

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

OP(C).No. 2494 of 2013 (O)

**I.A.NO.3861/2012 IN O.S.NO.535/2010 OF THE 1ST ADDITIONAL SUB COURT,
KOZHIKODE**

PETITIONER(S)/2ND DEFENDANT :

**C.HASHIM, AGED 40 YEARS,
S/O.SEETHI, RESIDING AT 'CHEERAYAKKATTU' HOUSE,
KOTTARAM ROAD, P.O.ERANHIPALAM, KACHERI AMSOM DESOM,
KOZHIKODE TALUK.**

**BY ADVS.SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR
SMT.VANDANA MENON**

RESPONDENT(S)/PLAINTIFF AND DEFENDANTS 1 AND 3 :

- 1. C.JASMINE,
W/O.A.U.SHAHUL HAMEED, RESIDING AT 'QURBAN'
KOLAPPURAM NORTH, A.R.NAGAR AMSOM AND DESOM,
THIRURANGADI TALUK, MALAPPURAM DISTRICT- 678 121.**
- 2. C.SEETHI,
S/O.ABDUL KHADER, RESIDING AT 'CHEERAYAKKATTU' HOUSE,
KOTTARAM ROAD, P.O.ERANHIPALAM, KACHERI AMSOM DESOM,
KOZHIKODE TALUK- 695 001.**
- 3. A.FIJUL KOMU,
S/O.A.KOMU, RESIDING AT PLOT NO.11,
CHEROOTY NAGAR HOUSING COLONY, KASABA AMSOM DESOM,
KOZHIKODE TALUK- 695 001.**

**R1 BY SRI.BALAKRISHNA IYER (SENIOR ADVOCATE)
ADVS. SRI.P.B.KRISHNAN
SMT.GEETHA P.MENON
SRI.N.AJITH
SRI.P.M.NEELAKANDAN
SRI.P.B.SUBRAMANYAN**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 08-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

OP(C).No. 2494 of 2013 (O)

APPENDIX

PETITIONER(S)' EXHIBITS :

**EXHIBIT P1 : TRUE COPY OF THE PLAINT IN O.S NO.535/2010 DATED 03-07-2010
ON THE FILE OF 1ST ADDL.SUB JUDGE, KOZHIKODE.**

**EXHIBIT P2 : TRUE COPY OF THE WRITTEN STATEMENT FILED BY
THE PETITIONER AND 2ND RESPONDENT IN O.S.NO. 535/2010.**

**EXHIBIT P3 : TRUE COPY OF THE APPLICATION ALONG WITH AFFIDAVIT
ACCOMPANYING I.A.NO.3861/2012 IN O.S.NO.535/2010
DATED 20-06-2012.**

**EXHIBIT P4 : TRUE COPY OF THE COUNTER STATEMENT IN I.A.NO. 3861/2012 IN
O.S.NO.535/2010 FILED BY THE PETITIONER ALONG WITH
THE 2ND RESPONDENT DATED 06-10-2012.**

**EXHIBIT P5 : TRUE COPY OF THE ORDER OF SUB COURT, KOZHIKODE IN
I.A.NO.3861/2012 IN O.S.NO.535/2010 DATED 24-05-2013.**

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

[CR]

B.KEMAL PASHA, J.

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O.P.(C).No.2494 of 2013

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Dated this the 8th day of July, 2015

J U D G M E N T

Can an application seeking an amendment for incorporating a relief, which is different from the relief already sought for in the original plaint, be declined merely on the ground that the relief sought for is time barred as on the date of the amendment application, is the short question to be decided here.

2. Exhibit P5 order passed by the court below in I.A.No.3861 of 2012 in O.S.No.535 of 2010 is under challenge. Through the said order, the court below has allowed the amendment sought for by the plaintiff. The suit, as it originally stands, is one for a declaration that the General Power of Attorney No.159 of 1996 of the Kozhikode Sub Registry, Release Deed No.1166 of 2007 of

the Kozhikode Sub Registry, and the Jenmom Assignment Deed No.4333 of 2008 of the Koduvally Sub Registry, are null and void. As relief No.(ii), a decree of perpetual injunction has also been sought for.

