

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****First Appeal No. 129 of 2008****Reserved on 3-2-2020****Delivered on 6-2-2020**

1. Smt Satwant Kaur W/o Harbhajan Singh aged about 66 years
 2. Smt. Manjeet Kaur, W/o. Shri T.P. Singh, aged about 45 years
 3. Shri T.P. Singh, S/o. Shri Harbhajan Singh, aged about 47 years
- All above residence of Shantinagar, Raipur (CG)

---- Appellants**Versus**

Azhar Nawaz S/o Late Nawaz Mohammed, aged about 45 years, R/o Bairan Bazar, Raipur Tahsil and District Raipur (CG)

---- Respondent

For Appellants	: Mr. Shubhank Tiwari, Adv. on behalf of Mr. Manoj Paranjpe, Adv.
For Respondent	: Mr. Shubham Pandey, Adv. on behalf of Mr. Kishore Bhaduri, Adv.

Hon'ble Shri Sharad Kumar Gupta, Judge**CAV JUDGMENT**

1. Appellants have preferred this Civil Appeal against the impugned judgment and decree dated 1-5-2008 passed by 8th Additional District Judge, (FTC), Raipur (CG) in Civil Suit No.4-B/2004 whereby and whereunder he partly decreed the suit of respondent.
2. This is admitted by appellants that an agreement was taken place between respondent and themselves, fixed date 30-6-1999 was extended time to time and lastly the date fixed for execution of registered sale deed was 30-7-1999, they had got some advance money. They had sent two telegrams dated 30-7-1999 to him. They had received the notice of his lawyer.
3. In brief, the respondent's case is that he and appellants had entered into an agreement for sale on 3rd June, 1999, it was settled between them that respondent would purchase the land measuring 12.50 acre situated at village Bakhtara (hereinafter called as 'disputed land') from appellants at the rate of Rs. 48,500/- per acre. He had paid appellants Rs. 51,000/- as

Bayana and an agreement was written and signed by both the parties. On 14-6-1999 he paid Rs. 40,000/- to appellant No. 3, thereafter on 24-6-1999 he paid him Rs. 1,50,000/-. He totally paid them Rs. 2,41,000/-. At the time of said agreement appellants stated that land is free from encumbrances but the land was not transferred in the name of appellants after the death of Harbhajan Singh. It came to his knowledge afterward. Therefore, registration was frequently adjourned. On 22-7-1999 appellant No. 3 told him that now he is inclined to keep the mid-part of the land with himself, thus, they will return the received amount to him. It was reiterated on 30-7-1999 in his office by appellant No. 3. Appellants also informed him that they are going to sell the disputed land to another person. He had received both the telegrams on 31-7-1999, when he asked from appellant No. 3 as to why these telegrams had been sent then he replied that it was just formality and again promised to return back the amount, appellants failed to perform their part of contract hence he cannot be punished and he is entitled to get back Rs. 2,41,000/- from them.

4. In brief, the appellants' case is that except admitted facts other facts of plaint are denied by them. They are the landlord of disputed land. It was the respondent who got extended the time for execution of registered sale deed to 14/17-7-1999, and to 30-7-1999 because he was financially unable. He did not turn up on 30-7-1999 in the office of the Registrar. They were always ready to perform their part of contract. They had replied the notice of respondent. Hence, the advance amount is forfeited as per the term of the agreement.

5. Trial Court by the impugned judgment and decree partly decreed the suit of respondent. Being aggrieved the appellants have preferred this appeal.

6. In brief the appellants' case regarding appeal is that trial Court did not appreciate the evidence available on record in proper perspective. Trial Court failed to appreciate that time was the essence of contract. Respondent failed to show that he was ready and willing to perform his part of contract.

7. **Point for determination:-**

There are following points for determination in the case in hand:-

(i) Whether the respondent and appellants had executed an agreement for

sale regarding the disputed land on 3-6-1999, they were agreed that respondent will purchase the disputed land at the rate of Rs. 48,500/- per acre and appellants have received Rs. 51,000/- as Bayana ?

(ii) Whether appellants had received total Rs. 2,41,000/- as advance from respondent ?

(iii) Whether date of registration was adjourned because appellants had taken time as the disputed land was not mutated in their name in revenue records ?

