



IN THE HIGH COURT OF SIKKIM AT GANGTOK
(Civil Revisional Jurisdiction)

DATED : 18.08.2010

CORAM

HON'BLE MR. JUSTICE P.D. DINAKARAN, CHIEF JUSTICE

C. Rev. P. No. 03 of 2010

Shri Ram Krishna Pradhan,
S/o Late M.K. Pradhan,
R/o Namchi Bazar, Masjid Road,
Namchi, South Sikkim.

...Defendant No.10/Petitioner.

-Versus-

1. Shri Bhagawat Prasad,
S/o Late Kapurchand Prasad,
Namchi, South Sikkim.
...Plaintiff/Respondent No.1.
2. The Government of Sikkim,
Represented by the Principal Secretary,
Urban Development & Housing Department,
Gangtok.
3. The Principal Secretary,
Urban Development & Housing Department,
Govt. of Sikkim, Gangtok.
4. The Commissioner-cum-Secretary
to the Government of Sikkim,
Urban Development & Housing Department,
Govt. of Sikkim, Gangtok.



5. The Special Secretary
to the Government of Sikkim,
Urban Development & Housing Department,
Govt. of Sikkim, Gangtok.
6. The Joint Secretary
to the Government of Sikkim,
Urban Development & Housing Department,
Govt. of Sikkim, Gangtok.
7. The Deputy Secretary
to the Government of Sikkim,
Urban Development & Housing Department,
(A/TAX), Gangtok.
8. The Joint Secretary
to the Government of Sikkim,
Urban Development & Housing Department,
(ADM), Gangtok.
9. The Town Planner (S&W),
Urban Development & Housing Department,
Govt. of Sikkim, Housing Board, Gangtok.
10. The Assistant Town Planner (South),
Urban Development and Housing Department,
Namchi.

...Defendants/Respondents.

For the petitioner : Mr. A. Moulik, Sr. Advocate with
Mr. N.G. Sherpa, and Mr. Leonard
Gurung, Advocates.

For the respondents : Mr. J.B. Pradhan, Additional Advocate
General with Mr. S.K. Chettri, Asst.
Government Advocate for the State
respondents.



JUDGMENT

Dinakaran, CJ

1. The Revision Petitioner herein is the 10th defendant in the suit. The plaintiff filed an application for framing of additional issues under Order XIV Rule 5 and the Revision Petitioner/10th defendant filed an application for amendment of the written statement with counter claim under Order VI Rule 17.
2. Conceded by the parties, evidence has already been led to substantiate their respective pleadings.
3. Under such circumstances, the 1st respondent/ plaintiff sought for permission under Order XIV Rule 5 CPC for framing the following additional issues:

"(i) Whether the Indian Easement Act, 1882 is enforced in the State of Sikkim?

(ii) Whether the plaintiff is entitled to easementary right as claimed by him under the provision of the Indian Easement Act, 1882 or some other provisions of law?"



4. The learned Civil Judge, South Sikkim at Namchi allowed the application filed by the 1st respondent/ plaintiff's for framing additional issues, by his order dated 30.07.2010, but refused to permit the revision petitioner/ 10th defendant to amend the written statement which reads as hereunder: -

"9. That the amendment as proposed by the defendant no. 10 is furnished hereunder. After paragraph 26 of the written statement the following paragraphs are to be incorporated which shall read as follows: -

"27. That as per the Lease Deed dated 16/2/2000 of the plaintiff, his total area of land after allotment of an additional site of 210 sq. ft. is 506 sq. ft. which is equivalent to 11' x 46'. He has raised his construction on 10' x 46' without keeping setback of 5' in the side and rear as contemplated in the law.

28. That even after 'No Objection Certificate' from the defendant no. 10 for allotment of 3 feet land to the plaintiff; the plaintiff had to comply with the law of the land while constructing his building thereby keeping a setback of 5 feet in the immediate west of his land in between the buildings of the plaintiff and that of the defendant no. 10.

