performance of the contract. If the contract is rescinded the earnest shall be returned.

Section 338. If the performance due from the giver becomes impossible in consequence of a circumstance for which he is responsible, or if the rescinding of the contract is due to his fault, the holder of the earnest is entitled to retain it. If the holder of the earnest demand compensation for non-performance, the earnest shall, in case of doubt, be credited, or if this cannot be done shall be returned on payment of compensation.

In German law earnest money, in the absence of a contrary agreement, performs the same function as in classical law, i.e., it is evidence of the formation of the agreement, and is not presumed to be a forfeit.[13]

Austria: The Austrian Civil Code provides [14]

Sec. 908. If, on entering into a contract something is given, unless otherwise agreed upon, it is deemed to be given as proof of the conclusion of or as security for the performance of the contract and is called earnest (Angeld). If the contract is not performed through the fault of a party, the party free from fault may retain the earnest money received or demand back double the amount of the earnest given. If the party is not satisfied with that he may demand specific performance, or damages if that is no longer possible.

According to the provisions of the Austrian Commercial Code, earnest money is to be regarded as a forfeit conferring the privilege of withdrawing, only when it is so agreed between the parties or in case it is customary to regard it as a forfeit. The highest court of Austria has decided that this provision of the

[11]K.C.N Gowda and Bros. v. Malakaram Tekchand and Sons AIR 1958 Mys. 10.

[12] German Civil Code (Wang's trans. 1907).

[13] See Schuster. Principles of German Civil Law 191 (1907).

[14]Tianslated fiom STUBENRAUCH. Commentar zum osterreichischen Allgemeinen bu.gerlichen gesetzbuehe (6th. ed. 1892

Commercial Code does not detract from the principle of Section 908 of the Civil Code.[15]

Netherlands: The Civil Code of the Netherlands repudiates the doctrine of forfeiture and wihdrawal: Article 1500. If the sale has been concluded with the giving of earnest, neither of the parties may withdraw, be it by abandoning or be it by restoring the earnest.[16]

Switzerland: Swiss law recognizes the giving of earnest solely as a means of proof of the existence of the contract unless there is a special agreement to the contrary. If the contract is not carried out the earnest must be restored, and the injured party may sue for damages.[17] When it is specially agreed that the earnest is to be considered as a forfeit, each of the contracting parties is free to withdraw from the contract, the one who has paid the earnest, by abandoning it, and the one who has received it by restoring double. [18]

Italy: The Italian Civil Code enacts:[19]

Article 1217. When not otherwise agreed upon, that which has been paid before the conclusion of the contract is considered as a guaranty for the reparation of damages in case of the inexecution of the contract, and is called earnest (caparra). The party who is not at fault, if he does not wish to obtain specific performance of the agreement, may retain the earnest received or demand double of that he has given.

Portugal: The Portuguese Civil Code enacts:[20]

Article 1548. The reciprocal promise to sell and to buy, when it is accompanied with an agreement upon the thing and the price, produces a simple obligation to do, which is regulated by the general rules relating to these contracts; with this difference, if earnest has been given, the loss of the earnest or the restoration of double the earnest money, will form the indemnity due to the party having a cause of action for damages.

South Africa: Roman Dutch law in effect in South Africa recognizes the doctrine of forfeiture and withdrawal from agreements of sale on the payment of earnest money.[21] According to one authority, the doctrine applies to contracts of sale even though they are regarded as complete.[22] On the other hand, the writings of Grotius, which are largely relied on as authority in jurisdictions governed by Roman Dutch law, clearly indicate that Grotius considered that a Party might only withdraw from incomplete contracts.[23] Grotius says, .. . so long as the sale remains in any way incomplete, either party may withdraw from the contract without incurring any loss, except that the buyer loses the earnest." The subject of

[15] Art. 285 Commercial Code of Austria; STUBENRAUCH

[16] Translated from the French by Haanebrink, Civil Code of the Netherlands (1921) Art. 1500

[17] ROSSEL, Droit f6d~ral des Obligations (4th. ed. 1920) Sec. 322.

[18] FICK, Commentaire du Code federal des obligations (1915 ed.) Art 158

[19] Code Civil Italien (Collection Des Codes Et.angers by Prudhomnme 1951.

[20] Code Civil Portugais (Laneyrie and Dubois 1896). (93) 72.

[21] MORICE, SALE IN ROMAN DUTCH LAW (1919)

[22] Ibid.

[23] LEE, THE JURISPRUDENCE OF HOLLAND. (1926) (Trans. from Grotius) p. 367

earnest money seems to be of no modern importance in Roman Dutch law.[24]

Argentina: The Argentine Civil Code contains no provisions regarding earnest money. The Commercial Code enacts:[25]

Article 475. The sums which it is the custom to give in sales, under the name of earnest (senal or arras), are always considered as a part of the purchase price and as a sign of the completion of the contract, without either of the parties being able to withdraw by losing the earnest. When the vendor and the purchaser agree that, by means of losing the earnest or a sum paid in advance, they will be permitted to withdraw from the execution of the contract, they must mention it in a special clause of the contract.

Brazil: Earnest in the civil law of Brazil is simply evidence of the final agreement:

Article 1094. The sign, or earnest (arrhas) given by one of the contracting parties confirms (firma) the presumption of final accord and renders the contract obligatory.[26]

Earnest money is considered as part payment in the absence of a contrary agreementBut if the party who makes the deposit of the earnest refused to perform he forfeits his earnest. [27] The parties may expressly agree that the payment of earnest shall give each of the parties the right to withdraw from the agreement. In case of such an agreement, the party who receives it must return dotible if he retracts.[28] The same rules apply to commercial sales.[29]

Chile: The Civil Code of Chile provides:[30]

Article 1803. If the sale has been made with earnest, that is to say, giving a thing as pledge of the celebration or of the execution of the contract, each of the contracting parties is free to withdraw from the contract, the one who has given the earnest by losing it, and one who has received it by restoring double. The parties may expressly agree that the earnest is on account of the purchase price, in which case the parties are no longer free to withdraw. [31] With regard to commercial sales, the giving of earnest does not permit the parties to withdraw unless it is expressly agreed that they shall have this privilege.[32]

Colombia: The Civil Code provides:[33]

Article 1859. If a sale is made with earnest money (arras), that is, giving something as a sign of the completion of the contract, it is understood that each of the contracting parties will be able to retract; he who has given the earnest, by losing it, and he who has received it by restoring double.

Spain, Cuba, Porto Rico, and the Philippines. The Civil Code in effect in these jurisdictions contains the following provision relating to earnest:

[24] GROTIUS. Dutch Jurisprudence (Herbert's trans. 1845) p. 342.
[25] Code de Commerce Argentin (Prudhomme 1893).
[26] MACKEURTAN, LAW OF SALE OF GOODS IN SOUTH AFRICA (1921) p. 10
[27] BRAZIL CIVIL CO. Art. 1097
[28] Ibid. Art. 1095
[29] OBREGON, LATIN AMERICAN COMMERCIAL LAW (1921) 389, citing the provisions of the commercial code
[30] Code Civil Chilien (Prudhomme 1892)
[31] Lagrasserie, Code Civil Chilien (1896) p. 312
[32] Chilien Code of Commerce (Prudhomme 1892) Arts. 107, 108
[33] Civil Code of Colombia (1915 ed.)

Article 1454. When earnest money or a pledge has been given in the contract of purchase and sale, the contract may be rescinded, if the vendee should agree to forfeit the money or the vendor to return double the amount.[34]

In Spain a distinction is made if the sale is a commercial transaction. In such a case the earnest serves as evidence of the existence of the contract and not as the price of the privilege of withdrawing, unless it is otherwise stipulated.[35]

Mexico: The Mexican Civil Code enacts:[36]

Article 2820. If the purchase and sale should not be realized and payments by way of earnest should have been made the purchaser shall lose what he has paid when through his fault the contract shall not be carried into effect.

