

**Shajahan Vs. Aboobacker**

**Shajahan Vs. Aboobacker**

**SooperKanoon Citation :** [sooperkanoon.com/3184](http://sooperkanoon.com/3184)

**Court :** Kerala

**Decided On :** Nov-24-2014

**Judge :** Honourable Mr.Justice P.Bhavadasan

**Appellant :** Shajahan

**Respondent :** Aboobacker

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN MONDAY, THE 24<sup>TH</sup> DAY OF NOVEMBER 2014 3<sup>RD</sup> AGRAHAYANA, 1936 OP(C).No. 807 of 2012 (O) ----- OS1512008 of SUB COURT, PALA PETITIONER(S): ----- SHAJAHAN, S/O.ABOOBACKER, KARIPPAYIL VEEDU, KANJIRAPPALLY KARA & VILLAGE AND TALUK, REPRESENTED BY POWER OF ATTORNEY HOLDER M.T.RASHEED, S/O.THAMPIKUNU, MOOTHEDATHU VEEDU, PERUVANTHANAM KARA & VILLAGE, PEERUMEDU TALUK. BY ADVS.SRI.MATHEW JOHN (K) SRI.DOMSON J.VATTAKUZHY RESPONDENT(S): ----- 1. ABOOBACKER, KARIPPAYIL VEEDU, KANJIRAPPALLY KARA AND VILLAGE, KANJIRAPPALLY TALUK-686507.

2. A.P.SHAJAHAN, S/O.KANI RAVUTHER, AKKATTUPARAMBIL, EDAKKUNNAM KARA & VILLAGE, PIN-686507.

3. SHUKKOOR, S/O.SAINUDHEEN, PULIMOOTTIL VEEDU, EDAKKUNNAM KARA AND VILLAGE, KANJIRAPPALLY TALUK-686507. R1,2 BY ADV. SRI.T.V.GEORGE R3 BY ADV. SRI.BIJU .C. ABRAHAM THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON2411-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: OPC. 807 OF 2011 APPENDIX PETITIONER'S EXTS. EXT. P1 : A TRUE COPY OF THE PLAINT FILED BY THE PETITIONER DATED98.2008 BEFORE THE SUB COURT, PALA. EXT. P2 : A TRUE COPY OF THE WRITTEN STATEMENT FILED BY ABOOBACKER AND THE PETITIONER IN O.S. NO. 151OF 2008 OF SUB COURT, PALA. EXT. P3 : A TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE PETITIONER DATED811.2010 IN O.S. NO. 151 OF2008 SUB COURT, PALA. EXT. P4 : A TRUE COPY OF THE OBJECTION DATED3011.2010 BY RESPONDENTS1AND2IN O.S. NO. 151 OF2008 SUB COURT, PALA. EXT. P5 : A TRUE COPY OF THE OBJECTION BY THE3D RESPONDENT IN O.S. NO. 151 OF 2008 SUB COURT, PALA. EXT. P6 : A TRUE COPY OF THE

ORDER

DATED1312.2010 IN I.A. NO. 1648 OF 2010 IN O.S. NO. S151 OF 2008 SUB COURT, PALA. EXT. P7 : A TRUE COPY OF THE

JUDGMENT

IN O.P.(C) NO. 511 OF 2011 DATED1611.2011. EXT. P8 : A TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE PETITIONER BEFORETHE SUB COURT, PALA IN O.S. NO. 151 OF2008 EXT. P9 : A TRUE CPOPY OF THE OBJECTION FILED BY RESPONDENTS1AND2DATED252.2012 IN O.S. NO. 151 OF2008 SUB COURT, PALA. EXT. P10 : A TRUE COPY OF THE

ORDER

DATED292.2012 BY THE SUB COURT, PALA. P. BHAVADASAN, J.

----- O.P.(C). No. 807 of 2012 -----  
- - - Dated this the 24th day of November, 2014.

JUDGMENT

Aggrieved by the dismissal of an application for amendment of the plaint by Ext.P10 order by the Sub Court, Pala, the plaintiff in the suit has come up with this Original Petition.

