

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 14TH DAY OF JULY 2015/23RD ASHADHA, 1937

OP(C).No. 3822 of 2013 (O)

AGAINST THE JUDGMENT IN OS 27/2009 of SUB COURT,THODUPUZHA.

PETITIONER :

**ABDUL SHERIEFF,
S/O. KHALID, CHERUVILPURAYIDATHIL HOUSE,
THODUPUZHA KARA, THODUPUZHA VILLAGE.**

**BY ADVS.SRI.P.K.IBRAHIM.
SMT.K.P.AMBIKA.**

RESPONDENT(S):

**DR.ABDUL KARIM,
S/O. MAKKAR, ALIYAKUNNEL HOUSE,
EDAMARUKU KARA,
UDUMBANNOOR VILLAGE - 685 595.**

R1 BY ADV. SRI.TOM THOMAS (KAKKUZHIYIL)

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 14-07-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1. TRUE COPY OF THE PLAINT DATED 13-3-2009 IN O.S. NO. 27/2009 ON THE FILES OF SUB COURT, THODUPUZZHA.
- P2. TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER/PLAINTIFF DATED 24-09-2009.
- P3. TRUE COPY OF THE PETITION FOR AMENDMENT OF THE WRITTEN STATEMENT ALONG WITH THE AFFIDAVIT IN SUPPORT THEREOF DATED 22-01-2013.
- P4. TRUE COPY OF THE ORDER DATED 26-7-2013 OF THE SUBORDINATE JUDGE OF THODUPUZZHA DISMISSING EXT.P3.

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A TO JUDGE

amk

A.HARIPRASAD, J.

O.P(C) No.3822 of 2013

Dated this the 14th day of July, 2015.

J U D G M E N T

Challenge in this original petition is against Ext.P4 order,
which reads as follows :

“Heard. Petition filed to amend the written statement. This petitioner, being the defendant in the suit O.S.27/2009, to return of the advance amount of Rs.11 lakhs and odds filed this petition to add one more plea to adjust the plaint claim by way of amendment. It was filed 2013 after elapsing 4 years from the date of institution of this suit. Thereby it is hit by limitation. There is nothing pleaded to seek the same. Hence it is dismissed.”

2. Heard the learned counsel for the petitioner and the respondent.

3. Petitioner is the defendant in a suit for recovery of money filed by the respondent/plaintiff before the Sub Court,

Thodupuzha. Ext.P1 is the copy of the plaint. Ext.P2 is the copy of the written statement. It is the contention of the petitioner that he omitted to incorporate a plea of adjustment of the amounts, which the plaintiff is liable to pay to the defendant. Court below dismissed the application for the aforementioned reasons.

3. The legal distinction between set off and counter claim on one hand and the plea of payment by adjustment on the other was not properly considered by the court below. It is well settled that the adjustment is a plea, which is in respect of a matter, which had taken place before the institution of the suit. It is also well established that no court fee need be paid for determination of the truthfulness of the plea of adjustment. Whereas in the case of set off and/or counter claim, it can only be raised after institution of the suit although the cause of action might have arisen before the institution of the suit. Besides, in the case of set off and/or counter claim, the defendant is bound to pay court fee for adjudication. The reasoning of the court

below that the plea of adjustment was attempted to be raised after four years of institution of the suit and hence it is legally unsustainable is not correct. The obvious reason is that the plea of adjustment does not require an adjudication as to the factum of adjustment, but only the propriety and legality of the plea. Therefore, the question of limitation does not arise. However, it is made clear that even if a plea of adjustment is allowed to be incorporated in the written statement, its legality and acceptability can be challenged by the plaintiff by raising appropriate pleadings and adducing evidence. If the court finds in favour of the adjustment pleaded, it shall allow the plaintiff to recover amount from the defendant after deducting the amount so adjusted. On the other hand, if the plea of adjustment was not accepted by the court in evidence, the defendant will be liable to satisfy the plaint claim without any deductions.

4. Learned counsel relying on *Baldev Singh and Others v. Manohar Singh and Another* (AIR 2006 SC 2832)

contended that the court below erred in dismissing an application for amendment of the pleading, which was filed before commencement of the trial. Considering the rival contentions, I am of the view that Ext.P4 order passed by the court below is legally incorrect. Hence it is set aside.

In the result, the original petition is allowed. The amendment sought for by the petitioner to the written statement is allowed. The plaintiff shall be permitted to file a replication, if he chooses to do so. The court below shall dispose of the case, untrammelled by any of the observations contained in this judgment within a period of six months from today.

All pending interlocutory applications will stand dismissed.

amk

**Sd/-
A.HARIPRASAD,
JUDGE.**

//True copy//

P.A to Judge