

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9713 OF 2016

Madhav Housing Private Limited & Ors.	.. Petitioners
Versus	
Suchita Baburao Chavan	.. Respondent

Mr. P.J. Thorat for petitioners.
Mr. A.A. Garge for respondent.

CORAM : K.K. TATED, J.

DATE : 28 FEBRUARY 2019.

P.C:-

- . Heard learned Counsel for parties.
2. By consent of both the parties, matter is taken on board for final hearing at the stage of admission.
3. By this writ petition under Article 227 of the Constitution of India petitioner/original plaintiff is challenging the order dated 12.07.2016 passed by the Court below Exhibit-28 in Special Civil Suit No.336 of 2014 rejecting plaintiff's application for carrying out amendment in the plaint.
4. Learned Counsel for petitioner submits that in the present proceedings they have filed Special Civil Suit No.336 of 2014 before learned Civil Judge, Senior Division, Nashik for

specific performance of contract. He submits that at the time of filing plaint it remain on their part to make appropriate alternative prayer for damages. Hence, plaintiff has filed application under Order 6 Rule 17 of Civil Procedure Code, 1908 on 25.02.2016. That application was rejected by the trial Court only on the ground that petitioner/original plaintiff was not due diligent at the time of filing a suit. He submits that trial Court also specifically recorded in the order that, trial of suit was not started. In spite of that, the trial Court rejected their application under Order 6 Rule 17 of Civil Procedure Code, 1908.

5. The learned Counsel for petitioner submits that as per Sections 21(5) and 22(2) of Specific Relief Act, 1963 they have to make specific prayer for damages. Sections 21(5) and 22(2) of Specific Relief Act, 1963 reads thus :-

“21 (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 in-capable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

22 (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.”

6. The learned Counsel for the petitioner submits that in view of Section 21 and 22 of the Specific Relief Act and under Order 6 Rule 17 of Civil Procedure Code, plaintiff filed the application for carrying out amendment to claim damages in alternative to the main prayer. He submits that the trial Court instead of deciding their application on merits, dismissed the application only on technical ground of due diligence. The learned Counsel for the petitioner submits that there is no question of delay on the part of the petitioner to make the application for carrying out amendment. He submits that our High Court in the matter of **Manohar Dhundiraj Joshi Vs. Jhunnulal Hariram Yadao and Others**¹ held that in the case of Specific Relief Act in view of Section 21 and 22 of the said Act amendment can be allowed to claim in alternative damages. He relies on paragraph 5 and 7 of the said authority which reads thus :

1 1983 0 MhLJ 369

"5. It is not disputed before me that on the day when the application for amendment to the plaint was made, the claim for compensation and refund of earnest money would have been barred by limitation. This Court in (Parbhudas v. Lallubhai)¹, (Bai Kamala v. Shankarrao)², and (Chunttal v. Abdul Dawood)³ and the Privy Council in (Bhagwanji v. Alembic Chemical Works)⁴ have held that an amendment of plaint introducing a new claim which would have been barred by limitation at the time when the leave was sought cannot be allowed, unless there are exceptional circumstances. However, in (A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation)⁵, the Supreme Court has laid down that as a general rule a party is not allowed by amendment to set up a new case or new cause of action, particularly when the suit on the new cause of action is barred. But at the same time the Supreme Court has further held that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment would be allowed even after expiry of the statutory period of limitation. In laying down this rule the Supreme Court has observed as follows (at page 98):

"(8) The principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistake Cropper v. Smith⁶ and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (Kisandas Rupchand v. Rachappa Vithoba)⁷, (approved in Pirgonda Hongontla Patil v. Kalgonda Sttidgonda)⁸.

(9) The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in Cooke v. Gill⁹, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Ltd.¹⁰, and it seems to us to be the only possible view to take. Any other view would make the

rule futile. The words "new case" have been understood to mean "new set of ideas"; *Dornan v. J.W. Ellis and Co. Ltd.*¹¹. This also seems to us to on reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time.