3. Paragraph 11 of the plaint deals with the cause of action for the suit as on 01.10.2008 on which date the plaintiff came to know of the execution of Release Deed No.1166 of 2007 of the Kozhikode Sub Registry, by the 1st defendant in favour of the 2nd defendant, on 27.06.2010 on which date the plaintiff came to know that the defendants were entertaining an idea to execute further conveyance relating to plaint A schedule property, and thereafter.

4. Defendants filed Exhibit P2 written statement by which the maintainability of the suit has been seriously challenged. In paragraph 12, as items 'a' to 'i', the grounds of challenge regarding the maintainability of the suit are shown. Ground 'i' reads:

"i. As relief of recovery of possession and cancellation of documents are not prayed for in order to avoid payment of

proper court fee, suit is liable to be dismissed for improper valuation.”

5. It seems that the plaintiff has filed Exhibit P3 I.A. before the court below for getting the plaint amended, on the ground that on a perusal of the plaint, it could be seen that some typographical errors and omissions were crept in the plaint and on a further ground that the defendants have raised a plea that the relief of declaration sought for cannot be granted in the absence of a relief for the cancellation of the said documents. These are precisely the two grounds on which the amendments noted as Items ‘i’ to ‘viii’ were sought for. The court below, after hearing both sides, allowed the I.A. through Exhibit P5 order.

6. Heard the learned Senior Counsel Sri.T.Sethumadhavan for the petitioner and the learned Senior Counsel Sri.S.V.Balakrishna Iyer for the respondents.

7. The learned Senior Counsel for the petitioner has argued that at any stretch of imagination, the court below

ought not to have allowed Exhibit P3 mainly on the ground that as on the date of filing of Exhibit P3, a fresh suit for the said relief sought though the amendment could not have been filed, as such a suit would be barred by limitation. It is further argued that Exhibit P3, after such a relief, had become time barred.

8. *Per contra*, the learned Senior Counsel for the respondents has argued that amendments sought for as item numbers 'i' to 'vi' are merely the matters relating to some typographical errors and grammatical mistakes. Item 'vii' is by way of incorporation of a fresh relief as (iia) in the plaint as *"cancelling the registered Release Deed No.1166 of 2007 of the SRO, Kozhikode and the registered Jenmom Assignment Deed No.4333 of 2008 of SRO, Koduvally."* Item 'viii' is an addition of Item No.(iia) in the valuation portion as *"Valuation for relief 'iia' under Section 40 of the KCF & SV Act:Rs.1,50,000.00."*

9. It seems that the challenge is with regard to items 'vii' and 'viii' noted above. According to the learned Senior

Counsel for the petitioner, if the respondents are permitted to amend the plaint by incorporating item 'vii' relief as relief 'iia', it would be as good as taking away the legal right of the defendants to challenge such a relief based on the law of limitation. It is also argued that if such an amendment is allowed, it will be as good as enabling the plaintiff to institute a fresh suit on a subject matter, which has already become time barred.

10. According to the learned Senior Counsel for the respondents, apart from incorporating a relief based on the available pleadings in the plaint, no other amendment has been sought for. It is true that the respondents have not sought for any other amendments relating to the facts of the case. What is sought for is only the incorporation of a relief based on the available pleadings in the plaint. Of course, item 'viii' is with regard to an amendment to be incorporated in the valuation portion. The valuation of such a relief has necessarily to be amended in case of an amendment incorporating such a relief, as the court fee has to be paid in

such case under Section 40 of the KCF & SV Act.

11. The learned Senior Counsel for the petitioner has relied on the decision in ***A.K.Gupta and Sons Ltd. v. Damodar Valley Corporation [AIR 1967 SC 96]***; wherein it was held:

“In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. Where however 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 is to be allowed even after expiry of the statutory period of limitation.”

12. The Apex Court has relied on the decisions in ***Charan Das v. Amir Khan [AIR 1921 PC 50]***, ***L.J.Leach and Co. Ltd. and Another v. Messrs.Jardine Skinner and Co.[AIR 1957 SC 357]*** and ***Pirgonda Hongonda Patil v. Kalgonda Shidgonda [AIR1957 SC 363]***.

13. The learned Senior Counsel for the respondents has also placed reliance on the decision in ***A.K.Gupta and***

Sons Ltd. (Supra). In **L.J.Leach and Co. Ltd. (Supra)**, it was held in paragraph 16 that:

“It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice.”

14. The Supreme Court has placed reliance on **Charan Das (Supra)**; wherein it was held:

“That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case.”

15. In **L.J.Leach and Co. Ltd. (Supra)**, the Apex Court has held that the prayer in the original plaint itself is general and merely claiming damages, and thus all the allegations, which are necessary for substituting a claim for damages for breach of contract, are already in the plaint. It

was in that context, the Apex Court approved the amendment.

16. In ***Pirgonda Hongonda Patil (Supra)***, based on ***Charan Das (Supra)***, it was held that two circumstances were brought to the notice of the Apex Court; one was that the period of limitation for the suit had already been expired, and the second was that the attention of the plaintiff to the defect in the original plaint had been drawn much earlier. In that case also, the Supreme Court has approved the amendment. In that case, it was further held that:

“The learned Judges of the High Court rightly pointed out that the mistake in the trial Court was more that of the learned pleader and the proposed amendment did not alter the nature of the reliefs sought.”

17. In ***Kisandas Rupchand v. Rachappa Vithoba*** [33 Bom. 644] it was held that:

“In my opinion, two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows

necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed.”

18. In ***A.K.Gupta and Sons Ltd.*** (*Supra*), the Apex Court has relied on the decisions in ***L.J.Leach and Co. Ltd.*** (*Supra*) and ***Pirgonda Hongonda Patil*** (*Supra*). In paragraph 7 of ***A.K.Gupta and Sons Ltd.*** (*Supra*), it was held that:

“It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neale, (1887) 19 QBD 394. But it is also well recognized that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the

amendment will be allowed even after the expiry of the statutory period of limitation.”

19. The said finding was based on the decisions in ***Charan Das (Supra)*** and ***L.J.Leach and Co. Ltd. (Supra)***. It was held that normally, the courts would be slow in granting such an amendment for incorporating a time barred claim through an amendment. It was held in ***A.K.Gupta and Sons Ltd. (Supra)*** that firstly, the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes 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 is in substance already there in the pleadings. Therefore, the question to be decided is whether what is sought to be brought through the amendment is in substance already there in the plaint or not. If in substance, the relief sought for can be treated as already one therein the plaint, there is no bar in allowing such an amendment.

20. In ***A.K.Gupta and Sons Ltd. (Supra)***, it was

further held that:

“That expression for the present purpose only means, a new claim made on a new basis constituted by new facts.”

It was also held that:

“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.”

21. In the light of the decisions noted *Supra*, the facts relating to the present I.A. have to be considered. It seems that in effect what has been sought for through the amendment is mainly the incorporation of a new relief, which was not sought for. At the same time, it has to be considered whether in the plaint, such a relief is already there or not. It seems that the plaintiff has seriously challenged the said two documents, which are sought to be set aside through item 'vii' of the amendment. At the same time, in the plaint, the relief sought for is a mere declaration that those documents are null and void. It has to be considered that the defendants have seriously challenged

the said relief sought for by contending that the suit as such is not maintainable, especially when the plaintiff has not sought for the cancellation of those documents. It was on that background, it seems that the present I.A. was filed for incorporating a relief for the cancellation of those documents. It is pertinent to note that the plaintiff has not sought for any supporting amendments to be incorporated in the plaint for claiming such a new relief. As pointed out by the Apex Court in ***Pirgonda Hongonda Patil (Supra)***, it seems that the mistake committed in the original plaint is more that of the learned pleader in drafting the plaint.

22. Even otherwise, it can be seen that the court has power to mold a relief properly in tune with the pleadings for giving proper relief to the party at the time of passing the decree. When the court has got ample power to mold a relief in tune with the averments in the plaint and the evidence in the suit, can it be said that the party has no power or right to claim such a molded relief in the plaint?

