

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 18th September, 2017**

+ **CM(M) No.1039/2017**

RAM MOHAN

..... Petitioner

Through: Mr. Abhishek Harjika, Adv.

Versus

ANIL KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.34159/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 1039/2017 & CM No.34158/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 15th July, 2017 in Civil Suit No.417/2014 (New No.614927/2016) of the Court of Additional District Judge-08 (ADJ), Central District, Tis Hazari Courts, Delhi] allowing the application of respondent / plaintiff, filed after hearing of final arguments, for amendment of the plaint in the suit for specific performance of Agreement to Sell, to also include therein the relief, in the alternative, of recovery of double of the *bayana* amount with interest.
4. The impugned order, after allowing the application of the respondent / plaintiff, posted the suit on 19th July, 2017 for payment of costs and further proceedings.
5. The counsel for the petitioner / defendant, on enquiry as to what transpired in the suit after 15th July, 2017, states that the respondent /

plaintiff has not paid the costs as yet and the suit is now listed on 1st November, 2017 for further proceedings.

6. The learned ADJ has in the impugned order referred to proviso to Section 21(5) of the Specific Relief Act, 1963 to the effect that where the plaintiff has not claimed any 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 compensation.

7. The argument of the counsel for the petitioner / defendant is that the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC) as introduced vide amendment of CPC of the year 2002, does not ordinarily permit amendments post commencement of trial and the respondent / plaintiff pleaded no reasons for not seeking the relief of refund of double of earnest money in the plaint as originally filed or till framing of issues and such amendment could not have been allowed at the stage of final arguments.

8. Proviso to Section 21(5) of the Specific Relief Act, which codifies the law of specific performance, permits such amendment to be made 'at any stage of the proceeding'. Though I have been unable to find any judgment thereunder to this effect but in *M/s. Ex-Service Enterprises (P) Ltd. Vs. Shri Samey Singh* ILR (1975) II Delhi 539 & *Babu Lal Vs. M/s Hazari Lal Kishori Lal* (1982) 1 SCC 525, in the context of proviso to Section 22 (2), it has been held that the same permits amendment at the stage of execution also. I fail to see why, what has been held in the context of proviso to Section 22(2) should not apply in the context of proviso to Section 21(5). The language of the two is identical, as will be evident hereunder:

“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.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, 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 (9 of 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.

*Explanation.—*The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

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 1[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.”

(emphasis added)

9. While Section 21 is concerned with claim for compensation for breach, either in addition to or in substitution of the relief of specific performance, Section 22 is concerned *inter-alia* with any other relief to which the plaintiff may be entitled to, including the refund of any earnest money or deposit made by the plaintiff in case his claim for specific performance is refused. The words “any other relief to which he may be entitled” are of wide amplitude and would take within their ambit a claim also for compensation for breach of agreement either in addition or in substitution of the relief of specific performance. Thus, a plaintiff in a suit for specific performance of an agreement of sale can, under Section 22, claim the relief of compensation for breach either in addition or in substitution of specific performance and if the plaintiff has not claimed such relief he can amend the plaint under the proviso to sub-section (2) of Section 22. Sub-section (3) of Section 22 makes the power of the Court to grant relief thereunder, “without prejudice” to the powers to award compensation under Section 21 and which is again indicative of it being possible for the respondent / plaintiff in the present case, to claim the relief as was sought by way of amendment, under proviso to Section 22(2) as well.

10. However, even if it were to be held that a claim for compensation for breach in addition to or in substitution of the claim for specific performance having been specifically dealt with under Section 21, is not within the ambit of Section 22 and the claim thereunder is confined to other reliefs including of refund of earnest money or deposit paid or made by the plaintiff, I

still see no reason as to why the interpretation of the proviso to sub-section (2) of Section 22 should not also apply to the interpretation of the proviso to sub-section (5) of Section 21. What prevailed in *M/s. Ex-Service Enterprises (P) Ltd.* and in *Babu Lal* supra for holding amendment provided under proviso to sub-section (2) of Section 22 to be possible even at the stage of execution was the use of words “at any stage of the proceeding”; the term “proceeding” was held to be comprehensive term meaning a prescribed course of action for enforcing a legal right. It was held that the word “proceeding” includes execution proceedings also which is a stage in the legal proceedings or a stage in the judicial process and / or a stage in litigation. It was thus held that the legislature has given ample power to the Court to allow amendment of the plaint at any stage including the execution proceeding. There is nothing in the language of Section 21 which would make inapplicable the aforesaid interpretation of the words “at any stage of the proceeding” used in the proviso to sub-section (5) of Section 21 also.

11. Supreme Court in *Jagdish Singh Vs. Natthu Singh* (1992) 1 SCC 647 held that where the plaintiff, by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. However where 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. It was further held 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 will allow the amendment at any stage of proceeding. However different and less liberal standards apply if what is sought by amendment is the conversion of a suit for specific performance into one for damages for breach of contract

in which case Section 73 of the Contract Act is invoked. The latter amendment was held to be under the discipline of Rule 17 of Order VI of the CPC. It was clarified that the fact that sub-section (4) of Section 21 invokes Section 73 of the Contract Act for the principles of quantification and assessment of compensation, does not obliterate this distinction. Finding that the plaintiff in that case had not sought amendment of plaint for compensation in lieu of specific performance, the amendment of the plaint at the stage before the Supreme Court was permitted.

12. The Specific Relief Act having permitted amendment of plaint to seek the reliefs as mentioned above at any stage of the proceeding, the contention of the counsel for the petitioner that proviso to Order VI Rule 17 has to apply is clearly erroneous and misconceived. The Rules contained in First Schedule of the CPC, as Order VI is, provide the law relating to procedure of Courts of Civil Judicature; but where any statute codifying the law relating to any right which may be claimed in Civil Court provides otherwise, such statute being a special law, in comparison to general law contained in CPC, has to prevail or the two have to be harmoniously construed.

13. The only other argument of the counsel for the petitioner / defendant is that no opportunity to the petitioner / defendant to file written statement to the amended plaint has been given.

14. The aforesaid is not decipherable from the impugned order.

15. The counsel for the petitioner / defendant also agrees but states that the learned ADJ has verbally said so.

16. This Court cannot, on the basis of such submissions presume that

anything as argued has transpired. The petitioner / defendant, if is deprived of the opportunity to file written statement to the amended plaint, would have liberty to take remedies thereagainst.

17. The counsel for the petitioner / defendant then argues for enhancement of costs subject to which amendment has been allowed.

18. This Court, in exercise of powers under Article 227 would be loath to interfere with the discretion exercised with respect to the quantum of costs.

19. Dismissed.

No costs

SEPTEMBER 18, 2017

‘gsr/R’..

(Corrected and released on 5th October, 2017)

RAJIV SAHAI ENDLAW, J