IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 19TH DAY OF OCTOBER 2020 / 27TH ASWINA, 1942

OP(C).No.1316 OF 2020

AGAINST THE ORDER DATED 10.06.2020 IN I.A.NO.1789 OF 2017 IN OS 249/2014 OF MUNSIFF COURT, PUNALUR

PETITIONER/RESPONDENT/DEFENDANT:

MR.SASIDHARAN
AGED 52 YEARS
S/O. PARAMU, 'SREEPARVATHY', ALANCHERY, YEROOR VILLAGE, PUNALUR TALUK.

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA
SRI.R.GITHESH
SMT.HANI P.NAIR
SRI.AJAY BEN JOSE
SRI.MANJUNATH MENON
SRI.SACHIN JACOB AMBAT
SHRI.HARIKRISHNAN S.

RESPONDENTS/PETITIONERS/PLAINTIFFS:

1 **MR.SUDARSANAN**
AGED 41 YEARS
S/O. LAKSHMANAN, 'SUKRITHAM',YEROOR MURI, YEROOR VILLAGE, PUNALUR TALUK, PIN-691 312

2 **MRS. SHERLY SUDARSANAN,**
AGED 39 YEARS, W/O. SUDARSANAN, 'SUKRITHAM', YEROOR MURI, YEROOR VILLAGE, PUNALUR TALUK, PIN-691 312

R1-2 BY ADV. SRI.PRATHEESH.P
R1-2 BY ADV. SMT.ANJANA KANNATH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 14-10-2020, THE COURT ON 19-10-2020 DELIVERED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J
****
O.P.(C) No.1316 of 2020

Dated this the 19th day of October, 2020

J U D G M E N T

When does the trial in a suit commence? This is the core issue for consideration in the instant case.

2. The petitioner is the defendant and the respondents are the plaintiffs in the suit O.S.No.249/2014 on the file of the Munsiff's Court, Punalur.

3. The suit is instituted seeking the following reliefs. (1) A decree, setting aside document No.1768/2009 of S.R.O, Anchal. (2) A decree of declaration of the title and possession of the plaintiffs over the plaint schedule property. (3) A decree of prohibitory injunction restraining the defendent from trespassing into the plaint schedule property, committing any acts of waste therein and causing any obstruction to the possession and enjoyment of the property by the plaintiffs.

4. The crux of the averments in the plaint is as follows. The second plaintiff is the wife of the first plaintiff. The second plaintiff borrowed an amount of Rs.5,00,000/- from the defendant on 22.09.2008. The plaintiffs had borrowed a further amount of Rs.3,00,000/- from the defendant on 20.10.2008. The defendant wanted execution of a sale deed in his favour in respect of the property owned by the first plaintiff as security for the loan amount. As the plaintiffs had no other option, the first plaintiff executed sale deed No.1768 in respect of the plaint schedule property in favour of the defendant on 16.07.2009. It is not a legally valid document. There was no consideration for the sale deed. The sale deed has not come into existence. The possession of the property was not given to the defendant. The plaint schedule property is still in the possession of the plaintiffs. The sale deed was executed only as a security for the amount borrowed by the plaintiffs from the defendant. The plaintiffs repaid Rs.4,00,000/- to the defendant towards the principal amount. The defendant is liable to reconvey the property to the plaintiffs on paying him the balance amount of Rs.4,00,000/-.

5. The defendant filed written statement raising mainly the following contentions. There was no loan transaction between him and the plaintiffs as alleged in the plaint. He purchased the plaint schedule property from the first plaintiff as per sale deed No.1768/2009 of S.R.O Anchal, on payment of proper consideration. The plaint schedule property is under the ownership and possession of the defendant. No person other than the defendant has got right and possession over the property. The suit is barred by limitation.

6. On 18.09.2017, the plaintiffs filed an application as I.A.No.1789/2017 (Ext.P3) under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') for amendment of the plaint. By the proposed amendment, the plaintiffs sought deletion of the relief claimed in the suit for setting aside document No.1768/2009. The plaintiffs also sought a new relief to grant a decree directing the defendant to reconvey the plaint schedule property in their favour on receiving the amount of Rs.4,00,000/- from them. The plaintiffs also sought necessary amendment to the valuation portion of the plaint.

7. The defendant filed objection to Ext.P3 application, raising various contentions.

8. As per Ext.P6 order, the trial court allowed Ext.P3 application.

9. The defendant has filed this original petition under Article 227 of the Constitution of India, challenging the legality and propriety of Ext.P6 order.

10. Heard learned counsel for the petitioner and also the respondents.

11. Learned counsel for the petitioner has raised the following contentions. (1) The application for amendment of the plaint was filed at a highly belated stage. Ext.P6 order was passed by the trial court without taking into consideration the bar under the proviso to Order VI Rule 17 of the Code. (2) The proposed amendment, if allowed, would introduce a new cause of action for the suit and it is not permissible. (3) The new relief claimed by the plaintiffs, by the proposed amendment, is barred by limitation.

12. *Per contra*, learned counsel for the respondents has contended that, an application for amendment of the plaint can be filed at any stage of the suit and that the plaint already contains necessary averments enabling the plaintiffs to seek the new relief claimed by them.

13. 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.

14. 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. 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. The object of this provision is to prevent frivolous applications which are filed with the intention to cause delay in the trial (See **Salem Advocate Bar Association v. Union of India : (2005) 6 SCC 344**). Amendment of pleadings, subsequent to the commencement of trial, would give surprise to the opposite party and cause delay in the trial. Once the trial commences on the known pleas, it will be very difficult for any side to reconcile. The proviso to Order VI Rule 17 of the Code intends to curtail delay and expedite trial of the case (See **Chander Kanta Bansal v. Rajinder Singh : AIR 2008 SC 2234**). When the application for amendment is filed by a party to the suit 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 (See **Rajkumar Gurawara v. S. K. Sarwagi and Company : AIR 2008 SC 2303).**

15. The term "due diligence" determines the scope of a party's constructive knowledge (See **Samuel v. Gattu Mahesh : (2012) 2 SCC 300**). "Due diligence" means careful and

persistent application or effort. It means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. It means such diligence as a prudent man would exercise in the conduct of his own affairs (See **Chander Kanta Bansal v. Rajinder Singh : AIR 2008 SC 2234**)

16. When does the trial in a suit commence? In **Kailash v. Nanhku : AIR 2005 SC 2441**, a three Judge Bench of the Apex Court has held as follows:

> *"At this point the question arises: When does the trial of an Election Petition commence or what is the meaning to be assigned to the word 'trial' in the context of an Election Petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of Election Petitions as in the case of Election Petitions, all the proceedings commencing with the presentation*

> *of the Election Petition and upto the date of decision therein are included within the meaning of the word 'trial'."*
>
> (emphasis supplied)

17. However, in **Baldev Singh v. Manohar Singh : AIR 2006 SC 2832**, a two Judge Bench of the Apex Court held as follows:

> *"That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments".*

18. In **Ajendraprasadji N. Pande v. Swami Keshavprakeshdasji : AIR 2007 SC 806**, the decisions in **Kailash** (supra) and **Baldev Singh** (supra) were referred to. But the question, when would trial commence in a suit, did not actually arise in that case, as is seen from the following observation therein:

> *"Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of*

commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC".

19. In **Vidyabai v. Padmalatha : AIR 2009 SC 1433**, it has been held as follows:

"The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'."

The decision in **Kailash** (supra) was followed in **Vidyabai** (supra) and **Baldev Singh** (supra) was distinguished, stating as follows:

"It is not an authority for the proposition that the trial would not deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence".

20. In **Sushil Kumar Jain v. Manoj Kumar : AIR 2009 SC 2544**, after referring to **Baldev Singh** (supra), it was observed as follows:

> *"In view of the aforesaid decision and in view of the admitted fact that not even the issues have yet been framed, documents have not yet been filed, evidence has not yet been adduced, we are of the view that the proviso to Order 6 Rule 17 of the CPC has no manner of application as the trial has not yet commenced".*

21. In **Mohinder Kumar Mehra v. Roop Rani Mehra : AIR 2017 SC 5822**, a two Judge Bench of the Supreme Court has held as follows:

> *"In a suit when trial commences? Order XVIII of the C.P.C deal with "Hearing of the Suit and Examination of Witnesses". Issues are framed under Order XIV. At the first hearing of the suit, the Court after reading the plaint and written statement and after examination under Rule 1 of Order XIV is to frame issues. Order XV deals with "Disposal of the Suit at the first hearing", when it appears that the parties are not in issue of*

> *any question of law or a fact. <u>After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences</u>."*
>
> (emphasis supplied)

22. What the Apex Court has held in **Kailash** (supra) is not that the trial in a suit commences when issues are framed. The statement in **Kailash** (supra) that "the trial begins when issues are framed" cannot be read in isolation. The Apex Court has held that the trial begins when issues are framed and the case is set down for recording of evidence. Likewise, the statement in **Vidyabai** (supra) that "the date on which the issues are framed is the date of first hearing" also cannot be read in isolation. It is well known that the parties to a suit may be required to take various steps before the examination of witnesses or recording of evidence in the suit. In **Vidyabai** (supra), this aspect has been clarified by stating that the provisions of the Code envisage taking of various steps at different stages of the proceeding and filing of an affidavit in lieu of examination in chief of the witness would amount to 'commencement of proceeding'. This aspect has been further clarified in **Mohinder Kumar Mehra** (supra)

also. The position is also made clear in **Kailash** (supra) by holding that all proceedings before the stage of recording evidence is preliminary to trial or for making the case ready for trial.

23. 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.

24. In the instant case, the defendant contends that the application for amendment of the plaint was filed by the plaintiffs only after filing the affidavit in lieu of examination-in-chief. The trial court has not considered the question whether the application for amendment of plaint filed by the plaintiffs is hit by the proviso to Order VI Rule 17 of the Code. In fact, the defendant had not raised any specific contention before the trial

court that the application for amendment of plaint was filed after the commencement of trial in the case.

25. 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.

