

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**RSA No.792 of 2017 (O&M) and
RSA No.888 of 2017 (O&M)**

Date of Decision: 18.07.2018

Harish Kumar and others

... Appellants

Versus

Mohinder Singh and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present:- Mr. Ashwani Talwar, Advocate,
for the appellants.

TEJINDER SINGH DHINDSA, J.

This order shall dispose of **RSA Nos.792 of 2017 and
RSA No.888 of 2017 both titled as Harish Kumar and others Vs.
Mohinder Singh and others** as common issue is involved in these
two connected regular second appeals.

Plaintiff(s), namely, Harish Kumar, Paramjit Singh and
Kamal Kumar filed a suit for possession against the defendants
seeking a decree of possession by way of specific performance of
an agreement to sell dated 23.02.2005. Permanent injunction was
also sought restraining the defendants from alienating the suit
property. Vide judgment dated 03.12.2012 Trial Court denied the
main relief of specific performance of the agreement to sell but
partly decreed the suit directing the defendants to return the
earnest money of Rs.8,25,000/- to the plaintiffs along with interest

@ 8% per annum.

Defendants preferred civil appeal against the judgment and decree dated 03.12.2012 passed by the trial Court. Even the plaintiff(s) filed cross-objections under Order 41 Rule 22 CPC seeking modification of the judgment and decree dated 03.12.2012 to the extent that interest @ 18% per annum be awarded on the return of earnest money i.e. Rs.8,25,000/-. Civil appeal filed by the defendants and the cross-objections filed by the plaintiff(s) have been dealt with by the Lower Appellate Court vide composite judgment dated 22.08.2016 and whereby appeal of the defendants has been allowed and the judgment and decree dated 03.12.2012 passed by the trial Court has been set aside. The cross appeal preferred by the plaintiffs stands dismissed.

It is against the afore-noticed brief factual backdrop that these two connected regular second appeals have been filed by the plaintiffs/appellants. RSA No.792 of 2017 assails the judgment dated 22.08.2016 passed by the Lower Appellate Court to the extent the judgment of the Trial Court had been set aside and whereby defendants/respondents herein had been directed to return earnest money of Rs.8, 25,000/- along with interest @ 8% per annum. RSA No.888 of 2017 impugns the judgment dated 22.08.2016 passed by the Lower Appellate Court whereby the cross-objections preferred by the appellants to the extent of award of interest @ 18% along with earnest money of Rs.8, 25,000/- has been dismissed.

Learned counsel representing the plaintiffs/appellants

in these two connected second appeals would submit that the entering into the agreement to sell dated 23.02.2005 in respect of the suit property was duly established. That apart entrustment of Rs.8,25,000/- towards earnest money had been admitted by the defendants (respondent herein). It is submitted that the trial Court had returned a positive finding that title of the defendants to the suit property was defective and as such they were not competent to enter into any agreement to sell qua such property and under such circumstances to meet the ends of justice, the alternate relief of refund of earnest money of Rs.8,25,000/- had been directed. Accordingly, counsel argues that the Lower Appellate Court has clearly erred in setting aside the well-reasoned judgment of the trial Court and whereby discretionary relief of refund of earnest money had been awarded.

Insofar as rejection of the cross-objections are concerned, it is contended that the agreement to sell was in the nature of a commercial deal and the amount of Rs.8,25,000/- had been entrusted to the defendants (respondents herein) on 23.02.2005 and under such circumstances, the trial Court while granting the alternate relief of refund of earnest money ought to have granted interest at a higher rate than 8% per annum. Counsel submits that even though in the cross-objections interest @ 18% per annum had been claimed but he would restrict the prayer for payment of interest @ 12% per annum.

Having heard counsel for the appellants at length and having perused the pleadings on record, this Court is of the

considered view that there is no merit in these two regular second appeals and the same deserve to be dismissed.

The Trial Court on due appreciation of the evidence adduced on record and by taking into account attendant circumstances has returned the finding that plaintiffs were not ready and willing to perform their part of the contract. Accordingly, the relief of specific performance of the agreement to sell dated 23.02.2005 was declined. Admittedly, such findings were not assailed by the plaintiffs in the appeal/cross objections filed before the First Appellate Court. In the cross-objections that were filed, plaintiffs limited the scope thereof to grant of enhanced interest on the return of earnest money. In other words, the finding as regards the plaintiffs having not been ready and willing to perform their part of contract has attained finality.

Insofar as the alternate relief of refund of earnest money is concerned, it would be useful to advert to Section 22 of the Specific Relief Act, 1963 and the same is extracted hereunder:-

22. Power to grant relief for possession, partition, refund of earnest money, etc.—

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit

paid or I[made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.”

Bare perusal of the statutory provisions makes it clear that relief of refund of any earnest money or deposit paid cannot be granted unless it has been specifically claimed.

It has gone undisputed on record that the plaintiffs/appellants had not made any alternate prayer in the plaint for return of earnest money. Under such factual premise, the learned Additional District Judge was well justified in reversing the judgment and decree passed by the trial Court whereby the trial Court had gone beyond the pleaded case of the plaintiffs granting them alternate relief for return of earnest money.

Counsel for the appellants, on a specific query having been put has conceded that neither the plaintiffs had claimed any such relief in the plaint nor at any subsequent stage had filed an application to amend the plaint for including the claim for alternate relief. It is by now well settled that a Court of law can not exercise its discretionary jurisdiction *de hors* the statutory law. Its discretion

must be exercised in terms of existing statute.

In view of the discussion above, no patent infirmity is found in the impugned judgment dated 22.08.2016 passed by the Lower Appellate Court setting aside the judgment and decree dated 03.12.2012 passed by the trial Court. Consequentially, the claim for enhanced interest upon refund of earnest money also does not survive.

Appeals are dismissed.

Since the main appeals have been decided pending application, if any, shall also stand disposed of.

18.07.2018
vandana

(TEJINDER SINGH DHINDSA)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes