IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 21ST DAY OF DECEMBER 2020 / 30TH AGRAHAYANA, 1942

OP(C).No.3605 OF 2017(O)

CHALLENGE AGAINST EXT.P7 ORDER IN I.A.NO.5115/2017 IN OS 92/2011 DATED 11-12-2017 OF II ADDITIONAL SUB COURT,ERNAKULAM

PETITIONERS:

1 T.V. SASIKALA
W/O.P.P.VISHNUDAS,SHANKARA
NILAYAM,THEKKEKOYIKKAL,NEAR CHEPPANAM
BUND,PANANGADU.P.O,ERNAKULAM DISTRICT.

2 P.P.VISHNUDAS
S/O.P.V.PURUSHOTHAMAN,SHANKARA
NILAYAM,THEKKLEKOYIKKAL,NEAR CHEPPANAM
BUND,PANANGADU.P.O,ERNAKULAM DISTRICT.

BY ADV. SRI.J.JAYAKUMAR

RESPONDENT:

C.P. JOSEPH
S/O.PERU,CHEMBAKASSERY,CHEPPANAM,PANANGAD.P.O,ERNAKULAM DISTRICT-682506.

R1 BY ADV. SRI.JOLLY JOHN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 14-12-2020, THE COURT ON 21-12-2020 DELIVERED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J
****
O.P.(C) No.3605 of 2017

Dated this the 21st day of December, 2020

J U D G M E N T

The petitioners are the defendants and the respondent is the plaintiff in the suit O.S.No.92/2011 on the file of the Sub Court, Ernakulam.

2. The suit is instituted for granting a decree of declaration that the plaintiff has got absolute title, ownership and possession over the property described in the plaint C schedule and also a decree of prohibitory injunction restraining the defendants from trespassing into that property and committing any acts of waste therein. The plaintiff has also sought a decree for fixation of the boundaries of the plaint C schedule property.

3. After commencement of the examination of witnesses in the suit, the plaintiff filed an application (Ext.P5) under Order

VI Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') for amendment of the plaint.

4. By way of amendment of the plaint, the plaintiff sought correction of the extent of the property mentioned in the plaint C schedule and also incorporation of new survey numbers of the property. The plaintiff also prayed for insertion of a new schedule as plaint D schedule in the plaint containing description of the property of the defendants.

5. The defendants filed objection to Ext.P5 application raising various contentions.

6. As per Ext.P7 order dated 11.12.2017, the trial court allowed Ext.P5 application.

7. The defendants have filed this original petition under Article 227 of the Constitution of India, challenging the legality and propriety of Ext.P7 order.

8. Heard learned counsel for the petitioners as well as the respondent.

9. Ext.P7 order passed by the court below is cryptic and laconic. Ext.P7 order, in its entirety, is extracted below.

> *"Heard both sides and perused the case records. It is true that trial has already commenced in this suit. It is also noticed that the defendants have filed I.A.2529/15, which is an application for appointment of an Advocate Commissioner to measure out the property of the 1st defendant.*
>
> *The suit is for declaration, fixation of boundary and injunction.*
>
> *Considering the rival contentions, this court is of the view that the amendment sought for is to be allowed for the proper adjudication of the lis involved in the suit.*
>
> *Hence this I.A is allowed. Carry out amendment within 7 days."*

10. Reasons form the soul of a judicial decision. Reasons substitute subjectivity by objectivity. Absence of reasons renders exercise of judicial review virtually impossible in adjudging the validity of the decision. Reasons reflect application of mind and avoid arbitrariness. The need for a speaking order is a facet of fair procedure.

11. Ext.P7 order is devoid of reasons and it is liable to be set aside solely on that ground.

12. Order VI Rule 17 of the Code provides that, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The proviso to this rule states that, no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.

13. The proviso to Order VI Rule 17 of the Code, to some extent, curtails the absolute discretion of the court to allow amendment at any stage of the suit. If the application for amendment is filed after commencement of trial, it has to be shown that inspite of due diligence, such amendment could not have been sought earlier. When the application for amendment filed by a party to the suit is after commencement of trial, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso to Order VI Rule 17 of the Code.

14. When does the trial in a suit commence? This issue has been considered by the Apex Court in Kailash v. Nanhku : AIR 2005 SC 2441, Baldev Singh v. Manohar Singh : AIR 2006 SC 2832, Ajendraprasadji N. Pande v. SwamiKeshavprakeshdasji : AIR 2007 SC 806, Vidyabai v. Padmalatha : AIR 2009 SC 1433, Sushil Kumar Jain v. Manoj Kumar: AIR 2009 SC 2544 and Mohinder Kumar Mehra v. Roop Rani Mehra : AIR 2017 SC 5822. After a survey of these decisions, in **Sasidharan v. Sudarsanan : 2020 SCC OnLine Ker 4540**, this Court has held as follows:

> *"Thus, on a close analysis of the decisions referred to above, the following conclusion is inevitable. When understood in the context of the proviso to Order VI Rule 17 of the Code, the trial in a suit commences on the date on which the affidavit in lieu of examination in chief of a party or his witness is filed for the purpose of recording evidence. The bar under the proviso to Order VI Rule 17 of the Code would be attracted to an application for amendment of pleadings filed after that date".*

15. Admittedly, in the instant case, Ex.P5 application was filed by the plaintiff after conclusion of the examination of some of the witnesses on his side, that is, after commencement of the

trial of the suit. One of the main contentions raised by the defendants in the objection filed by them to Ext.P5 application is that the application for amendment of plaint cannot be allowed since it was filed by the plaintiff after the commencement of the trial of the suit. Therefore, before allowing Ext.P5 application, it was incumbent on the trial court to come to the conclusion, that inspite of due diligence, the plaintiff could not have raised the matter before commencement of the trial of the suit.

16. When an application for amendment of pleadings is filed after commencement of trial, whether or not the opposite party has raised any specific objection, before allowing the application, it is the duty of the court to satisfy itself that the applicant, inspite of due diligence, could not have filed the application at an earlier stage. The reason is that the jurisdiction of the court to allow the application is taken away unless it comes to the conclusion that, inspite of due diligence, the party could not have raised the matter before commencement of the trial.

17. In **Vidyabai** (supra), it has been held as follows:

"Order 6 Rule 17 C.P.C is couched in a mandatory

> *form. Unless the jurisdictional fact, as envisaged in the proviso to Order 6 Rule 17 C.P.C is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz., it must come to a conclusion that in spite of due diligence, the parties could not have raised the matter before the commencement of the trial."*

18. The burden is on the person who seeks an amendment after commencement of the trial to show that inspite of due diligence, such an amendment could not have been sought earlier (See **Revanna v. Anjanamma : AIR 2019 SC 940**).

19. While passing Ext.P7 order, the trial court has not considered Ext.P5 application in the light of the provision contained in the proviso to Order VI Rule 17 of the Code. The trial court has also not considered whether the other objections raised by the defendants to Ext.P5 application are legally sustainable or not.

20. In the above circumstances, Ext.P5 application requires reconsideration by the trial court.

21. Consequently, the original petition is disposed of as follows: Ext.P7 order passed by the trial court is set aside. Ext.P5 application is remanded to the trial court for fresh consideration and disposal. The trial court shall consider all relevant contentions raised by both parties and dispose of Ext.P5 application in accordance with law by a speaking order, within a period of one month from the date of production of a certified copy of this judgment before it by either of the parties to the suit.

All pending interlocutory applications are closed.

(sd/-)
R.NARAYANA PISHARADI, JUDGE

jsr

APPENDIX

PETITIONERS' EXHIBITS:

EXHIBIT P1	**TRUE COPY OF THE PLAINT IN I.S.NO.92/2011 ON THE FILES OF II ADDL.SUB JUDGE'S COURT,ERNAKULAM**
EXHIBIT P2	**TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONERS AGAINST EXHIBIT P-1 SUIT.**
EXHIBIT P3	**TRUE COPY OF THE JUDGMENT DATED 11/1/2017 IN OP(C)NO.2030/2015 OF THIS HON'BLE COURT.**
EXHIBIT P4	**TRUE COPY OF I.A.NO.2529/2015 IN O.S.NO.92/2011 FILED BY THE PETITIONER BEFORE THE II ADDL.SUB JUDGE'S COURT,ERNAKULAM**
EXHIBIT P5	**TRUE COPY OF THE I.A.5115/2017 IN O.S.NO.92/2011 FILED BY THE RESPONDENT BEFORE II ADDL.SUB JUDGE'S COURT,ERNAKULAM**
EXHIBIT P6	**TRUE COPY OF THE COUNTER FILED BY THE PETITIONERS AGAINST I.A.NO.5115/2017 IN O.S.NO.92/2011 BEFORE II ADDL.SUB JUDGE'S COURT,ERNAKULAM**
EXHIBIT P7	**TRUE COPY OF THE ORDER DATED 11/12/2017 IN I.A.NO.5115/2017 IN O.S.NO.92/2011 OF II ADDL.SUB JUDGE'S COURT,ERNAKULAM.**

RESPONDENT'S EXHIBITS : NIL

TRUE COPY

PS TO JUDGE