(iv) Whether on 22-7-1999, 30-7-1999 and 31-7-1999 appellants had promised to respondent that they shall repay him Rs. 2,41,000/- ?

(v) Whether appellants are responsible for the non-performance of said contract ?

(vi) Whether amount Rs. 2,41,000/- can be forfeited in favour of appellants ?

(vii) Whether respondent is entitled to get back Rs. 2,41,000/- from appellants?

(viii) Relief and costs.

Point for determination No.(i) and (ii)-Finding with reasons:-

8. Looking to the convenience points for determination No. (i) and (ii) are being disposed off simultaneously.

9. Issue no. (iii) covers the scope of point for determination No. (i).

10. The Trial Court has not framed issue regarding point for determination No. (ii) though it ought to have been by the Trial Court. The evidence available on record shows that the respondent and the appellants have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions Order 41 Rule 24 of the Civil Procedure Code, 1908 (in brevity 'the CPC'), this Court finds that it may pronounce the judgment in this appeal.

11. D.W.1 Tripath Pal Singh says in para No. 1 and 2 during his examination in chief that between them and respondent on 3.06.1999 an agreement was executed to purchase their disputed land, the rate was fixed

Rs. 48,500/- per acre, they received Rs. 51,000/-, on 14.06.1999 and 24-6-1999 they further received some advances which are described in the agreement.

12. In agreement Ex. P-1 it has been mentioned that on 14-6-1999 appellant No. 3 had received Rs. 40,000/- and also received Rs. 1,50,000/- on 24-6-1999 by cheque.

13. Looking to the above mentioned facts and circumstances of the case, looking to the concerned admitted facts, this Court finds that the respondent and appellants had executed an agreement for sale of disputed land on 3-6-1999, they were agreed that respondent will purchase the disputed land at the rate of Rs. 48,500/- per acre and appellants had received Rs. 51,000/- as Bayana and thereafter appellant No. 3 had received Rs. 40,000/- Rs., 1,50,000/- on behalf of him, and also on behalf of appellant No. 1 and 2, thus they had received total Rs. 2,41,000/- as advance from respondent. Thus, this Court decides points for determination No. (i) and (ii) accordingly.

Point for determination No. (iii)- Finding with reasons:-

14. The Trial Court has not framed issue regarding this point for determination though it ought to have been by the Trial Court. The evidence available on record shows that the respondent and the appellants have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions Order 41 Rule 24 of the CPC, this Court finds that it may pronounce the judgment in this appeal.

15. P.W.1 Azhar Nawaz says in para No. 2, 5 of his statement given on oath that after the death of Harbhajhan Singh mutation of disputed land was not taken place in favour of appellants, hence date of registration was extended from time to time on the request of them.

16. D.W.1 Tripat Pal Singh says in para No. 2 and 4 that on fixed date 30-6-1999 respondent was unable to pay them due amount hence registration was adjourned, respondent failed to pay them due amount till last date of 30-7-1999.

17. It has been mentioned in Ex. P-6 that after death of Harbhajan Singh

appellants had not got mutated their names in revenue records regarding disputed land and to correct the record they sought time.

18. As per the passbook Ex. P-2 on 30-6-1999, Rs. 70,74,221/- was there in the account of respondent.

19. There is no such material available on record on strength of which it can be said that aforesaid statements of P.W. 1 Azhar Nawaz, aforesaid facts of Ex. P-6 and Ex. P-4 are not simple, not natural and not normal.

20. Moreover, appellants had given suggestion to P.W. No.1 Azhar Nawaz during his cross examination in para 13 that he had entered into the agreement without seeing the papers. Moreover, D.W.1 Tripat Pal Singh says in para 9 and 11, during his cross examination that this is true that before 3-6-1999 his father had expired, after the death of his father he had not filed any application to record his name in revenue records, he has not filed any document regarding certification of his name till 30.07.1999. Moreover, in the reply of notice of respondent vide Ex. D-1 dated 6-9-1999 it has not been mentioned that now disputed land has been mutated in the name of appellants.

