IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 11TH DAY OF OCTOBER 2021 / 19TH ASWINA, 1943

OP(C) NO. 1621 OF 2018

AGAINST THE ORDER DATED 23.06.2018 IN I.A.NO.809/2018 IN OS 98/2013 OF MUNSIFF COURT, PALA

PETITIONER:

P.M. SALIM
AGED 51 YEARS
S/O.MADHAVAN, AGED 51 YEARS, GEETHANJALI HOUSE,
ARUNAPURAMKARA,PULIYANNOOR VILLAGE, MEENACHIL TALUK.

BY ADV SRI.P.C.HARIDAS

RESPONDENTS:

1 VASUDEVAN NAMBOOTHIRI
S/O.SREEKUMARAN NAMBOODIRI, AGED 68 YEARS,
KEEZHAKALLILAM, RAMAPURAM KARA, RAMAPURAM VILLAGE-686 576

2 SHAJI
PAINALIL HOUSE, VELLILAPPALLY KARA,
VELLILAPPALLY VILLAGE-686 574.

3 VIJAYAN, ASARIPARAMBIL HOUSE
RAMAPURAM KARA, RAMAPURAM VILLAGE-686 576.

4 P.G.HAREESH
VADAKKEARACKAL, KONDADU KARA,VELLILAPPALLY VILLAGE-686 574.

BY ADV SRI. C.UNNIKRISHNAN V.ALAPATT

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 11.10.2021, THE COURT ON 11.10.2021 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, JJ.

==========

O.P(C). No.1621 of 2018

==========

Dated this the 11th day of October, 2021

JUDGMENT

This Original Petition (Civil) has been filed by the sole plaintiff in O.S No.92 of 2013 of the Munsiff Court, Pala arraying defendants 1 to 4 therein as respondents herein.

2. Ext.P5 order, viz. Order in I.A.809/2018 dated 23.06.2018 is under challenge herein.

3. Brief facts:

The 1st defendant/1st respondent herein filed I.A.No.809/2018 in O.S No.92/2013 to amend the written statement on asserting that some mistakes crept therein due to oversight. According to the 1st defendant/petitioner those mistakes were required to be corrected to protect the interest of the defendants.

4. Plaintiff filed objection to this petition mainly contending that the 1st defendant's attempt was to strike down an admission

wilfully made and the same is impermissible. Further, the amendment application was filed after commencement of trial, that too, at a belated stage.

5. However, the learned Munsiff allowed the petition on the finding that the amendment would never cause any prejudice to the plaintiff and further holding that the averments in the 7th paragraph of the written statement specifically mentioned that the plaint schedule properties are within the possession and enjoyment of the 1st defendant.

6. As regards correctness of Ext.P5 order, the learned counsel for the petitioner/plaintiff would submit that though order 6 Rule 17 of C.P.C permits amendment of pleadings, that cannot be used to deny an admitted fact which favours the plaintiff. The learned counsel submitted further that amendment application was filed at a belated stage on 25.3.2018 after filing the written statement on 25.07.2013. Another challenge raised is that amendment petition was filed after starting trial and amendment sought for after starting

trial cannot be allowed mechanically since proviso to Order 6 Rule 17 mandates that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

7. Thirdly it is submitted that the affidavit in support of I.A.No.809 of 2018 Ext.P3 herein is vague and no details warranting amendment was narrated therein. On the above ground, the learned counsel for the petitioner submitted that Ext.P5 suffers from illegality and is liable to be set aside. The learned counsel for the petitioner/plaintiff placed decision reported in [2021 (1) KLT 767], ***Sasikala v. Joseph*** to contend that 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 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

itself that the applicant, inspite of due diligence, could not have filed the application at an earlier stage.

