IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE G.GIRISH

MONDAY, THE 1ST DAY OF APRIL 2024 / 12TH CHAITHRA, 1946

OP(C) NO. 723 OF 2023

AGAINST THE ORDER IN I.A.NO.08/2023 IN OS NO.1 OF 2019 DATED 24.01.2023 OF SUBORDINATE JUDGE'S COURT, KANNUR

PETITIONER/RESPONDENT/DEFENDANT:

SREEJA C.C
AGED 49 YEARS
W/O DINESHAN, RESIDING AT CANNDALE APARTMENTS, KSEB ROAD, BURNASSERY, KANNUR 1 ASOM DESOM, KANNUR TALUK, PIN - 670001

BY ADVS.
K.N.ABHILASH
SUNIL NAIR PALAKKAT
RAJAGOPAL V.
RITHIK S.ANAND
ANU PAUL
SREELAKSHMI MENON P.

RESPONDENT/PETITIONER/PLAINTIFF

YESODA.C
AGED 89 YEARS
D/O MANNI, RESIDING AT KOROTH HOUSE, MUZHAPPALA, KANHIRODE AMSOM, THATTYODE DESOM, KANNUR TALUK, PIN - 670001

BY ADVS.
M.K.SUMOD MUNDACHALIL KOTTIETH
VIDYA M.K.(K/910/1990)
RAJ CAROLIN V.(K/001117/2018)
THUSHARA.K(K/1443/2020)
PADMA LAKSHMI(K/000652/2023)

THIS OP (CIVIL) HAVING COME UP FOR FINAL HEARING ON 25.03.2024, THE COURT ON 01.04.2024 DELIVERED THE FOLLOWING:

"CR"

G.GIRISH, J.

O.P.(C) No.723 of 2023

Dated this the 1st day of April, 2024

J U D G M E N T

Can a suit for declaration of a document as null and void could be moulded as one for cancellation of that document by taking recourse to Order VI Rule 17 of the Code of Civil Procedure, that too, at a time when the case was reserved for judgment? This is the short issue to be resolved in this Original Petition.

2. The plaintiff in O.S.No.1/2019 on the files of Sub Court, Kannur, an octogenarian lady, sought a declaration in the said suit that Document No.100/2016 of S.R.O, Anjarakandy executed by her in favour of the defendant in that suit, who is none other than her daughter, is void since it was got executed by perpetrating fraud and misrepresentation upon her. She alleged that her daughter, the defendant in the suit, took her to the Sub Registrar's office under the pretext that she was to sign some papers in connection with the creation of a mortgage of the property as security for the loan being availed by her son-in-law. Thus, the defendant in O.S.No.1/2019 of

the Sub Court, Kannur is said to have managed to obtain a sale deed executed in respect of the property belonging to the plaintiff which is scheduled in that suit. The plaintiff claims to have instituted the above suit for declaration of the said document as void, immediately after getting knowledge about the actual nature of Document No.100/2016 which she executed before the S.R.O, Anjarakandy. The parties went for trial, and the case was posted for judgment by the learned Sub Judge after hearing both sides. It is at that stage that the plaintiff filed I.A.No.8/2023 seeking amendment of the plaint for the limited purpose of altering the relief prayed for as one for cancellation of the document, and for making consequential changes in respect of the valuation of the suit. The learned Sub Judge, as per order dated 24.01.2023, allowed the application and directed the plaintiff to carry out the amendment within two days. It is the above order which is under challenge in this petition filed under Article 227 of the Constitution of India by the defendant in O.S.No.1/2019 of the Sub Court, Kannur.

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

4. The impugned order of the learned Sub Judge is assailed by the learned counsel for the petitioner by relying on the embargo contained in the proviso to Order VI Rule 17 of the Code of Civil

Procedure. It is argued by the learned counsel that the rigour of the proviso to Order VI Rule 17 C.P.C against permitting amendment after the commencement of trial cannot be watered down unless there are compelling circumstances to show that inspite of due diligence the plaintiff was not in a position to raise the matter before the commencement of trial. Accordingly, it is pointed out that the learned Sub Judge went wrong in allowing the amendment without adverting to the question whether, despite due diligence the plaintiff was not in a position to seek the above amendment at any time before the commencement of trial. It is further argued that the impugned order of the trial court is totally silent on the above point regarding the exercise of due diligence by the plaintiff for seeking amendment which is now requested at the fag end of the trial.

5. Per contra, the learned counsel for the respondent would argue that the element of applying due diligence in seeking amendment earlier, is implied in this case, taking into account of the fact that the plaintiff, who is an age old lady, cannot be expected to know the intricacies of law relating to the reliefs of declaration of a document as void and a request for cancellation of such document. The learned counsel for the petitioner and the learned counsel for the respondent have relied on various decisions of the

Apex Court and this Court on the question as to what amount to 'due diligence' as envisaged in the proviso to Order VI Rule 17 of the Code of Civil Procedure. I do not propose to inflate this order by referring to all those decisions since it appears that the concept of 'due diligence' as envisaged under Order VI Rule 17 C.P.C is not having much relevance in the facts and circumstances of this case.

