

Before : G. C. Mital & Jai Singh Sekhon, JJ.

ROOP CHAND CHAUDHARI,—Petitioner.

versus

SMT. RANJIT KUMARI,—Respondent.

Civil Revision No. 1054 of 1989.

19th April, 1990.

Code of Civil Procedure (V of 1908)—O. 6, Rl. 17 & O. 37, Rls. 1 & 2—Specific Relief Act, 1963—S. 29—Suit filed under O. 37, Rls. 1 & 2 for refund of advance of earnest money and for damages and interest for non-execution of sale-deed—Application for amendment to seek decree for specific performance of contract and claim the original relief as an alternative relief in the suit cannot be allowed.

Held, that once a suit for return of the earnest money/advance or grant of damages is filed, such a plaintiff disentitles himself to the alternative relief of specific performance even if claimed in the suit. If that is so, he cannot be allowed to amend his plaint later on to claim specific performance of the contract as the first relief and return of earnest money/advance and/or damages as an alternative relief. This is primarily on the rule that a claim for return of earnest money/advance and/or damages can be based on repudiation of the contract for one reason or the other and once the contract is repudiated, the relief of specific performance would not be available either as an alternative relief as was held in *Prem Raj v. D.I.F.H. & C. Ltd.*, AIR 1968 SC 1355, nor would such a relief be admissible by amendment as is sought to be done in this case. Hence, the application for amendment of the plaint is liable to be dismissed.

(Paras 13 & 19)

Tarsem Singh v. Daljit Kaur, 1985 PLJ 534.

(OVERRULED)

Petition under Section 115 C.P.C. for revision of the order of the Court of Smt. Rekha Mittal, P.C.S. Sub Judge 1st Class, Chandigarh dated: 28th March, 1989 allowing the application and moved by the plaintiff for amendment of the plaint and subject to the payment of costs of Rs. 200 to compensate the defendant.

CLAIM : Suit for the Specific performance.

CLAIM IN REVISION : For reversal of the order of Lower Court.

Ashok Bhan, Sr. Advocate with Madan Dev, Advocate, for the Petitioner.

S. P. Gupta, Advocate, for the Respondent.

JUDGMENT

G. C. Mital, J. (Oral)

(1) After filing a suit for refund of the advance and an equal sum by way of damages and interest for not executing the sale deed within the specified time, can the suit be allowed to be amended to seek decree for specific performance of the contract and claim the original relief as an alternative relief in a suit filed by the person who agreed to purchase, is the legal issue which we are called upon to determine on a reference made by a learned Single Judge of this Court. Our answer is that amendment cannot be allowed.

(2) Roop Chand Chaudhary on 25th January, 1988, agreed to sell his house No. 4, Sector 9-A, Chandigarh to Smt. Ranjit Kumari for Rs. 18,50,000 and the former received Rs. 50,000 as earnest money. The sale was to be completed by 25th June, 1988. On 27th January, 1988 Rs. 1,50,000 more was received by him on 10th May, 1988. By this time, the seller had received Rs. 4,00,000 from the purchaser.

(3) The parties mutually agreed to extend the date twice: once to 10th July, 1988 and secondly, to 29th July, 1988.

(4) Smt. Ranjit Kumari, the person who was to purchase the house, filed the suit on 17th August, 1988 under Order 37 Rule 1 and 2 of the Code of Civil Procedure (the Code in short) for recovery of Rs. 8,30,510 against Roop Chand Chaudhary, the person who was to sell the house. In the break up, recovery of double the amount of earnest money/advance, plus interest at the rate of 18 per cent per annum on the earnest money/advance was claimed upto the date of the plaint. She also claimed interest at 18 per cent per annum from 18th August, 1988 till the date of decree and realisation.

(5) On receipt of notice of the suit, the defendant made an application for leave to defend. It is thereafter that the plaintiff filed an application u/o 6 r 17 of the Code for amendment of the plaint to seek a decree for specific performance and in the alternative, the relief which was claimed in the original plaint. The application for amendment was opposed by the defendant. The trial Court, by order dated 28th March, 1989, allowed the amendment, on the finding that the cause of action would not change, nor would the proposed amendment tantamount to change the nature

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of the suit. It also observed that the Supreme Court has laid down that the amendment can be allowed even if it is proposed to set up a new case unless and until it can cause prejudice to the other party for which it cannot be compensated with costs. However, in the order, reference was also made to the judgment of S. P. Goyal, J. in *Ram Chand v. Karamvir* (1).