29. That as per Sale Deed dated 16/8/1981 the defendant no. 10 had purchased land measuring 35' x 40'. Thereafter, he was allotted some additional land in the year 1991 and on 16/4/2005 land measuring 4' x 50' was allotted to him by the Urban Development & Housing Department. While constructing his building the defendant no. 10 confined his construction at a frontage of 30 feet leaving a setback of 5 feet towards the site of the plaintiff. This 5' area was attached to the building of the defendant No. 10 towards the site of the plaintiff. In addition there arose another 2 feet gap attached to the 5 feet gap due to dismantling of common wooden structure. Thus, a total gap of 7 feet arose in between the site of plaintiff and that of defendant No. 10. Out of this gap of 7 feet as stated above 5 feet was the plaintiff's land while 2 feet arose due to dismantling the wooden structure.

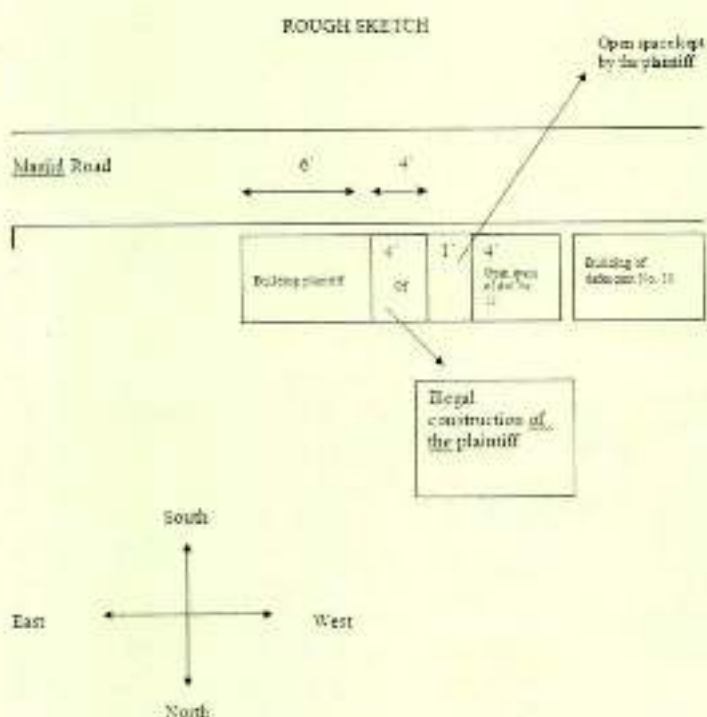


30. That out of 7 feet of land the defendant no. 10 had given 'No Objection Certificate' to the plaintiff for 3 feet. Out of this 3 feet, one foot was the land of the defendant no. 10 while the 2 feet was the land cropped up due to dismantling of wooden structure. This 3 feet land was allotted by the Government to the plaintiff vide allotment order dated 12/1/2000. Thus, the frontage of the plaintiff's land facing the road became 11 feet. Under the law the plaintiff has no right to raise his construction covering the entire frontage of ten feet as law provides that he should keep a setback of 5 feet from his own land towards the site of the defendant no. 10.

31. That vide order dated 16/4/2005 the defendant no. 10 was given allotment of the land having frontage of 4 feet attached to his construction towards the plaintiff's site and this 4 feet land so allotted to him was originally owned by himself. Thus, allotment of 4 feet was nothing but allotment of defendant's own land. It is stated that the defendant no. 10 had kept 5 feet setback towards plaintiff's site while constructing his building in the year 1991.

32. That the plaintiff cannot claim easementary right on the 4 feet land allotted to the defendant no. 10 in 2005 arising because of dismantling this compact wooden house and this gap was not in existence earlier and this gap is never recorded as a vacant space or a gully with the government record and it did not exist since long.

33. That as the plaintiff claims easementary right on this 4 feet land equally this defendant has also his right of easement on the 3 feet land which was allotted to the plaintiff by the government against no objection issued by the defendant no. 10. In addition this defendant has his easementary right on a total area of 5' (which includes 3' as above) because of the municipal law/otherwise. Whether the defendant no. 10 issued the N.O.C. for the 3 feet land or not, law provides that while constructing his building in the year 2005 the plaintiff had to keep a setback of 5 feet from his own land towards the site of the defendant no. 10. Unfortunately, the plaintiff has encroached upon an area of two feet out of three feet land and has raised his construction. As such it is required that the plaintiff's construction on the two feet of land plus another two feet land; in total 4' land towards the building of the defendant no. 10 shall be demolished and easementary right of the defendant no. 10 on that area be declared. The area to be demolished is shown by red lining in the rough sketch below.



