**Reserved on : 11.11.2020**

**Delivered on : 19.11.2020**

**A.No.7906 of 2019**
**in**
**CS.No.878 of 2005**

**P.T.ASHA, J.**

The plaintiff is the applicant before this Court. The applicant has filed this application to amend the Plaint, to include the relief of compensation.

2. The parties are referred to in the same array as in the suit.



3. The brief facts that have given rise to the instant application are as follows:

3.1. An Agreement dated 28.10.1995 was entered into between the plaintiff and the defendants to purchase the suit schedule property for a total sale consideration of Rs.1,05,00,000/- ( Rupees One Crore Five Lakhs only). It is the case of the plaintiff that on the date of the Agreement, a sum of Rs.49,50,000/- (Rupees Forty Nine Lakhs Fifty Thousand only) was received by all the defendants. The defendants had agreed to receive the balance sale consideration at the time of registration of the sale deed and the handing over of possession.

3.2. The plaintiff would submit that after the execution of this Agreement, the defendants started demanding a higher sale consideration and they were not co-operating to have the Deed executed, after receiving the balance sale consideration. This prompted the applicant to file a suit for Specific Performance against the defendants on 30.04.1999.

3.3. Once the defendants came to know about the filing of the suit, they had come forward to execute a fresh sale agreement under a nomenclature of Supplementary Agreement. The said Agreement was signed by all the defendants on various dates ranging from 28.04.2001 to 30.04.2001 and it was agreed that the Agreement would take effect from 30.04.2001 since one of the terms of the Agreement was that this Agreement would come into effect from the date when the last of the parties have subscribed their hand to the said Agreement. Under the Supplementary Agreement, the sale consideration was enhanced to a sum of Rs.1,24,60,000/- (Rupees One Crore Twenty Four Lakhs Sixty Thousand only). The plaintiff had agreed to pay the balance sale consideration of Rs.75,00,000/- as he had already paid an advance of Rs.49,60,000/-.



3.4. The plaintiff would submit that he was all along willing and ready to perform his part of the contract. However, the defendants without performing their part of the contract, kept delaying the finalisation of the Agreement and effectively evaded receiving the balance amount so as to not execute the sale deed.

3.5. The plaintiff would submit that he had therefore issued a legal notice dated 28.09.2005, calling upon the defendants to execute the sale deed after receiving the balance sale consideration. The plaintiff had also stated about the availability of the sum of Rs.75,00,000/- with him. However, since the defendants did not come forward to comply with the demand, the plaintiff could not make the payment. The defendants 1 to 5 sent a reply notice dated 08.09.2005 denying their liability wherein they would state that they had received only a sum of Rs. 35,00,000 (Rupees Thirty Five Lakhs) from the plaintiff. Likewise, defendants 6 to 8 denied their liability under their reply notice dated 09.09.2005. The defendants had acknowledged the binding effect of the Agreement dated 28.10.1995 and the Supplementary Agreement dated 30.04.2001. The plaintiff had stated that the refund of the advance amount with interest would not be an adequate remedy for them. The plaintiff therefore had come forward with the above suit for the following reliefs:

> *"(i) pass a decree for specific performance directing the defendants to execute the sale deeds in respect of the suit property in favour of the plaintiff or its nominee for Rs.1,24,60,000/- after receiving the balance sale consideration of Rs.75,00,000/- and to hand over the possession of the suit property failing which direct the Asst. Registrar (O.S) to execute and register*

*the sale deed in favour of the plaintiff;*

*(ii) award the costs of the suit."*

**4. Defendants' Case:**

4.1. The defendants had filed a detailed written statement wherein the following legal issues have been raised and therefore the Court is not traversing through the entire defense:

(a) The suit is barred by limitation;

(b) Even according to the Agreement, the plaintiff was to pay the balance sale consideration on or before 07.06.2001.

(c) The plaintiff did not have the necessary wherewithal to pay the balance sale consideration and purchase the suit schedule property. Therefore, on this ground of readiness and willingness also, the plaint should fail.

(d) The property value had increased twofold, which has prompted the plaintiff to file the suit belatedly.

(e) That the breach was only on the part of the plaintiff and not on the part of the defendants and therefore the plaintiff was not entitled to the equitable relief on Specific Performance.

4.2. From the records, it is seen that the parties had commenced trial and the Chairman and Managing Director of the plaintiff's company had been examined as PW1 and Exs. P1 to P10 have also been marked. Thereafter, the third defendant has examined himself as DW1 and the matter is pending for cross examination. At this juncture, the plaintiff has come forward with the present application to amend the relief of the plaint to include the sum of Rs. 3,75,00,000/- together with interest in addition to other prayers.

**Content of the amendment application and counter**

4.3. In the affidavit filed in support of the application, the plaintiff has not given any reason for filing the said amendment. The plaintiff has sought for this compensation on the ground that the guideline value of the suit property has gone up five times over from the date of the original Agreement. That apart, the defendants by continuing to squat in the property and not executing the sale deed, have effectively deprived the plaintiff of the rental income to the suit property at the rate of Rs.1,50,000/- per month which amounts to a sum of Rs. 3,75,00,000/-.

4.4. The plaintiff would plead that under the Provisions of Section 73 of the Indian Contract Act (hereinafter referred to as 'Act') and Section 21 of the Specific Relief Act (hereinafter referred to as 'Relief Act'), it was well within the plaintiff's right to seek the amendment even at this stage.

4.5. The said application has been vehemently contested by the defendants who would submit that the same is highly belated and filed at the time the parties have already gone to Trial. The defendants would further submit that this is an attempt to fill up the lacuna. The amendment has been sought for 14 years after the institution of the suit and therefore, the application deserves to be dismissed. The defendants would contend that the plaintiff has attempted to introduce a fresh cause of action not pleaded earlier and therefore the application deserves to be dismissed.



5. The plaintiff has filed a reply refuting the contention raised in the counter affidavit.

**6. Submissions:**

6.1. Mr. George Cheriyan, learned counsel appearing on behalf of the applicant/plaintiff would draw the attention of the Court to Section 21 of the Specific Relief Act with specific emphasises on the Proviso to Section 21 (5) of the Specific Relief Act. The learned counsel had submitted that the amendment is very much in line with Provisions of Section 21 of the Specific Relief Act particularly the Proviso to Section 5 of the Act.

6.2. He would submit that as per Clause 9 of the Supplementary Agreement, it has been agreed between the parties that the parties on signing the Agreement were bound only by the terms of the Supplementary Agreement and nothing else. Under the terms of this Agreement, the balance sum of Rs. 75,00,000/- was payable on or before 07.06.2001. The owners were given an option to pay a sum of

Rs.35,00,000/- to the purchasers namely the plaintiff in full and final settlement and vice versa where the plaintiff could pay the sum of Rs.75,00,000/- and have the sale completed. The plaintiff would submit that handing over vacant possession of the property was *sine qua non* for this agreement as the plaintiff was desirous of putting up further construction in the suit property.

6.3. He would argue that by notice dated 29.08.2005, the plaintiff had directed the defendants to handover the possession of the property to him and execute a sale deed. In the said notice, the plaintiff has brought out the reasons for not having instituted the suit earlier. To this notice, the defendants had sent a reply dated 08.09.2005 denying the fact that the plaintiff was ready and willing to perform his part of the contract and contended that right from the word 'go' the plaintiff has not been ready and willing to conclude the contract. The defendants have also mentioned about the earlier suit that had been filed on 30.04.1999 which was also after the period of limitation had lapsed on 29.04.1999. Therefore the defendants had denied the claim of the plaintiff.

6.4. The learned counsel would also draw the attention of this Court to paragraph 4 of the counter statement where the defendants have admitted that in case the sale does not go through on or before 07.06.2001 with the plaintiff, the defendants as owners, are only liable to refund a sum of Rs.35,00,000/-. He would therefore submit even on their own pleadings, the defendants were liable to refund the sum of Rs.35,00,000/- to the plaintiff.

6.5. He would further argue that the reasons for which the property was being purchased was given in the Agreement of sale dated

28.10.1995 which was to defend that schedule property. He would also rely upon the Judgment reported in

***"[AIR 1922 SC1604] - Jagdish Singh vs Natthu Singh"***

This is a case where an amendment was sought for when the matter was pending in SLP before the Supreme Court. Like in the instant case, the plaintiff had only filed a suit for Specific Performance of the Agreement to resale. The suit was dismissed and the Appeal was also unsuccessful. However, in the Second Appeal filed by the plaintiff, the High Court had reversed the finding of the Lower Courts and allowed the Appeal holding that the plaintiff was ready and willing to perform his part and that the defendants were the party in breach. This Judgment and Decree was taken up on Appeal before the Supreme Court. The Hon'ble Supreme Court confirming the Decree of the Trial Court had allowed compensation to the plaintiff.

6.6. The learned counsel has also relied upon the Judgement ***"Kahini Developers Pvt. Ltd. vs Mukesh Morarji Panchamatia and Ors*** reported in **[*2013(3) MhLJ 440]" .*** This was a case where the amendment was sought to be introduced nearly 21 years after the institution of the suit. The learned Judges relying upon the Provisions of Section 21 of the Specific Relief Act and the Judgement in ***Jagdish Singh vs Natthu Singh*** held that the amendment that was sought for was in order, as the same would not in any manner prejudice the applicant therein.

6.7. He would therefore submit that the application for amendment should be allowed, particularly in the light of the language of the Proviso to Section 21 (5).

7. Per Contra, Mr.M.K. Kabir, learned Senior Counsel appearing on behalf of Mr. Tanveer Ahmed learned counsel for the respondents would at the outset submit that this application is highly belated. In fact, parties were asked to negotiate the compensation and at this juncture the present application has been moved.

7.1. He would submit that apart from being highly belated, the amendment sought for, ran contrary to the pleadings contained in the Plaint. In the Plaint, the plaintiff has clearly and categorically stated that compensation is not an adequate remedy for them and therefore by allowing this amendment, it would be a diametrically converse defence that has been now pleaded by the plaintiff. Being the plaintiff he cannot approbate and reprobate.



7.2. He would further submit that the Court has to examine the conduct of the parties. On 07.01.2013, the evidence of both parties had been closed. Thereafter, an application was filed for reopening the evidence. This application was dismissed, which was taken up on Appeal in OSA.Nos.246 and 247 of 2014. The said Appeals were dismissed by order dated 03.11.2014. It is only thereafter that the instant application has been moved. Even according to the plaintiff's case, the balance sale consideration had to be paid on 07.06.2001 and such a payment had not been paid. That apart, the plaintiff had waited till the year 2005 to issue the first notice to show that he is ready and willing.

**Discussion**

8. Heard the counsel and perused the papers. The application does not provide any details of the amendment that is sought to be made to the plaint. The relief sought for in the application would read as follows:

*" It is therefore prayed that this Hon'ble Court may be pleased to permit the applicant/plaintiff to amend the plaint and include the additional relief of payment of Rs.3,75,00,000/- by the defendants 1 to 5 to the plaintiff or its nominees along with interest at the rate of 15 % per annum till the date of payment and thus render justice. "*

Procedure is but the handmade of justice. A reading of the above extract would indicate that the applicant seeks to have an additional relief in the form of a compensation.

8.1. The issued involved in this application revolves around the Provisions of the Proviso to Section 21 (5) of the Specific Relief Act which reads as follows:

> *"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 incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."*



8.2. An explanation is also given to Section 21 which states even in circumstances where the contract had become incapable of performance it does not preclude the Court from exercising the jurisdiction available to it under Section 27 of the Act.

8.3. The two judgments relied upon by the plaintiff would further buttress the contention of the plaintiff. The Senior Counsel appearing for the defendants tried to distinguish the same by stating that the power to award compensation would arise only if the defendant is able to establish breach. In the instant case, admittedly there is no breach on the side of the defendants and it was only the plaintiff who was not able to conclude the contract as agreed in the Supplementary Agreement. This is an issue which has to be decided after the trial of the suit. With reference to the issue of limitation, a perusal of the written statement would disclose that the defendant has very clearly and categorically stated that the Agreement had come to an end on 07.06.2001 and that the plaintiff was not in a position to pay the balance consideration and have the sale deed executed. The question of limitation is a mixed question of fact and law which has to be tested after trial and evidence.

9. Under the above circumstances the application for amendment is allowed. It is well open to the defendants to raise all defences in their additional written statement which is to be filed after the amended plaint is filed. Considering the fact that the suit is of the year 2005 the plaintiff shall file their amended plaint within a period of two weeks from today. The additional written statement shall be filed within a period of two weeks from the date of filing of the amended plaint and two weeks thereafter the draft issues shall be filed into Court by both parties.



19.11.2020

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*A.No.7906 of 2019*
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**P.T.ASHA, J.**

**mrn**

**Pre-delivery Order in**
**A.No.7906 of 2019**
**in**
**CS.No.878 of 2005**



**19.11.2020**