26. 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."*

27. 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**).

28. In the instant case, there is no material before this Court to ascertain whether the application for amendment of plaint was filed after the commencement of trial in the suit. If the application for amendment of the plaint was filed after commencement of the trial of the suit, before allowing the application, the trial court has to come to the conclusion that, inspite of due diligence, the plaintiffs could not have filed the application at an earlier stage. If the application for amendment has been filed after commencement of the trial of the case, it is for the plaintiffs to convince the trial court that the relief for setting aside the sale deed was claimed by mistake and it was only a bona fide omission not seeking the relief for reconveyance

of the property in their favour by the defendant. Therefore, Ext.P3 application needs reconsideration by the trial court on this aspect.

29. There is no merit in the contention raised by the learned counsel for the petitioner that the proposed amendment of plaint introduces a new cause of action. There is a specific averment in the plaint that the defendant is bound to reconvey the plaint schedule property to the plaintiffs on payment of the balance amount of Rs.4,00,000/- to him. There is also a specific averment in the plaint to the effect that the plaintiffs had sent a lawyer notice to the defendant on 09.10.2013 stating that they were ready to pay the balance amount due to him and demanding reconveyance of the property in their favour. There is no merit in the contention of the defendant that the amendment of the plaint introduces a totally different, new and inconsistent case or that it changes the fundamental character of the suit.

30. The other contention raised by the learned counsel for the petitioner is that the new relief sought by the plaintiffs is barred by limitation. The new relief sought by the plaintiffs, by

the proposed amendment, is to issue a direction to the defendant to reconvey the property in their favour after receiving the balance amount of Rs.4,00,000/- from them. As noticed earlier, the plaint already contains necessary averments enabling the plaintiffs to seek such a relief.

31. 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 (See **H.J.Leach and Company v. M/s Jardine Skinner and Company : AIR 1957 SC 357**).

32. The general rule, no doubt, is that a party shall not be 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. But it is also well recognised 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. When what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended, bar of limitation is not a good ground to refuse amendment (See **A.K.Gupta and Sons Limited v. Damodar Valley Corporation : AIR 1967 SC 96**). 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 (See **Vineet Kumar v. Mangal Sain : AIR 1985 SC 817**). There is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed (See **Pankaja v. Yellappa : AIR 2004 SC 4102**). When the plea, that the relief sought by way of amendment is barred by time, is arguable in the circumstances of a case, amendment can be allowed and the plea of limitation, being disputed, could be made a subject matter of the issue after allowing the amendment prayed for

(See **Ragu Thilak v. Rayappan : AIR 2001 SC 699**).

33. In the instant case, by the proposed amendment of the plaint, no new case is set up by the plaintiffs. The amendment does not constitute addition of a new cause of action or raise a different case. The plaint already contains an averment that the defendant is bound to reconvey the property to the plaintiffs on receiving the balance amount due to him from them. The plaintiffs had also sent a lawyer notice to the defendant, before the institution of the suit, demanding reconveyance of the property to them. In such circumstances, even if it is assumed that the new relief sought by way of amendment is barred by limitation, the application for amendment can be allowed.

34. In view of the above discussion and conclusions reached by this Court, Ext.P3 application requires reconsideration by the trial court in the light of the proviso to Order VI Rule 17 of the Code.

35. Consequently, the original petition is disposed of as follows: Ext.P6 order passed by the trial court is set aside and Ext.P3 application is remanded to the trial court only for

considering the question whether the application for amendment of plaint could be allowed or not in the light of the provision contained in the proviso to Order VI Rule 17 of the Code. It is made clear that, in view of the findings made by this Court in this judgment, the trial court need not reconsider the question of limitation with regard to the new relief claimed by the plaintiffs by way of amendment.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1	**TRUE COPY OF PLAINT FILED AS O.S. NO.249 OF 2014 BEFORETHE MUNSIFF'S COURT, PUNALUR.**
EXHIBIT P2	**TRUE COPY OF WRITTEN STATEMENT IN O.S. NO. 249/2014 FILED BY THE DEFENDANT BEFORE THE MUNSIFF'S COURT, PUNALUR.**
EXHIBIT P3	**TRUE COPY OF I.A. NO. 1789 OF 2017 IN O.S NO. 249/2014 FILED BY THE PLAINTIFFS BEFORE THE MUNSIFF'S COURT,PUNALUR.**
EXHIBIT P4	**TRUE COPY OF OBJECTION IN EXHIBIT P3 FILED BY THE DEFENDANT BEFORE THE MUNSIFF 'S COURT, PUNALUR.**
EXHIBIT P5	**TRUE COPY OF JUDGMENT DATED 26.02.2020 IN OP(C)NO.2979 OF 2018 OF THIS HON'BLE COURT.**
EXHIBIT P6	**TRUE COPY OF ORDER IN I.A. NO. 1789 OF 2017 IN O.S NO. 249/2014 DATED 10.06.2020 OF THE MUNSIFF'S COURT, PUNALUR.**

RESPONDENTS' EXHIBITS : NIL

TRUE COPY

PS TO JUDGE