
(1998) 03 DEL CK 0049
In the Delhi High Court
Case No : F.A.O. 17 of 1997

I. Kovoov (Retd.)(WG. CDR.)

APPELLANT

Vs

Mahalakshmi Land and Finance

RESPONDENT

Date of Decision : 17-03-1998

Acts Referred:

Citation : (1998) 45 DRJ 113

Hon'ble Judges : Y.K. Sabharwal, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : Ms. Hima Kohli, for the Appellant;

Judgement

Dr. M.K. Sharma, J.—The present appeal is directed against the order dated 30.11.1995 passed by the learned Single Judge in IAs 1495, 1496, 8487 all of 1994 and 8346/1995 in Suit No.1763/1984. By the aforesaid order the learned Single Judge dismissed the application filed by the appellant/plaintiff for amendment of the plaint. Under the said order the learned Single Judge has also dismissed the applications registered as I.A.s 1496/1994 and 8487/1994 filed by the appellant/plaintiff praying for calling the second defendant for further cross-examination & in addition for permission to cross-examine the counsel for the plaintiff. Consequently, the learned Single Judge also dismissed the application registered as I.A. 8747/1995.

2. The appellant, as plaintiff instituted a suit against the defendants praying for a decree for specific performance of the contract to sell plot No. 53, Vikram Enclave, Ghaziabad, U.P. in favor of the plaintiff by defendant No.1 and also for payment of a sum of Rs.50,000/- as damages on account of delayed transfer and in the alternative praying for a decree awarding damages to the plaintiff for a sum of Rs.2 lacs. The reliefs sought for by the plaintiff have been set out in paragraph 32 of the plaint which are extracted below:-

i) Declare that there is a valid and binding agreement to sell plot No.53, Vikram Enclave, Ghaziabad, U.P. in favor of the plaintiff by defendant No.1;

ii) Pass a decree for specific performance in favor of the plaintiff and against defendant No.1 directing defendant No.1, its servants and agents to forthwith execute a valid conveyance of plot No.53, Vikram Enclave, in favor of the plaintiff and execute all such documents and do all such acts and things as may be necessary to convey and transfer to the plaintiff a valid and perfect title in respect of the aforesaid plot and put the plaintiff in possession of the plot forthwith;

iii) Pass a decree for specific performance in terms of prayer (ii) above Along with a sum of Rs.50,000/- as damages on account of delayed transfer;

iv) Pass a decree restraining the defendants his servants and agents from demanding from the plaintiff any further charges, including the charges referred to in their letters dated 16th December, 1981 and 2nd August, 1982 and/or any further charges which may allegedly have been incurred by the defendants;

v) In the alternative to prayers (ii) and (iii), pass a decree awarding damages to the plaintiff against defendants No.1 and 2 amounting to Rs.2,00,000/- for failure of the defendants to perform their part of the agreement to sell plot No.53, Vikram Enclave, Ghaziabad, together with interest at the prevailing Bank rate on the date of payment;

vi) Pass such other and further decree as may, in the interest of justice, be deemed necessary;

vii) award the costs of the suit to the plaintiff.

3. The suit thereafter proceeded before the learned Single Judge and the evidence of the parties was recorded in the year 1991 and the case was listed in the category of "Finals".

4. However, in the year 1994 the appellant/plaintiff moved an application being I.A.No.1495/1994 under Order 6 Rule 17, 17-A, 18 of the Code of Civil Procedure read with Section 21(1) & (5) of the Specific Relief Act seeking to amend the plaint. Through the amendment application the reliefs sought for by the plaintiff in the original plaint are sought to be changed mainly by way of enhancement of the amount of damages and compensation to a sum of Rs.7,21,362/- from Rs.50,000/- as calculated as on date of filing the application and shown in the amended paragraph 31 with the stipulation that the calculation would be changed if the suit is unduly delayed any further.

In the original plaint, the plaintiff claimed for a decree for specific performance of the contract in question and also claimed compensation for damages in addition to the decree for specific performance for an amount of Rs.50,000/- and in the alternative for a decree for compensation towards damages for an amount of Rs.2,00,000/- lumpsum; whereas through the amendment prayed for reliefs sought for by the plaintiff are for a decree of specific performance and payment of compensation and damages of Rs. 7,21,362/- and the alternative relief sought for in the original plaint is sought to be deleted.