The question now therefore arises is whether by seeking to include the relief for compensation and refund of earnest money the plaintiff was trying to set up a new case or new cause of action or it amounted merely to a different or additional approach to the same facts. A look at the application for amendment would show that the plaintiff wanted to introduce para 7(a) in the plaint, in which he states certain facts on which the claim for compensation is based. Obviously these facts were not in the plaint and in the absence of these facts the plaintiff would not have been entitled to the relief at least for compensation. Hence in so far as the additional relief for compensation is concerned, it has to be said that the plaintiff introduced a new case or a new cause of action as contemplated by the Supreme Court in Gupta's case (*supra*). Since this relief was barred by limitation the plaintiff would not have been allowed to amend the plaint to introduce it. However, the same could not be said with regard to the refund of earnest money. In that respect no new facts or new cause of action was being set up by the plaintiff and this relief is being sought to be introduced in the plaint only as an alternative relief to the relief for specific performance for which the suit had been filed. Normally the plaintiff in a suit for specific performance would be entitled to refund of earnest money, if the relief for specific performance is refused since this is just and equitable. Hence applying the principle in Gupta's case (*supra*) it would not be possible to say that the amendment with regard to the inclusion of relief for refund of earnest money could have been refused solely on the ground that the said relief was barred by limitation on the day when the amendment was sought. It is not possible to uphold the submission of Mr. Ghate that the application was not bona fide. As pointed out above, the plaintiff in the said application has stated that in the belief that the phrase "any other relief" in the prayer clause would include this relief, he omitted to claim the said relief. It cannot be said that this was not bona fide or that the amendment application was filed with ulterior motive. However the question is whether the provisos to Sub-

section (5) of Section 21 and Sub-section (2) of Section 22 of the Act leave no alternative to the Court but to allow the amendment at any stage of the proceeding irrespective of the fact that the reliefs for compensation and refund of earnest money are barred on the day when the amendment is sought, as submitted by Mr. Deopujari. It will be convenient to reproduce Sections 21 and 22 of the Act to understand these submissions.

“21. (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.

(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. (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure 1908, any person suing for the specific performance of a contract for the transfer of immoveable 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 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.

Sub-sections (1), (2) and (3) of Section 21 of the Act correspond to paras. 1, 2 and 3 of Section 19 of the Specific Relief Act, 1877 and Sub-sections (4) and (5) of Section 21 of the Act are newly added. It appears that there was no provision corresponding to Section 22 in the Act of 1877 and this section is a new addition to the provisions on the subject of specific relief. It is obvious that Sub-sections (4) and (5) of Section 21 and the whole of Section 22 have been introduced in the Act in order to avoid multiplicity of suits and proceedings. Section 21 and 22 enact a rule of pleading. The only question which falls for consideration is whether in enacting the provisos to Sub-section (5) of Section 21 and Sub-section (2) of Section 22 the Legislature intended to cast a duty on the Court to permit the amendment contemplated therein without leaving any discretion to it. This is more so because of the word "shall" having been used in both these provisos.

7. Obviously these two provisos deal with the question of permitting the plaintiff to amend his plaint. It is not as if in the absence of these provisos a plaintiff would not have been permitted to carry out an amendment in his pleading by introducing a relief for compensation and refund of earnest money. Rule 17 of