(6) The defendant felt aggrieved and came to this Court in revision under Section 115 of the Code of Civil Procedure and the case was placed before J. V. Gupta, J. on 7th August, 1989 before whom on behalf of the plaintiff reliance was placed in a direct judgment of S. S. Kang, J. in *Tarsem Singh v. Daljit Kaur* (2), in which the facts were more or less the same. S. S. Kang, J. had set aside the order of trial Court declining the amendment and allowed the amendment of the plaint to seek decree of specific performance as the first relief in spite of the fact that in the original suit relief of recovery of earnest money/damages alone was sought. The learned Judge referred the matter to a larger Bench to consider the correctness of that judgment. That is how, the case has been placed before us.

(7) Having heard the learned counsel at length and on consideration of the judgments cited at the bar, we are of the view that the correct legal position is not depicted in *Tarsem Singh's case* (supra).

(8) The other direct judgment on the point is rendered by J. V. Gupta, J. in *Jai Bhagwan v. Raja Ram*, (3), where in similar circumstances amendment allowed by the trial Court, for including the relief of specific performance as the first relief in a suit for return of the advance and damages was set aside. Therein, the decision in *Tarsem Singh's case* (supra) was noticed and distinguished.

(9) We have gone through both the decisions of this Court and are of the opinion that both the decisions cannot stand and one has to be overruled. In order to resolve the controversy, the matter has to be deeply considered on legal principles.

(1) 1987 PLJ. 611.

(2) 1985 PLJ. 534.

(3) 1989 (2) RLR. 214.

(10) The first case which has some relevance is *Ardeshir v. Flora Sassoon* (4). Therein, suit for specific performance was filed, but during trial of the suit, the plaintiff gave up the claim for specific performance and limited the relief to the return of earnest money/advance and damages. On the facts of the case, it was held that amendment of the suit for specific performance to claim damages could not be allowed. That was not a matter of rule, but on the peculiar facts of that case.

(11) The next case is *Sundaramayyar v. Iagadeesan* (5). There the purchaser filed a suit for specific performance of contract, but that relief was declined to him on the ground that before filing the suit, he had sent a registered notice to the seller that since he (seller) had failed to perform his part of the contract, he (purchaser) would be entitled to return of advance and equal sum as damages. Thereafter, another notice was issued to claim specific performance and the plaintiff withdrew the earlier notice to claim refund and damages. On these facts, it was held as under:

“——It will not be open to a party to a contract, who has once elected to accept the breach assuming there was a breach on the part of the other side to cancel that election and treat the contract as if it were subsisting. We regard the notice dated 22nd May, 1958 as amounting to a definite abandonment by the appellant of his right to obtain specific performance of the contract. As pointed out by the Privy Council in *Ardeshir Mama v. Flora Sassoon*, ILR 52 Bom., 597: (AIR 1928 PC 208) the plaintiff in a suit for specific performance should always treat the contract as still subsisting; he has to prove his continuous readiness and willingness, from the date of the contract to the time of the hearing of suit, to perform his part of the contract and a failure to make good that case would undoubtedly lead to a rejection of his claim for specific performance. Where, therefore, a party to a contract of sale made a claim for damages, on the footing of its breach by the other party it would amount to a definite election on his part to treat the contract as at an end and thereafter no

(4) A.I.R. 1928 P.C. 208.

(5) A.I.R. 1965 Madras 85.

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suit for specific performance could be maintained by him, for, by such election, he had disabled himself from making the averment that he had always been ready and willing to perform his part of the contract.”

In spite of the fact that a suit for specific performance was filed, the relief was denied on the ground that before filing the suit, the plaintiff had elected his remedy to claim return of advance and damages and this could be done only on treating the contract as at an end, disentitling the plaintiff to claim relief of specific performance. This case will have bearing on the decision of the point involved before us. Similar view has been taken in *Hari Krishna v. K. C. Gupta* (6) and *Ayissabi v. Gopala Konar* (7).

(12) Then we have the Supreme Court decision, *Prem Raj v. D.L.F. H. & C. Ltd.*, (8). 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 :

“.....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 Section 37 of the Specific Relief Act (Act No. 1 of 1877), which is to be 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

(6) A.I.R. (36) 1949, Allahabad 440.

(7) A.I.R. 1989 Kerala 134.

(8) A.I.R. 1968 S.C. 1355.

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. Section 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., Page 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 first relief of specific performance with alternative relief of

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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 Section 29 of the (new) Specific Relief Act, 1963. Therefore, the aforesaid decision would be applicable to the facts of the instant case also.

(13) Then we have another decision of the Supreme Court recorded in *Jawahar Lal Wadhwa v. Haripada Chatroberty*, (9), the following passage of which gives guidelines to us:

“.....It is settled in law that where a party to a contract commits an anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages, but in that event he cannot ask for specific performance. The other option open to the other party, namely, the aggrieved party is that he may choose to keep the contract alive till the time for performance and claim specific performance, but, in that event, he cannot claim specific performance of the contract unless he shows his readiness and willingness to perform the contract”.