34. That the plaintiff who is claiming easementary right over the 4 feet land allotted to the defendant no. 10 had to come to the court with clean hands and mind and equity warrants that. Unfortunately, he himself has not kept any vacant space except one feet towards the building of the defendant no. 10; has illegally raised construction without keeping any setback from his own land and is on the other hand claiming easementary right on the land of the defendant no. 10 is not only illegal but fraud on law.

35. That on the other hand the so called easementary right of the plaintiff has not matured on the four feet land allotted to the defendant no. 10.

36. That equally the defendant no.10's claim for easementary right on the three feet plus one feet area towards plaintiff's site which has been illegally encroached by the plaintiff by raising illegal construction has stood mature.

37. That on the other hand while constructing his building the plaintiff has not also kept a minimum setback of 10 feet from outer edge of road passing through infront of his own construction. As such it is also required that his illegal construction on the road without keeping any setback of 10 feet has to be demolished.



38. That in the suit, the defendant no.10 make the following prayer as counter claim which may be read as follows: -

(i) A decree declaring that the defendant no.10 has acquired easementary right on the land/space in the extreme west side of the land of the plaintiff measuring 5 feet towards the building of the defendant no. 10 upon which the plaintiff has raised illegal construction and hence to clear the land measuring 5 feet by demolition of the plaintiff's illegal construction to the extent of 4 feet frontage thereby making the open vacant space of 5 feet in between the buildings of the plaintiff and that of the defendant no. 10

39. That the defendant no. 10 had been enjoying this 5 feet vacant space with air and light until the month of July of the year 2007 when the plaintiff inspite of objection from the defendant no. 10 raised illegal structure on the said area and closed the way of air and light.

40. That the valuation of the counter claim is fixed at Rs.1050/- being the valuation fixed by the plaintiff for his suit. The defendant no. 10 has deposited the said amount in the bank and original receipt is enclosed herewith.

41. That the building of the parties are located in the commercial zone at Namchi Bazar and the cause of action for the counter claim arose after 29.06.2010 when the plaintiff made a prayer for easementary right. Thereafter it is a continuous cause of action and is continuing within the jurisdiction of this Hon'ble Court."

5.1 According to the learned Civil Judge, South Sikkim at Namchi, by his order dated 30.07.2010, the revision petitioner/10th defendant is only attempting to delay the disposal of the case as evidence has already been closed; the matter stood adjourned for arguments; and the date was already fixed for arguments on 20.08.2010. Learned Judge while refusing the amendment of written statement relied on a decision of the apex



Court in ***Salem Advocate Bar Association vs. Union of India*** reported in **(2005) 6 SCC 344** to the effect that the revision petitioner/ 10th defendant now has to show that despite diligence amendment could not be sought earlier after the trial began. The learned Civil Judge also observed that the revision petitioner/ 10th defendant was unable to explain why he had waited till all the witnesses were examined and cross-examined.

5.2 Placing reliance on the decision of the apex Court in ***Chander Kumar vs. Rajinder*** reported in **(2008) SCC 117**, the learned Civil Judge also observed that the Court must remember that the no injustice is to be occasioned to the 1st respondent/plaintiff by allowing amendment at the end of the trial, which would shake the edifice on which plaintiff has built his case.

5.3 The learned Civil Judge also relied on the ratio laid by the apex Court in ***Vidyabai vs. Premlatha*** reported in **(2009)2 SCC 409** that the proviso to Order VI Rule 17 CPC puts an embargo on the jurisdiction of the Court's, as there was express bar for the proposed amendment.

5.4. Since the revision petitioner/ 10th defendant also claimed counter-claim for a decree, declaring easementary rights



on the disputed portion of the land, the learned Civil Judge observed that in view of Rule 6-A(4) of Order VIII CPC, all the rules governing the plaint are also applicable to the counter-claims. Hence limitation for filing the counter-claims is also to be considered. Therefore, as per the ratio laid in **Karma Denka Bhutia vs. Sarki Lhamu** reported in **AIR 2005 Sikkim 1** at page 2, the counter-claim is barred by limitation as the declaration for easementary rights is 3 years under Article 58 of the Limitation Act, 1963. Therefore, the same is not permissible in law by way of amendment.