Order VI of the Code of Civil Procedure (hereinafter referred to as "the Code") does confer power on a Court to allow a party to alter or amend his pleading in such manner and on such terms as may be just. This rule does not stop at that, but it further says that all such amendment should be made as may be necessary for the purpose of determining the real question in controversy between the parties. It is pertinent to note that this provision which empowers the Court in its discretion to permit a party to amend his pleadings, was already on the statute book when the Specific Relief Act, 1963 was enacted. It can, therefore, be presumed that when the latter legislation was on the anvil the Parliament was aware of this power of the Court to permit amendment of pleadings. It cannot be successfully urged that a suit for specific performance falling under the provisions of the said Act would not be governed by the provisions of the Code of Civil Procedure. It is, therefore, clear that to such a suit the provisions contained in Order VI, Rule 17 of the Code would apply and a plaintiff who has earlier failed to incorporate the reliefs for compensation and refund of earnest money could seek the permission of Court to introduce these reliefs by way of amendment. If the legislature intended that allowing such amendment should be left to the discretion of the Court, it would not have enacted the provisos to Sub-section (5) of Section 21 and Sub-section (2) of Section 22. It is well-known that the legislature normally does not enact a superfluous provision. It is therefore not possible to say that by enacting these two provisos the legislature once again wanted to invest the Court with discretionary power of permitting amendment of pleadings which power already existed under Order VI, Rule 17 of the Code. This gives a clue to the intention of the legislature in enacting the two provisos and particularly using the word "shall" in both of them. In the context which I have stated above, it appears clearly to me that the legislature did not intend merely to confer discretionary power on the Court to permit a plaintiff to amend his pleading to introduce these two reliefs at any stage of proceeding, but it intended to make it obligatory and imperative on the Court to allow such amendment. As I have said above, the very idea in enacting Sub-sections (4) and (5) of Section 21 and Section 22 including Sub-section (2) thereof was to avoid and do away with the multiplicity of litigation. In my view, therefore, these two provisos do not merely

confer discretionary power on the Court, but they make it obligatory on the Court to permit such amendments which come within their purview.”

7. The learned Counsel for petitioner also relies on a judgment in the matter of **Vidyabai and Others Vs. Padmalatha and Another**². In this case, the Apex Court held that if trial is not begin, the Court can consider the application for carrying out amendment. On the basis of this authority and the submissions made by learned Counsel for the petitioner, he submits that this Hon'ble Court be pleased to set aside the impugned order dated 12.07.2016 and allow the petitioner's application below Exhibit-28 under Order 6 Rule 17 of Civil Procedure Code, 1908. He submits that if this writ petition is not allowed irreparable loss will cause to the petitioner. He further submits that because of amendment, cause of action is not going to be changed in the original suit.

8. On the other hand, the learned Counsel appearing on behalf of respondent/original defendant vehemently opposed the present writ petition. He submits that in view of Order 2 Rule 2 and 3 of Civil Procedure Code, 1908 there is no question of allowing the application filed by the plaintiff for carrying out amendment. He submits that bare reading of the plaint and the Order 2 Rule 2 and 3 of Civil Procedure Code shows that plaintiff

2 (2009) 2 SCC 409

has relinquished the part of his claim. Therefore, that cannot be permitted. Hence, there is no question of allowing the plaintiff to carry out amendment in the plaint. Hence, the trial Court has rejected the petitioner's application to carry out the amendment on the ground of due diligence. Hence, there is no substance in the present writ petition and same to be dismissed with cost.

9. I heard both the sides at length. It is to be noted that in the present proceedings, plaintiff has filed suit for Specific Performance. It remain on their part to make the prayer for damages in alternative to the main prayer before commencement of trial. Amendment is not going to change the nature of suit.

10. Considering the submissions made by learned Counsel for the petitioner and judgment of this Court in the matter of **Manohar Dhundiraj Joshi (Supra)**, I am of the opinion that petitioner has made out case for allowing this Writ petition. Hence, following order :-

a) Order dated 12.07.2016 passed by the learned Civil Judge, Senior Division, Nashik below Exhibit-28 in Special Civil Suit No.336 of 2014 is set aside.

- b) The application filed by the petitioner/original plaintiff below Exhibit-28 under Order 6 Rule 17 of Civil Procedure Code, 1908 is allowed.
- c) Petitioner/original plaintiff is permitted to carry out amendment in the plaint as per application below Exhibit-28 on or before 30.04.2019 and serve the amended copy of plaint on other side.
- d) Liberty granted to the defendant, if they so desire, to file their additional written statement if any with copy to other side on or before 15.06.2019.
- e) Writ petition is allowed accordingly.
- f) No order as to costs.

(K.K. TATED, J.)