

APPELLATE CIVIL.

Before R. C. Mitter J.

KRISHNA CHANDRA RUDRAPAL

v.

KHAN MAHMUD BEPARI.*

1935

Dec. 10, 13.

Earnest money—Forfeiture—Conditions—Exemption from—Time, when essence of contract.

Earnest money is a guarantee for the performance of the contract. If the transaction goes forward, it is a part of the purchase price; but, if it falls through on account of the default of or breach by the vendee, it is forfeited, in the absence of a contract either express in its terms or to be inferred from the whole contract.

Chiranjit Singh v. Har Swarup (1); *Atul Chandra Kundu v. Sarat Chandra Laha* (2); *Dinanath Damodar Kale v. Malvi Mody Ranchhoddas & Co.* (3) and *Muhammad Habib-ullah v. Muhammad Shaft* (4) referred to.

If the purchaser says that the earnest money has not been forfeited, though the breach is on his part, he has to show that the agreement prevents the forfeiture. This he can do, if the contract says so in plain terms, or if the same can be inferred from all the terms of the contract itself.

Palmer v. Temple (5) followed.

Time is not of the essence of a contract simply because a period for completion is mentioned in a contract for sale of land. It is not ordinarily of the essence of the contract, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a day certain, or if the nature of the property intended to be sold requires it, e.g., if the contract is for the sale of a life interest or a mining lease given for a fixed period of time.

APPEAL FROM APPELLATE DECREE by the defendant.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

*Appeal from Appellate Decree, No. 1495 of 1933, against the decree of K. N. Datta, District Judge of Faridpur, dated April 12, 1933, confirming the decree of Anukul Chandra Lahiri, First Munsif of Chikandi, dated July 30, 1932.

(1) [1926] A. I. R. (P. C.) 1. (3) [1930] A. I. R. (Bom.) 213.

(2) (1920) 24 C. W. N. 967. (4) (1919) I. L. R. 41 All. 324.

(5) (1839) 9 Ad. & El. 508; 112 E. R. 1304.

Gunada Charan Sen, Rajendra Bhooshan Bakshi
and *Beerendra Nath Banerji* for the appellants.

A. S. M. Akram for the respondents.

Surajit Chandra Lahiri for the Deputy Registrar.

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Cur. adv. vult.

R. C. MITTER J. This appeal is on behalf of the defendant and arises out of a suit instituted by the plaintiffs to recover from him a sum of Rs. 475 (with interest) paid to him on the basis of a contract, by which the latter agreed to sell to the plaintiffs a piece of land. The contract was an oral one, entered into on *Kârtik* 28, 1335. By it the price was fixed at Rs. 1,375. It is the plaintiffs' case that, at the date of contract, Rs. 375 was paid by them as earnest money and later on a further sum of Rs. 100 was paid in part payment of the price. There is nothing to show that the last mentioned sum was paid by way of earnest.

The plaintiffs came to Court with the case that the balance of the price was to be paid in the month of *Mâgh*, 1335, at the time of the conveyance, but before that, *i.e.*, at some time in *Foush*, 1335, the defendant refused to sell. The defence is that the time for completion according to the contract was *Agrahâyan*, 1335, and that the conveyance was not executed by him, as the plaintiffs failed to find the money. Both the Courts below have held that the contract could not be completed on account of the refusal by the defendant to convey his land, the breach being on his part.

Whether the breach was on the part of the defendant or on the part of the plaintiffs, there is no defence to the plaintiffs' claim for the refund of Rs. 100. That was not earnest money and the plaintiffs are entitled to recover it with interest in any event.

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The question, therefore, is whether the plaintiffs can recover the other sum, *viz.*, Rs. 375, which admittedly was paid by way of earnest. It is well settled on the authorities that earnest money is a guarantee for the performance of the contract. If the transaction goes forward, it is a part of the purchase price; but, if it falls through on account of the default of or breach by the vendee, it is forfeited in the absence of a contract either express in its terms or to be inferred from the whole contract. *Chiranjit Singh v. Har Swarup* (1); *Atul Chandra Kundu v. Sarat Chandra Laha* (2); *Dinanath Damodar Kale v. Malvi Mody Ranchhoddas & Co.* (3); *Muhammad Habibullah v. Muhammad Shafi* (4)]. If the purchaser says that the earnest has not been forfeited, though the breach is on his part, he has to show that the agreement prevents the forfeiture. This he can do, if the contract says so in plain terms or if the same can be inferred from all the terms of the contract itself. In the case of *Palmer v. Temple* (5) such an agreement was inferred from a clause in the contract that the party in default would pay a penalty of £1,000, Lord Deenham C. J. observing that "the intent of the parties being clear, that there should be 'no other remedy.'"

Both the Courts below have held that time was the essence of the contract, but have not decided the question as to whether the date for completion was the month of *Mâgh* or the month of *Agrahâyan*. If the finding, that time was the essence of the contract, is a correct finding based on evidence, the question as to what was the time for completion, whether the month of *Agrahâyan* or *Mâgh*, 1335, is a material one, as the plaintiffs' case is that the defendant refused to sell, when an agent of theirs went to him with a part of the balance of the price in the middle of the month of *Poush*, 1335.

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On looking into the judgments it seems as if the finding that time was of the essence is not based on an examination of the evidence. The learned Subordinate Judge in one line says that he agrees with the Munsif's finding on the point. The Munsif records his findings on the said point in the following terms :—

It is quite clear time was a very prominent material of the contract. *As a matter of fact, in a contract for sale of land like the present one, usually time must have counted.* I, therefore, hold that time was an essence of the contract.

If he meant to say that time is of the essence of the contract, simply because a period for completion is mentioned in a contract for sale of land, he is certainly wrong. It is not ordinarily of the essence of the contract, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a day certain, or if the nature of the property intended to be sold requires it, *e.g.*, if the contract is for the sale of a life-interest or a mining lease given for a fixed period of time. For the reasons given above, I hold that the plaintiffs are entitled to a decree for Rs. 100 with interest, but their claim to the further sum of Rs. 375, which was paid by way of earnest, must be further considered, and for that purpose I remand the case to the lower appellate Court. That Court will consider on the evidence the following points: (i) as to whether time was of the essence of the contract; (ii) if so, whether the time of completion was *Agrahâyan*, or *Mâgh* 1335. If it finds that time was of the essence of the contract and the time for completion was *Agrahâyan*, it will dismiss the plaintiff's claim to that sum of money, *viz.*, to Rs. 375 and interest claimed thereon. If the Court below finds either that time was not of the essence of the contract or that the time for completion was the month of *Mâgh*, 1335, it will decree the plaintiff's claim to that sum, for I maintain the finding of the lower appellate Court, which must be taken along with the plaintiff's case,

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that the defendant refused to sell the lands in the middle of *Poush*, 1335.

The appeal is, accordingly, allowed in part and the case remanded in the lower appellate Court, with directions to decide the plaintiff's claim to Rs. 375 and interest thereon in the way indicated above. As the success of the appellant is only partial, the parties will bear their respective costs of this appeal. Future costs will be in the discretion of the lower appellate Court.

Appeal allowed : case remanded.

G. S.