

IN THE COURT OF THE SUBORDINATE JUDGE OF VATAKARA.

Present: Sri. Joji Thomas, Sub Judge.
Wednesday, the 26th day of March, 2025

IA. 01/2025 IN OS 72/2011

Between:

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| <ol style="list-style-type: none"> 1. Veeraliyambath Andru Haji @
Abdurahiman Haji, S/o Mammad Haji,
Aged 69 Years, Kummamkode Amsom,
Nadapuram desom, Vatakara Taluk,
Kozhikode District, Kerala State. 2. Veeraliyambath Mariyam,
D/o Mammad Haji, Aged 73 Years,
Residing at Mannath House,
Kummamkode Amsom, Desom,
Vatakara Taluk, Kozhikode District,
Kerala State. | } | <p>Petitioners/
D1 & D2</p> |
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And:

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| <ol style="list-style-type: none"> 1. Nedumparambath Basheer,
S/o Pocker Haji, aged 58 Years,
Velloor Amsom, Chalapram desom,
Vatakara Taluk, Kozhikode District,
Kerala State. 2. Pottantepunathil Afsal,
S/o Andru haji, 38 Years, Velloor Amsom,
Chalapram desom, Vatakara Taluk,
Kozhikode District, Kerala State. 3. Pottantepunathil Asma,
D/o Andru haji, Aged 49 Years,
Velloor Amsom, Chalapram desom,
Vatakara Taluk, Kozhikode District,
Kerala State. 4. Mullarikandi Noorjahan,
W/o Abbdul Nazar, Aged 47 Years,
Vanimel Amsom, Mambilakkool Desom,
Vatakara Taluk, Kozhikode District,
Kerala State. | } | <p>Respondents/
Plaintiff & D3 to D5</p> |
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This petition coming on the 24th day of March, 2025 for final hearing before me in the presence of Sri. C. Subramanian, Sri.P. Anoop and Smt. E. Vidya Advocates for Petitioners and of Sri. K. Ramesh and Sri. K.V. Sasidharan, Advocates for R1 , Sri. P. Divakaran, Advocate for R3 and R4, R2 not entered in appearance and having stood over to this day for consideration, the Court passed the following:

ORDER

This application is filed by defendants No. 1 and 2 under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’) to amend the written statement and to incorporate plea of counter claim. The petitioners have delivered additional written statement stating that plaintiffs are not entitled to return of advance money. The petitioners have executed assignment deed No.1064 of 2009 of SRO, Nadapuram in favour of nominees of plaintiffs, the defendants No.3 to 5, of their one out of four shares in plaint schedule property. The plaintiffs have derived improper and unreasonable gain by getting an undivided one out of four share in plaint schedule property to their nominees without paying the proportionate sale consideration. The value of the property conveyed is Rs.49,50,000/- and advance paid by the plaintiffs is only Rs.25,00,000/-. The plaintiffs gain an unfair advantage of Rs.24,50,000/- following the sale of undivided share. The petitioners are entitled to recover the said amount. Hence, this application to raise a plea of counter claim to recover Rs.24,50,000/- from the plaintiffs.

2. The respondent No.1 filed counter affidavit with following contentions:- The petitioners' assertion that they executed assignment deed No. 1064 of 2009 in favor of the plaintiffs' nominees, defendants 3 to 5, assigning one out of four shares as demanded, is incorrect. Defendants 3 to 5 are not nominees of the plaintiffs. This respondent did not receive Rs. 4,95,0000 as consideration for the one-fourth share. In reality, the petitioners received Rs. 25,00,000 from the plaintiffs, which remains unpaid. This application was filed by the petitioners after the plaintiffs indicated they would not present oral evidence. The current counterclaim is raised after the written statement and additional written statement. The petitioners allege the transaction occurred on 16.05.2009, and this counterclaim application is filed after a 16-year delay, rendering it untenable. Hence, seeks to dismiss the application.

3. Heard both sides.

4. The following points are raised for consideration and decision:-

- 1) Is amendment of written statement sought for, necessary to determine the real questions in controversy between the parties?
- 2) Is IA 2 of 2025 allowable?
- 3) Reliefs and costs?