23. The learned Senior Counsel for the petitioner has invited the attention of this Court to the decisions in ***Muni Lal v. The Oriental Fire and General Insurance Company Ltd. And Another*** [AIR 1996 SC 642], ***K.Raheja Constructions Ltd. v. Alliance Ministries and Others*** [AIR 1995 SC 1768], ***Radhika Devi v. Bajarangi Singh and Others*** [AIR 1996 SC 2358], ***Vishwambhar And Others v. Laxminarayan (Died) through Lrs. And Another*** [AIR 2001 SC 2607] and ***Branch Manager, Magma Leasing and Finance Limited and Another v. Potluri Madhaviata and Another*** [(2009) 10 SCC 103], on the subject. When those decisions are rendered by two Judges Benches, this Court has to prefer the decisions rendered by the four Judges Bench of the Supreme Court in ***L.J.Leach and Co. Ltd.*** (Supra) and ***Pirgonda Hongonda Patil*** (Supra) and ***A.K.Gupta and Sons Ltd.*** (Supra), rendered by three judges Benches of the Supreme Court, squarely applicable in the matter.

24. The learned Senior Counsel for the petitioner has argued that as the amendment will relate back to the date of the suit, the valid right conferred on the petitioner to challenge the claim on the ground of limitation will be lost, in case of such an amendment and, therefore, the court below ought not to have allowed the amendment. The said argument seems to be technical because of the fact that what is sought to be incorporated through the amendment is the incorporation of a relief alone without seeking the incorporation of any supporting pleadings. All the pleadings are there in the plaint for enabling the plaintiff to claim such a relief sought to be added through the amendment.

25. It merely amounts to not more than a different or additional approach to the same facts, and nothing more. In such a case, the attempt of the plaintiff is not to bring a new case based on new set of facts. There is no attempt to bring a fresh cause of action also. In a case wherein a fresh cause of action is attempted to be brought out through an amendment and when such cause of action itself is time

barred, it could be contended that the court below ought not to have allowed such an amendment. When an amendment is sought for merely for incorporating a relief based on the existing pleadings in the plaint, without bringing any new set of facts or a new case on a new basis, it seems that the general rule has no application. In such case, the court has to deviate from the general rule for imparting justice. When it was a fault committed in drafting the relief portion of the plaint, as held by the Supreme Court, the procedural law should not be something for punishing a party and it should be for advancing a proper remedy.

26. The learned Senior Counsel for the respondents has invited the attention of this Court to the decision in ***Kallambat V.M. v. K.S.W. Devaswom [1969 ILR 388]***; wherein it was held that:

“It is well established that a plaintiff will not be allowed to amend the plaint by setting up fresh claims in respect of causes of action which have become barred on the date of the application for amendment of the plaint. Where the amendment does not constitute the

addition of a new cause of action nor raise a different case but amounts to be more than a different or additional approach to the same facts based on the same cause of action, the amendment will be allowed even after the period of limitation.”

The learned Senior Counsel is relying on the decision in ***Kunheedu v. Marakkar & Others [1989 (1) KLJ 92]***; wherein this Court has relied on the decisions in ***L.J.Leach and Co. Ltd. (Supra)*** and ***A.K.Gupta and Sons Ltd. (Supra)***. In ***Pouloth Paranchu v. Pappu Francis [1957 KLT 3]***, it was held that “*although the defendant would be deprived of the plea of limitation if the amendment allowed to be incorporated, there is no inflexible rule that in such cases amendments cannot be allowed.*”

27. The attempt should be in order to note whether the plaintiff has laid the factual foundation in the plaint for enabling the plaintiff to seek such a relief. When factual foundation has already been laid and facts enabling the plaintiff to get the relief molded in such a manner as one sought for through the amendment have already been

pleaded, the amendment for incorporating a new relief, even though such relief has by then become time barred, can be allowed.

25. Considering all the above, this Court is of the view that Exhibit P5 order passed by the court below does not suffer from any illegality, irregularity or jurisdictional error and the same is not liable to be interfered with.

In the result, this Original Petition (Civil) is dismissed. The court below shall give an opportunity to the defendants to file additional written statement in the matter.

Sd/-

B.KEMAL PASHA
JUDGE