5. It is worthwhile to mention at this stage that on 14.9.1995 the respondent defendant through his counsel made a statement that the respondent defendant has no objection if a decree for specific performance is passed in respect of the suit property in favor of the appellant subject to the appellant/plaintiff paying the amount on account of registration charges etc. which is the liability of the appellant. The said statement by way of concession of the respondent defendant was recorded by the learned Single Judge on 24.10.1995. Learned Single Judge, while disposing of the aforesaid application filed by the appellant/ plaintiff praying for amendment of the plaint took notice of the fact that the defendant has no objection to a decree for specific performance being granted and also that the defendant has agreed to hand over possession of the property after registration of the sale deed provided the plaintiff makes payment of the stamp duty and registration charges as per the rates. The learned Single Judge while dismissing the application held that if such an amendment is allowed then in every case the parties would be entitled to have such an amendment enlarging the scope of the suit which cannot be entertained in law.

6. We have heard the appellant/plaintiff who appears in person before us and also the counsel appearing for the respondent defendant. The appellant has brought to our notice the provisions of Section 21 of the Specific Relief Act which enables the plaintiff in a suit for specific performance also to claim compensation for the breach of a contract either in addition to or in substitution of such performance. Sub-sections (1),(2),(4) & (5) of said section 21 are material and Therefore, they are extracted below:-

21. Power to award compensation in certain cases. - (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation 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 compensation.

Relying particularly on sub-section (5) of Section 21 of the Specific Relief Act the appellant submitted before us that the aforesaid provision is mandatory and Therefore, the court could at any stage of the proceedings allow the plaintiff to

amend the plaint for inclusion of claim for such compensation in addition to the decree for specific performance. He further submitted that in his original plaint he has also claimed for damages for an amount of Rs.50,000/- in addition to the decree for specific performance and Therefore, by the present application seeking for amendment in effect what the plaintiff is seeking for is to get an enhanced amount of compensation.

7. The learned counsel appearing for the respondent however, submitted that the provisions of Section 21 of the Specific Relief Act are not applicable to the facts and circumstances of the present case and that the amendment sought for by the appellant/plaintiff in the present case would come actually within the ambit of Rule 17 of Order 6 of the Code of Civil Procedure. The learned counsel further submitted that the claim for payment of enhanced compensation for an amount of Rs.7,21,362/- is also barred by limitation as also barred by Order 2 Rule 2 of the Code of Civil Procedure. It is submitted that the appellant/plaintiff had quantified the damage at the time of filing the suit and Therefore, could not be allowed at this distant date to add specific claim for loss of profit, cost of house rental etc. as sought for by him by way of the proposed amendment of the plaint. It is further submitted that he having quantified the damage at the time of institution of the the suit and choosing not to sue for any portion of his claim as sought to sue now through the present application, the appellant/plaintiff is debarred from suing in respect of the said portion now at a belated stage, which is also barred under the provisions of Section 73 & 74 of the Contract Act.

8. In Jagdish Singh Vs. Natthu Singh, the Supreme Court had occasion to deal with the provisions of Section 21 of the Specific Relief Act. While analysing the aforesaid provisions the Supreme Court laid down that if the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the court should allow the amendment at any stage of the proceedings since that is a claim for compensation falling u/s 21 of the Specific Relief Act and the amendment is one under the proviso to sub-section (5) of Section 21. The Supreme Court however, issued a caution note by laying down that different and less liberal standards would apply if what is sought by the amendment is conversion of a suit for specific performance into one for damages for breach of contract, in which case Section 73 of the Contract Act would get invoked, and then the said amendment would be under the discipline of Order 6 Rule 17 of the Code of Civil Procedure. The Supreme Court further held that when the plaintiff by his option had made specific performance impossible then Section 21 does not entitle him to seek damages. It is also held that in Indian Law when the contract, for no fault of the plaintiff, becomes impossible of performance section 21 enables award of compensation in lieu and substitution of specific performance.

9. Legal position, Therefore, in respect of scope and ambit of section 21 of the Specific Relief Act is clear and made so more by the ratio of the aforesaid decision of the Supreme Court.

10. We have also given our anxious consideration to the submissions made and also the applicability of the aforesaid provisions to the facts of the present case.

