No. of Order	Date of Order	Order with Signature	Office Note as to action (if any) taken on Order
10.	01.08.2008	Present: Mr. S. P. Wangdi, Senior Advocate with Mr. N. Rai and Ms. Jyoti Kharka, Advocates for the Petitioners. Mr. U. R. Moitra, Advocate for the Respondent Nos. 1 and 3. Mr. B. K. Rai, Advocate for the Respondent No.2. --- This is a revisional application made under Section 115 of the Code of Civil Procedure against an order of the learned District Judge, Special Division – I, Sikkim at Gangtok passed on 15.11.2006. By the said order the learned Judge has dismissed an amendment application made by the applicant before us who had presented that application for the purpose of amending an affidavit-in-opposition filed in answer to an application made by the opposite parties before us under Order XXXIX Rule 2A of the Code of Civil Procedure. The parties herein are propertied persons and the main issue in question in the main case under Order XXXIX Rule 2A is in respect of a room on the second floor of a seven storied building situated in Sikkim. In or about the year 1994 a *status quo*	

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order had been passed in the suit filed by the opposite parties.

The instant application was made by them alleging violation by the revisional applicants.

The fourth paragraph of the application under Order XXXIX Rule 2A was dealt with in the original affidavit of the revisional applicant in paragraph 7 and there was a bare denial with regard to the said room therein.

By way of amendment they wish to amend their affidavit-in-opposition and seek to introduce one sub-paragraph, which would be the sub-paragraph of the original paragraph 7, as mentioned in paragraph 3(a) of the amending application.

They wish to state that the puja ceremonies were not being performed by the opposite parties in the said room on the second floor but that those were being performed all along in a terrace room of the seven storied R.C.C. building.

We are not concerned with the issue on merits at this stage. What the lower Court did was that it opined that it did not have jurisdiction to

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		allow any amendment application at all in the circumstances mentioned. What it specifically said is as follows:- "13. In view of the above discussions, I am constrained to opine that the application filed by the defendants do not fall within the ambit of Order VI Rule 1 and thereby cannot invoke the relief under Order VI Rule 17 CPC and Sec.141 CPC. The petition is, therefore, not maintainable and is dismissed accordingly." It is clear from the said paragraph that the implication in the mind of the learned Judge was that the application for amendment did not fall under the ambit of Order VI of the Code of Civil Procedure and since it did not so fall amendment could not be ordered at all. This is an extremely remarkable decision. It would mean that if in proceedings connected with the suit, like say, an application for commission or an application for substitution or say an application for adjournment or an application for receiver or an injunction, either the applicant wanted to amend his petition or the respondent wanted to amend his affidavit-in-opposition, the Court would have no power to allow such amendment.	

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		This remarkable result has occurred in the judgment because of the following line of this reasoning. There is (with respect) an excellently reasoned judgment of an Hon'ble Single Judge at Calcutta, namely, **Justice Salil Kumar Datta** being the case of **Rathindra Nath Bose** vs. **Jyoti Bikash Ghosh and Others** reported at **AIR 1975 Calcutta 377** where it was opined that an application for injunction made in aid of an application for restoration of a dismissed suit would not ever result in an order being passed under Order XXXIX and, therefore, would not be appealable. This decision was given by the Court relying upon a judgment of the Judicial Committee given in the case of **Thakur Pershad** reported at **(1895) 22 Indian Appeal page 44** where it was said that 'proceedings in any Court of Civil Jurisdiction' would be original matters like probates, guardianships and so forth. Since in Section 141 of the Code of Civil Procedure the same phrase appears i.e. 'in all proceedings in any Court of Civil Jurisdiction', proceedings under Order	

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		IX was held not be such a proceeding, because Order IX is not an original matter like a probate or a guardianship matter. Thus an injunction granted or refused in aid of an Order IX application would not be an injunction under Order XXXIX and, therefore, it would not be appealable in terms of Order XLIII Rule 1. Because in the lower Appellate Court such an appeal had been entertained, the Calcutta High Court interfered. We need merely mentioning in passing that by the later 1976 amendment of the Code of Civil Procedure proceedings under Order IX were specifically included in Section 141 but we are not concerned with that aspect here. On this line of reasoning, we would have no hesitation in agreeing with the lower Court and opining that Order VI i.e. the order relating to amendment of pleadings does not specifically and in terms apply to a proceeding under Order XXXIX Rule 2A, had it not been for one point which we mention hereafter. But let us assume for the time being that as per the reasoning given in the above case an Order XXXIX Rule 2A proceeding is not a	

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proceeding contemplated under Section 141. If that is so a petition under Order XXXIX Rule 2A cannot be amended by having recourse to Order VI, nor can an affidavit-in-opposition thereunder be amended by having recourse to Order VI.

