

(2015) 06 KL CK 0053
In the High Court Of Kerala
Case No : OP(C). No. 523 of 2014 (O)

Maramveettil Sumangali

APPELLANT

Vs

Valiyakath Kamal Muhiyudheen

RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 9 Rule 13

Citation : (2015) 06 KL CK 0053

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : T. Krishnan Unni, Senior Advocate, Saju S.A., P.A. Sheeja and K.C. Kiran, for the Appellant; Jacob Abraham, Advocates for the Respondent

Final Decision : Dismissed

Judgement

B. Kemal Pasha, J.—Ext. P3 IA was filed before the I Additional Sub Court, Kozhikode in OS No. 291/2010 by seeking the amendment of the written statement under Order VI Rule 17 of the Code of Civil Procedure, 1908(for short "the Code"). The suit is one for specific performance of contract for sale of an immovable property. According to the plaintiff, the defendant had agreed to execute a sale deed in respect of the plaint schedule property for a total consideration of Rs. 85 lakhs and she had obtained an amount of Rs. 20 lakhs by way of part of consideration from the plaintiff through cheques. In spite of demand, the defendant had not cared to execute the sale deed as agreed and hence the suit.

2. The defendant filed a written statement admitting the transaction. The agreement stands admitted and the part of consideration received is also admitted. The contention resorted to by the defendant in the written statement is that the time is the essence of contract and during the period of agreement, in spite of demands, the plaintiff was not ready and willing to perform his part of the contract for getting the sale deed executed by paying the balance consideration. Thereafter, it seems that after the evidence of the plaintiff, the

defendant who is the petitioner herein has filed Ext. P3 IA for amending the written statement by incorporating a contention that the defendant has not accepted part of consideration, whereas the amounts were obtained by her husband through two cheques. Ext. P3 was strongly resisted by the plaintiff before the court below. The court below dismissed the IA through Ext. P5 order, which is under challenge in this O P.

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

4. The learned counsel for the petitioner has argued that the petitioner is entitled to take up alternate pleadings by way of defence. It is also argued that the defendant has never attempted to take away any of the admissions from the written statement whereas the defendant wanted to incorporate the true state of affairs which were not incorporated in the original written statement as the same was prepared and filed by the husband of the defendant.

5. Per contra, the learned counsel for the respondent has pointed out that within the period of agreement, a notice was issued to the defendant calling upon her to perform her part of the contract by executing the sale deed, and that even though the plaintiff was ready and willing to get the sale deed executed by paying the balance consideration, the defendant had not turned up and hence the suit was necessitated. It is also pointed out that the suit has come up in the list and the plaintiff's evidence was over. After the plaintiff's evidence, adjournments were obtained by the defendant for adducing evidence and finally the defendant had not turned up. Consequently, the suit was decreed ex parte. For getting the ex parte decree set aside, the defendant filed an application under Order IX Rule 13 of the Code. The same was allowed by the court below by imposing a cost of Rs. 15,000/-. The said order was challenged before the Division Bench of this Court through FAO No. 224/2013. The said FAO was disposed of on 03.12.2013, thereby deducting the amount of cost to Rs. 3,000/-. The Division Bench of this Court in the said judgment has directed the court below to list the matter for further trial in accordance with law. It was mentioned of that "we also record the submission on behalf of the defendant-appellant that she would co-operate in the trial to enable expeditious consideration and disposal of the suit on merits."

6. The suit is of the year 2010. A series of amendments, in order to introduce new contentions contradictory to those contained in the written statement, have been sought for as against the mandates contained in Order VI Rule 17 CPC. The petitioner wanted to incorporate an amendment to the effect that the petitioner had never intended to sell her property or expressed her willingness to sell the same. Further, her husband had obtained her signature in the agreement by representing that, that was one for borrowing an amount of Rs. 20 lakhs.

7. According to her, when her signatures were obtained in the agreement two cheques were given to her and on those two cheques she affixed her signatures

and handed over it to her husband for getting it encashed. When summons was received, she was taken to the Advocate's office and her signature was obtained in the vakkalath. Thereafter, she was again taken to the Advocate's office and her signature was obtained in the written statement.

8. It cannot be said that through Ext. P3 there was no attempt to incorporate new pleadings. It clearly reveals an attempt to plead fresh facts, which did not find a place in the original written statement. At any stretch of imagination, the petitioner cannot escape from the clutches of the proviso to Order VI Rule 17 of the Code. The trial has commenced, and the evidence of the plaintiff was over. Six adjournments were obtained by the defendant for adducing evidence. As she did not turn up even after that, an ex parte decree was passed. Based on the directions in the decree, the plaintiff had deposited an amount of Rs. 65 lakhs in court, being the balance sale consideration. It was after all these, the petitioner had chosen to file Ext. P3. When there was a specific undertaking before the Division Bench of this Court that she would co-operate with the expeditious disposal of the suit, Ext. P3 cannot be expected from the petitioner.

9. It seems that through the amendment sought for, the petitioner wanted to press into service new facts by displacing the earlier admissions in the original written statement. Matters being so, based on the decision in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, AIR 1977 SC 680 : (1976) 4 SCC 320 : (1977) 1 SCR 728 , such an amendment to the written statement cannot be permitted.

10. Even though the learned counsel for the petitioner has argued that there is no attempt in Ext. P3 to withdraw the admissions made in the written statement, the explanation attempted to be incorporated by way of an amendment through Ext. P3 clearly reveals that it is as good as withdrawal of the specific admissions made in the original written statement. Based on the decision in *Heeralal Vs. Kalyan Mal and Others*, AIR 1998 SC 618 : (1997) 9 JT 267 : (1997) 7 SCALE 196 : (1998) 1 SCC 278 : (1997) 5 SCR 277 Supp : (1998) 1 UJ 155 : (1998) AIRSCW 219 : (1997) 10 Supreme 56 , the said attempt cannot be permitted. Further, in the light of the decision in *Vidyabai and Others Vs. Padmalatha and Another*, AIR 2009 SC 1433 : (2009) 1 JT 302 : (2009) 154 PLR 490 : (2009) 1 SCALE 202 : (2009) 2 SCC 409 : (2009) 12 Vat Reporter 2524 : (2009) AIRSCW 899 : (2009) 1 Supreme 238 also, the present amendment cannot be allowed. There is absolutely no irregularity, illegality or jurisdictional error committed by the court below in passing Ext. P5 order and hence Ext. P5 is not liable to be interfered with.

In the result, this Original Petition is dismissed.