

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

WRIT PETITION NO.1459 OF 2018

Ashok Agarwal and Anr.

.. Petitioner

V/s.

Rakesh Electrical Instruments and Anr.

.. Respondents

Mr.Rajendra Thakkar with Ms.Pooja Thakkar for the petitioner

Mr.Mangul Bhandari with Mr.Dharmesh Jain I/b M/s.Divya Sanghavi for the respondent

CORAM: K.K. TATED, J

DATED : DECEMBER 4, 2018

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, the Petitioner challenges the order dated 29.09.2017 passed by Bombay City Civil Court, Mumbai in Chamber Summons No.1106 of 2017 in Suit No.6107 of 2006 (High Court Suit No.860 of 2006) rejecting petitioner original plaintiff's Application for amendment of plaint on the ground that same was filed when issues were framed and plaintiff's witness had filed evidence.

3 Trial Court also rejected Application for amendment on the ground that initially plaintiff filed suit simplicitor for recovery of money and later on by amendment to introduce the prayers for specific performance of the agreement between the parties.

4 The learned counsel for the Petitioner submits that the Trial Court erred in coming to the conclusion that Petitioner failed to make out a case for allowing them to carry out amendment as per draft amendment filed along with the Chamber Summons.

5 The learned counsel for the Petitioner submits that initially Petitioner filed Suit No.6107 of 2006 for recovery of sum of Rs.23,46,652/- along with interest @ 18% p.a. on sum of Rs.6,80,000/-. Prayer clause a and b of the said suit reads thus:

“(a) Rs.23,46,652/- together with interest @ 18% per annum on the sum of Rs.6,80,000/- from the date of the suit till payment or realisation in accordance with the particulars of claim being Exhibit 'Y' to the Plaint.”

“(b) Rs.5,000/- by way of damages being the legal fees paid by the Plaintiffs to M/s.Mahesh Jani and Co.”

6 The learned counsel for the petitioner submits that in view of subsequent development, they preferred Chamber Summons for carrying out amendment. He submits that by way of amendment Petitioner original plaintiff seeks permission from the Trial Court to add the following prayers in the pending Suit along with consequential amendment which reads thus:

“36(e) In the alternative of the prayers 36(a) to 36(d), the defendants be directed to enter into a registered agreement with the plaintiffs and transfer the suit premises to the plaintiffs on ownership basis and form a Cooperative Society and join the plaintiff as a member of the same;

36(f) In the alternative of the prayers 36(a) to 36(d), the Hon'ble may declare through a decree that the Agreement dated 27th July, 1992 attempting to carry tenancy of the suit premises in favour of the plaintiffs, is a sham and colorable document with the intention to commit fraud, as the real intention of the parties was to enter into a sale agreement to transfer the ownership of the premises to the plaintiffs;

36(g) In the alternative of the prayers 36(a) to 36(d), the plaintiffs be allowed to deposit the balance amount of Rs.25,000/- as their readiness and willingness to complete the contract on the modified terms of the Defendants offer;

36(h) In the alternative of the prayers 36(a) to 36(d), the plaintiffs be allowed to be the arrears of maintenance and other outgoings in the court or to the Defendants.”

7 The learned counsel for the Petitioner submits that Trial Court erred in coming to the conclusion that by way of amendment, Petitioner is changing the entire structure of the suit itself. He submits that in a money suit, Petitioner can make appropriate Application for carrying out amendment in alternate for specific performance of the agreement. In support of this contention, he relies on the judgment of the Apex court in the matter of ***Sampath Kumar vs. Ayyakannu and Ors.***

MANU/SC/0812/2002, Panchanan Dhara and Others vs. Monmatha Nath Maity (Dead) Through Lrs. And Another (2006)5 SCC 340, G.Nagamma and Ors. vs. Siromenamma and Ors. MANU/SC/1067/1996 and order of this court Durga Trading Company vs. Shree Sitaram Mills Limited & Ors. In Chamber Summons No.467 of 2015. On the basis of these submissions, the learned counsel for the Petitioner submits that Trial Court erred in coming to the conclusion that Petitioner failed to make out a case for allowing the Chamber Summons.