11. The appellant/plaintiff in the original plaint claimed for compensation both in addition to or in substitution of a decree for specific performance of the agreement to sell. Therefore, strictly speaking the provisions of Section 21 of the Specific Relief Act are not attracted to the facts of the present case. The intention of the appellant/plaintiff in seeking for amendment of the plaint appears to be to get an enhanced amount of compensation than what was originally claimed in the original plaint which was restricted only to Rs.50,000/-. The aforesaid intention becomes apparent when the averments made in the application praying for amendment are looked into inasmuch as, the appellant/plaintiff has stated that in view of the fact that in last 10 years there had been a tremendous escalation of costs which has an adverse effect on the quantum of damages, compensation, relief sought for the fraudulent breach of contract by the defendants. According to the appellant/plaintiff raising of the amount of compensation to Rs.7,21,362/- from Rs.50,000/- as claimed in the original plaint has been necessitated in view of undue delay in the prosecution of the suit which was not earlier foreseen, which in turn has caused more damage to the appellant/plaintiff through the years and Therefore, he has sought to raise the amount of compensation to the present value as stated above from Rs.50,000/-. By the present application the appellant/plaintiff has sought for amendment of paragraph 29 of the original plaint praying for deletion of original paragraph 29 of the plaint and inserting therein the following:-

"29. The plaintiff submits that the value of the land is Rs.1,50,000/-. The value of damages, compensation and relief be revised, at present, on the basis of the present cost index in the year 1994 and be further revised later at the end of the Suit on the basis of the cost index prevalent at that time, if the suit is further unduly delayed. The escalation of the Cost of Construction is as follows:

29.1 Escalation in Cost of Construction. The plaintiff had purchased the plot of land with the sole purpose to construct his house and make it his home on retirement from the Air Force. The cost of construction has escalated from the year 1975, when the plaintiff was to start construction of his house on Plot No.53, Vikram Enclave. The details of calculation of the cost of construction is shown in the table below:

ESCALATION OF COST OF CONSTRUCTION

ITEM	YEAR	YEAR	1975	1994	Cost Per Sq. Ft.	Rs.	135	350	No. of years from 1975
Area of plot-	Sq. Ft.	4500	4500	Floor area as % of Area of Plot:	60%	60%	Floor Area	Sq. Ft.	2700
2700	2700	Cost of Construction	corporation	Rs.	3,64,500	9,45,000	Cost of Escalation as damage -	Rs.	5,80,500

29.1.1. The claim for damage on this account is to change in keeping with the future escalation in the cost index.

29.2 Cost of Suit - The cost of suit EXCLUDING COURT FEES is shown in the

table as follows:

COST OF SUIT EXCLUDING COURT FEE

ITEM RS. Lawyer's fees 4,500 Expenses Bangalore - Delhi and back: No. of Visits 4 No. of train journeys : 8 Expenses per train journey: 350 Total train journey expenses: 2,800 No. of Days stay: 70 Expenses per day at Delhi: 150 Total expenses for stay at Delhi: 10,500 Total cost of suit: 17,800 Note: Court fee not included.

29.2.1 The cost of suit is to change if the suit is unduly prolonged and on the basis of the additional expenses, the plaintiff is to expend for the successful termination of the suit.

29.3 Cost of Interest - The Cost of interest is shown in the table as follows.

COST OF INTEREST

ITEM RS. Amount to Deft. Company 20,912 No. of years interest due from 1975: 18 Interest % as simple interest: 10% Interest due/damage claimed 37,642 29.3.1 The cost of interest is to be changed if the suit is prolonged further.

29.4 Damage due to loss of profit/House Rental Paid - This is the damage claimed on profit for the house rental that should have been received on the house constructed on the plot or in the alternatively for the house rental that the plaintiff paid as the plot was not registered on his name for the house to be constructed. This is calculated as follows:

LOSS OF PROFIT/COST OF HOUSE RENTAL 1

ITEM RS. No. of years from 1975: 18 Average Rent Expected/ paid per Month: 500 Loss of Profit/Rental claimed as Damages: 1,08,000 29.4.1 This is to be revised on the basis of the time taken to complete the suit.

29.5 Damages for Non-Pecuniary Losses -

Damages are claimed for loss of amenity without a house of his own for the plaintiff to live, mental anguish due to the inability to construct a house as a result of escalation of cost of construction from 1975 to 1994 and the harassment caused as a result of the long-drawn out suit from 1984 to 1994. This is calculated as follows:

NON-PECUNIARY LOSSES

ITEM RS. No. of years from 1975: 18 Losses per year: 2,000 Total Damage claimed for Non-Pecuniary Losses: 36,000 29.5.1 Damage claimed for under this head is subject to revision at the end of the suit.

