

**Subramanian Vs. Aboobacker Koya**

**Subramanian Vs. Aboobacker Koya**

**SooperKanoon Citation :** [sooperkanoon.com/728873](http://sooperkanoon.com/728873)

**Court :** Kerala

**Decided On :** Aug-06-2003

**Reported in :** 2003(3)KLT819

**Judge :** R. Bhaskaran, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17

**Appeal No. :** A.S. No. 710 of 1992

**Appellant :** Subramanian

**Respondent :** Aboobacker Koya

**Advocate for Def. :** M.C. Sen and; Jayaprakash Sen, Advs.

**Advocate for Pet/Ap. :** A.P. Chandrasekharan and; K. Jayesh Mohankumar, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**R. Bhaskaran, J.**

1. This appeal is filed by the plaintiff in a suit for money. The plaintiff's case, after amendment of the plaint, is as follows. On 23.2.1984, the defendant executed a document in favour of the plaintiff and obtained Rs. 25,000/-. He paid back Rs.

10,000/- in May, 1984 and Rs. 10,000/- on 20.7.1984. Again he borrowed Rs. 15,000/- on 7.8.1984 and Rs. 10,000/- on 18.8.1984. On 6.3.1986 he paid back Rs. 5,000/-. The balance payable is Rs. 35,389/-. Before amendment, the claim was based on the loan given on 23.2.1984 and no repayment was stated in the plaint. Even after amendment, the cause of action portion of the plaint was not amended.

2. The defendant contended that the entire loan as stated in the original plaint was repaid by payment of Rs. 10,000/- on 20.7.1984, Rs. 10,000/- on 11.8.1984, and Rs. 5,000/- on 6.3.1986. The document was not returned and the plaintiff insisted on 36% interest. The defendant also contended that the suit was barred by limitation.

3. The trial court found that the amendment of plaint in 1990 will not relate back to the date of suit. Therefore, payments made in 1984 are barred by limitation. It was held that the plaintiff was entitled to get interest at 12% on the amounts borrowed after adjustment of the three payments made of the principal amount.

4. The points for consideration in this appeal are:

(1) Whether the amendment of plaint related back to the date of plaint or to the date of amendment.

(2) Whether the case of the plaintiff after the amendment is proved to be correct in case the suit is found to be not barred by limitation.

Point No. 1

Originally the trial court dismissed the application for amendment of plaint stating that by amendment a time barred debt is sought to be introduced in the plaint. That order was challenged in C.R.P. No. 1259 of 1990. This Court allowed the revision taking note of the contention of the learned counsel for the revision petitioner that after amendment the defendant can 'file additional written statement to prove the matter and also by raising all available contentions'. Therefore, though the order does not in so many words state that the amendment will relate from the date of the amendment only and not to the date of filing of the plaint, the

intention was not to deny the valuable right of plea of limitation by the allowing of the amendment. Now, it cannot be said that in all cases the amendment will relate back to the date of filing of the suit. It is open to the Court ordering amendment to specify that it will not relate back to the date of plaint so as to affect the defence of limitation available to the defendant. This position of law is made clear in the decision reported in Sampath Kumar v. Ayyakannu (AIR 2002 SC 3369). In that case, the suit originally filed for injunction was sought to be amended to convert it for recovery of possession on the basis of title. The allegation was that after the filing of the plaint the defendant reduced the property to his possession. The trial court as well as the High Court held that the plaintiff can bring a fresh suit and dismissed the application for amendment. The Supreme Court allowed the amendment to curtail multiplicity of legal proceedings. However, the Supreme Court made it clear that so far as the relief of declaration and recovery of possession are concerned the suit will be deemed to be filed only on the date of the application for amendment of plaint was made.

5. In Vishwambhar v. Laxminarayan (2001 (6) SCC 163) the suit was filed by the two minors for partition and separate possession by treating alienation made by the natural guardian as void since it was not for the benefit of the minors and no permission of the District Court was also obtained under S. 8 of the Hindu Minority and Guardianship Act. Subsequently, the plaint was amended to include a prayer of setting aside the sale deed. That application was made after the period of limitation to set aside the sale. The Supreme Court held that the suit for setting aside the transfer could be taken to have been filed only on the date when the amendment of plaint was allowed. The Supreme Court has in various cases held that no amendment of plaint can be allowed when the relief prayed for by the amendment will be barred by limitation as on that date of the amendment. (See K. Raheja Constructions Ltd. v. Alliance Ministries (AIR 1995 SC 1768) and Muni Lal v. Oriental Fire & General Insurance Co. Ltd. (AIR 1996 SC 642). In view of the above legal position the amount claimed as per the amendment made in the plaint in 1990 for the amounts alleged to have been paid in 1984 was clearly barred by limitation and as permitted by this Court in C.R.P. No. 1259 of 1990 the defendant could take up that plea in the additional written statement. In the original plaint the suit was based on Ext. A1 dated 23. 2.1984 and the cause of action for the suit

even after the amendment remained the same. There was no amendment made to that portion of the plaint. It was only in 1990 that the plaintiff set up a new case that the defendant had repaid the amounts in three instalments but in the meanwhile he was paid another Rs. 25,000/- by two cheques (one for Rs. 15,000/- on 7.8.1984 and Rs. 10,000/- on 18.8.1984). This was a new case set up as per the amendment. The point No. 1 is therefore found against the appellant.

## Point No. 2

Apart from the averments in the original plaint which was entirely based on Ext. A1 dated 23.2.1984 it can be seen that Ext. A2 notice dated 7.12.1984 also was based on the promissory note (Ext. A1). In Ext. A6 lawyer notice also the specific claim is based on the promissory note. There is no averment in the notice that subsequently certain repayments were made and again amounts were paid and as the balance amount is so much and that such amounts should be paid failing which he was instructed to file the suit. It will also go to show that the plaintiff, as an after thought, gave evidence in variance with the original plaint and then filed the application for amendment to justify such evidence. It was probably because there was no other way to explain the repayments made by the defendant. In Ext. A3 reply the defendant has narrated his financial difficulty and promised to settle the amounts without delay. Though there is no mention of repayments made in it, in Ext. A7 reply to the lawyer notice the repayments are specifically mentioned. The main case of the plaintiff is that subsequent payments by the two cheques are supported by Exts. A4 and A8. Ext. A4 is the inner foil of the plaintiff's cheque book. There are pages unfilled and subsequent pages are filled up. Therefore it could be written at any time. Ext. A8 is the passbook which shows that the two payments are encashed. But a mere look at the two entries will show that they were subsequently written and no other entry in the same passbook the cheque number or the name of the person to whom the amount is paid is noted in it though there are various other entries where cheques are issued and payments are noted. These two entries appear to be over written. It would have been believable if the plaintiff had taken steps to call for the account book maintained by the Bank to show that the payments were made. The defendant has denied of any receiving any such cheques or payments. The person who would have made the entry in the

normal course is not examined. There is no presumption of correctness attaching to the entries in book of accounts even if it is assumed that a Bank Pass Book is an account book coming under Section 34 of the Evidence Act. Therefore it has to be concluded that these payments are not at all proved. In view of the above discussion, the point No. 2 also is to be answered against the plaintiff.

In the result, the judgment and decree passed by the trial court are confirmed and the appeal is dismissed with costs.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**