21. Looking to the above mentioned facts and circumstances of the case this Court believes aforesaid statement of P.W.1 Azhar Nawaz, Ex. P-6 and Ex. P-4 in the reference that registration was adjourned because disputed land was not recorded in the name of appellants in revenue records, appellants had taken time for it, respondent had sufficient fund for payment of remaining amount and disbelieves the aforesaid statement of D.W.1 Tripat Pal Singh.

22. After the appreciation of the evidence discussed herebefore this Court finds that the date of registration was adjourned because appellants had taken time as the disputed land was not mutated in their name in revenue records. Thus, this Court decides point for determination No. 3 accordingly.

Point for determination No. (iv)- Finding with reasons:-

23. The Trial Court has not framed issue regarding this point for determination though it ought to have been by the Trial Court. The evidence available on record shows that the respondent and the appellants have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the

judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions Order 41 Rule 24 of the CPC, this Court finds that it may pronounce the judgment in this appeal.

24. This has been earlier decided that appellants had received Rs. 2,41,000/- as advance from respondent with reference to Ex. P-1, the disputed land was not recorded in name of the appellants in revenue records and they had taken time to get entry in revenue record.

25. P.W.1 Azhar Nawaz says in para No. 7 of his statement given on oath that on 22-7-1999 appellant No. 3 had told that he will not sell the disputed land and told him that he will return back the advance amount. On 30-7-1999 he came in his office and told that the conversation of sale of disputed land is going on to third person and he will return back Rs. 2,41,000/-.

26. There is no such evidence on record on strength of which it can be said that aforesaid statement of P.W.1 Azhar Nawaz is not simple, not natural and not normal.

27. Moreover, counsel for the appellants had given suggestion to P.W. 1 Azhar Nawaz during his cross examination in para 21 that appellant No. 3 had reached in his office on 30-7-1999.

28. Looking to the above mentioned facts and circumstances, this Court finds that on 22-7-1999 and 30-7-1999 appellants had promised to respondent that they shall repay him Rs. 2,41,000/-. Thus, this court decides point for determination No. (iv) accordingly.

Point for determination No. (v) : finding with reasons-

29. The Trial Court has not framed issue regarding this point for determination though it ought to have been by the Trial Court. The evidence available on record shows that the respondent and the appellants have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions Order 41 Rule 24 of the CPC, this Court finds that it may pronounce the judgment in this appeal.

30. This has been earlier decided that appellants had taken time for

execution of registered sale deed as the disputed land was not mutated in their name in revenue record, appellants had promised to respondent that they shall repay him advanced amount Rs. 2,41,000/- to him.

31. Moreover, there is following provisions in Section 19(m) of the Madhya Pradesh Registration Rules, 1939 -

“19.- The following documents may be returned for amendment, correction or supply of omissions-

(m) a document required to be registered under the provisions of Clause (a) to (e) of sub-section (1) of Section 17 of the Registration Act, 1908 pertaining to agricultural land which is not presented along with the Bhoo Adhikar Amam Rin Pustika as required by Section 114 (a) of the CG Land Revenue Code, 1959.”

32. Looking to the above mentioned facts and circumstances of the case, this Court finds that appellants are responsible for non-performance of said contract. Thus, this Court decides point for determination No. (v) accordingly.

Point for determination No. (vi): Finding with reasons:-

33. It emerges from Ex. P-1 that if registered sale deed would not be executed within 30-6-1999 then the amount of Bayana Rs. 51,000/- would be lost. In the foot of last page Ex. P-1 there are receipts of Rs. 40,000/- dated 14-6-1999 and cheque of Rs. 1,50,000/- dated 24-6-1999, but there is no condition stipulated that in the case of non-performance of the contract said amounts would also be forfeited.

34. In the matter of **(Kunwar) Chiranjit Singh vs. Harswarup**, AIR 1926 P.C.1, Hon'ble Supreme Court has laid down following judicial precedents -

“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 are failure of the purchaser.”

35. In the matter of **Shree Hanuman Cotton Mills and Others vs. Tata Aircraft Limited**, 1969 (3) SCC 522 Hon'ble Supreme Court observed in para No. 21 which read as under -

“21. From a review of decisions cited above the following principles emerged regarding 'earnest' -

(i) it must be given at the moment at which the contract is concluded.

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

(iii) it is part of the purchase price when the transaction is carried out.