8. Disspelling this argument the learned counsel for the respondents/defendants would contend that amendment application was not filed after long delay and after starting trial. According to the learned counsel for the respondents, the application was filed before examination of the witnesses and when the matter was listed for trial. It is submitted further that some mistakes crept while drafting the written statement and the same came to the notice of the 1st defendant only during 2018 when the written statement was read before start of trial. Immediately thereafter Ext.P3 application was filed and necessary averments highlighting the mistakes occured due to oversight had been narrated in Ext.P3. He submitted further that going by the preceding and proceeding paragraphs of the written statement the 1st defendant never admitted any right to the plaintiff in respect of the plaint schedule property and the 1st defendant

asserted absolute possession in his favour throughout. It is submitted further that therefore the averment in para.7 of the written statement to the effect that the plaintiff cut and removed rubber trees and made new plantain therein is an inadvertent mistake, liable to be corrected. He submitted further that instead of `plaintiff', the reference must be `1st defendant'. According to the learned counsel, the amendment sought was not intended to strike down any categorical admission and the intention was to correct an error as espoused.

9. The learned counsel for the respondents urged further that the learned Munsiff passed Ext.P5 order considering the above aspects in detail and therefore the order does not require any interference.

10. In view of the rival contentions, 2 questions required to be answered.

(1) When trial commences for the purpose of proviso to Order 6 Rule 17 of CPC?

(2) Whether a categorical and wilful admission made in the

pleadings can be strike down by filing an amendment application?

Question No.1

11. A mere reading of proviso to Order 6 Rule 17 makes it clear that no application for amendment shall be allowed after 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 the trial.

12. When responding to the challenge raised by the learned counsel for the petitioner on the submission that the amendment application was filed after commencement of trial in this case, wherefrom the 1st question arose for consideration, it has to be observed that Ext.P3 application was filed on 5.6.2018 before commencement of examination of witnesses. In this context it is necessary to refer a 3 Bench decision of the Honourable Supreme Court reported in [(2005) 4 SCC 480 : 2005 KHC 697: 2005 (2) KLT 623], ***Kailash v. Nanhku***. In this case the word `trial' in the context of an election petition was considered and it was held that 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.

13. But in a subsequent 2 Bench decision reported in [2006 KHC 1060 : (2006) 6 SCC 498], ***Baldev Singh & Ors. v. Manohar Singh & anr.***, rendered by the Honourable Supreme Court also commencement of trial was considered. In para.17 of the judgment it was held that *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. As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to O.6 R.17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings*.

14. In ***Baldev Singh***'s case *(supra*), the Apex Court included

4 distinct stages in a civil suit. When it is arranged, *final hearing* is the last stage, *examination of witnesses* is the stage before final hearing. *Addressing arguments* to be read along with final hearing. Coming to *filing of documents*, Order 13 of CPC deals with production, impounding and return of documents. After the amendment w.e.f 1.7.2002, as per Order 13 Rule 1 *the parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed with a plaint or written statement.* It could be noticed that before the amendment Order 13 Rule 1 in the matter of production of documents more liberty was given to the parties as the said rule provided that *the parties or their pleaders shall produce at or before settlement of issues, all the documentary evidence of every description in their possession or power, or in which they intend to rely, and which has not already been filed in court, and all documents which the court has ordered to be produced.* However, the amended provision as extracted above mandates that parties or

their pleaders shall produce on or before the settlement of the issues, all the documents in evidence in original where the copies thereof have been filed along with plaint or written statement.

15. It is true that as per Order 13 Rule 3(a) and (b), 2 exceptions provided, viz., (i) to documents produced before the cross examination of the witnesses of other party or (ii) handed over to a witness merely to refresh his memory.

16. That apart, Order 7 Rule 14 provides that where a plaintiff sues upon a document, or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint. However, Order 7 Rule 14(3) provides that a document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the court, be received in the evidence on his

behalf at the hearing of the suit. Paramateria provision in relation to written statement is Order 8 Rule 1A(3) of C.P.C. Thus generally production of documents or copies thereof shall be along with the plaint or written statement. It is true that courts are not powerless to receive documents which were not produced along with plaint or written statement in view of Order 7 Rule 14(3) and Order 8 Rule 1A(3) of C.P.C on satisfying that the said documents are relevant to decide the matter in issue before the court and with leave of the court. Such power is available even during examination of the witnesses or by recalling the witnesses already been examined or even after closure of evidence. True that this is an exception to general rule as already pointed out. If *filing of documents* contemplated under Order 13 Rule 1, Order 7 Rule 14 and Order 8 Rule 1A is to be treated as commencement of trial, the same would lead to confusion in practical application. Therefore, by filing documents, it could not be held that trial has commenced.

17. This is the context in which another decision of the

Honourable Supreme Court reported in [(2018) 2 SCC 132], ***Mohinder Kumar Mehra v. Roop Rani Mehra & Ors.*** requires reference. In this decision, the Apex Court held that after issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, then trial of the suit commences. In fact, the term `commencement of trial' requires a precise and conclusive definition so that a trial court shall not be confused in any manner to decide a question when trial commences. It is true that the decisions discussed in detail would give the ratio that trial commences **when the case is set down for recording of evidence and the party having right begins to produce his evidence**. At this juncture, how recording of evidence starts in a civil case required to be addressed exhaustively. That is to say, when the view that filing of chief affidavit by one party is taken as the starting point of trial, in a case, the plaintiff confines his evidence to documents alone without filing a chief affidavit, confusion would mount. Similarly, when the plaintiff submits in a case that the plaintiff has no oral or

documentary evidence and the suit can be decided based on the admission in the written statement or otherwise, then for want of filing chief affidavit can it be safe to hold that trial not commenced? Likewise, when a suit was listed for trial either the plaintiff or the defendant not filing chief affidavit and they are confining their evidence in documents alone, can one say that no trial commenced in that case? So, the term `commencement of trial' required to be interpreted to avoid such confusions and to give an easy understanding for practical application. Thus it can be held that;

(a) Trial commences when the first witness in the case was examined in chief directly by the Court.

(b) In a case chief affidavit is filed in lieu of chief examination, trial commences when the witness who filed chief affidavit in lieu of chief examination offers himself for cross examination by the other side at the witness box and when the cross examination begins.

(c) Trial commences in a case when the plaintiff is not

adducing any oral evidence, the date on which the plaintiff or his counsel either tenders the documents in evidence following the procedure or the date on which the plaintiff or his counsel submits that no oral or documentary evidence to be adduced on the part of the plaintiff.

(d) All other steps prior to stages (a) to (c) to be treated as proceedings preliminary to commencement of trial.

Question No.(2)

18. While answering this question a decision placed by the learned counsel for the petitioner/plaintiff reported in [2018(2) KLT SN 65 (case No.79) : 2018 (2) KLT online 2079, ***Jagadamma v. Indira*** holding the view that amendment of written statement which would have the effect of displacing the plaintiff's case and cause irretrievable prejudice to the plaintiff cannot be permitted also to be borne in mind. Apart from ***Jagadamma's*** case (*supra*), other decisions on this question also required to be addressed.

19. As early as in 1976, in the decision reported in [(1976) 4

SCC 320], ***Modi Spg & Wvg. Mills Co. Ltd. v. Ladha Ram & Co.,*** when the Honourable Apex Court considered the question as to whether the defendant can be allowed to file a written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff, it was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed and if such amendments are allowed in the written statement, the plaintiff would be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants.

20. In another decision reported in [(1998) 1 SCC 278], ***Heeralal v. Kalyan Mal & Ors.***, the Honourable Supreme Court held that once the written statement contains an admission in favour of the plaintiff, by amendment, such admission cannot be allowed to be withdrawn, if such withdrawal would amount to totally displacing the claim of the plaintiff and would cause him irretrievable prejudice.

21. In the decision in [2001 (2) SCC 472], ***Ragu Thilak D. John v. S.Rayappan & Ors.***, the Apex Court observed that the necessity of amendment is to minimise the litigation. The observations is as under:

The dominant purpose of allowing the amendment is to minimize the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We fee that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

22. Further in the decision reported in [2001(8) SCC 97], ***Estralla Rubber v. Dass Estate (P) Ltd.,*** the Apex Court held that *even there was some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written*

statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff/respondent No.1 so as to take away any accrued right.

23. In the decision reported in ***Baldev Singh***'s case *(supra),* the Honourable Supreme Court considered many questions relating to different aspects covered under Order 6 Rule 17. In the said case the Honourable Supreme Court held that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of plaint.