29.6. The summary of the damages claimed EXCLUDING COURT FEES are shown in the table as follows:

SUMMARY OF DAMAGES CLAIMED EXCLUDING COURT FEES

ITEM RS. Escalation in construction cost: 5,80,500 Cost of Suit: 17,800 Cost of Interest: 37,642 Loss of Profit or Cost of House Rental: 1,08,000 Non-Pecuniary Losses: 36,000 Total Damages Excluding Court Fees: 7,79,942 29.7 Court fees - The Court Fees is calculated as shown in the Table below:-

CALCULATION OF COURT FEES

ITEM RS. REMARKS Court fees for value of land/ damages of Rs.4 lakhs: 6,248 The Court Fee is cal Above Rs.4 lakhs, culated on add Rs.48.80 for the value every Rs.5,000/-: of land plus the damages Value of land + claimed Damages - Court excluding fees: 9,29,942 Court fees Court Fees 11,420 Addl. Payment of Court Fees: 7,124 Total damages claimed: 7,91,362 29.8 The defendants are legally bound to pay the damages claimed for the following reasons:

29.8.1 The damages claimed are losses sustained by the plaintiff as a direct consequence of the fraudulent breach of contract,

29.8.2 The consequences of the Breach of contract were well known to the defendants before the contract was breached with fraudulent intent,

29.8.3 The Court Fees for the present claims have been paid and additional court fees will be paid at the end of the suit, if required when the claims are further amended."

Consequent thereto the appellant/plaintiff has also sought for amendment to para 31 by substituting that total claim as on date amounting to Rs.7,21,362/- whereas paragraph 32 of the plaint is wished to be amended by including in the relied portion the amount of Rs.7,21,362/- which is sought to be claimed as damages. The aforesaid contents which the appellant/plaintiff seeks to bring into the plaint by way of amendment make it crystal clear that the said damages are being claimed by the plaintiff for fraudulent breach of the contract which is a claim u/s 73 and/or 74 of the Contract Act. At the time of filing of the original plaint a claim was made for payment of Rs.50,000/- by way of compensation towards damages without giving any specific data for raising the said claim whereas the appellant/plaintiff now seeks to give specific data for enhancing his claim for payment of compensation towards damages.

12. The learned Single Judge has already framed issues and the evidence has also been led by the parties and the suit is ready for arguments. Subsequent thereto the defendant/ respondent has conceded that the decree for specific performance of the agreement may also be granted to the plaintiff. Since the suit has already proceeded to the aforesaid extent allowing the amendment would definitely enlarge the scope of enquiry as has been held by the learned Single Judge. The same would also amount to allowing the plaintiff to sue for fresh claims, thereby causing prejudice to the defendant. If the amendment as detailed above and as sought for in the application is allowed the parties would

have to be allowed to produce more witnesses on their behalf and also to recall their earlier witnesses in support of fresh claims. Since in view of the concession of the defendant a decree for specific performance of the agreement has to be passed in the present case, the amendment if allowed would not only drag the suit for many more years but it would also result in re-opening entire controversy though decree for specific performance has been conceded by the defendant. In re-opening of the aforesaid controversy various factors may have to be considered by the court as to whether the plaintiff is entitled to such a relief and even if he is so entitled to what amount he would be entitled to and whether or not such claim is too remote and distant. The parties have already led their evidence and thereafter the evidence has been closed and the matter is ready for arguments. Considering the nature of the amendments as sought for, there can be no doubt that if allowed it would cause unnecessary harassment to the defendant and allowing such amendment would amount to permitting the plaintiff to turn "his suit into a gamble for himself at the defendant's expense". Accordingly, the application filed by the appellant/plaintiff praying for amendment of the plaint is held to have no merit and the decision of the learned single Judge of this court is upheld.

13. We have also given our thoughtful consideration to the merit of the arguments made on behalf of the appellant/plaintiff in respect of the contents of the other three applications. We have looked into the reasons given by the learned Single Judge in dismissing the aforesaid applications holding that once the defendants have conceded the claim of plaintiff for specific performance there is no need for any further cross-examination of the second defendant as also the counsel for the plaintiff. On careful consideration we do not find any infirmity therein. If for any reason the plaintiff has any grievance as against his counsel he could appropriately seek the remedy that is provided for for taking action for the alleged conduct of his counsel. But he cannot be allowed to exploit the present suit for such action. The appeal, Therefore, has no merit and the same accordingly, stands dismissed leaving parties to bear their own costs.