But it is surprising that the lower Court thought this to be the end of the matter. Even if ~~After~~ Order VI does not in terms apply, that does not mean that no petition and no affidavit-in-opposition in any proceedings relating to a suit can ever be amended. There inheres in a Court several powers, which are specifically preserved by the Code of Civil Procedure. Such powers include the power to rectify obvious mistakes and clerical or typographical errors, a power to adjourn, a power of hearing again before an order is finalized, and even a power to amend pleadings in the interest of justice. In regard to suits and original proceedings, some of the inherent powers (and many others) are specifically provided for in the Code, and where the provisions are specific, those provisions must be applied and inherent power should not be exercised in derogation or disregard of those provisions.

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		But in proceedings connected with a suit, like say, a substitution application or (assuming it not to be original) even an application under Order XXXIX Rule 2A, the power of amendment which inheres in a Court has to be used as otherwise petitions and affidavits would become fixed ones for all times, which is an absurd view in the present state of law. It would mean that a plaint can be amended but an application made in aid of a plaint for, say, obtaining a receiver over a property in suit cannot be amended. To repeat, this would be absurd. As such, the Court should have considered the amendment application on its merits and not refused the amendment application on the ground that Order VI did not apply in terms and, therefore, it lacked jurisdiction to allow amendment altogether. Further, in our opinion Order XXXIX Rule 2A proceedings are original proceedings of a very special type. These are very similar to contempt proceedings. The provisions were included so that all Courts could enforce their own orders and not have to wait helplessly unless some other higher	

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		Court interfered and helped it out. Contempt proceedings are obviously proceedings of an original type, although it might not be wholly a civil type of proceedings. Nobody has argued that an Order XXXIX Rule 2A proceeding invokes that jurisdiction of a Court which is not a civil jurisdiction at all, and we also do not think that argument can be made. Another reason why an Order XXXIX Rule 2A proceeding is original is that the result of an application made thereunder might produce results which are in no manner connected with the suit itself. A defendant in a property suit might win the property suit, but during the interim period might have spent time in jail for having violated an order of interim injunction. No plaintiff would be able to obtain a decree in a suit for putting the defendant in prison. As such, the proceedings under Order XXXIX Rule 2A are of a separate kind and clearly partake of the characteristic of original proceedings leading to different types of results altogether than the suit.	

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		It was argued before us that the proviso of Section 115 Sub-section (1) bars this revisional application. Sub-section 1 of Section 115 of the Code of Civil Procedure is set out herein:- **"115. Revision.—** (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears— (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit: Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings." The argument was that since an amendment to an affidavit-in-opposition has only being refused, 'the other proceeding' is still to be decided because the amendment application itself has not yet been disposed of. Accordingly, the proviso bars the revisional application and the High Court is	

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		debarred from either varying or reversing the order under revision. We do not propose either to vary or to reverse the order under revision as we are not entering into the issue finally whether the amendment should have been allowed or not on the merits of the case. We are concerned only with the failure of the Court to exercise its jurisdiction to consider the amendment application on merits. We propose to remand the matter and quash the order under revision so that on remand that the matter can be looked at afresh. This is not barred by the proviso as quashing and remanding is neither varying nor reversing an order under revision. It is also to be noted that the power under sub-Section 1 for the High Court is to 'make such order in the case as it thinks fit'. This phrase is far wider than the phrase 'vary or reverse any order' which occurs in the proviso. Quashing and remanding the matter is an instance of an exercise of power by the High Court where it makes an order as it thinks fit, but is not an instance of an	

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exercise of the power by the High Court where it specifically varies or reverses the order under revision.

In this view of the matter, the order sought to be revised is set aside. The matter is remanded for a fresh consideration. We make it clear that none of the orders or observations made herein will in any manner prejudice the rights and contentions of the parties before the lower Court in the hearing of the amendment application, and even more so in the suit or in any other proceedings which might be had hereafter therein.

No order as to costs.

A. N. Ray

(A. N. Ray, C.J.)

01-08-2008

(A. P. Subba, J.)

01-08-2008

A Copy of order forwarded to trial Court on 4.8.08