

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

OP(C) NO. 1374 OF 2021

OS 61/2019 OF SUB COURT, SULTHAN BATHERY, WAYANAD

PETITIONER/S:

MUHAMMED ASHRAF,
AGED 47 YEARS
S/O. AHAMMED HAJI, VAYAPURATH HOUSE, KIZHAKOTH
AMSOM, ELETTEL DESOM, THAMARASSERY, KOZHIKODE-673
572
BY ADVS.
R.SUDHISH
M.MANJU

RESPONDENT/S:

FASALU RAHMAN,
AGED 44 YEARS
S/O. MOIDEEN, THATTARI VEETTEL, ERANHIKKAL P.O,
ELATHOOR AMSOM, DESOM, KOZHIKODE-673 303
BY ADVS.
K.M.FIROZ
M.SHAJNA

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION
ON 06.09.2021, THE COURT ON 10.09.2021 DELIVERED
THE FOLLOWING:

"CR"

JUDGMENT

Dated this the 10th day of September, 2021

The petitioner is the defendant in O.S.No. 61 of 2019 on the files of the Sub Court, Sulthan Bathery. The suit is filed, seeking to cancel two assignment deeds registered by the respondent in favour of the petitioner. After the petitioner filing his written statement, respondent amended the plaint. Thereupon, the petitioner filed additional written statement. Later, when the case was listed for trial, the petitioner filed I.A.No.15 of 2021 seeking to amend the written statement. Plaintiff opposed the application, contending that the amendment is totally misconceived and filed only for the purpose of protracting the suit. The trial court dismissed the amendment application vide Ext. P5. Hence, the

original petition.

2. The amendment application was dismissed finding that the attempt of the petitioner is to withdraw the admissions in the written statement and to incorporate new contentions. The trial court also found the petitioner guilty of wanton negligence and callousness.

3. Sri.R.Sudhish, learned Counsel for the petitioner assailed the findings and submitted that the purpose of amendment is to withdraw certain portions from the written statement and to incorporate identical averments with minor modifications. According to the learned Counsel, the amendment is only clarificatory in nature. As regards the finding that the petitioner is guilty of callous negligence, it is submitted that the suit was listed for trial on 04.08.2021, whereas the application for amendment was filed on 29.7.2021. The trial having not commenced, the

proviso to Order VI Rule 17, interdicting the court from allowing the amendment, in the absence of due diligence by the party, is not applicable. Moreover, the Court should have taken a liberal approach, as it was the written statement that was sought to be amended and not the plaint. In support of the contention, the following decisions are relied on; Pavithran v. Narayanan [1997 (2) KLT 271], Estralla Rubber v. Dass Estate (P) Ltd [(2001) 8 SCC 97], Ram Niranjana Kajaria and another v. Sheo Prakash Kajaria and others [2015 KHC 4631] and Mohinder Kumar Mehra v. Roop Rani Mehra and others [(2018) 2 SCC 132].

4. Sri.K.M.Firoz, learned Counsel for the respondent contended that the amendments, if allowed, would change the nature and scope of the suit. According to the learned Counsel, the amendments are not clarificatory or explanatory in nature, but are intended to set up a case,

hitherto not pleaded. To buttress the argument, particular emphasis was laid on the portions in the amendment where the percentage of share is sought to be changed from 22.5% to 32.5%, payment in the name of the power of attorney of the defendant changed to payment to the defendant and the term 'adjustment' replaced with 'payment'. It is pointed out that the application for amendment was filed after the respondent had filed his affidavit in lieu of chief examination and trial commenced from the date on which the affidavit in lieu of chief examination was filed. There being no whisper in the amendment application about the due diligence factor, the trial court was fully justified in dismissing the amendment application. In support of his contentions, learned Counsel relied on the decisions in Modi Spinning and Weaving Mills Co.Ltd v. M/s.Ladha Ram and Company [AIR 1977 SC 680], Heera Lal v. Kalyan Mal and

others [(1998) 1 SCC 278] and Sasikala T.V v. C.P. Joseph [2021 (1) KHC 23], Usha Balashaheb Swami and others v. Kiran Appaso Swami and others [(2007) (5) SCC 602].

5. In the impugned order, after referring to the relevant portions of the written statement and the amendment application, the trial court came to the conclusion that certain material admissions are sought to be withdrawn and new facts introduced. The relevant portions of the written statement and the amendment application has been extracted in the impugned order. Having heard the learned Counsel and having scrutinised the extracted portion in the order, I find no reason to arrive at a different conclusion. More so, since even in the lengthy explanations in the additional written statement, the petitioner had not mentioned about the contentions now sought to be incorporated.

