

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

MONDAY, THE 13TH DAY OF FEBRUARY 2023 / 24TH MAGHA, 1944

O.P.(FC) NO. 667 OF 2022

AGAINST THE ORDER DATED 03.11.20223 IN I.A.NO.2 OF 2022

IN O.P.NO.267 OF 2016 ON THE FILES OF THE FAMILY COURT,

PATHANAMTHITTA

PETITIONER:

SUNITHA C. NAIR

AGED 45 YEARS, W/O SANDEEP KUMAR, KUMMALIL
HOUSE, MALLASSERY P.O., PRAMADAOM MURI,
PRAMADAOM VILLAGE, KONNI TALUK, PATHANAMTHITTA
DISTRICT, PIN - 689646.

BY ADVS.

P.HARIDAS

BIJU HARIHARAN

SHIJIMOL M.MATHEW

P.C.SHIJIN

RISHIKESH HARIDAS

RESPONDENTS:

- 1 SANDEEP KUMAR K.B
AGED 50 YEARS
S/O. BHASKARAN NAIR, KUMMALIL HOUSE,
MALLASSERY P.O., PRAMADAOM MURI, PRAMADAOM
VILLAGE, KONNI TALUK, PATHANAMTHITTA DISTRICT,
PIN - 689646.

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2 KAMALAKSHIYAMMA V.R.,
AGED 72 YEARS,
W/O. BHASKARAN NAIR, KUMMALIL HOUSE,
MALLASSERY P.O., PRAMADAOM MURI, PRAMADAOM
VILLAGE, KONNI TALUK, PATHANAMTHITTA DISTRICT,
PIN - 689646.

BY ADV V.SETHUNATH

THIS OP (FAMILY COURT) HAVING COME UP FOR FINAL
HEARING ON 13.02.2023, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

JUDGMENT

P.G. Ajithkumar, J.

The petitioner filed O.P.No.267 of 2016 before the Family Court, Pathanamthitta seeking a decree of return of gold ornaments, household articles and realisation of money. She has filed I.A.No.2 of 2022 seeking leave to amend the original petition. The Family Court did not grant leave. Ext.P5 is the order dismissing I.A.No.2 of 2022. Feeling aggrieved thereof, the petitioner has filed this Original Petition under Article 227 of the Constitution of India.

2. The respondents entered appearance pursuant to notice. An interim order directing the Family Court to keep the proceedings in O.P.No.267 of 2016 in abeyance for a period of three weeks was granted on 05.12.2022. That order was subsequently extended for a period of two months.

3. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents.

4. O.P.No.267 of 2016 was filed with the following prayers.-

"A. To direct the respondent to return 55 sovereigns of gold

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ornaments to the petitioner or its market value as Rs.12,65,000/- as on the date of filing this petition with interest 12% till realisation.

- B. To direct the respondent to pay the patrimony amount of Rs.8,30,000/- to the petitioner with 12% interest till realisation.
- C. To direct the respondent to hand over one washing machine and a sofa settee or its market value of Rs.50,000/- to the petitioner."

5. I.A.No.2 of 2022 was filed seeking to amend pleadings as well as the prayer column. By way of amendment, reliefs A and B in the original petition are sought to be corrected besides adding supporting pleadings.

6. The Family Court rejected the permission to amend the petition stating that the petitioner was aware of the said facts at the time of filing of the Original Petition and inclusion of such additional facts and reliefs will be prejudicial to the respondent.

7. The learned counsel appearing for the petitioner would submit that the petition for amendment was filed well before commencement of the trial and as the proposed amendment would not cause any substantial change to the

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nature of the proceedings or the reliefs claimed, the Family Court ought to have allowed the petition. The learned counsel appearing for the respondent, on the other hand, would submit that correction of the reliefs would change the character of the proceedings inasmuch as more claim will get included. Moreover, the additional relief is with respect to monetary claim and therefore the question of bar by the law of limitation arises. In such circumstances, it is contended that the impugned order does not suffer from any infirmity.

8. It is true that when a claim for realisation of additional amount is added, it may amount to addition of a new relief. However, in the nature of the proceedings, which is one for return of gold ornaments and money, addition of such a claim would not change the nature or character of the proceedings. Such an addition may have the bearing on the bona fides of the petitioner, which is a matter to be considered at the time of disposal of the O.P.

