

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

OP(C).No. 523 of 2014 (O)

**ORDER DATED 12.2.2014 IN IA.NO.816/2014 IN OS 291/2010 OF SUB COURT,
KOZHIKODE**

PETITIONER(S):

**MARAMVEETIL SUMANGALI, AGED 41 YEARS,
D/O. N.CHANDRASEKHARAKURUP, KINNATTINKARA PARAMBATH,
NELLIKODE AMSOM DESOM, KOZHIKODE TALUK.**

**BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SRI.SAJU.S.A
SMT.P.A.SHEEJA
SRI.K.C.KIRAN**

RESPONDENT(S):

**VALIYAKATH KAMAL MUHIYUDHEEN, AGED 43 YEARS,
S/O. MUHAMMED IBRAHIM, VALIAKATH S.B.I. COLONY,
HOUSE NO.14, NELLIKODE AMSOM, DESOM,
KOZHIKODE TALUK,
REPRESENTED BY POWER OF ATTORNEY HOLDER
ABDUL SALAM, THAIVALAPPIL BEERAVU, AGED 36 YEARS,
S/O. BEERAVU, KAITHAVALAPPIL PARAMBA,
OMASSERI AMSOM DESOM, KOZHIKODE TALUK-673 582.**

BY ADV. SRI.JACOB ABRAHAM

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 09-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

OP(C).No. 523 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

**EXHIBIT P1- THE TRUE COPY OF THE PLAINT IN O.S.NO. 291/2010 ON THE FILE OF
SUB COURT, KOZHIKODE DATED 08-04-2010.**

**EXHIBIT P2- THE TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE
DEFENDANT IN O.S.NO. 291/2010 DATED 24-07-2010.**

**EXHIBIT P3- THE TRUE COPY OF I.A.NO. 816/2014 IN O.S.NO. 291/2010
DATED 03-02-2014.**

**EXHIBIT P4- THE TRUE COPY OF THE COUNTER FILED BY THE PLAINTIFF IN
I.A. 816/2014 DATED 10-02-2014.**

**EXHIBIT P5- THE TRUE COPY OF THE ORDER OF THE COURT OF THE SUBORDINATE
JUDGE OF KOZHIKODE IN I.A.NO. 816/2014 IN O.S.NO. 291/2010 ON ITS
FILE DATED 12-02-2014.**

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

B.KEMAL PASHA, J.

.....
O.P.(C) No. 523 of 2014

.....
Dated this the 9th day of June, 2015

J U D G M E N T

Ext.P3 IA was filed before the I Additional Sub Court, Kozhikode in OS No.291/2010 by seeking the amendment of the written statement under Order VI Rule 17 of the Code of Civil Procedure, 1908(for short 'the Code'). The suit is one for specific performance of contract for sale of an immovable property. According to the plaintiff, the defendant had agreed to execute a sale deed in respect of the plaint schedule property for a total consideration of Rs.85 lakhs and she had obtained an amount of Rs.20 lakhs by way of part of consideration from the plaintiff through cheques. In spite of demand, the defendant had not cared to execute

the sale deed as agreed and hence the suit.

2. The defendant filed a written statement admitting the transaction. The agreement stands admitted and the part of consideration received is also admitted. The contention resorted to by the defendant in the written statement is that the time is the essence of contract and during the period of agreement, in spite of demands, the plaintiff was not ready and willing to perform his part of the contract for getting the sale deed executed by paying the balance consideration. Thereafter, it seems that after the evidence of the plaintiff, the defendant who is the petitioner herein has filed Ext.P3 IA for amending the written statement by incorporating a contention that the defendant has not accepted part of consideration, whereas the amounts were obtained by her husband through two cheques. Ext.P3 was strongly resisted by the plaintiff before the court below. The court below dismissed the IA through Ext.P5 order, which is under challenge in this OP.

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

4. The learned counsel for the petitioner has argued that the petitioner is entitled to take up alternate pleadings by way of defence. It is also argued that the defendant has never attempted to take away any of the admissions from the written statement whereas the defendant wanted to incorporate the true state of affairs which were not incorporated in the original written statement as the same was prepared and filed by the husband of the defendant.