2. Most of the facts are not in dispute. The first defendant in the suit is none other than the father of the plaintiff. The plaintiff was employed abroad. According to the plaintiff, in order to manage his properties while he was abroad, he had executed a general power of attorney in favour of his father. He would also say that he had the intention to avail bank loan for improving his property and that too was a reason to execute the power of attorney. Later he came to know that the general power of attorney was got registered by his father and using that document, assignment deeds were O.P.(C). 807/2012. 2 executed in favour of the other defendants. He therefore laid the suit for setting aside the sale deeds and power of attorney executed in favour of his father stating that a fraud had been played on him.

3. The defendants filed their written statement. They denied the allegation in the plaint and contended that the sale deeds are in accordance with law.

4. Later on, the plaintiff by virtue of an application filed as I.A. 1382 of 2009 called upon the third respondent herein to produce the original of the sale deeds and also the power of attorney which were being assailed in the suit filed by the plaintiff.

5. On production of those documents, according to the plaintiff, he realized that the power of attorney which was utilized for executing the documents was not the power of attorney executed by him in favour of his father, but it was a fabricated and forged power of attorney created for the purpose of assigning the property. Realizing the said fact, he O.P.(C). 807/2012. 3 moved an application for amendment of the plaint by filing I.A.1648 of 2010. The respondents objected to the amendment sought for by the plaintiff. The court below by virtue of Ext.P6 order rejected the amendment application. That was challenged by the plaintiff in O.P.(C). 511 of 2011 which was disposed of by order dated 16.11.2011 marked as Ext. P7 in this Original Petition. This Court while confirming the finding of the court below that an admission made in the plaint cannot be allowed to be taken away by way of amendment, it was observed that it is open to the plaintiff to explain the circumstances under which the so-called admission is said to have been made. To

be more precise, this Court while disposing of the Original Petition observed as follows: "While no interference is called for with Ext.P6 order it is made clear that it is open to the petitioner to file fresh application for amendment to incorporate any additional statement in the plaint (without altering or deleting any statement already made in Ext.P1) O.P.(C). 807/2012. 4 explaining the so-called admission if any made by petitioner in the plaint and based on that explanation seek amendment of relief No.A in the plaint as well." 6. Presumably, in pursuance to Ext.P7 judgment of this Court, the plaintiff moved I.A. 413 of 2012 seeking amendment of the plaint. In the said application he sought to add a paragraph in the plaint whereby he tried to explain the circumstances under which he had stated that the power of attorney which he executed power of attorney in favour of his father which had been clandestinely got registered and had executed documents. He wanted to introduce a new paragraph with regard to the circumstances under which the above statement was made and also that after the document had been produced by the third defendant in pursuance to the application filed by him, on perusal of the same, he found that that power of attorney was not the general power of attorney executed by him in favour of his father, but it was a totally fabricated one. Consequently, he sought amendment in the O.P.(C). 807/2012. 5 body of the plaint and the relief portion also.

7. The respondents filed their objection pointing out that this is an indirect way of withdrawing the admission and the earlier application whereby the plaintiff sought to delete the relevant paragraph and to introduce the present paragraph was condemned by the trial court as well as this Court. Under such circumstances, this is an indirect method adopted by the plaintiff.

8. The court below found in favour of the respondents and dismissed the application.

9. Assailing the said finding, learned counsel for the petitioner contended that the court below has erred both on facts and in law in dismissing the application. Relying on Ext.P7, the learned counsel went on to point out that this Court had afforded an opportunity to the plaintiff to offer his explanation and the circumstances under which he had made the statement regarding the fraudulent

registration of the power of attorney which he is alleged to have been executed O.P.(C). 807/2012. 6 in favour of his father and the circumstances under which he now claims that the power of attorney is a forged one. It was in pursuance to that observation of this Court that the amendment application was moved seeking to introduce an additional paragraph and also relief in pursuance thereof. Learned counsel went on to point out that his earlier statements are very much retained in the plaint and he is only trying to explain the circumstances under which those statements were made. It is for the court to decide which one of the explanations should be accepted and that arises only at the time of final hearing and that cannot be a ground to deny amendment of the plaint.

10. Relying on the decision reported in *Pavithran v. Narayanan* (1997(2) K.L.T. 371), it was contended that it is certainly open to the plaintiff to explain the circumstances under which he made the admission.

11. Relying on the principle laid down in the above decisions, it was contended that there is no attempt from the O.P.(C). 807/2012. 7 side of the plaintiff to withdraw the admission which is alleged to have been made by him on the earlier occasion, but he seeks to explain the circumstances under which he made those statements and the additional plea in the light of the facts already made mention of. Accordingly, it is contended that the court below was erred in declining to grant the relief.