6. As already stated above, the only change which the plaintiff wanted to make in her plaint was to alter the relief for declaration of Document No.100/2016 as void to one for the cancellation of that document. The other alterations sought for are only consequential modifications in the valuation of the suit. There is absolutely no change requested in the factual matrix of the case. No new plea is sought to be incorporated by way of amendment. It is also pertinent to note that the net effect of the declaration of a document as void, and the cancellation of document, when viewed in the general perspective, is the same. Of course, in the legal perspective, there is subtle difference in the consequences and implications while considering the declaration of a document as void and the cancellation of the document. However, as far as a common litigant like the plaintiff herein is concerned, she cannot be expected to be aware of the legal implications of declaration of a document as void, and the cancellation of that document. It has been stated

by the plaintiff in the affidavit supporting the amendment application that she now understood that it is better to amend the above suit for cancellation of document instead of declaration of document as void, and hence it is highly necessary to amend the plaint. Obviously, the above statement is indicative of the belated legal advice received by the plaintiff about the need to have the suit changed to one for cancellation of document instead of declaring the document as void. The plaintiff cannot be found fault with for the failure of her counsel to visualise before the commencement of the trial about the need to incorporate the prayer for cancellation of document in the suit, instead of declaration of that document as void. Had the wisdom in this regard dawn upon the plaintiff's counsel at the time of institution of the suit or at any time later on before the commencement of trial, she could have very well sought the amendment before the stage forbidden by the proviso to Order VI Rule 17 C.P.C. When viewed in the above perspective, the question whether the plaintiff could have exercised due diligence in seeking the proposed amendment at any time before the commencement of trial, is not having much relevancy in the facts and circumstances of the case. If at all there is any relevancy, it can only be presumed that inspite of due diligence the plaintiff could

not have made that amendment, in view of her limitations while depending upon a lawyer to espouse her case.

7. It is true that no litigant is expected to raise a contention that the lack of proper legal advice or wrong legal advice, has to be accepted as a ground to permit him to perform an act or to take an action which the law forbids after a prescribed period of time. But the case on hand does not come under the above category. Here is a case where right from the very inception, till now, the plaintiff challenges the validity of a document which she happened to execute as a result of the alleged fraud and misrepresentation perpetrated by the defendant. Whether it be by a decree directing the cancellation of the document, or by a decree declaring the said document as void, the relief which the plaintiff seeks is to nullify the operation of the document. It is true that at the final stage of the suit, the relief sought for was requested to be moulded by incorporating the legal terms in a way which was somewhat different from the legal phraseology which was used at the time of institution of the suit. However, there is absolutely no change in the plea set forth by the plaintiff or the narration of facts pertaining to the cause of action for the suit. The proposed modification sought to be incorporated in the relief does not make even a slightest deviation from the original stance taken by the plaintiff at the time

of institution of the suit. That being so, the present case cannot be classified as an instance where the plaintiff seeks to override a proscription imposed by law stating the reason that she was given wrong legal advice.

8. It is argued by the learned counsel for the petitioner that the prayer for cancellation of document cannot be permitted to be incorporated at this stage of the proceedings, since a relief in the above regard is now barred by limitation. I find no merit in the above objection since the challenge against the document which the plaintiff assail in the suit, had already been raised at the time when the suit was instituted within the prescribed period of time. As already stated in the foregoing paragraphs, a change in nomenclature of the nature of the relief sought for by the plaintiff cannot be said to be hit by limitation since she had already instituted the suit challenging the legal validity of the document sought to be annulled. In that view of the matter, I find no reason to interfere with the impugned order of the learned Sub Judge allowing the amendment.

In the result, the Original Petition is hereby dismissed.

(sd/-)

G.GIRISH, JUDGE

jsr

APPENDIX OF OP(C) 723/2023

PETITIONER EXHIBITS

Exhibit-P1 **THE TRUE COPY OF THE PLAINT DATED NIL IN OS NO. 1/2019 ON THE FILES OF SUBORDINATE JUDGE KANNUR**

Exhibit-P2 **THE TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER HEREIN DATED 11.07.2019 IN OS NO 1/2019 ON THE FILES OF SUB-JUDGE KANNUR**

Exhibit-P3 **THE TRUE COPY OF INTERLOCUTORY APPLICATION NO-8/2023 IN O.S-1/2019 UNDER ORDER 6 RULE 17 OF THE CODE OF CIVIL PROCEDURE ON THE FILES OF SUBORDINATE JUDGE KANNUR**

Exhibit-P4 **THE TRUE COPY OF THE COUNTER STATEMENT IN I.A NO. 8/23 IN OS 1/19 DATED 11.01. 2023 ON THE FILES OF SUBORDINATE JUDGE, KANNUR**

Exhibit-P5 **THE TRUE COPY OF THE ORDER DATED 24.01.2023 IN IA NO. 8/2023 IN O.S. NO. 1/2019 ON THE FILES OF SUB JUDGE KANNUR**