Keeping in view the two decisions of the Supreme Court, we are of the opinion that the only conclusion is that once a suit for return of the earnest money/advance or grant of damages is filed, such a plaintiff disentitles himself to the alternative relief of specific performance even if claimed in the suit. If that is so, he cannot be allowed to amend his plaint later on to claim specific performance of the contract as the first relief and return of earnest money/advance and/or damages as an alternative relief. This is primarily on the rule that a claim for return of earnest money/advance and/or damages can be based on repudiation of the contract. For one reason or the other and once the contract is repudiated, the relief of specific performance would not be available either as an alternative relief as was held in *Prem Raj's case* (supra) by the Supreme Court, nor would such a relief be admissible by amendment as is sought to be done in this case.

(14) Accordingly, we are of the view that the decision rendered in *Sundaramayyar's case*, *Hari Krishana's case*, *Ayissabi's case* (supra), and a decision rendered by J. V. Gupta, J. in *Jai Bhagwan's case* (supra) are in consonance with the Supreme Court decisions and lay down correct law and the decision rendered by S. S. Kang, J. in *Tarsem Singh's case* (supra) does not lay down the correct law and we overrule the same.

(15) We have carefully gone through the decision in *Tarsem Singh's case* (supra) and on the facts of that case, amendment could not be allowed in view of the decision referred to and followed by us. There is hardly any distinguishing feature. The bare facts are the same, namely, that originally a suit for return of the earnest money and damages was filed and later on amendment was sought to claim a decree for specific performance and in the alternative for return of the earnest money and payment of damages. Hence, there is no option left, but to over-rule the decision rendered in *Tarsem Singh's case* (supra).

(16) On behalf of the plaintiff, reliance was placed on *Gajanan Jaikishan v. Prabhakar Mohanlal* (10), a Supreme Court decision and *Joga Singh v. Pakhar Ram* (11), a decision of this Court to the effect that in case, in suit for specific performance an averment required by Section 16 of the Specific Relief Act is not made in the plaint by oversight, amendment should be granted to add the averment so that the cause of action for claiming specific performance may be completed. Both these decisions have nothing to do with the point which arises before us. They are, therefore, of no help in settling the legal issue in controversy before us.

(17) It was then argued on behalf of the plaintiff that in revisional jurisdiction, this Court should not interfere as the case does not fall within the parameter of the provisions of Section 115 of the Code.

(18) It is not disputed that if a subordinate Court exceeds its jurisdiction or commits illegality in the exercise of its jurisdiction, this Court in revisional jurisdiction can set the matter right in case manifest injustice is going to be caused to the aggrieved party by such an order. Even in *Tarsem Singh's case* (supra), relied upon by

(10) (SC) 1990 (1) RCR. 229.

(11) 1990 PLJ. 42.

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the plaintiff, there was interference by this Court in revision and so was in *Jai Bhagwan's case* (supra). Therefore, the argument which has been raised in this behalf does not stand in our way to grant relief to the revision-petitioner, because if the suit for specific performance is allowed to continue, when such a relief cannot be ultimately allowed, it is certainly going to cause manifest injustice to the petitioner.

(19) For the reasons recorded above, we allow the revision and after setting aside the order of the trial Court, allowing the amendment, the application for amendment of the plaint is dismissed, leaving the parties to bear their own costs in this revision.

(20) In case the plaintiff filed the amended plaint with additional Court-fee after the grant of application for amendment of the plaint by the trial Court, the additional Court-fee paid by the plaintiff would be refunded to her. The trial Court would issue the refund order.

RNR.

Before : A. L. Bahri, J.

GURBACHAN SINGH,—Petitioner.

versus

LABH SINGH AND ANOTHER,—Respondents.

Civil Revision No. 1443 of 1988.

14th May, 1990.

Code of Civil Procedure, 1908—S. 96, O. 41 Rl. 1 Sub Rl. 3—Decree for payment of money—Appeal against such decree—Admission of appeal subject to deposit of decretal amount—Such deposit—Whether a condition precedent to the filing appeal.

Held, that the appeal is a statutory right as enjoined under S. 96 of the Code of Civil Procedure. This right is not subject to any condition. Obviously at the time of filing the memorandum of appeal there was no obligation on the appellant to deposit the disputed amount as a condition precedent. Admission of the appeal by the District Judge subject to deposit of the disputed amount in appeal within 15 days was obviously without jurisdiction.

(Paras 3 & 5)