ORDERS ON IA-IX

The case is set down for judgment. The appellants have filed an application under Order VI Rule 17 r/w Sec.151 of CPC to amend the written statement by adding para No.2 (A) to (D) and 3(A) to (E) in the written statement.

2. The respondent has filed objections.

3. Heard both sides.

4. Now, the point that arises for consideration of this Court is :

> ***"Whether appellants have made out grounds to allow the amendment as sought"?***

5. On hearing both and perusal of relevant material on record, this court answers the above point in the **Negative** for the following:

REASONS

6. Point No.1:- Along with the application, the appellants have filed an affidavit sworn to by 1st appellant. In the said affidavit, they have stated that they could not

plead the legally and factually available defenses in the earlier written statement. Their earlier advocate was not keeping good health during trial in the trial court. He had suffered stroke and during that period he had visit Bangaluru frequently. The defendant No.1 also involved in facilitating his daughter to study in foreign. Therefore, he could not collect the facts and documents. Some pleadings in the proposed amendments are new and some pleadings are additional. They are required for just and correct decision of the appeal. The suit/appeal involves the valuable right of the appellants in respect of an immovable property. Therefore, if the application is not allowed, the appellants will be put to greater hardship and injury and inconveniences. Hence, they must be permitted to amend the plaint as sought in the application.

7. In the objections the respondents have contended that the application is not maintainable. Under the provisions of law the application cannot be considered at the appeal stage. As per order 6 rule 17 CPC, it should have

been filed before the commencement of trial. But, it is filed after 8 years of filing the suit and hence there is inordinate delay in making the application. The application is filed to harass the respondent and therefore, if the application is allowed, she will be put to greater hard ship and injustice and hence the application is liable to be dismissed.

8. It appears there is no some force in the contention of the respondent. It is not in dispute that the respondents have filed the suit in the trial court in the year 2013 and it has been disposed off by the trial court in the year 2018 i.e., after long term of 5 years. The application is not filed in the trial court, though the case was litigated among the parties for 5 years. Even in the appeal stage also, it is not filed while filing this appeal. But, it is filed after 3 years of filing the appeal. As such, it is very clear that as rightly pointed by the learned counsel for respondent, the application filed by the appellants is not only hit by proviso to order VI rule 17 of CPC., but it is one which is filed after thought. It is the clear mandate of proviso to order VI rule

17 PC that no amendment shall be permitted after the commencement of evidence, unless the party making application proves that in spite of his due diligence, he could not have raised the matters of the proposed amendment before the commencement of the trial. Therefore, it is very clear that the appellants had to give a strong, cogent and acceptable reason for such long and inordinate delay of 8 years in seeking the amendment. Hon'ble High Court of Karnataka in case of ***Jambulingayya Hiremath since dead by Lrs Vs. Smt. Akkamahadevi @ Shashikala and Others*** reported in ***2021 (1) KCCR* 256**, relying upon the decision of Hon'ble Supreme Court rendered in case of ***Gayathri Women's Welfare Association Vs. Gowramma and Another*** reported in (***2011) 2 SCC 330*** observed that one of the circumstance to be considered before an amendment is granted is whether there is an acceptable explanation for delay as to why the proposed pleas could not be raised at the earliest point of time.

9. In the present case, the first reason that has been assigned by the appellants / defendants for delay is that his earlier advocate was not keeping well and he suffered a stroke and he used to visit the hospital at Bangaluru frequently and hence, he could not raise the contentions of proposed amendment at the earliest point of time. But, it is pertinent to note that this application is filed **seeking amendment of** written statement. It is not filed seeking permission **for filing the** written statement by condoning the delay. If an advocate was not available for any reason, it may be ground for condoning the delay in filing the written statement. But such delay cannot be a ground seeking amendment. Explanation expected is reason for non raising the contentions in the earlier written statement and reason for delay in seeking the proposed amendment. There is no explanation as to why he could not raise the contentions of the proposed amendment at the time of filing the earlier written statement and what prevented them from raising those contentions at the time of filing the

earlier written statement. More over, this version of the appellants that their advocate had suffered stroke and not doing well is contrary to their version taken in the trial court while making application seeking permission to lead the defense evidence. As per the affidavits filed by the Appellants in the trial court in support of IA IV and V , the reason assigned was that the – Appellant no.1 was suffering from illness and not his advocate. This shows the contention of the appellants that their advocate was suffering from illness is a contention raised after thought. However, for both the contentions , there is no supportive documents. All the more, if at all their advocate was not available for any reason for such a long time, certainly the appellants could have got engaged another advocate and filed the amendment in time. Therefore, the contention of the appellants that their advocate was not doing well and hence there is delay in seeking the amendment is not at all acceptable and believable.