5. **Point No. 1 and 2 :-** The petitioners claim that they assigned one out of four shares of their right over the plaint schedule property to Defendants No. 3

to 5 for Rs. 49,50,000/-. According to them, Defendants No. 3 to 5 are nominees of the plaintiffs. On the other hand, the first respondent contends that the petitioners have sold their rights to Defendants No. 3 to 5 without his knowledge, and he is entitled to the return of Rs. 25,00,000/- that was paid as an advance sale consideration based on the agreement for sale dated 19.11.2008. The present suit was filed for the specific performance of the agreement for sale dated 19.11.2008. However, there was no alternative prayer for the return of the advance amount. By judgment dated 30.07.2013, this Court disallowed the plea for the specific performance of the agreement for sale dated 19.11.2008 and dismissed the suit as there was no alternative prayer for the return of the advance amount. As per the order of the High Court of Kerala in RFA 716 of 2013, the said judgment and decree were set aside in appeal, and the matter was remitted back after allowing IA No. 1 of 2024, which sought the amendment of the plaint to incorporate a prayer for the return of the advance amount of Rs. 25,00,000/- along with interest and costs. The Hon'ble High Court of Kerala also allowed the defendants to file additional written statements, if any, and granted the parties the opportunity to adduce further evidence. The defendants have filed their additional written statement. Thereafter, this application has been filed to incorporate the plea for a counterclaim.

6. In the present case, the petitioners herein filed their written statement on 19.08.2011. As permitted by the Hon'ble High Court of Kerala in RSA 716 of

2013, the petitioners also filed an additional written statement on 05.12.2024. Thereafter, the case was listed for trial on 11.03.2025. The learned counsel for the plaintiffs submitted that the plaintiffs had no further oral evidence, and the case was posted for the defendants' evidence on 15.03.2025. It was subsequently adjourned to 19.03.2025 and 22.03.2025 at the request of the counsel for Defendants No. 1 and 2. The present application to amend the written statement to incorporate a plea for a counterclaim was filed on 22.03.2025. Under the proviso to Order 6 Rule 17 of the CPC, no application for amendment shall be allowed after the trial has commenced unless the Court is satisfied that, despite due diligence, the party could not have raised the matter before the commencement of trial. In the present case, the plea for a counterclaim is sought to be raised through the amendment of the written statement after the filing of the original and additional written statements. The petitioners claim that, due to financial constraints regarding the payment of court fees, they could not raise the plea for a counterclaim in the additional written statement. However, under the proviso to Order 6 Rule 17 of the CPC, this contention is not a valid ground for allowing the amendment of the written statement after the commencement of the trial.

7. In the present case, according to the petitioners, the cause of action to raise the counterclaim originated on 16.05.2009, when they sold one out of four shares to Defendants No. 3 to 5. The plea for a counterclaim was raised for

the first time in IA 1 of 2025 . A counterclaim must necessarily be treated as a plaint. If that is the case, the counterclaim should have been raised within the time prescribed under the Limitation Act, 1963. Since no specific time limit is prescribed under the Limitation Act for raising a counterclaim, Article 113 applies, which provides a limitation period of three years from the date when the right to sue accrues. In the present case, the plea for the counterclaim should have been raised within three years from 16.05.2009. However, it was raised after 16 years. Hence, the said claim is clearly barred by limitation. In *Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri and Others* (2019 (5) KHC 735), the Honble Supreme Court of India held as follows “As counter-claim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time barred suits cannot be entertained under the guise of the counter- claim just because of the fact that the cause of action arose as per the parameters of Order VIII R.6A”. Hence, there can be no doubt that the present counterclaim is barred by limitation. For these reasons, it can only be concluded that this application is not maintainable. Accordingly, these points are decided against the petitioners.

8. **Point No.3:-** In the light of finding in point 1 and 2, this application is to be dismissed. There is nothing on record to deviate from normal rule of imposing costs. Hence, costs shall follow the event.

In the result, this application is dismissed with costs.

(Dictated to Confidential Assistant, typed by her, corrected and pronounced by me in Open Court, on this the 26th day of March, 2025)

Sd/-
SUB-JUDGE,
VATAKARA.

Witnesses and Exhibits marked on either side. : NIL

Sd/-
SUB-JUDGE,
VATAKARA.

pp/-

Fair/Copy of order in IA.01/25
in OS 72/2011 Dtd: 26/03/2025