12. Learned counsel appearing for the contesting respondents very vehemently contended that this is nothing but an indirect attempt by the plaintiff to achieve what he could not directly achieve on earlier occasions. Even though innocuously worded, the effect is to withdraw the earlier admission and substitute a new plea which is tabooed by the trial court as well as by this Court.

13. Learned counsel for the respondents relied on the decision reported in *Chandran v. Gopalan* (1999(3) K.L.T. 809) and *Sankaranarayanan v. Charumathi* (2001(1) K.L.T. 325) and contended that if by way of amendment a new case is introduced, that would take away the substratum of the case O.P.(C). 807/2012. 8 put forward by the plaintiff and would prejudice the case of the defendants who have formulated the defence on the basis of the earlier pleading. Taking away of

the advantage obtained by the defendants cannot be accepted. It is therefore pointed out that the court below was justified in declining the prayer sought for by the plaintiff.

14. One cannot dispute that the statement made in the plaint earlier can at best only amount to an admission. It is true that the plaintiff in the original plaint stated that the documents of sale executed by his father was based on the general power of attorney executed by him which was fraudulently got registered to execute sale deeds. It is then pointed out by him that it was only after the production of the documents as desired by him by the third respondent when he happened to peruse the power of attorney. He realized that it was not the power of attorney he had executed in favour of his father, but it was a totally fabricated document which has been brought into existence. The case of the plaintiff is that O.P.(C). 807/2012. 9 he remained under the bonafide belief that the general power of attorney which he had executed earlier was fraudulently got registered and on that basis the documents were registered. When he came to know that the very power of attorney on the basis of which the sale deeds were executed is a fraudulent one, and under such circumstances he happened to make the earlier statements. Initially the plaintiff might have no occasion to suspect that that is a fabricated document. He may be justified in his submission that he was under the bonafide belief that the general power of attorney executed by him might have been got registered by his father with a fraudulent intention.

15. It is true that on the earlier occasion, he had moved an application for amendment of the plaint deleting the above statement and substituting it with a statement regarding fabrication of the power of attorney itself. The trial court was disinclined to allow the application which was confirmed by this Court by way of Ext.P7. But this Court O.P.(C). 807/2012. 10 accepted the plea of the plaintiff that he has a right to explain the circumstances under which the earlier statement was made.

16. It is here that the decisions relied on by the learned counsel for the respondents assumes importance. In the decision reported in Chandran v. Gopalan (1999 (3) K.L.T. 809) it was held as follows: "The parties have power to

seek amendment of the pleadings and this will be considered liberally. The plaintiff is the master of the suit and it is for him to shape its case. Amendments will not be denied even if there is some delay in moving therefor. No party can be refused a just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The court will always give leave to amend the pleadings unless it is satisfied that the party applying therefor was acting mala fide or that by his blunder he has caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless the party may have been, and however late the proposed amendment was sought for, the amendment may be allowed if it can be made O.P.(C). 807/2012. 11 without injustice to the other side. Every case depends upon its own facts in such matters. However, no amendment will be allowed if its effect is to take away a valuable right that has accrued to the opposite party by lapse of time. Applications for amendments made with malafides will not be favourably considered. All amendments will be allowed, if they satisfy the test of not working out injustice to the other side and if it is necessary for the purpose of determining the real question in controversy between the parties. Where the amendment introduces a new case which is totally different from the one pleaded and where the consequences of such amendment would be to deprive the other side of the benefit of the admissions and where such opposite side will be irretrievably prejudiced, the amendment sought for will not be allowed." 17. In the decision reported in Sankaranarayanan v. Charumathi (2001(1) K.L.T. 325) it was held as follows: "It is also pertinent to note that the petitioner who has alleged a specific consideration for the cheque in the plaint seeks to amend the plaint by deleting the allegation regarding consideration after the respondents-defendants filed written statement denying that allegation and produced documents to disprove that O.P.(C). 807/2012. 12 allegation. Even though the cause of action for filing the suit is the dishonour of the cheque, the petitioner who has alleged a particular mode of consideration in the plaint cannot turn round and contend that the consideration mention in the plaint was incorrect. If the amendment sought for by the petitioner is allowed, it will alter the very cause of action for the suit alleged by the petitioner. Therefore, the lower court is perfectly justified in disallowing the amendment sought for by the petitioner." 18. One cannot dispute the proposition that an

admission made in the original plaint cannot be withdrawn. To that extent the learned counsel for the respondents may be justified and it is supported by the decisions relied on in that regard. It is also true that by way of amendment, the plaintiff cannot be allowed to introduce a new case altogether different from the earlier one. It is also true that the defendants must have formulated their defence and filed written statement as per the plaint as it originally stood. The effect of allowing the amendment is to take away the defence which the defendants O.P.(C). 807/2012. 13 have. The court below may be justified in declining to allow the amendment application.