(iv) it is forfeited when the transaction false through by reason of default or failure of the purchaser.

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

36. In the matter of **Delhi Development Authority vs. Grihstrapana Cooperative Group Housing Society Limited**, 1995 Supp. (1) SCC 751 Hon'ble Supreme Court has laid down following judicial precedent -

'The forfeiture of earnest money is legal'.

37. In the matter of **V. Laxmanan vs. B.R. Mangalgiri and Others** (1995) Supp. (2) SCC 33 Hon'ble Supreme Court has observed that -

'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 respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellants, as part of the contract, they are entitled to forfeit the entire amount.'

38. In the matter of **Videocon Properties Limited vs. Dr. Balchandra Laboratories and Others**, (2004) 3 SCC 711 Hon'ble Supreme Court observed in para No. 14 which is extracted herebelow -

"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."

39. In the matter of **Satish Batra vs. Sudhir Rawal**, 2013 (1) SCC 557 Hon'ble Supreme Court has observed in para No. 15 which reads as under -

'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.”

40. Looking to the aforesaid judicial precedents laid down by Hon'ble Supreme Court in the matter of **(Kunwar) Chiranjit Singh (supra)**, **Shree Hanuman Cotton Mills and Others (supra)**, **Delhi Development Authority (supra)**, **V. Laxmanan (supra)**, **Videocon Properties Limited (supra)** and **Satish Batra (supra)** following legal positions emerge-

- (i) earnest money is given at the time when the contract is concluded,
- (ii) earnest money is the guarantee of the contract,
- (iii) earnest money is the part of the purchase price when the transaction is carried out,
- (iv) the forfeiture of earnest money is legal,
- (v) to ascertain the character of the advanced money the description by words are not only determinative factor but also the intention of the parties and surrounding circumstances would be looked,
- (vi) the terms of the contract should be clear and explicit,
- (vii) earnest money can be forfeited when the transaction falls through by reason of default or failure of the purchaser/depositor.
- (viii) there can be converse situation also that if the seller fails to perform the contract the purchaser/depositor can also get the amount, if it is so stipulated in the contract,
- (ix) the 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.

41. Looking to the aforesaid contents of Ex. P-1 and judicial precedents

laid down by the Hon'ble Supreme Court in the matter of (**Kunwar**) **Chiranjit Singh** (supra), **Shri Hanuman Cotton Mills and others** (supra), **Vediocon Properties Ltd.** (supra), **Satish Batra** (supra), this Court finds that at the time of Execution of Ex. P-1 only Rs. 51,000/- was earnest money and thereafter Rs. 40,000/- and Rs. 1,50,000/- had been given towards part payment of consideration and not as earnest money, hence for the amount Rs. 40,000/-, Rs. 1,50,000/- forfeiture clause does not apply, forfeiture clause could only be applicable for the Bayana amount of Rs. 51,000/-, but this has been earlier decided that appellants are responsible for non-performance of the contract hence Rs. 51,000/- also shall not be forfeited.

42. After appreciation of the evidence discussed herebefore, this Court finds that Rs. 2,41,,000/- cannot be forfeited in favour of the appellants. Thus, this Court decides point for determination No. (vi) accordingly.

Point for determination No. (vii)- Finding with reasons:-

43. This has been earlier decided that appellants are responsible for non-performance of said contract. They had also promised to respondent that they shall repay him Rs. 2,41,000/-. Said amount cannot be forfeited in favour of appellants.

44. Moreover, Ex. P-1 is also executed by deceased Harbhajan Singh through appellant No. 1.

45. Looking to the above mentioned facts and circumstances of the case, this Court finds that respondent is entitled to get back Rs. 2,41,000/- from appellants. Thus, this Court decides point for determination No. (vii) accordingly.

Point for determination No. (viii)- Finding with reasons:-

46. After complete and full appreciation of the evidence discussed hereinbefore, this Court finds that appellants are failed to prove their appeal. There is no substance in the appeal. Appeal deserves to be and is hereby dismissed. The judgment and decree of the trial Court are affirmed to the extent discussed herebefore.

47. A decree be drawn accordingly.

Sd/-
(Sharad Kumar Gupta)
Judge