9. The learned counsel for the respondents placed reliance in **L.I.C. of India v. Sanjeev Builders Private Ltd.**

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& another [AIR 2022 SC 4256], Asian Hotels (North Ltd. v. Alok Kumar Lodha and others [(2022) 8 SCC 145], and Mohinder Kumar Mehra v. Roop Rani Mehra [(2018) 2 SCC 132] in order to fortify his contentions.

10. In **L.I.C. of India** (supra), the Apex Court laid down the parameters for allowing an amendment, which reads,-

"70. Our final conclusions may be summed up thus:

- (i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.
- (ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.
- (iii) The prayer for amendment is to be allowed.
 - (i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and
 - (ii) to avoid multiplicity of proceedings, provided

- (a) the amendment does not result in injustice to the other side,
- (b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side
- (c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).
- (iv) A prayer for amendment is generally required to be allowed unless
 - (i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,
 - (ii) the amendment changes the nature of the suit,
 - (iii) the prayer for amendment is malafide, or
 - (iv) by the amendment, the other side loses a valid defence.
- (v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.
- (vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest

the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed.

11. The petitioner filed application for amendment before the commencement of the trial. Therefore, the bar to allow amendment in the proviso to Order VI, Rule 17 of the Code is not applicable. In the light of the law laid down in the aforesaid decision, we are of the view that the amendment is liable to be allowed.

12. The objection raised by the learned counsel appearing for the respondent by placing reliance **Asian Hotels (North) Ltd.** (supra) that there would be change to the nature of the relief claimed and therefore the proposed amendment is untenable. In **Asian Hotels (North) Ltd.** (supra) the amendment sought was for declaring the charges-mortgages on the entire premises, which was the subject matter of the litigation as void ab initio and also to permit impleading banks and financial institutions as additional defendants. The suit was

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one challenging revocation of licence. The Apex Court held that in such a suit dispute regarding legality or otherwise mortgages cannot be added since the same would change the nature of suit drastically. The amendment sought in this case is to add additional claim, which is quite in the nature of the relief already included. Therefore, the said decision has no application in the facts and circumstances of this case.

13. The Apex Court held in **Mohinder Kumar Mehra** (supra) that when an amendment is opposed on the ground that the claim is barred by the law of limitation and such an objection cannot be decided without answering the disputed questions of fact, the amendment can be allowed and the question of limitation can be postponed to be decided in the suit. Additional amount is sought to be added in the claim in the original petition. Whether the plea of limitation would be attracted to the said claim in the light of the provisions of Section 6 of the Dowry Prohibition Act, 1961 and Section 10 of the Limitation Act, 1963 is a question to be considered answered on the basis of findings on the disputed questions of fact.

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14. In such circumstances, we are of the view that the amendment is liable to be allowed and hence Ext.P5 order is liable to be set aside. Accordingly, the Original Petition is allowed. Ext.P5 order dated 3.11.2022 is set aside. I.A.No.2 of 2022 is allowed. The Family Court, Pathanamthitta will allow to carry out amendment sought in I.A.No.2 of 2022 in O.P.No.267 of 2016 and proceed in accordance with law.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

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APPENDIX OF OP (FC) 667/2022

PETITIONER EXHIBITS

- EXHIBIT P1** TRUE COPY OF THE PETITION IN OP NO.267/2016 BEFORE THE FAMILY COURT, PATHANAMTHITTA DATED 07.04.2016 FILED BY THE PETITIONER
- EXHIBIT P2** TRUE COPY OF THE OBJECTION IN OP NO. 267/2016 BEFORE THE FAMILY COURT, PATHANAMTHITTA DATED 13.09.2019 FILED BY THE 1ST RESPONDENT
- EXHIBIT P3** TRUE COPY OF THE AMENDMENT APPLICATION I.A.NO. 2/2022 IN OP NO.267/2016 BEFORE THE FAMILY COURT, PATHANAMTHITTA DATED 01.06.2022 FILED BY THE PETITIONER
- EXHIBIT P4** TRUE COPY OF THE OBJECTION IN I.A. NO. 02/2022 IN OP NO. 267/2016 BEFORE THE FAMILY COURT, PATHANAMTHITTA DATED 01.07.2022 FILED BY THE RESPONDENTS
- EXHIBIT P5** TRUE COPY OF THE ORDER IN I.A. NO. 02/2022 IN OP NO. 267/2016 OF THE FAMILY COURT, PATHANAMTHITTA DATED 03.11.2022 AND THE TYPED COPY OF THE SAME