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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 1589/2011**
KPG LEASING & FINANCE COMPANY Plaintiff
Through: Mr. K. K. Rohatgi, Advocate
Versus
CHAMBEL KHAN & ANR Defendants
Through: Mr. Bahar U. Barqi, Advocate
CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
ORDER
% **05.02.2018**

I.A.15356/2017 (of the plaintiff for restoration of the suit dismissed in default on 28th November, 2017)

1. This order is in continuation of the earlier order dated 28th December, 2017.
2. The counsel for both the defendants appears.
3. For the reasons stated, the application is allowed and disposed of and the suit is restored to its original position.

I.A.15357/2017 (of the plaintiff for amendment)

4. The plaintiff, in this suit for specific performance of an agreement of sale of immoveable property, seeks to amend the plaint to now, in addition to or in the alternative to the relief of specific performance, also claim the relief of recovery of compensation.
5. The counsel for both the defendants opposes the application.
6. Section 21 of the Specific Relief Act, 1963 permits such amendment to be carried out at any stage. Reference in addition can be made to the dicta of this Court in ***Ram Mohan Vs. Anil Kumar*** 2017 SCC OnLine Del 10922

and ***Bhayana Builders Pvt. Ltd. Vs. Kawal Kumar*** 2017 SCC OnLine Del 12018.

7. The application is thus allowed and disposed of.

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8. The amended plaint is taken on record.

9. Though the plaintiff, on 20th December, 2017 had categorically stated that the plaintiff is not interested in a decree for specific performance but a perusal of the amended plaint taken on record today shows the plaintiff therein also claiming the relief of specific performance of the Agreement to Sell dated 5th January, 2011 and in addition to such specific performance, seeking the relief of recovery of compensation of Rs.2,50,00,000/- or in substitution of such specific performance, seeking recovery of Rs.1,05,00,000/- as compensation with future interest.

10. The counsel for the plaintiff however even today is not willing to a decree for specific performance which the counsel for the defendants today also, as on earlier occasion, is willing to concede.

11. The counsel for the plaintiff however argues that the specific performance be granted by modifying the Agreement and by reducing the sale price. It is stated that it was so done in ***Nirmala Anand Vs. Advent Corporation (P) Ltd.*** (2002) 8 SCC 146.

12. There appears to be a mismatch between what the counsel for the plaintiff is arguing and what he has drafted in the amended plaint just a few days ago. In the amended plaint, specific performance is sought of the Agreement as it was and no basis for the plaintiff being entitled to modification is laid in the amended plaint and no relief in this regard claimed.

13. I have in the circumstances put it to the counsel for the plaintiff that the plaintiff at best only is entitled only to refund of the money paid with interest. When the plaintiff itself is not willing for specific performance, the question of the plaintiff being entitled to any damages for breach of contract and for performance of which contract, the defendants are still willing, does not arise.

14. On enquiry, both the counsel for the plaintiff and the counsel for the defendants state that the plaintiff has paid and the two defendants have received from the plaintiff under the Agreement to Sell, a sum of Rs.50,00,000/-.

15. Upon the defendants being asked to refund the said amount, the counsel for the defendants states that the plaintiff is in breach and the defendants are therefore entitled to forfeit the said amount.

16. However, the counsel for the defendants on enquiry fairly admits that the said amount of Rs.50,00,000/- was received by way of part payment / advance payment and not by way of earnest money and the defendants have neither pleaded nor claimed any loss or damage suffered by the defendants owing to breach if any by the plaintiff of its part of the Agreement to Sell.

17. Attention of the counsel for the defendants has been drawn to the dicta of the Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority*** (2015) 4 SCC 136 and the subsequent judgments of this Court in ***Palm Art Apparels Pvt. Ltd. Vs. Entry Builders Pvt. Ltd.*** MANU/DE/3533/2017, judgment dated 11th December, 2017 in CS(OS) No.401/2010 titled ***Satish Verma Vs. Garment Craft (India) Pvt. Ltd.*** and to order dated 31st January, 2018 in CS(OS) No.308/2016 titled ***Mera Baba Pvt. Ltd. Vs. Ram Lubhaya Puri*** in this regard.

18. The counsel for the defendants then states that the defendants are willing to refund the said amount to the plaintiff.

19. I have proposed return of the said amount together with interest at 8% per annum from the date the said amount was received by the defendants and till the date of refund.

20. The matter was passed over to enable the counsels to take instructions.

21. The counsel for the plaintiff on passover has repeated what he had argued in the morning and what is recorded hereinabove.

22. I have already held above that there can be no specific performance by this Court modifying the price, as is the want of the plaintiff.

23. The counsel for the plaintiff then states that the defendants, on an earlier occasion had agreed to refund the said amount with interest at 15% per annum.

24. The counsel for the defendants states that that settlement fell through as recorded in the earlier order dated 28th December, 2017.

25. The counsel for the defendants contends that the rate of interest should be @5% per annum.

26. I am unable to agree with the contention of the counsel for the defendants also. The rate of 8% was proposed keeping in view the average rate of interest paid by nationalized banks on fixed deposits during the contemporaneous time. The defendants have enjoyed the monies of the plaintiff and having suffered no loss are liable to pay to the plaintiff interest as would be earned on the fixed deposit.

27. It is not in dispute the amount of Rs.50,00,000/- was paid as under:

Sl. No.	Amount (in Rs.)	Date of payment
01	1,00,000.00	25.12.2010
02	9,00,000.00	26.12.2010
03	40,00,000.00	05.01.2011

28. In this view of the matter, it is deemed appropriate that the interest on the entire amount of Rs.50,00,000/- runs from 5th January, 2011.

29. Accordingly, a decree is passed in favour of the plaintiff and jointly and severally against the defendants for recovery of Rs.50,00,000/- with interest thereon at the rate of 8% per annum with effect from 5th January, 2011 till the date of realisation / payment.

30. If the defendants do not pay the entire decretal amount on or before 31st March, 2018, a decree is also passed in favour of the plaintiff and against the defendants of recovery of costs of this suit with counsels fee assessed at Rs.2,00,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 05, 2018

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