5. *Per contra*, the learned counsel for the respondent has pointed out that within the period of agreement, a notice was issued to the defendant calling upon her to perform her part of the contract by executing the sale deed, and that even though the plaintiff was ready and willing to get the sale deed executed by paying the balance consideration, the defendant had not turned up and hence the suit was necessitated. It is also pointed out that the suit

has come up in the list and the plaintiff's evidence was over. After the plaintiff's evidence, adjournments were obtained by the defendant for adducing evidence and finally the defendant had not turned up. Consequently, the suit was decreed *ex parte*. For getting the *ex parte* decree set aside, the defendant filed an application under Order IX Rule 13 of the Code. The same was allowed by the court below by imposing a cost of Rs.15,000/-. The said order was challenged before the Division Bench of this Court through FAO No.224/2013. The said FAO was disposed of on 03.12.2103, thereby deducting the amount of cost to Rs.3,000/-. The Division Bench of this Court in the said judgment has directed the court below to list the matter for further trial in accordance with law. It was mentioned of that *“we also record the submission on behalf of the defendant-appellant that she would co-operate in the trial to enable expeditious consideration and disposal of the suit on merits.”*

6. The suit is of the year 2010. A series of

amendments, in order to introduce new contentions contradictory to those contained in the written statement, have been sought for as against the mandates contained in Order VI Rule 17 CPC. The petitioner wanted to incorporate an amendment to the effect that the petitioner had never intended to sell her property or expressed her willingness to sell the same. Further, her husband had obtained her signature in the agreement by representing that, that was one for borrowing an amount of Rs.20 lakhs.

7. According to her, when her signatures were obtained in the agreement two cheques were given to her and on those two cheques she affixed her signatures and handed over it to her husband for getting it encashed. When summons was received, she was taken to the Advocate's office and her signature was obtained in the vakkalath. Thereafter, she was again taken to the Advocate's office and her signature was obtained in the written statement.

8. It cannot be said that through Ext.P3 there was no attempt to incorporate new pleadings. It clearly reveals an attempt to plead fresh facts, which did not find a place in the original written statement. At any stretch of imagination, the petitioner cannot escape from the clutches of the proviso to Order VI Rule 17 of the Code. The trial has commenced, and the evidence of the plaintiff was over. Six adjournments were obtained by the defendant for adducing evidence. As she did not turn up even after that, an *exparte* decree was passed. Based on the directions in the decree, the plaintiff had deposited an amount of Rs.65 lakhs in court, being the balance sale consideration. It was after all these, the petitioner had chosen to file Ext.P3. When there was a specific undertaking before the Division Bench of this Court that she would co-operate with the expeditious disposal of the suit, Ext.P3 cannot be expected from the petitioner.

9. It seems that through the amendment sought for, the petitioner wanted to press into service new facts by

displacing the earlier admissions in the original written statement. Matters being so, based on the decision in ***Modi Spinning and Weaving Mills Co. Ltd. and another v. Ladha Ram and Co.***[(1976) 4 SCC 320], such an amendment to the written statement cannot be permitted.

10. Even though the learned counsel for the petitioner has argued that there is no attempt in Ext.P3 to withdraw the admissions made in the written statement, the explanation attempted to be incorporated by way of an amendment through Ext.P3 clearly reveals that it is as good as withdrawal of the specific admissions made in the original written statement. Based on the decision in ***Heerala v. Kalyan Mal***[(1998) 1 SCC 278], the said attempt cannot be permitted. Further, in the light of the decision in ***Vidya Bai and others v. Padmalatha and another***[(2009) 2 SCC 409] also, the present amendment cannot be allowed. There is absolutely no irregularity, illegality or jurisdictional error committed by the court below in passing Ext.P5 order and

hence Ext.P5 is not liable to be interfered with.

In the result, this Original Petition is dismissed.

Sd/- B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge