

In the High Court of Judicature at Madras

Dated : 16.06.2015

Coram

The Honourable Mr.Justice R.SUBBIAH

Application No.8191 of 2014

in

C.S.No.696 of 2005

N.K.Mahesh,
16 (26/1) Venugopal Avenue,
Off Spurtank Road,
Chetpet, Chennai-600 031.

.... Applicant/Plaintiff

Vs.

1.Mrs.Vasna Soman,
301 ISM House, Thakur Village,
Khandhiville East, Mumbai-400 101.

2.Mr.N.K.Dinesh,
16 (26/1) Venugopal Avenue,
Off Spurtank Road, Chetpet, Chennai-600 031.

3.Mr.K.P.Soman,
S/o.T.Karuvan, No.301-C, ISM House,
Thakur Village, Kandivile East,
Mumbai-400 101.
(R3/D3 was impleaded as per order
dt 26.11.2014 in A.No.605 of 2006
in C.S.No.696 of 2005)

.... Respondents/Defendants

Application has been filed by the applicant/plaintiff under Order XIV Rule 8 of Original Side Rules r/w Order VI Rule 17 & 151 of CPC, praying to amend the plaint by including paragraphs 9A to 9C, after paragraph 9 in the plaint and to add additional prayers in the plaint.

For Applicant : Mr.M.K.Kabir, Senior Counsel
for Mr.A.Dhiraviyanathan

For Respondents : Mr.Satish Parasaran (For R1/D1)

ORDER

This application has been filed by the applicant/plaintiff under Order XIV Rule 8 of Original Side Rules r/w Order VI Rule 17 & 151 of CPC, praying to amend the plaint by including paragraphs 9A to 9C, after paragraph 9 in the plaint and to add additional prayers in the plaint.

2.The applicant herein is the plaintiff and the respondents herein are the defendants in the suit. For the sake of convenience, the parties will be referred to as per their rankings in the suit.

3.Originally the plaintiff has filed the suit for the following reliefs_

a)granting a preliminary decree for partition and separate possession of the plaintiff's 1/3 share in the suit schedule property;

b)appointing an Advocate Commissioner to divide the suit schedule property by metes and bounds and to demarcate and allot the plaintiff's 1/3 share in the said property;

c)granting the relief of permanent injunction restraining the defendants or their heirs, legal representatives, men, agents, servants or any person or persons claiming through or under them from interfering with the plaintiff's peaceful possession and enjoyment of his 1/3rd share in the suit schedule property or dealing with the same in any manner whatsoever;

4. Before dealing with the application for amendment of plaint, it would be appropriate to see the averments made in the plaint in brief.

4(1) The plaintiff is the youngest son of one N.K. Padmanabhan. The 1st defendant is the sister and the 2nd defendant is the elder brother of the plaintiff. Originally, the suit was filed only as against the defendants 1 & 2. Subsequently, the 3rd defendant K.P. Soman, who is the husband of the 1st defendant, was impleaded by order dated 26.11.2014 passed by this Court in A.No.605 of 2006. The plaintiff's mother Padmini died on 04.12.1967 and his father N.K. Padmanabhan died on 27.12.1977. During his life time, the plaintiff's father N.K. Padmanabhan had purchased the vacant land bearing Plot No.1 in Puliyur Thuki Manyam, now bearing Door No.11, 3rd Main Road, United India Colony, Kodambakkam, Chennai, comprised in Paimash Nos.965 & 966, Survey No.12/4, 12/2 & 12/1B, T.S.No.25/1, Block No.39 admeasuring an area of 3 grounds and 323 sq.ft. under a Sale Deed dated 06.02.1963, registered as Document No.317 of 1963 at the Office of the Sub-Registrar, Kodambakkam. He was in absolute possession and enjoyment of the same, during his lifetime, without any encumbrances. The said property is a self acquired property of Sri.N.K. Padmanabhan.

4(2) During his life time, Sri.N.K. Padmanabhan sold an extent of 300 sq.ft of pathway measuring 4' x 75' in the said property, under a Deed of Sale dated 01.04.1972 registered as Document No.996 of 1972 at the Office of the Sub-Registrar of Kodambakkam, to and in favour of one

Mr.M.T.Viswanathan, as the said Viswanathan wanted an access to his property from the 3rd Main Road, United India Colony, Kodambakkam. That apart, on 15.05.1972, the said N.K.Padmanabhan sold an extent of one ground to and in favour of one Mrs.Rama Krishnamurthy under a Deed of Sale dated 15.05.1972 registered as Document No.1547 of 1972 at the Office of the Sub-Registrar, Kodambakkam. Thus, out of the total extent of 3 grounds 323 sq.ft. purchased under the Deed of Sale dated 06.12.1963, the said N.K.Padmanabhan sold an extent of one ground & 300 sq. ft and retained an extent of 2 grounds and 23 sq.ft. After his demise, the said land measuring to an extent of 2 grounds 23 sq.ft. devolved on the legal heirs of N.K.padmanabhan. As his wife predeceased him, the said property devolved on the plaintiff and the defendants 1 & 2 equally, as legal heirs of the deceased N.K.Padmanabhan being his children. The plaintiff and the defendants 1 & 2 are entitled to 1/3 share each in the said property.

4(3)While so, the plaintiff and his elder brother / the 2nd defendant in the suit, under a Deed of General Power of Attorney dated 18.06.1982 registered as Doc.No.173 of 1982 in the Office of the Sub-Registrar Periamet, appointed their sister the 1st defendant in the suit as their Power of Attorney Agent to develop the said property and to manage and safeguard it. It is the specific case of the plaintiff that though power of attorney was executed in favour of his sister ie., the 1st defendant, she did not act upon the said power of attorney, resulting in the property being encroached by the third party. Since the Power of Attorney was not acted

upon by the 1st defendant as she was living throughout in North India, the plaintiff had to clear the encroachment in the property. Since the 1st defendant did not exercise the mandate conferred under the Deed of Power of Attorney, the plaintiff had orally informed the 1st defendant that the power granted to her stands revoked and the 1st defendant is not his power agent and she should refrain from dealing with the plaintiff's share in the said property.

4(4) Pursuant thereto, the plaintiff repurchased the pathway measuring 4' x 75' from the said M.T. Viswanathan and Mrs. Lakshmi under a Sale Deed dated 09.12.2002 registered as Document No. 4385 of 2002 at the office of the Sub-Registrar, Kodambakkam. The said repurchase was done to enhance the value of the plaintiff's share in the suit schedule property and to avoid the said pathway being used by the public or becoming a source of nuisance. It was also the intention of the plaintiff to effectively and peacefully protect and enjoy the property. The defendants were aware of the said purchase and the intention behind the purchase. Thus, the defendants were aware that the Power of Attorney dated 18.06.1982 stood revoked insofar it pertains to the share of the plaintiff in the suit property. Therefore, now the 1st defendant cannot act as the agent of the plaintiff. The plaintiff and the defendants are in joint possession and enjoyment of the suit property. The plaintiff reliably learns that with an intent to deprive the plaintiff of his lawful share in the said property and cause loss to him, the defendants have connived with each other and have inter-meddled with the

said property, affecting the share of the plaintiff. Neither the 1st defendant nor the 2nd defendant, either jointly or severally, is entitled to interfere with the plaintiff's 1/3rd share in the subject property or interfere with his right, title and interest over the subject property in respect of his share is concerned. Hence, the plaintiff issued a legal notice dated 08.06.2005 informing the defendants that the power of attorney dated 18.06.1982 stands revoked, cancelled and annulled insofar it pertains to his 1/3rd share is concerned. But, the 2nd defendant has sent a reply vide his letter dated 20.07.2005 raising untenable contentions. Hence, the plaintiff has filed the present suit.

4(5) Pending the suit, the plaintiff filed an Original Application No.790 of 2005 seeking interim injunction restraining the defendants or their men, servants, agents, heirs or any person or persons claiming through or under them or in trust for them from alienating, encumbering or changing the topography by erecting any construction or dealing with the property described in the suit schedule. This Court, by order dated 12.08.2005, has granted interim injunction for a period of four weeks. Subsequently, the said interim order was extended by this Court by order dated 10.09.2005.

5. In the meanwhile, on 19.05.2005 the 1st defendant had sold the suit subject property to her husband K.P.Soman, inspite of the knowledge that the power of attorney executed by the plaintiff stood revoked. Hence,

the plaintiff filed an Application No.605 of 2006 seeking to implead the said K.P.Soman, as the 3rd defendant in the suit. The said application was allowed by this Court on 26.11.2014 and accordingly, the 3rd defendant was impleaded in the suit.

6.Pursuant to the same, the present application has been filed by the plaintiff viz., A.No.8191 of 2014 seeking to amend the plaint by adding paragraphs 9A to 9C after paragraph 9 in the plaint and also to include consequential reliefs in the plaint. Paragraphs 9A to 9C which are sought to be added in the plaint read as follows_

"9A.The plaintiff submits that the Deed of Sale dated 19.05.2005 registered as Document No.2172 of 2005 at the Office of the Sub-Registrar, Kodambakkam is sham and nominal and it is not binding on the plaintiff. The value stated in the alleged Deed of Sale is far below the market value of the property. In the document itself the market value is stated to be Rs.66,96,000/- whereas the alleged consideration stated to have already been paid is Rs.45,00,000/-. Moreover, the alleged Deed of Sale is executed by the 1st defendant in favour of the 3rd defendant, who is none other than her husband. It is unheard of for a wife to sell a property to her husband. In this case, despite the 1st defendant being categorically informed earlier and again on 05.05.2005 that she does not represent the interest of the plaintiff in the suit property, she has chosen to dispose off the

plaintiff's share surreptitiously with the connivance of the 3rd defendant and her daughter's father-in-law in favour of the 3rd defendant. Moreover, the 1st Defendant left Chennai on 07.05.2005 and without informing the plaintiff and without residing at 26 Venugopal Avenue, Chetpet, Chennai-600031, she came back to Chennai on 17.05.2005 and registered the Deed on 19.05.2005. The alleged sale is thus sham and nominal and non est in law.

9B.The plaintiff further submits that no power agent would act behind the back of the principal and that too without informing the principal usurp the property to herself. The alleged sale consideration is stated to have been already paid by the purchaser, the 3rd defendant herein, but the mode has not been disclosed. The 1st defendant is bound to account for the same to the plaintiff, even if she had continued as an agent of the plaintiff. No agent can appropriate the sale consideration from the principal as long as he purports to act as such and on behalf of the principal. Primarily, an agent cannot appropriate the property of the principal to himself. When the relationship is strained and the 1st defendant was already informed that she cannot act as the agent of the plaintiff; the execution and registration of the Deed of Sale can only be construed as void and done with a *mala fide* intention. Added to the above, factually the plaintiff had removed the encroachment and vacated the trespasser from the suit property in the mid eighties. This very fact would show that the 1st defendant ceased

to be the power agent of the plaintiff as the purpose of the agency failed. Thereafter, under a Deed of Sale dated 09.12.2002 registered as Document No.4385 of 2002 at the Office of the Sub-Registrar, Kodambakkam, the plaintiff repurchased the 300 sq.ft., sold by his father to M.T.Vishwanathan under a Deed of Sale dated 01.04.1972, from M.T.Viswanathan and Mrs.Lakshmi. Thus, the plaintiff has exercised his right over the suit property and consequently, by implication the Deed of Attorney executed in favour of the 1st defendant would lapse. It is thus evident that not only by the action of the plaintiff but also by the fact that the 1st defendant was informed orally not to act as an Agent, the decadent Deed of Power of Attorney stood revoked both impliedly and expressly. Consequently, the 1st defendant cannot act as an agent of the plaintiff under any circumstance.

9C.The plaintiff further submits that the defendants were aware of the repurchase of the 300 sq.ft. of land measuring 4 ft & 75 ft by the plaintiff from M.T.Viswanathan and Mrs.Lakshmi. In the Schedule to the Deed of Sale dated 19.05.2005, the Northern boundary is described as "*strip of land now owned by N.K.Mahesh and previously owned by Mr.M.T.Viswanathan*". It is thus evident that the defendants 1 to 3 were aware of the exercise of the right of the plaintiff over the said property and thus were also aware that the power of attorney stood impliedly revoked. Despite the same, the appropriation of the property by the 1st & 3rd defendants with the

knowledge of the 2nd defendant is *per se* illegal. Even though the document is sham and nominal and not binding on the plaintiff as it is executed with a *mala fide* intention in connivance with the 1st & 3rd defendant's daughter's father-in-law, yet in order to avoid any hyper technical defense and any anomalous situation, the plaintiff is also praying to set aside the alleged Deed of Sale dated 19.05.2005 as far as it relates to his 1/3rd share in the suit schedule mentioned property. The Deed of Sale dated 19.05.2005 is not binding on the plaintiff as the 1st defendant cannot act as his agent to transfer the property to her husband after the plaintiff had exercised independent right over the property and also expressly informed her that she cannot act as his Agent.

Consequent to the amendment of the plaint, the plaintiff has sought for the following additional reliefs in the prayer column__

a)to declare that the Deed of Sale dated 19.05.2005 registered as Document No.2172 of 2005 at the Office of the Sub-Registrar Kodambakkam as sham and nominal and not binding on the plaintiff;

b)directing the defendants 1 to 3 to render true and proper accounts pertaining to the Deed of Sale dated 19.05.2005 registered as Document No.2172 of 2005 at the Office of the Sub-Registrar, Kodambakkam.

7.Thus, according to the plaintiff, the Sale Deed dated 19.05.2005

executed by the 1st defendant in favour of her husband - 3rd defendant is shame and nominal and it is not binding on the plaintiff. The value stated in the alleged Sale Deed is far below the market value of the property. The alleged Sale Deed has been executed by the 1st defendant in favour of the 3rd defendant, who is none other than her husband. It is unheard of for a wife to sell a property to her husband. Despite the 1st defendant being categorically informed earlier and again on 05.05.2005 that she does not represent the interest of the plaintiff in the suit property, she has chosen to dispose off the plaintiff's share surreptitiously with the connivance of the 3rd defendant and her daughter's father-in-law, in favour of the 3rd defendant. Thus, according to the plaintiff, the nature of amendment to the plaint will not change the character of the suit. Thus, the plaintiff sought for permission to amend the plaint.

8. Opposing the prayer of amendment, the 1st defendant has filed a counter affidavit. The sum and substance of the counter filed by the 1st defendant are as follows_

8(a) The present application seeking amendment of the plaint to introduce a new relief, is *ex facie* not maintainable as being not only barred by limitation, but also would amount to altering the character of the suit. The sole purpose of the present application for amendment is to overcome the lacuna committed by the plaintiff in having failed to file a separate suit praying for the relief as sought for in the present application

within the statutory limitation period. The plaintiff is in no way can cure the defect of limitation by filing the present application, since the present application even if is allowed cannot relate back to the date of filing of the suit.

8(b)With regard to the merits of the case, it is stated by the 1st defendant that the suit property was an absolute property of her late father N.K.Padmanabhan and after his demise, the properties were divided amongst the plaintiff and the defendants 1 & 2, the sons and daughter of the deceased N.K.Padmanabhan. There was a specific understanding between the parties that the present suit property be given to the 1st defendant as her share and in furtherance of the same, an irrevocable power of attorney dated 18.06.1982 was executed by the plaintiff and the 2nd defendant in favour of the 1st defendant. The said irrevocable power of attorney executed in favour of the 1st defendant in respect of the suit property stood exhausted as early as on 19.05.2005, on which date the suit property was sold to the 3rd defendant for a valid sale consideration. Since the suit property was allotted to the 1st defendant as her share, as a legal heir of late N.K.Padmanabhan, the plaintiff is not entitled to claim partition of the suit property. Further, the late N.K.Padmanabhan held a number of properties which devolved on all the three legal heirs viz., the plaintiff and the defendants 1 & 2. However, the 1st defendant was not given her rightful 1/3rd share in the entire estate of her late father N.K.Padmanabhan, but she was only given the present suit property as her share in the entire estate. The plaintiff has approached the

Court with unclean hands. If there was any *bona fide* on the part of the plaintiff, then he would have sought for partition of the entire estate and not merely the suit schedule property. Thus, the 1st defendant sought for dismissal of the application.

9.The 3rd defendant has also filed a counter contending that the reliefs sought to be introduced by the plaintiff in the plaint is barred by limitation and that the introduction of the relief of declaration would alter the character of the suit and it would cause new cause of action. Thus, the 3rd defendant sought for dismissal of the application.

10.The plaintiff has also filed rejoinder to the counters filed by the defendants 1 & 3, denying the allegations made by the defendants 1 & 3.

11.The learned senior counsel appearing for the plaintiff submitted that the defendants 1 & 2 are the sister and brother of the plaintiff. Originally the present suit was filed by the plaintiff only as against the defendants 1 & 2 claiming partition of his 1/3rd share in the suit schedule property. The suit property was purchased by their father viz., N.K.Padmanabhan on 06.02.1963. During the life time of the said N.K.Padmanabhan, out of the total extend of 3 grounds and 323 sq.ft, he sold an extent of 300 sq.ft of pathway measuring 4'x 75' to one M.T.Viswanathan on 01.04.1972 and he had also sold an extent of one ground to one Mrs.Rama Krishnamurthy on

15.05.1972. Thus, after selling 1 ground 300 sq.ft, the said N.K.Padmanabhan retained an extent of 2 grounds and 23 sq.ft. While so, he died on 27.12.1977, leaving behind the plaintiff and the defendants 1 & 2 as his legal heirs. The plaintiff and the 2nd defendant had executed a power of attorney deed dated 18.06.1982 in favour of their sister viz., the 1st defendant in respect of the suit schedule property to develop the same and to maintain it. But, the 1st defendant has not acted upon the said Power of Attorney executed in her favour by the plaintiff and the 2nd defendant. In fact, when an encroachment was made in the suit schedule property, it was the plaintiff who initiated action for evicting the trespassers and he had spent money to safeguard the property. Subsequently, the plaintiff had repurchased the pathway measuring 4'x 75', 300 sq.ft, from the said Viswanathan, to whom the same was sold by the plaintiff's father N.K.Padmanabhan. Since the power of attorney was not acted upon by the 1st defendant, on 05.05.2005 the plaintiff duly informed the 1st defendant not to deal with the share of the plaintiff in the suit schedule property. But, with an intention to deprive the plaintiff's lawful share in the suit schedule property and to cause loss to the plaintiff, the defendants connived with each other and inter-middled with the suit schedule property. Hence, the present suit has been filed claiming 1/3rd share in the suit schedule property. While so, on 27.01.2006 the plaintiff's counsel was furnished with a copy of a sale deed executed by the 1st defendant in favour of her husband (3rd defendant), from which the plaintiff came to know that the 1st defendant has sold the suit

schedule property to her husband 3rd defendant on 19.05.2005 based on the power of attorney dated 18.06.1982, in order to defeat the right of the plaintiff. Hence, the plaintiff had filed an Application No.605 of 2006 to implead the husband of the 1st defendant as the 3rd defendant in the present suit and the said application was allowed by this Court by order dated 26.11.2014. Since the 1st defendant has executed a sale deed in favour of her husband (3rd defendant), now it has become necessary for the plaintiff to amend the plaint by adding the prayer for declaration to declare the said sale deed dated 19.05.2005 executed by the 1st defendant in favour of the 3rd defendant as sham and nominal and not binding on the plaintiff and also for consequential reliefs.

12.The learned senior counsel appearing for the plaintiff would further submit that unless the said sale deed dated 19.05.2005 which was surreptitiously executed by the 1st defendant in favour of the 3rd defendant is declared as sham and nominal, the relief sought for by the plaintiff in the original plaint to allot 1/3rd share in the suit property in favour of him cannot be granted. Further, even if the amendment is allowed, the original cause of action for partition will remain as such and the relief will not change in any way. Actual controversy in this suit is *whether the plaintiff is entitled to 1/3rd share in the suit property or not?* Therefore, the nature of the amendment sought for by the plaintiff certainly would not alter the character of the suit. In this regard, the learned senior counsel appearing for the

plaintiff has also invited the attention of this Court to the judgment reported in ***AIR 1985 SC 817 [Vineet Kumar Vs. Mangal Sain Wadhera]*** wherein it has been held as follows_

“Normally amendment is not allowed if it changes the cause of action. But, it is well recognised that where the amendment does not constitute an addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record, the amendment would be allowed even after the statutory period of limitation.”

13.By relying upon the above said judgment, the learned senior counsel appearing for the plaintiff submitted that in the instant case, only additional facts are to be brought on record, which are necessary to grant the reliefs sought for by the plaintiff. Thus, the learned senior counsel appearing for the plaintiff prayed for allowing the present application to amend the plaint.

14.Per contra, the learned counsel appearing for the 1st defendant submitted that late N.K.Padmanabhan held number of properties, which devolved on all his three legal heirs viz., the plaintiff and the defendants 1 & 2. However, the 1st defendant was not given her rightful 1/3rd share in the entire property and she was only given the present suit schedule property as her share in the entire estate of late N.K.Padmanabhan. In this regard, the learned counsel appearing for the 1st defendant invited the attention of this

Court to the letter written by her father Padmanabhan dated 05.12.1972 addressed to the 1st defendant, and submitted that in the said letter, her father Padmanabhan had expressed his desire to give the suit schedule property to her. Further, the learned counsel appearing for the 1st defendant by drawing the attention of this Court to the reply sent by the 2nd defendant dated 20.07.2005, to the legal notice sent by the plaintiff, submitted that in the said reply, the 2nd defendant had stated that he had no interest in the suit property since he has given general power of attorney in favour of his sister 1st defendant. Thus, the learned counsel appearing for the 1st defendant submitted that the power of attorney had no point of time been revoked in the manner known to law. Since the plaintiff has evicted some of the encroachments from the suit property and since he had repurchased 300 sq.ft of pathway, it does not mean that the power of attorney granted in favour of the 1st defendant was revoked. Further, on the date of execution of the sale deed dated 19.05.2005 by the 1st defendant in favour of the 3rd defendant, there is a valid power of attorney in favour of the 1st defendant executed by the plaintiff and the 2nd defendant. Hence, based on the power of attorney, the 1st defendant had executed the sale deed dated 19.05.2005 in favour of her husband-3rd defendant. Now, on execution of the sale deed dated 19.05.2005, the power of attorney stood exhausted as early as on 19.05.2005 itself. Therefore, now at this point of time, the question of passing a decree for declaration declaring that the said sale deed is sham and nominal and not binding on the plaintiff, does not arise.

15. That apart, the learned counsel for the 1st defendant submitted that the plaintiff has sought to alter his stand by way of amending the plaint and by including the relief of declaration to declare the sale deed dated 19.05.2005 as sham and nominal and not binding on the plaintiff. The relief sought to be added by the plaintiff under the present application would change the very nature and character of the suit, inasmuch as the suit for *'partition and separate possession of the plaintiff's 1/3 share in the suit schedule property'* on the ground that the *'action done with an intention to deprive the Plaintiff of his lawful shares is null and void and the plaintiff ignores the same'*, would then be construed as a voidable transaction and the suit would be altered to *'declare that the deed of sale dated 19.05.2005 registered as Doc.No.2172 of 2008 at the office of the Sub-Registrar, Kodambakkam, as sham and nominal and not binding on the applicant/plaintiff'*. Since the proposed amendment is contrary and inconsistent with the original suit and since the amendment would change the partition suit into a declaratory suit, the amendment is not maintainable.

16. The learned counsel appearing for the 1st defendant would further submit that when the plaintiff had chosen to file the suit, as if the transaction is void transaction, now inconsistent with the original suit, the plaintiff is asking for a declaratory relief "declaring the sale deed dated 19.05.2005 as sham and nominal and not binding on the plaintiff", as if the transaction is

voidable transaction. Therefore, the nature of amendment sought for by the plaintiff would certainly amount to altering the very nature and character of the suit.

17. In this regard, the learned counsel appearing for the 1st defendant has also relied upon the judgment reported in **(2008) 15 SCC 610 [Ashutosh Chaturvedi Vs. Prano Devi @ Parani Devi and others]**, wherein it has been held that if the proposed amendment changes the character of the entire suit, such amendment cannot be allowed. For the same proposition, the learned counsel appearing for the 1st defendant has also relied upon the judgment reported in **(2001) 6 SCC 163 [Vishwambhar Vs. Laxminarayan]**.

18. The learned counsel appearing for the 1st defendant has also relied upon the judgment reported in **AIR 1953 Mad 611 [Jami Appann Vs. Jami Venkatppadu and others]** and submitted that the dictum laid down in the said judgment would show that there is a distinction between the voidable and void transactions and while the former class of transactions should be set aside, the latter need not be. In the case of voidable transfer, the title of the property vests in the transferee on the execution of the deed and it can revest in the transferor only by a decree of Court rescinding the transfer on grounds such as coercion, undue influence or fraud. To such a suit, Article 91 of the Limitation Act prescribes the period of limitation and if

no suit is filed within the time limited thereby, the transferor loses his right to avoid the sale and the title of the transferee becomes unimpeachable.

19.The learned counsel for the 1st defendant would further submit that in the present case, when the plaintiff had chosen to file the suit, as if the transaction is void transaction, now inconsistent with the original suit, the plaintiff is asking for a declaratory relief "declaring the sale deed dated 19.05.2005 as sham and nominal and not binding on the plaintiff", as if the transaction is voidable transaction. Therefore, the nature of amendment sought for by the plaintiff would certainly amount to altering the very nature and character of the suit.

20.It is yet another submission of the learned counsel for the 1st defendant that as per the averments in the plaint, the plaintiff came to know about the sale transaction on 27.01.2006; therefore, either the plaintiff ought to have filed the suit for declaration within the period of three years or ought to have filed an application to amend the prayer within the period of three years. Now, after ten years, the present application has been filed seeking amendment of the plaint; hence, the amendment of the prayer by way of consequential relief is purely hit by limitation; on this ground also, the amendment application cannot be entertained. In this regard, the learned counsel appearing for the 1st defendant has also relied upon the judgment reported in **(2010) 14 SCC 596 [Van Bibhag Karamchari Griha Nirman**

Sahkari Sanstha Maryadit (regd) Vs. Ramesh Chander and ors],

wherein it has been held as follows_

“Even though the prayer for amendment to include the relief of specific performance was made about 11 years after the filing of the suit, the same was allowed after 12 years of the filing of the suit, such an amendment in the facts of the case cannot relate back to the date of filing of the original plaint, in view of the clear bar under Article 54 of the Limitation Act.

... in *Raheja Constructions Ltd., Vs. Alliance Ministries [1995 Supp (3) SCC 17]*, this Court held that an application for amendment filed 7 years after the filing of the suit to include the plea of specific performance, would defeat the valuable rights of limitation accruing to the other side. In that case, the factual position was somewhat similar to the present case and this Court held that *when a plea for specific performance was not included in the original suit, it could not be included after a period of 7 years having regard to Article 54 of the Limitation Act.*”

Thus, by relying upon the above said judgment, the learned counsel appearing for the 1st defendant submitted that the additional relief sought for by the plaintiff to declare the sale deed dated 19.05.2005 as sham and nominal cannot relate back to the date of filing of the original plaint, as it is hit by limitation. Therefore, on this ground also, the present application cannot be entertained.

21.By way of reply, the learned senior counsel appearing for the plaintiff submitted that the power of attorney was executed in the year 1982; but, no point of time the power of attorney was acted upon by the 1st defendant; subsequently, the power of attorney was revoked by the plaintiff on 05.05.2005; but, after 23 years, the 1st defendant surreptitiously executed the sale deed in favour of her husband on 19.05.2005; but, this additional fact came to the knowledge of the plaintiff only on 27.01.2006; immediately, he had filed an application No.605 of 2006 to implead the husband of the 1st defendant and the said application was also allowed by this Court on 26.11.2014; unless the said impleadment application was allowed the plaintiff, he cannot ask for the amendment of the plaint. Since the impleadment application was allowed on 26.11.2014, consequent to the impleadment of the husband of the 1st defendant as 3rd defendant in the suit, the additional prayers are now sought to be added by the plaintiff. Hence, it cannot be said that the prayer sought to be added in the plaint is hit by limitation.

22.In this regard, the learned senior counsel appearing for the plaintiff has also relied upon the judgment reported in **AIR 2002 SC 3369(1) [Sampath Kumar Vs. Ayyakannu and another]**, wherein it has been held as follows__

"In the present case the amendment is being sought for almost 11 years after the date of the institution of the

suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby, depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

On the averments made in the application, the same ought to have been allowed. If the facts alleged by plaintiff are not correct it is open for the defendant to take such

plea in the written statement and if the plaintiff fails in substantiating the factual averments and/or the defendant succeeds in substantiating the plea which he would obviously be permitted to raise in his pleading by way of consequential amendment then the suit shall be liable to be dismissed. The defendant is not prejudiced, more so when the amendment was sought for before the commencement of the trial.

For the foregoing reasons, the appeal is allowed. The impugned orders of the High Court and the Trial Court are set aside. The plaintiff is permitted to incorporate the plea sought to be raised by way of amendment in the original plaint foregoing the plea to the extent given up by him before the Trial Court. However, in view of the delay in making the application for amendment, it is directed that the plaintiff shall pay a cost of Rs.2,000/- (Rupees Two Thousand only) as a condition precedent to incorporating the amendment in the plaint. The prayer for declaration of title and recovery of possession shall be deemed to have been made on the date on which the application for amendment was filed."

Thus, by relying upon the above said judgment, the learned senior counsel for the plaintiff submitted that in the said case, the Hon"ble Supreme Court has allowed the application for amendment of prayer after statutory period on a reasoning that the merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing the prayer for amendment. Hence, it is incorrect to state that the present application filed by the plaintiff to add additional prayer of declaration is hit by limitation.

23.Keeping the submissions made on either side, I have carefully gone through the entire materials available on record.

24.Though several contentions were raised on either side with regard to the validity of the alleged revocation of power of attorney by the plaintiff as well as about the desire of the father of the 1st defendant to give the entire suit schedule property to the 1st defendant, I am of the opinion that those facts are not necessary to deal with the issue involved in the present application, since the present application has been filed only for amendment of plaint and consequently to add additional prayer. In the present application, this Court has to consider the following points only__

(i)whether the amendment sought by the plaintiff would amount to altering the very nature and character of the suit?

(ii)Whether the amendment sought for by the plaintiff is hit by limitation?

25.With regard to the first point, it is the submission of the learned counsel for the 1st defendant that when the plaintiff had chosen to file the suit, as if the transaction is void transaction, now inconsistent with the original suit, the plaintiff is asking for a declaratory relief "declaring the sale deed dated 19.05.2005 as sham and nominal and not binding on the plaintiff", as if the transaction is voidable transaction. It is further submission

of the learned counsel for the 1st defendant that the present prayer for declaration is totally contrary and inconsistent with the original averments in the plaint, since originally the plaintiff had treated the sale as void transaction and now by way of present amendment prayer, he is converting it into voidable transaction; therefore, if the amendment is allowed, it would alter the very character of the suit. In this regard, the learned counsel for the 1st defendant has also relied upon number of decisions of various High Courts and the Hon'ble Supreme Court of India.

26. But, in my considered opinion, originally in the plaint the plaintiff has made a prayer to grant preliminary decree for partition of his 1/3rd share and separate possession of the suit schedule property. But, during the pendency of the suit, on 27.01.2006 the plaintiff came to know that the 1st defendant had sold the property by way of sale deed dated 19.05.2005 in favour of her husband - 3rd defendant; therefore, the plaintiff had filed an application No.605 of 2006 seeking to implead the 1st defendant's husband as a party to the suit and the said application was allowed by this Court on 26.11.2014 and pursuant to the same, the 1st defendant's husband has been impleaded as 3rd defendant; therefore, according to the learned counsel for the plaintiff, the said sale deed dated 19.05.2005 executed by the 1st defendant in favour of her husband - 3rd defendant stands as an impediment for granting the decree for partition and separate possession. Hence, he has filed the present amendment application seeking to amend the plaint and to

add the prayer for declaration declaring the said sale deed dated 19.05.2005 as sham and nominal. Only if the amendment sought for by the plaintiff totally changes the nature and character of the suit, it can be said that the amendment alters the basis structure of the suit. Further, I find that only as a passing reference, the plaintiff has stated in the original plaint that the sale deed dated 19.05.2005 is a sham and nominal, but he has not asked any relief in the original plaint, based on the said averments. Only if the identity of the cause of action for filing the suit is lost by allowing the prayer of amendment, then only it can be said that the basic structure of the suit is altered. But, in the instant case, even if the amendment is allowed, the identity of the cause of action for filing the suit will not be lost; in other words, even if the amendment sought for by the plaintiff is allowed, the cause of action for filing the suit claiming 1/3rd share in the suit schedule property, will remain unaltered. Therefore, in my considered opinion, the present amendment sought for by the plaintiff will not alter the basic structure and character of the suit.

27. It is the next fold of submission of the learned counsel for the 1st defendant that the present amendment sought for by the plaintiff cannot be allowed because it is hit by limitation; that in the instant case, even according to the plaintiff, the plaintiff came to know about the execution of the sale deed dated 19.05.2005 in the year 2006, but, whereas the amendment application was filed only in the year 2014. As per Section 21 of

the Limitation Act, an amendment to the plaint would take effect only from the date of amendment and not from the date of filing the plaint. Therefore, according to the learned counsel for the 1st defendant, the statutory period of three years to ask for the prayer "*to declare the sale deed as null and void*" had expired within three years from 27.01.2006 ie., the date on which the plaintiff got the knowledge about the sale deed executed by the 1st defendant in favour of the 3rd defendant and as such, even if the amendment is allowed, it will take effect only from the date of amendment and it will not relate back to the date of filing the plaint. While that being so, the additional prayer for declaration sought for by the plaintiff after 10 years from the date of knowledge of the sale of the property cannot be allowed, since the said prayer is purely hit by limitation. Thus, according to the learned counsel for the 1st defendant, the present amendment sought for by the plaintiff cannot be allowed, at this juncture.

28. But, in my considered opinion, when the plaintiff came to know about the sale deed dated 19.05.2005 in respect of the suit property, immediately he filed an application No.605 of 2006 seeking to implead the 1st defendant's husband as a party to the suit and the said application was allowed by this Court on 26.11.2014. Unless and until the said application for impleadment is allowed by this Court, the plaintiff cannot seek for amendment of the plaint. Already this Court has come to the conclusion that the amendment does not alter the basic structure and character of the

suit. Therefore, I am of the opinion that the amendment sought for by the plaintiff could be allowed even after the statutory limitation period. In this regard, a reference could be placed in the judgment reported in ***AIR 1985 SC 817 [Vineet Kumar Vs. Mangal Sain Wadhera]*** wherein it has been held as follows_

“Normally amendment is not allowed if it changes the cause of action. But, it is well recognised that where the amendment does not constitute an addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record, the amendment would be allowed even after the statutory period of limitation.”

One more reference could be placed in the decision reported in ***AIR 1969 SC 1267 (1) [Jai Jai Ram Manohar Lal Vs. National Building Material Supply, Gurgaon]***. The factual aspects of the said case would show that the originally the suit was instituted by misdescription of the plaintiff; subsequently the amendment petition was filed to substitute the real plaintiff. Under such circumstance, in that case, the Hon'ble Supreme Court has held as follows_

“Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date

on which it was originally instituted.”

29.As contended by the learned senior counsel for the plaintiff, when the amendment does not alter the basic structure of the suit but only seeks to add alternate plea and addition to the facts already on record, the amendment could be allowed even after the statutory period of limitation. In the instant case, by way of present amendment, the plaintiff has brought only certain additional facts, which would not alter the basic structure of the suit; therefore, even after the statutory period of limitation, the amendment could be allowed.

30.Though the learned counsel for the 1st defendant submitted that as per Section 21 of the Limitation Act, an amendment to the plaint would take effect only from the date of amendment and not from the date of filing the plaint, I find from Proviso to Section 21(1) of the Act that if the omission to include a new plaintiff or defendant was due to a mistake made in good faith, the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. In the instant case, the factual aspects would show that the plaintiff came to know about the sale deed executed by the 1st defendant in favour of her husband - 3rd defendant only on 27.01.2006; thereafter, immediately he filed an application No.605 of 2006 seeking to implead the husband of the 1st defendant as a party to the suit and the said application was also allowed by this Court on 26.11.2014 and pursuant to the

same, the husband of the 1st defendant was also added as 3rd defendant in the suit. Since the husband of the 1st defendant was added as a new defendant during the pendency of the suit, the plaintiff has filed the present petition for amendment of the plaint. Therefore, in my considered opinion, the nature of amendment would take effect only from an earlier date. Further, as per the Proviso to section 22 (2) of the Specific Relief Act, if the plaintiff has not claimed any relief in the plaint, the Court may at any stage of the proceedings allow the plaintiff to amend the plaint on such terms as may be just for including for such relief. Hence, I do not find any legal impediment for allowing this application for amendment of plaint.

For the foregoing reasons, the application is allowed. Time to carry out the amendment is two weeks from the date of receipt of a copy of this order.

16.06.2015

Index : Yes / No

Internet : Yes / No

ssv

R.SUBBIAH, J.,

SSV

Pre-delivery order

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