

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL (ST.) NO.28377 OF 2022
WITH
INTERIM APPLICATION NO.30398 OF 2022
WITH
INTERIM APPLICATION NO.30397 OF 2022**

Mohammed Ali Yusuf Shaikh	... Appellant
V/s.	
Manoj Punjalal Patel & Ors.	... Respondents

Mr. Satish Muley with Mosin Naik for the appellant.

Mr. Kaustubh Patil for the respondents.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 6, 2023

RC.:

- 1.** The appeal is by the original defendant in a suit for specific performance who is directed to refund earnest amount of Rs.15,10,000/- along with interest at the rate of 12% per annum from 28th February 2004.
- 2.** The respondent/original plaintiff entered into agreement dated 23rd September 2002 for purchase of suit property on payment of Rs.20,10,000/-, out of the said consideration amount Rs.13,10,000/- by cash and Rs.2,00,000/- by cheque No.135236 were paid by the plaintiff on the date of execution of the MoU.
- 3.** According to the plaintiff, he approached the defendant No.1

along with demand draft of the remaining consideration, the defendant refused to accept the said amount and, therefore, he filed suit for specific purpose. The appellant/original defendant No.1 contested the suit raising a defence that original MoU was changed without his knowledge and consent. He also raised defence of the encroachment on the suit property. According to him, total consideration was agreed of Rs.1,02,00,000/-. According to him, the page containing consideration clause was changed to make it Rs.20,10,000/-.

4. The learned Trial Court based on pleadings of the parties framed issues. The learned Trial Court based on the material on record held that the plaintiff is not entitled to relief of specific performance. The plaintiff has accepted the judgment and decree and has not filed appeal against the impugned judgment and decree. The defendant No.1 has filed present appeal challenging direction of refund all amount of Rs.15,10,000/-. While passing the said decree, the learned Trial Court in paragraph 26 observed thus:

“26. Plaintiff has claimed the refund of amount of Rs.15,10,000/-. There is no dispute between the parties that the plaintiff has paid an amount of Rs.15,10,000/- to the defendant no.1. The plaintiff is claiming interest of 21% on the said amount. The evidence of plaintiff is silent to justify the claim of interest at the rate of 21% per annum. There is nothing in the agreement as regard the interest to be paid by the defendant no.1 on the amount paid by the plaintiff in case, he failed to complete the transaction.”

5. The ground 4.22 raised by the appellant in the present appeal is as under:

“4.22 . That the Hon’ble Bombay City Civil Court failed to consider the fact that the Appellant was always willing to return the earnest money of Rs.15,10,000/- to the Respondent No.1 at the early stage of the proceedings, but the Respondent No.1 always had the intention of usurping the Suit Premises by paying the additional Rs.5,00,000/-, which the Appellant never wanted the same.”

6. Learned advocate for the appellant does not dispute before this Court that the defendant No.1 had received amount of Rs.15,10,000/-; however, according to him, the defendant forfeited the said amount. On perusal of the defence raised by the defendant, it appears that the defendant had not raised such defence nor the learned Trial Court framed issue of forfeiture of earnest amount. Therefore, it is not open to the appellant to raise issue of forfeiture of the earnest amount.

7. Since only issue involved in this appeal is for payment of earnest amount along with interest at the rate of 12% per annum, in view of admission of the appellant before the learned Trial Court and before this Court that the defendant No.1 had received amount of Rs.15,10,000/- towards earnest amount, no fault can be found with the judgment and decree of the learned Trial Court directing the defendant No.1 to pay an amount of Rs.15,10,000/- along with interest at the rate of 12% per annum from 28th February 2004.

8. Since the appeal neither raises question of fact nor law, the appeal is liable to be dismissed under Order 41 Rule 11 of the Code of Civil Procedure, 1908 and is accordingly dismissed. No costs.

9. In view of dismissal of the first appeal, the interim applications does not survive & are disposed of accordingly.

(AMIT BORKAR, J.)