

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal No. 313 of 2017**

Sunil Jain S/o. Late Gumanmal Jain, Aged about 44 years, R/o.
Hatri Bazaar Durg Tehsil and District Durg (C.G.)

---- **APPELLANT**

Versus

Pitamber Sahu S/o. Late Vishnu Sahu, Aged about 70 years, R/o.
Village Potiyakala, Tehsil and District Durg (C.G.)

---- **RESPONDENT**

For the Appellant	:- Mr. Avinash Chand Sahu, Advocate
For the Respondent	:- Mr. H.B. Agrawal, Sr. Advocaee along with Ms. Deepali Pandey, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra

Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board By

Prashant Kumar Mishra, J.

14.09.2018

1. Heard on I. A.No. 01/2017, application for condonation of delay.
2. On due consideration, I.A. No. 01 of 2017 is allowed. Delay of 9 days in filing the instant appeal is hereby condoned.
3. With the consent of the learned counsel for the parties, the matter is heard finally at the motion stage.
4. The present appeal arises out of the judgment and decree dated 23.02.2017 passed by the 8th Additional District Judge, Durg, in

Civil Suit No. 23-B/2014, wherein the trial Court has dismissed the plaintiff/appellant's suit for refund of the advance amount.

5. Appellant Sunil Jain is the prospective purchaser of land from respondent Pitambar Sahu, Dhaneshram Sahu and Vishal Ram Sahu. The agreement for sale was executed between the parties on 08.10.2011 advance amount of Rs. 1,00,000 was paid to the respondent/defendant.
6. According to the plaintiff, he had agreed to purchase the property for developing and selling plots. However, subsequent to the agreement, it came to his notice that the land is reserved in the master plan for green belt. Therefore, the same being not useful for him, he was no longer willing to purchase the land and requested the defendant to return the advance amount which was refused by the defendant stating that he is ready to sell the property.
7. In a suit for return of advance amount or the earnest money, it is not to be adjudicated as to which party committed default in part performance unless the agreement contains a forfeiture clause. The Supreme Court in the matter of **Satish Batra vs. Sudhir Rawal (2013) 1 SCC 345** has held that precision and clarity in clauses of contract to justify forfeiture is necessary and that in agreement for purchase of immovable property the forfeiture clause will not apply when the payment is made only towards part payment of consideration and not intended as earnest money.
8. The trial Court has held in clear terms in para-22 of the impugned judgment that there is no stipulation in the contract that in the event of breach of contract by the prospective purchasers the advance amount shall stand forfeited. We have also seen the

agreement Ex.P-1, containing only six clauses, duly signed by both the parties, executed on 08.10.2011 without containing any clause for forfeiture of the advance amount. Clause-2 of the agreement, referred to the amount paid to the prospective vendor as “*Bayana*” i.e. the advance amount which is to be adjusted towards sale consideration at the time of registration of sale deed. Thus, the parties never intended that the amount so paid to the prospective vendor at the time of execution of agreement shall be the earnest money and not advance money and it is precisely for this reason there is no forfeiture clause in the agreement.

9. Difference between 'advance amount' and the 'earnest money' has been considered by the Supreme Court in number of cases. In **Shree Hanuman Cotton Mills vs Tata Air-Craft Ltd (1969) 3 SCC 522**, the Supreme Court laid down certain principles to determine as to when the amount paid as 'advance' be treated as 'earnest money' and the seller is entitled to forfeit the same. Para 21 of the judgment is reproduced hereunder.

“ 21. From a review of the decisions cited above, the following principles emerge regarding 'earnest':

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

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

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

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

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

10. In the matter of **DDA v. Grihsthapana Coop. Group Housing Society Ltd 1995 Supplementary (1) SCC 751**, the Supreme Court, following privy council's decision in the matter of **Chiranjit Singh v. Har Swarup AIR 1926 PC 1**, held that for the question whether the respondents are entitled to forfeit the entire amount, it is to be 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.
11. In **Videocon Properties Ltd. v. Bhalchandra Laboratories (2004) 3 SCC 711**, the Supreme Court examined the nature and character of the earnest money and took a view that the words used in the agreement alone would not be determinative of the character of the “earnest money” but really the intention of the parties and surrounding circumstances. It held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned.
12. It is not the description by word used in the agreement only that would be determinative of the character of the sum but really the intention of the party have to be looked into and what may be called as an 'advance money' 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”.
13. In Satish Batra (Supra), the Supreme Court considered the issue and held thus in paragraph 15 and 16.

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 the 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.

16. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, “earnest” is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011.

14. Applying the ratio to the facts of the case at hand, it is to be seen that there is no stipulation in the agreement that the amount is paid as a security for performance of the contract and that in the event of default by the purchaser in observing the terms of the contract the amount, so paid as an advance would be forfeited. The advance was, therefore, not paid by way of security for performance of contract and the same was made part of the sale

consideration to be adjusted at the time of execution of the sale deed. The vendor was thus not entitled to forfeit the amount in view of the law laid down by the Supreme Court in the matter of **Satish Batra** (supra) and the trial Court has committed serious error of law by dismissing the suit.

15. In the result, the appeal is allowed. The impugned judgment and decree is set aside and instead a decree is passed allowing the plaintiffs' suit for return of the advance amount of Rs. 1,00,000/- without any interest. The parties shall bear their own cost throughout litigation.
16. A decree be drawn up accordingly.

Sd/-

(Prashant Kumar Mishra)
JUDGE

Sd/-

(Vimla Singh Kapoor)
JUDGE