24. In another decision reported in [(2015) 10 SCC 203: 2015 (4) KLT suppl. 97 (SC)], ***Ram Nirajan Kajaria v. Sheo Prakash Kajaria & Ors.*** when the Apex Court considered the scope of Order 6 Rule 17 r/w Order 12 of CPC it was held that admissions made in the pleadings cannot be permitted to be withdrawn by amendment, but application may be made for explaining the clarification in the

admissions.

25. From a conspectus of the case law discussed above emerges the principle that categorical or wilful admission made in the pleadings (plaint and written statement) cannot be permitted to be withdrawn by way of amendment if such withdrawal would amount to totally displacing the case of the plaintiff and would cause him irreparable prejudice.

26. To be on the facts of this case, if the amendment sought for is to strike down a categorical or wilful admission in the written statement, the same cannot be allowed to be withdrawn by way of amendment and such an amendment would have the effect of displacing the plaintiff's case and cause irretrievable prejudice to the plaintiff. However, the facts of each case to be evaluated to decide whether the amendment sought for is one to strike down a categorical or wilful admission.

27. To move on keeping the above principle, on reading para.7 of the written statement, Ext.P2 herein, the same is as follows:

"അന്യായപട്ടിക വസ്തുക്കളിൽ ഒന്നാം പ്രതിയുടെ

കൈവശത്തിലും അനുഭവത്തിലുമാണ് ഇരിക്കുന്നത് വാദി പേർക്കുള്ളൊരു തീറാധാരത്തിൽഒന്നാം പ്രതി സാക്ഷിയുമാണ് മുൻ ഉടമകൾ ഒന്നാംപ്രതിയിൽ നിന്നും വസ്തുക്കളുടെ തീരുവിള കൈപ്പറ്റിയിട്ടുള്ളതും അവർക്കു വാദിയെപ്പറ്റി യാതൊരു അറിവും ഇല്ലാത്തതുമാണ് അവർ വാദിയ്ക്കു വസ്തു നല്കിയിട്ടില്ല ഉദ്ദേശം എട്ടു വർഷത്തിന് മുൻപ് പട്ടിക വസ്തുക്കളിൽഉണ്ടായിരുന്നറബ്ബർ മരങ്ങൾ മുഴുവൻവെട്ടിമാറ്റി വാദി പുതുതായി റബ്ബർ പ്ലാന്റ് ചെയ്തിട്ടുള്ളതാണ് പട്ടിക വസ്തുക്കൾ ഉൾപ്പെട്ട ഒരേക്കർ 5 സെന്റ് സ്ഥലം ഒന്നാം പ്രതിയുടെ കൈവശത്തിലും ദേഹണ്ഡത്തിലുമാണ് ടി ഒരേക്കർ അഞ്ചു സെന്റിൽ ഒരേ രീതിയിലാണ് ഉള്ളത്. ഒരേ പ്രായമുള്ള തെങ്ങും റബ്ബറുമാണ് ടി സ്ഥലത്തു നില്പുള്ളത്. അന്യായപട്ടിക വസ്തുക്കൾ തീറാധാരങ്ങൾ ചെയ്യുന്നതിന് വന്നിട്ടുള്ള ചിലവും അളവുകാരനെക്കൊണ്ട് അളപ്പിച്ചതിനുള്ള ചിലവും ഒന്നാം പ്രതി നടത്തിയിട്ടുള്ളതാണ്. അന്യായപട്ടിക വസ്തുക്കളിൽ ബലമായി പ്രവേശിക്കുന്നതിന്വാദിയാണ്ശ്രമിക്കുന്നത്"

28. Again in para.4 of the written statement it was stated thus:

"അന്യായപട്ടിക വസ്തുക്കൾ തീറുവാങ്ങുന്ന സമയം ധനാഢ്യനായ വാദിയിൽ നിന്നും ഒരുലക്ഷം രൂപ ഒന്നാം പ്രതി വായ്പയായി വാങ്ങുന്നതിനുള്ളസഹചര്യം ഉണ്ടായി. ടി വായ്പയുടെ ഈടിലേക്കു ഒന്നാം പ്രതി തീറു വാങ്ങുന്നതിനു കരാർ ചെയ്തിരുന്ന മൊത്തം 12 ആർ 35 ചമീറ്റർ സ്ഥലം വാദിയുടെ പേർക്ക് ഒന്നാം പ്രതി തീറെഴുതി വാങ്ങിയിട്ടുള്ളതാണ്. വാദിയുടെ പേര് തീറാധാരക്കാരന്റെ സ്ഥാനത്തു വച്ച് എന്നുള്ളതല്ലാതെ വാദിയ്ക്ക് ഏതെങ്കിലും രീതിയിലുള്ള പണം മുടക്കോ വസ്തു തീറുവാങ്ങുന്നതിന് വാദി ഉദ്ദേശിക്കുകയോ ചെയ്തിട്ടില്ലാത്തതാണ്. തീറാധാരതീയതി മുതൽ പട്ടിക വസ്തുക്കൾ ഒന്നാംപ്രതിയുടെ കൈവശത്തിലും അധീനതയിലും ഇരുന്നുവരുന്നതാണ് രണ്ടു വസ്തുക്കളുടെയും അസ്സൽ പ്രമാണങ്ങൾ ഒന്നാം പ്രതിയുടെ മാത്രം കൈവശത്തിൽഇരുന്നു വരുന്നതാണ് "

29. The legal position is not in dispute that picking and separately reading one or two sentences from the pleadings may not be the procedure to understand the exact case of the parties pleaded therein. In order to understand the case of the parties in the pleadings, pleadings in general to be taken into consideration. A

cursory reading of the extracted portion in the written statement filed by the 1st defendant/1st respondent herein would go to show that the 1st defendant put up a specific contention in the written statement throughout that the plaintiff never possessed the plaint schedule property at any point of time. If so, the word 'vaadi' sought to be amended as 'onnam prathi' is to be read in tune with the specific contention to be gathered from the written statement throughout. If so, the amendment sought for and allowed by the Munsiff as per Ext.P5 order cannot be categorised as a wilful or categorical admission, To the contrary, the amendment sought for is to be treated as a mistake. Thus the learned Munsiff could not be faulted in holding so.

30. Coming to the third challenge raised by the learned counsel for the petitioner pointing out the fact that the affidavit in support of Ext.P3 amendment application is not narrative of in so many words, the necessity of amendment, it has to be held that courts must be extremely liberal in granting prayer for amendment, if the

court is of the view that if such amendment is not allowed, a party who has prayed for such an amendment, shall suffer irreparable loss and injury. Further the court can allow an amendment if the court is of the view that allowing an amendment shall really subserve the ultimate cause of justice. Therefore, this challenge also is of no avail to the petitioner.

31. In view of the discussion above, I am of the view that the learned Munsiff rightly allowed the amendment sought for as per Ext.P5 order and the same does not require any interference in any manner in a petition filed under Article 227 of the Constitution of India to invoke the power of superintendence. Therefore, the Original Petition is liable to be dismissed and I do so.

In the result, this Original Petition stands dismissed. Ext.P5 order of the court below stands confirmed.

Sd/-

A. BADHARUDEEN, JUDGE

rtr/

APPENDIX OF OP(C) 1621/2018

PETITIONER'S EXHIBITS

EXT.P1	TRUE COPY OF THE PLAINT IN OS.NO.98/2013 OF THE MUNSIFF'S COURT, PALA.
EXT.P2	TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE 1ST RESPONDENT OS.NO.98/2013 OF THE MUNSIFF'S COURT, PALA.
EXT.P3	TRUE COPY OF THE IA.NO.809/2018 IN OS.NO.98/2013 OF THE MUNSIFF'S COURT, PALA.
EXT.P4	TRUE COPY OF THE OBJECTION TO EXT.P3.
EXT.P5	TRUE COPY OF THE ORDER DATED 23/06/2018 IN IA.NO.809/2018 IN OS.NO.98/2013 OF THE MUNSIFF'S COURT, PALA.