

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge
and Mr. Justice Muhammad Raza.

LALA GOPAL DAS (PLAINTIFF-RESPONDENT) v. PANDIT
RATAN LAL AND ANOTHER (DEFENDANT-RESPON-
DENTS)*

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February 13.

Sale—Earnest money, forfeiture of—Purchaser's default, effect of, on recovery of earnest money paid.

HELD that money paid by an intending purchaser under a perfected contract of sale as a guarantee that the sale shall be performed remains with the vendor if the contract fails by reason of default on the part of the purchaser. *Howe v. Smith* (1), *Chiranjit Singh v. Har Swarup* (2), and *Mayson v. Clouet* (3), relied on. *Collins v. Stimson* (4), *Depree v. Bedborough* (5), and *Ex parte Barrell* (6), referred to.

Mr. *Ram Prasad Verma*, for the appellant.

Messrs *Ali Zaheer, Jagat Narain Bahadur, Hakimuddin and Brijmohan Nath Chak*, for the respondents.

HASAN, A. C. J. and RAZA, J. :—This is the plaintiff's appeal from the decree of the third Additional District Judge of Lucknow dated the 14th of August, 1928, reversing the decree of the Subordinate Judge of Malihabad, dated the 26th of September, 1927.

The facts of the case are as follows :—

The respondents held a decree against one Suraj Kumar and the sum of money due to them under that decree approximately amounted to Rs. 17,000. The plaintiff-appellant agreed to purchase this decree at a value less by Rs. 2,000. It is agreed that the contract for sale was complete and it is also agreed that with-

*Second Civil Appeal No. 393 of 1928, against the decree of M. Mahmud Hasan, third Additional District Judge of Lucknow, dated the 14th of August, 1928, modifying the decree of Babu Bhagwat Prasad, Subordinate Judge of Malihabad at Lucknow, dated the 26th of September, 1929, decreeing the plaintiff's suit.

(1) (1884) L.R., 27 Ch. D. 89.

(2) (1926) 3 O.W.N., 168.

(3) (1924) L.R., A.C., 980.

(4) (1883) 11 Q.B.D., 142 (143).

(5) 4 Giff., 479.

(6) L.R., 10 Ch. 512.

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in a month from the 15th of March, 1926, the sale was to be completed. It is further agreed that on the 15th of March, 1926, a sum of Rs. 100 was paid by the appellant to the respondents and it is no longer disputed that the character of this payment was as earnest money for the due performance of the contract of sale.

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From what has been stated above it follows that the completion of the sale was to take place on or before the 15th of April, 1926. A further point on which the parties are now agreed is that on the 16th of April, 1926, one Lala Indar Prasad paid a sum of Rs. 1,000, to the respondents on behalf of the appellant.

There is controversy between the parties as to the nature of the second payment of Rs. 1,000 made on the 16th of April, 1926, but the controversy is settled by the finding arrived at in the court below. That court has held on evidence that this payment was made as security money for the due performance of the contract of sale. A good deal of argument was addressed to us to induce us to go behind this finding but we have not been so induced. We hold that the finding is valid, not vitiated by any error of law or procedure and is therefore conclusive. This being so, it seems to us that the plaintiff's case, out of which this appeal arises, for the refund of Rs. 1,100, which he paid to the respondents as specified above, and having regard to the finding which was not challenged that the contract of sale fell through because of the fault of the appellant, is wholly untenable.

It is settled law that money paid by an intending purchaser under a perfected contract of sale as a guarantee that the sale shall be performed remains with the vendor if the contract fails by reason of default on the part of the purchaser. In the case of *Howe v.*

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Smith (1) the law on the subject of deposit under a contract of sale and its forfeiture is exhaustively considered and stated. COTTON, L. J., in his judgment quotes the following passage from Sugden's Vendors and Purchasers, 14th edition:—

“Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract.”

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After referring to the cases of *Collins v. Stimson* (2), *Deprea v. Bedborough* (3) and *Ex parte Barrell* (4) and quoting a passage from the judgment of Lord Justice JAMES in the last-mentioned case COTTON, L. J., says:—“What is the deposit? The deposit, as I understand it, and using the words of Lord Justice JAMES, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice JAMES, he can have no right to recover the deposit.” In the same case BOWEN, L. J., said. “A deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchaser? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong.” FRY, L. J., in his judgment in the same case, said: “Money paid as a deposit must,

(1) (1884) L.R., 27 Ch. D., 89.

(2) (1885) 11 Q.B.D., 142 (143).

(3) 4 Giff., 479.

(4) L.R., 10 Ch., 512.

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I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

The above being the state of law it is not necessary to enter into the question as to whether Lala Inder Prasad, when he paid the sum of Rs. 1,000 to the respondents on behalf of the appellant, had or had not the authority to enter into an express contract on behalf of the appellant as to the forfeiture of the deposit in the event of the contract failing by reason of the default on the part of the appellant. It is agreed that Lala Inder Prasad made this deposit on behalf of the appellant. This is enough for the disposal of the appeal. But there is a conclusive finding of the lower appellate court that the deposit was by way of security for the due performance of the contract.

Before we take leave of this case we may refer to a recent decision of their Lordships of the Judicial Committee in the case of *Chiranjit Singh v. Har Swarup* (1). The law was stated by Lord SHAW in the following words:—"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 vendee." Another recent decision of the same tribunal and to the same effect is to be found in *Mayson v. Clouet* (2).

We dismiss this appeal with costs.

Appeal dismissed.