10. The another contention of the appellants is that Appellant No.1 was making facilities for studies of his daughter in foreign and hence he could not collect the required facts and documents. But again it is pertinent to note that, there is no clear pleadings as to how Appellant No.1 was making arrangements for his daughter's education in foreign and how it has come in the way to the appellants to raise the proposed amendment in the earlier written statement or to file an application seeking amendment in time to the earlier written statement. As mentioned above, it is to be noted that the suit was pending in the trial court for 5 years. It is not case of the appellants that entire five years Appellant No.1 was involved in facilitating his daughter to study out side country. It is not his say that he could contact his advocate for 5 years due to preparation of his daughter study at foreign. He has not stated in which year and on what dates he had to involve in facilitating his daughters for foreign studies. Having not raised the contentions of the proposed

amendment for long time in the trial court and this court, now after lapse of 8 years, the present amendment application is filed by the appellants without valid and acceptable reasons.

11. When it comes to the nature of amendment also, it is pertinent to note that according to the own version of the appellants pleaded in the affidavit, some of grounds raised in the amendment are new and some of the grounds are additional. But there is specification made in the affidavit also which are the new grounds and which are additional and what is their necessity and relevancy. According the defense raised by the appellants/defendants, the transaction between them and the plaintiff/respondent is a money transaction. According to them the Appellant No.1 was in dire need of money and hence he has put the signature to the document on the confidence of the plaintiff. But, the plaintiff/respondent has created the document. The counsel appellants contended that in proposed amendment para 2(A) to (D) and 3 (A) and (B),

the appellants have stated that the plaintiff has entered into different agreements of sale with different persons. Therefore, the proposed amendment is necessary to prove that this transaction is also a money transaction. But, it is pertinent to note that the proposed pleadings do not appear to be defense in the nature. The averments appear like evidence and arguments in nature. They are not in the nature of facts. It is well settled principle of law that the pleadings shall contain the facts and facts alone and they shall not contain either evidence or position law applicable to that particular case. In the proposed amendment, the appellants have stated about pendency of O.S. No. 158/2013. But in the written statement the appellants have already pleaded about the pendency of the said case. Therefore, question of stating once again does not arise. Even with regard to the alleged contention that that the suit property is worth more than 20 lakhs is concerned also, there is already pleading in the plaint that suit properties is

worth more than 20 lakh. There are no new grounds as such raised in the application.

12. The only new ground sought to be added by way of amendment in the defense is the non-service of notice alleged to have issued by the plaintiff. But as mentioned above, it is pertinent to note that there is no mention as to why this contention was not raised in the earlier written statement. It is not the contention of the appellants that it was not within their knowledge about the non service of notice and hence there is delay in stating the said facts in the written statement. Such being the case, in the absence of cogent and convincible reasons for not stating in the earlier written statement and for the delay in seeking proposed amendment, this court cannot permit the appellants to carry out the amendment against the settled principles of amendment and proviso to order 6 rule 17 of CPC. In so far as, condonation of delay in seeking amendment, the appellants have mainly relied upon the decision rendered by the **Hon'ble High Court of**

Karnataka in the case of **Byrappa Vs Mariswamaiah (in RSA No. 2375/2006)**. **Relying upon this judgment, the learned counsel for the appellants contended that Hon'ble High court has allowed the amendment even after lapse of 26 years.** Therefore, the present application is also has to liberally considered and same is to be allowed. But this contention of the appellants is not acceptable. Because, in the said judgment itself it is clearly observed by the Hon'ble High court **that the suit was filed in the year 1995. The code of Civil Procedure was amended in the year 2002. The code had wide power to allow the amendment prior to 2002. Since the pleading is of the year 1995, the application has to be allowed**. This shows that Hon'ble high has allowed the application only because the suit belongs to the year 1995 and filed prior to the enforcement of amendment to CPC of the year 2002 i.e., before insertion of proviso to order VI rule 17 CPC. But the present suit is filed after amendment to CPC of the year 2002. Therefore, the

decision relied upon by the appellants is not applicable to the case on hand and hence it is not helpful to them.

13. The appellants also relied upon another decision reported in **2021(1) KCCR 503** rendered in case of **Annapurna and another Vs Dundawwa and others**. In this case, the court has observed that in a suit for partition the defendant also can ask for inclusion of properties and it would not prejudice the other side. But, it is pertinent to note that this decision is rendered in a suit for partition. The application was also filed in the trial court and not in the appellant court. Therefore, the facts and circumstances of the case and nature of amendment sought are totally different. Hence, in the humble opinion this court the this decision is not applicable to the case on hand. The appellants also relied upon an another decision reported in **2021(2) KCCR 1293** rendered in case of **Kalegowda Vs Marigowda.** But again this decision is also rendered in case of partition suit and amendment sought was for inclusion of additional properties. Application was also field

in the trial court and not in the appellate court. In the present case, the appellants never made an application for amendment in the trial court. Therefore, the facts and circumstances of the case are totally different. Therefore, in the humble opinion of this court, the present decision also is not useful for the appellants. The appellants relied upon another **unreported judgment** rendered by Hon'ble Supreme court rendered in **Civil Appeal No.3362/2006** between **Baldev Singh Vs Manohar Singh.** In this decision also, the application was filed in the trial court and not in the appellate court. When the suit was filed in the trial court, the amendment to CPC of the year 2002 was not passed. There was no **barrier of proviso to order 6 rule 17 CPC.** Moreover, the nature of amendment sought and facts and circumstances of the relied case are totally different and hence in the humble opinion of this court, the said decision is not applicable to the case on hand.

14. It is most significant to note that in the affidavit, the appellant No.1 just has stated the proposed amendment is for raising legally and factually available defenses. But as mentioned above there are no factually raised defense at all. Most of the portion of proposed amendment is in the nature of evidence. As mentioned only one defense that found to be factually raised is with regard to non-service of notice. But there are no acceptable and cogent and convincing reasons forth coming from the appellants to overcome the barrier provided under proviso to order VI rule 17 of CPC. Moreover, whether the appellants/defendants have raised this contention or not, it would be burden upon plaintiff/respondent to prove the service of notice as required under law. As stated above, basically the legal defenses need to not be raised in the written statement. Legal points need to be stated through pleadings. Certainly legal points can be convinced to the court while submitting arguments on merits. Therefore, such contention cannot sought to be inserted by way

amendment. Therefore, viewed from any angle the application filed by the appellants for amendment at this highly belated stage without cogent, con- vincible and strong reasons is not sustainable and no hard ship and injury would be caused to the appellants if the application is rejected. On the other hand it would cause unnecessary delay in disposal of the case. Therefore, this court does not find any merits in the application filed by the appellants and hence, it is liable to be dismissed. **Accordingly, Point No.1 is answered in the Negative** and this court proceeds to pass the following:

O R D E R

The application filed by the appellants under order VI Rule 17 r/w Sec.151 of CPC is hereby rejected.

(M.C. NANJE GOWDA)
ADDITIONAL SENIOR CIVIL JUDGE &
JMFC., MADDUR.

ORDER ON IAs NO.IV AND V FILED BY THE APPELLANTS UNDER ORDER 41 RULE 27 CPC

The case is set down for JUDGMENT.

The Appellants/defendants hae filed above two applications under same provision seeking permission to produce the documents.

2. The respondent/plaintiff has filed objections.

3. Heard.

4. Now, the point that arises for consideration of this Court is :

> ***"Whether the appellants/defendants have made out grounds to condone delay in production of documents?***

5. On hearing both and perusal of relevant material on record, this court answers the **above point No.1** in the **Affirmative** for the following:

R E A S O N S

6. **POINT No.1 and 2:-** Along with applications, the appellant No.1 has filed affidavits sworn to by him. In the said affidavit, it is stated in the trial court his advocate Ramegowda was not keeping good heath and suffered a stroke. He had to frequently visit Bangaluru. The daughter of appellants pursuing studies at Russia and he had to perform the marriage of his daughter and hence he could not collect and produce some documents. Therefore, application needs to be allowed and documents have to be taken on record by condoning the delay.

7. On the other hand, the plaintiff/respondent has filed a detailed objections and denied the entire allegations made in the affidavits and sought for dismissal of the applications.

8. At the out set, it is pertinent to note that the appellants/defendants have not lead any evidence in the trial court. Though, the appellants have filed application for

leading the defense evidence, the said applications are rejected by the trial court. Therefore, there is neither oral evidence nor documentary evidence on behalf of the appellants on record. It is pertinent to note, as rightly contended by the appellants, the appeal involves a valuable right of the appellants for immovable property. The appellants in the written statement have raised a specific defense that the transaction between the appellants and respondent is not sale transaction but it is loan transaction. In order to substantiate the said defense, the proposed documents have got much relevance. The respondent though objected the application, has not stated how she will be put hard ship if the application is allowed and provided one more opportunity. It is the duty of the court avoid the multiplicity of proceedings as for as possible. Therefore, in order to avoid the further multiplicity of proceedings and provide last opportunity to the appellant to substantiate his case, the application filed by him under order 41 rule 27 needs to be allowed.

However, as there is delay in production of those documents, it has to be compensated to the respondent with cost. Accordingly, **Point No.1 is answered in the Affirmative** and this court proceeds to pass the following:

O R D E R

The applications filed by the appellants/defendants under order 41 rule 27 of CPC (IA-VI dated 6/9/21 and VI dated 13/12/21) are hereby allowed subject to payment of cost of Rs. 1,000/- each.

Therefore, the judgment is deferred. Call for defense evidence by 11/3/2024

(M.C. NANJE GOWDA)
ADDITIONAL SENIOR CIVIL JUDGE &
JMFC., MADDUR.