19. But that is not to say that under no circumstances the plaintiff cannot be asked to explain the earlier admission available in the plaint. He can certainly be allowed to explain the circumstances under which he made the statement and whether the explanation should be acceptable or not is a different question altogether. He on the earlier occasion attempted to withdraw the earlier statement altogether, but did not succeed in his attempt. But he had given an opportunity to explain. That is precisely what he has done in the present application. He has explained the circumstances under which he happened to make the earlier statement, how he was mistaken and how he happened to see the document produced by the third defendant.

20. The amendment sought for are as follows: "1)e%Hc^O" 2\_^" gl<\_We5\_^"eI^xd7^K\_W5^" h\H\_WeRx<\_Xmd?V f:OnaKD\_H\_?O^ODmQ .KD\_Ha gVW" O.P.(C). 807/2012. 14 U^F\_ 1999 fKdLaUx\_ N^XJ\_WeH^G\_W UKgM^Z ?\_ UXqae(?m HW5\_ U^Oml .?aAaKD\_fHAay\_:nm &g\^:HOaI^O\_.e%D\_Xdl5^x"e1\_^"edID\_ &UVcfMGD\_fa %?\_XmE^HJ\_W1^" dID\_ glx\_W2a XVUn^G\_5^xcNa5qc^VeDOn^y^A\_e1\_^" dID\_fO /Wm\_:na. UXqaU\_fa 5^xc^F\_5Z gH^A\_ %gHbW\_AaKe&Z .K H\_\O\_\a" U^F\_Oaf? I\_D^Um &OD\_H^a" N^dDN^CmeU^F\_ 'dl5^x" 2xa XVUn^G\_5^x Na5qc^V1^" dID\_fO /WM\_:nDm.e.K^W U^F\_ %Dm x<\_Xmd?Ve&K`X\_WeY^

22. True, the learned counsel for the respondents pointed out that there was an attempt from the side of the plaintiff to have the documents sent for expert opinion which was given up at one point of time. That should be taken note of while

considering the present application.

23. Even assuming it to be so, it has no bearing on the issue as to whether the amendment should be allowed or not. By allowing the amendment, all that the plaintiff sought for is an explanation with regard to the documents in question and which one should be accepted is a matter for the court to decide. It is not necessary that by the amendment now sought for, the so-called statement made in the earlier part of the plaint is not sought to be deleted. It still stares at the face of O.P.(C). 807/2012. 17 the plaintiff. Of course, the plaintiff has come forward with an explanation of his own as to the circumstances under which he was compelled to seek the amendment.

24. The reason given by the court below that since no permission was obtained from the court to verify the document, it could not be pleaded that he comes to know on verification that the power of attorney was forged cannot be accepted is a finding which cannot be countenanced. One should remember that if as a matter of fact the plaintiff was aware or in the know of things or had a contention that the power of attorney was a forged one, nothing prevented him from disclosing the said fact and he need not take the risk of admitting that he had executed a power of attorney in favour of his father which was subsequently got registered.

25. Thus, an impartial and dispassionate view on the amendment sought for does not indicate that there is any withdrawal of the earlier admission in the plaint. But as rightly disclosed by the learned counsel for the petitioners and O.P.(C). 807/2012. 18 as found by this Court, it amounts only as an admission made by him earlier. Of course, there is the effect of dilution of the rigour of the admission made earlier. But to what extent the statement made by way of amendment should be accepted is a matter for the court to decide. Viewed from that angle, it does not appear that the order of the court below can be sustained. In the result, this Original Petition is allowed, the impugned order is set aside and the petition to amend the plaint is allowed and the plaintiff is directed to carry out the amendment within two weeks from today. The defendants will be at liberty to file additional written statement, if they are so advised. P. BHAVADASAN, JUDGE sb.