6. In **Ram Niranjana Kajaria**, the Apex Court held that even though an attempt to wholly resile from an admission cannot be permitted, the admission can be clarified or explained by way of amendment and the basis of admission can be attacked in a substantive proceedings. This court in **Pavithran** also held that if an admission could be explained away or can be rescinded or superseded, there cannot be any prohibition against such admission being allowed to be taken away by amending the pleading. The aforementioned decisions would have applied, had the attempt of the petitioner been to only explain or clarify the admission. On the contrary, the attempt here is to withdraw the admissions and set forth an entirely new case. As held by the Apex Court in **Modi Spinning and Weaving Mills** (supra), the defendant cannot be permitted to change his case completely and substitute an entirely new case. Here, the

the amendments would, not only have the effect of the defendant making inconsistent and alternative pleadings, but also of completely displacing the admissions made in the written statement. Even the most liberal approach towards amendment of written statements will not justify the approval of such an application.

7. The sequence of events reveal that the petitioner had been permitted to file additional written statement. Thereafter, he waited till the case was listed for trial before filing the second amendment application. Going by the order, the application for amendment was filed on 2.8.2021 and considered by the court when the suit was taken up for evidence. There is no dispute to the fact that the amendment application was filed after the plaintiff had submitted his affidavit in lieu of chief examination. According to the learned Counsel for the petitioner, the amendment

application having been filed before examination of parties had commenced, the interdiction under Order 6 Rule 17 CPC is not attracted. On the other hand, learned Counsel for the respondent contended that trial had commenced from the day on which the plaintiff had submitted his affidavit in lieu of chief examination. Therefore, it was incumbent upon the petitioner to have satisfied the trial court that he could not have filed the application earlier, in spite of due diligence. In Sasikala (supra), this Court, after considering the precedents, held that 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. In Mohinda Kumar (supra), the amendment application was filed before evidence was led by the plaintiff and hence, the Apex Court held that the amendment application was filed before the

commencement of trial. In the case at hand, the affidavit in lieu of chief examination was filed prior to the filing of application for amendment and therefore, even if it is accepted that the application was filed before the date fixed for leading evidence, the interdiction in the proviso to Order VI Rule 17 will apply.

8. **Estralla Rubber** is cited to contend that the Apex Court has held the delay in making an application for amendment, by itself, cannot be a ground for rejection of the application, unless serious prejudice is caused to the other party and accrued rights taken away. It may be pertinent to note that in the case at hand, the suit was included in the provisional list for the month of August, 2021 on the request of the plaintiff, since he is working abroad. The plaintiff had come down for the purpose of giving evidence and also submitted his affidavit in lieu of chief

examination. The amendment application was filed thereafter, just prior to the date fixed for trial. Being so, there cannot be any doubt that substantial prejudice was caused to the plaintiff.

9. Considering the nature of the amendments and the stage at which the application for amendment was filed, the trial court was fully justified in rejecting the application.

In the result, the original petition is dismissed.

Sd/-

V.G.ARUN
JUDGE

Scl/

APPENDIX OF OP(C) 1374/2021

PETITIONER EXHIBITS

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| Exhibit P1 | COPY OF THE PLAINT IN O.S. NO. 61 OF 2019 ON THE FILE OF THE SUBORDINATE JUDGE, SULTHAN BATHERY. |
| Exhibit P2 | COPY OF THE WRITTEN STATEMENT IN O.S. NO. 61 OF 2019 ON THE FILE OF THE SUBORDINATE JUDGE, SULTHAN BATHERY. |
| Exhibit P3 | COPY OF THE AMENDMENT APPLICATION I.A. NO. 15 OF 2021 IN O.S. NO. 61 OF 2019 ON THE FILE OF THE SUBORDINATE JUDGE, SULTHAN BATHERY. |
| Exhibit P4 | COPY OF THE COUNTER IN I.A. NO. 15 OF 2021 IN O.S. NO. 61 OF 2019 ON THE FILE OF THE SUBORDINATE JUDGE, SULTHAN BATHERY. |
| Exhibit P5 | COPY OF THE ORDER IN I.A. NO. 15 OF 2021 IN O.S. NO. 61 OF 2019 ON THE FILE OF THE SUBORDINATE JUDGE, SULTHAN BATHERY. |