8 On the other hand, the learned counsel for the Respondent vehemently opposed the present Writ Petition. He submits that the Trial Court rightly held in the impugned Judgment that, by way of amendment, Petitioner wants to change the entire structure of the suit itself. Therefore, there is no question of allowing the present Writ Petition at all. He also relies on the judgment in the matter of *Roop Chand Chaudhari vs. Smt. Ranjit Kumari, AIR 1991 P & H 212*. Paragraph 12 of the said judgment reads thus:

“12. Then we have the Supreme Court decision, Prem Raj v. D.L.F. H. & C. Ltd., MANU/SC/0039/1968MANU/SC/0039/1968 : AIR 1968 SC 1355. This case is also important for the decision of the point involved. Here, the person, who was to purchase, filed a suit for declaration that the contract of sale against him was void and inoperative, having been obtained by undue influence. At the same time, the alternative prayer in the suit was for grant of a decree of specific performance of the same contract. It was ruled as follows AIR 1968 SC 1356 :

".....So far as the relief of specific performance is concerned, the matter must be examined in the light of the provisions of the Specific Relief Act. In this connection reference may be made to S. 37 of the Specific Relief Act (Act No. 1 of 1877) which is to the following effect :

'A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the Court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly.'

" 'It is expressly provided by this section that a plaintiff Suing for specific performance of the contract can alternatively sue for the rescission of the contract but the converse is not provided. It is, therefore, not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance. S. 35 of the Specific Relief Act, 1877 states that the principles upon which the rescission of a contract may be adjudged. But there is no provision in this section or any other section of the Act that a plaintiff suing for rescission of the agreement may sue in the alternative for specific performance. In our opinion, the omission is deliberate and the intention of the Act is that no such alternative prayer is open to the plaintiff. This view is borne out by the following passage in "Fry on Specific Performance, 6th Edition, p. 493" :--

'It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled, provided that the alternative relief is based on the same state of facts, though with different conclusions as to law. When the action is brought by the vendor, and the purchaser has been in possession, this alternative claim may embrace an

account of the rents and profits. But for the reason already stated, a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise could not be sustained in the Court of Chancery. And notwithstanding the provisions of the Rules of the Supreme Court as to alternative claims for relief, it seems probable that the same conclusion would still be arrived at, on the ground that the claims were inconsistent and embarrassing."

The same principle is enunciated in Cawley v. Poole (1863) 71 ER 23 in which it was held by the Court of Chancery that in a case where a bill alleges a judgment obtained by fraud, and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or in default to have the compromise carried out, and the Court is of opinion that the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed."

It is important to note from the above quotation that while a suit to claim relief of specific performance with alternative relief of declaration/damages is permissible, converse is not true. The reason given by the Supreme Court is that one can claim damages only on rescission of agreement, but the relief of specific performance cannot be granted on rescission of the agreement. While coming to the aforesaid conclusion, a reference was made to S. 37 of the (old) Specific Relief Act which is equivalent to S. 29 of the (new) Specific Relief Act, 1963. Therefore, the aforesaid decision would be applicable to the facts of the instant case also."

9 Heard both the sides.

10 It is to be noted that bare reading of the copy of the plaint filed by the Petitioner in the Trial Court shows that initially

Petitioner filed a suit for recovery of amount. By way of amendment, Petitioner wants to convert the said suit of the specific performance of the agreement. In any case, the Petitioner has filed Chamber Summons for amendment on the basis of subsequent development. That was considered by the trial court at the time of deciding the Chamber Summons and has observed that the petitioner has already taken appropriate steps for specific performance as stated by them in affidavit in support of Chamber Summons.

11 The authorities relied by the Petitioners are not relevant in the facts and circumstances of the present case. In that case, Supreme Court has held that amendment can be allowed if it is consistent with the original pleading. In the case in hand, the original Petitioner has filed suit for recovery of money and by way of amendment he wants to convert the same for specific performance of agreement. That also when the trial began. All these facts are considered by the Trial Court at the time of deciding the Chamber Summons.

12 Hence, I do not find any substance in the present Writ Petition.

13 At this stage, the learned counsel for the Petitioner submits that ad-interim relief granted by this court on 18.07.2018 be continued. On the other hand, the learned counsel for the Respondent vehemently opposed the same. He submits that in view of the stay granted by this court dated 18.7.2018, plaintiff is taking time in another suit pending before the Small Causes

Court.

14 Considering these facts, following order is passed:

- a) Writ Petition stands rejected.
- b) No order as to costs.
- c) Ad-interim relief granted by this court on 18.7.2018 to continue for further 8 weeks. It is made clear that suit filed by the plaintiff in Small Causes Court to proceed on its own merits without influencing the stay granted by this court.

(K.K. TATED, J.)