Article 2821. If the fault should be that of the vendor, the latter shall return the earnest money (arras), with as much more. As in Spain, a distinction is made when the transaction is a commercial sale, in which case the earnest is evidence of the completion of the agreement and does not give the privilege of withdrawing[37]

Japan: The Japanese Civil Code contains the following provision relating to earnest money:

Article 557. When the purchaser has delivered bargain money (earnest) to the seller, so long as one of the parties has not commenced performance the contract may be rescinded by the purchaser by abandoning the bargain money, and the seller by repaying twice its amount.[38]

FORFEITURE OF EARNEST MONEY

The Supreme Court has drawn distinction between "earnest money" and "security deposit", for the application of section 74 to the forfeiture clauses. The distinction was set to work in Fateh Chand v. Balkishan Das[39]. It is very important to discuss the facts of this case, as considered one of the leading authorities on this point. The facts of this case are as follows:-

"There was an agreement between the parties for the sale of certain land and bungalow for Rs. 25,000. It was provided in the agreement that the buyer had to pay Rs. 1000 as earnest money and rest of the Rs. 24,000 had to be paid on delivery of possession. It was further, provided in the agreement that if the buyer failed to pay the balance price and get the sale deed registered by certain day, the sum of Rs. 25,000 would stand forfeited, the agreement would be considered as cancelled and the buyer shall return possession to the seller. The seller forfeited the above sum because the buyer defaulted. Moreover, the seller brought an action to recover the possession and compensation for occupation and use." In this case, the seller was allowed to forfeit Rs. 1000 being earnest money and to retain the sum of Rs. 24,000 also not by virtue of

[34] Civil Code in force in Spain, Cuba, Porto Rico, and Philippines (Wilson's Trans. 1900)
[35] OBREGON, Spanish Commercial Code Art. 343
[36]Mexican Civil Code (Taylor's Trans. 1904). Cf. Wheless, Compen- dium of the Laws of Mexico (1910) v. 1 p. 269
[37] OBREGON, op. cit. supra. n. 102 citing Mexican Commercial Code Art. 381
[38] Civil Code of Japan (DeBecker's Trans. 1909).
[39] MANU/SC/0258/1963, AIR 1963 SC 1405, 1964 (1) AnWR 60, [1964] 1 SCR 515(SC)

his right to forfeit, but as representing use value. The defendant did not object to the plaintiff's right to forfeit Rs. 1000 paid as earnest money under the agreement, but contended that Rs. 24,000 was expressly paid out of sale price and the stipulation was in the nature of penalty. The Supreme Court made it very clear that Rs. 24,000 was not paid as an earnest money, and it was expressly referred to in the agreement as paid "out of sale price". Moreover, no evidence was found regarding the fact that Rs. 24,000 was paid as a security for the performance of the contract. Thus, in these circumstances, it could not be assumed that because there was a stipulation for forfeiture of the amount paid must bear the character of deposit for the performance of the contract. Hence, the plaintiff was only entitled to retain Rs. 1000 received by him as earnest money. If in any contract there is no forfeiture clause, then the vendor cannot forfeit earnest money, and he would be entitled to reasonable compensation only.[40]

Therefore, in all cases, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of the contract, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

The provision is applicable to every kind of deposit by whatever name it may be called. The words "any other stipulation by way of penalty" are wide enough to cover all kinds of forfeiture provisions. Union of India v. Shyam Sundar Lal[41], Bombay Scrap Traders v. Port of Bombay[42], failure on the part of the tenderer to comply with the work order, forfeiture of earnest money, Held justified. State of Karnataka v. Stellar Construction Co., AIR 2002 Kant.6: (2002) 5 Kant. LJ 474, the road building contract was not paid extra charges because the claim in respect of thereof, was not found by the Department to be justified. He had received payment as per contractual terms. He stopped working, and did not resume it in spite of clear notice. The court said that this amounted to breach. He was not entitled to claim refund of the forfeited security deposit. New Media Broadcasting (P) Ltd. v. Union of India, AIR 2008 NOC 967 (Del), contract envisaged specifications of further details, by government, some changes or representation of bidders were within tender terms, bidder those bead bars excepted refused to sign, right to forfeit earnest money and claim damages arose. Winmaxx Management Service (P) Ltd. v. UCO Bank[43], buyer failed to pay the whole of the earnest money. Forfeiture of money actually paid by him held to be justified. Haryana Financial Corporation v. Rajesh Gupta, AIR 2010 SC 338, auction sale of unit, earnest money deposited on assurance that independent approach road to unit would be provided, but not actually done, the purchaser did not make further payment, forfeiture of his earnest held to be not proper.

[40] Mohammad Sultan v. Naina Mohammad, AIR 1973, Mad. 233.

[41] Union of India v. Shyam Sundar Lal1963 All LJ 251

[42] Bombay Scrap Traders v. Port of Bombay ,(1994) 1 Bom CR 266

[43] Winmaxx Management Service (P) Ltd. v. UCO Bank AIR 2011 Gau 217

The respondent Rampur distillery & chemical co. ltd., supplied to the appellant-Union of india- a large quantity of rum. The rum was found not to conform to the quality stipulated and was, therefore, rejected by the appellants. The appellant then cancelled the Contract and forfeited the entire security deposit of Rs. 18332 which was kept by the respondent for the due performance of the contract. The breach of Contract caused no loss to the appellant. The stipulated quantity of rum was subsequently supplied to the appellant by the respondents themselves are the same rate. That the High Court was right in rejecting the appellant claim that they are entitled to forfeit the security deposit[44].

Plaintiff entered in contract of supplying potatoes with respondent. Earnest money deposited by plaintiff. Default made by him in supplying potatoes and so contract rescinded by respondent. Earnest money deposit forfeited. Petition filed by plaintiff in Court of Civil Judge for recovery of earnest money. Court held that respondent justified in rescinding contract but amount cannot be forfeited. On appeal decree modified by Trial Court and amount of money returned to plaintiff reduced. Against decision appeal made to High Court. High Court observed that amount deposited was a guarantee for specific performance of contract can be taken as earnest money. Held that respondent entitled to forfeit the same. Against decision appeal filed in Supreme Court. Supreme Court observed that amount of earnest money was reasonable. Provisions of Section 74 not applicable. No loss suffered by respondent due to non-performance of contract by plaintiff. Appeal allowed by Supreme Court. Plaintiff guilty of breach of contract. Contract liable to be rescinded but amount deposited cannot be forfeited[45].

Appellants entered in contract for sale of area-scrap with respondent. Earnest money deposited. Contract repudiated by appellants. Respondent forfeited earnest money deposited by appellants. Appellants for recovery of said money filed suit in High Court. Suit dismissed. High Court held that said amount was deposited as earnest money. Appellants entitled to same only on specific performance of contract. Certificate granted by High court and appeal filed in Supreme Court. Supreme Court observed that there was misrepresentation regarding quantity of material. Appellants entitled to recover earnest money by on that ground. Appellants abandoned that ground by accepting that they committed breach of contract. Appeal dismissed as appellants committed breach of contract. Held, they were not entitled to recover earnest money[46].

Parties entered into contract for sale of certain land and certain amount was paid to petitioner as earnest money. Suit for specific performance filed when petitioner did not execute sale deed and decreed by Trial Court. In appeal Additional District Judge observed that both parties suffered from mistake of fact as to area of land and sale-consideration. Decree for specific

[44] Union of India v. Rampur Distiller and Chemical co. ltd. AIR 1973 SC 1098 at pp. 1098-99

[45] Maula Bux v. Union of India (UOI) MANU/SC/0081/1969 = AIR 1970 SC 1955 = 1970 (2) AnWR 61 = 1970 (18) BLJR 885 = (1969) 2 SCC 554 = [1970] 1 SCR 928(SC)

[46] Shri Hanuman Cotton Mills and Ors. v. Tata Air Craft Limited MANU/SC/0086/1969 = AIR 1970 SC 1986 = 1970 Mh LJ 28 (SC) = 1970 MPLJ 74 (SC) = (1969) 3 SCC 522 = [1970] 3 SCR 127(SC)

aperformance not passed but decree for refund of earnest money passed which was confirmed by High Court. Appeal by special leave. Petitioner contended according to forfeiture clause in contract respondent not entitled to refund of earnest money. Observed that contract was void from its inception as observed by Additional District Judge. Forfeiture clause in contract also void. Petitioner could not legally forfeit amount and seek enforcement of forfeiture clause. Decree for refund of earnest money confirmed.[47]

Whether Tribunal was right in law in holding that earnest money deposit of Rs. 75000 received by assessee in respect of agreements for sale of old and uneconomic rubber trees is revenue income assessable to income-tax when forfeited consequent to termination of agreements for breach thereof by purchasers. Amounts received by assessee/appellant in respect of an abortive sale transaction of rubber trees were capital or revenue receipts. Assessees right to recover compensation was to place assessee in same position as if breach had not taken place. If agreed sums of money under agreements received by assessee they would have been credited in its account as capital receipt. Forfeited amounts treated as capital receipts. Agreements were of sale where both payment of price and delivery deferred. Purchasers paid purchase price in agreed installments right to take delivery of trees under agreement complete. Question referred by assessee answered in negative. Appeal in favour of Assessee.[48]

Respondent entered into an agreement with Respondent No. 1 (DLF) for purchasing a flat and paid earnest money. Respondent also paid some installments. Respondent showed his inability to make further payments. Respondent sent a legal notice to Appellant to refund the entire amount along with interest. As Appellant did not accede to his request, he filed an application before the Monopolies and Restrictive Trade Practices Commission (Commission) purported to be under Section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 (Act). Application was allowed and Appellant was directed to refund the entire amount together with the interest. Hence, present appeal. Held, power of the Commission to award compensation was restricted to a case where loss or damage had been caused as a result of monopolistic or restrictive or unfair trade practice. It had no jurisdiction where damage was claimed for mere breach of contract. Appeal disposed of accordingly.[49]

CONCLUSION

There are certain rules regarding the forfeiture of earnest money which the courts must keep in mind while deciding whether the earnest money should be forfeited or not. These are as follows:-

♣ Neither the earnest money nor any other kind of deposit, which is liable to be

[47] Sri Tarsem Singh v. Sri Sukhminder Singh MANU/SC/0158/1998, AIR 1998 SC 1400

[48] The Travancore Rubber & Tea Co. Ltd. v. Commissioner of Income Tax, Trivandrum MANU/SC/0194/2000, AIR 2000 SC 1980

[49] Saurabh Prakash v. DLF Universal Ltd. MANU/SC/5198/2006, 2007 (5) ALT 24 (SC)

forfeited, can be subjected to forfeiture if the underlying contract is void. Moreover, it is refundable under section 65, if the contract is found to be void.[50]

♣ There can be no forfeiture or encashment of bank guarantee where no contract arises due to the revocation of acceptance or due to any other reason.[51]

♣ Forfeiture of earnest money is permissible by way of liquidated damages.[52]

♣ There is no absolute right to forfeit the entire amount without the proof of total extent of loss, when the material on record showed that the extent of loss was less than the amount held as earnest, forfeiture could not go beyond that.

♣ No one can be allowed to enrich himself at the cost of the other by taking advantage of forfeiture clause.[53]

♣ Forfeiture of earnest money under a contract of sale, if the amount is reasonable does not fall within Sec. 74.

♣ Forfeiture of earnest money should be allowed only when it is reasonable to do so.

♣ No forfeiture of earnest money should be allowed where extra cost otherwise can be recovered.[54]

♣ No forfeiture of earnest money should be allowed where contract still has not performed and the amount if forfeited is refundable.[55]

♣ To invoke Sec. 74 it is not necessary that a contract should be broken in its entirety.

♣ Forfeiture of earnest money without issuance of a show cause notice is considered as violation of the principle of natural Justice.[56]

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[50] Tarsem Singh v. Sukhminder Singh, (1998) 3 SCC 471: AIR 1998 SC 1400; J.K. Enterprises v. State of M.P., AIR 1997 MP 68, forfeiture of earnest money on failure of bidder to perform, justified.

[51] Food Corporation of India v. Sujit Roy, AIR 2000 Gau. 61. The earnest money of a tenderer was forfeited before acceptance of the tenderer and conclusion of the contract and the dispute between the parties was also not related with the contract, a writ petition challenging the forfeiture was held to be maintainable

[52] Amarjeet Singh v. Zonal manager, FCI, (2002) 4 ICC 47 (P&H), public authority has to exercise its powers even under the contract fairly and reasonably. Even otherwise, namely, where government is not a party, the terms relating to forfeiture must be strictly followed and the courts should also strictly construe them.

[53] GattaRattaiah v. Food Corpn. Of India, AIR 2011 AP 65

[54] State of U.P. v. Chandra Gupta & Co., AIR 2004, Kant 155.

[55] Commr of HR & CE Deptt.v. S. Muthekrishnan, AIR 2012 Mad. 43, the court held that the absence of any time prescribed for the acceptance could not give the authority and unlimited and unreasonable period of time. The forfeiture was not proper. And, therefore, the amount forfeited was refundable. JayantShantilalSanghvi v. Vadodara Municipal Corpn, AIR 2011 Guj 122 (DB).

[56] S.R.S. Infra Projects (P) Ltd. v. Gwalior Development Authority, (2010) 2 MPLJ 142.

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