6. Aggrieved by the said order of the learned Civil Judge, South Sikkim, refusing to amend the written statement, the revision petitioner/ 10th defendant has filed the present revision petition.

7.1 Mr. A. Moulik, learned senior counsel appearing on behalf of the revision petitioner/ 10th defendant fairly concedes that the application had been filed only after closure of the evidence and when the case was posted for final arguments on 20.08.2010. However he contended, by placing reliance on the order of the apex court in **Sajjan Kumar vs. Ram Kishan** reported in **(2005) 13 SCC 89**, that the failure on the part of the revision petitioner/ 10th defendant to move the application for



an amendment at an early stage is not a bar to move this application for the proposed amendment, which is required to test the real question in controversy between the parties.

7.2 Mr. Moulik, the learned senior counsel also contents that the revision petitioner/ 10th defendant is constrained to move this application for the proposed amendment, as the 1st respondent/ plaintiff has approached the Court for framing of additional issues, which was allowed by the learned Civil Judge by an order dated 30.07.2010.

7.3 Mr. Moulik placing reliance on a decision of the apex Court in **Rakesh Kumar Aggarwal and others vs. K.K. Modi and others** reported in (2006) 4 SCC 385, that if the basic structure of the suit is not changed, and that there was merely change in the nature of relief claimed, the proposed amendment cannot be rejected..

7.4 The learned senior counsel also drew my attention to the ratio laid down in the **Rakesh Kumar Aggarwal's** case (supra) that the rule of amendment is essentially a rule of justice, equity and good conscience; and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.



8. I have given careful consideration to the submissions made by the learned senior counsel.

9. With regard to the contention, that the petitioner/ 10th defendant is constrained to move the application for amendment of the written statement as the 1st respondent/plaintiff has chosen to approach the court for framing additional issues, I have to point out that the case of the 1st respondent/plaintiff is that he had approached the Court for framing additional issues on specific grounds, that the parties have already led evidence with regard to the easementary rights of ingress and egress of light and air. It is only to that limited scope additional issues were sought to be framed and accordingly were framed even after the completion and closure of evidence, other than that the plaintiff does not propose to adduce any additional issues. The additional issues are purely related to question of law, but do not require any evidence to be adduced. It is in this connection that the learned Civil Judge took an exception to the case of the revision petitioner/ 10th defendant that the application for the proposed amendment of written statement with counter-claim is frivolous and intended to further delay the case at the stage when the case was fixed for final argument. Further, the revision petitioner/ 10th defendant had failed to take due diligence for the



proposed amendment at the appropriate stage before the trial began and, therefore, the application preferred by the revision petitioner/ 10th defendant on the proposed amendment is not bonafide and the same cannot be considered, particularly in view of the proviso to Rule 17 of Order VI CPC.

10. In this connection, it is apt to extract Rule 17 of Order VI CPC, which is as under:

"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

11. The first limb of the Rule 17 of Order VI CPC viz. "the Court may at any stage of the proceedings allow either party to alter or amend their pleadings in such manner" is discretionary in view of the word "may" used therein; The second limb of the Rule 17 of Order VI CPC i.e. "all such amendments shall be made as may be necessary for the purpose of determining the real



questions in controversy between the parties" is imperative in view of the word "shall" used. However, the proviso to Rule 17 of Order VI CPC expressly bars such amendments after the commencement of the trial of suit. But still, the bar imposed under the proviso to the Rule 17 of Order VI CPC is not absolute, because, even after the commencement of the trial, the Court may allow either of the parties to amend or alter their pleadings, if the court comes to the conclusion that despite due diligence, the parties could not raise the matter before the commencement of the trial. It is in this sense, the power to amend the pleadings, is wide, and such power of the court should not be mere hypertechnical. It should be exercised liberally. With this background, now let us consider the submissions made by either side.

12.1 The apex Court in ***Sajjan Kumar vs. Ram Kishan*** reported in **(2005) 13 SCC 89**, held that even after commencement of trial, if the applicant satisfies the Court that he has taken due diligence in seeking amendment, the same may be considered. In the said case, it was the plaintiff who had taken the application for amendment of the plaint to correctly describe the suit premises, which if not amended would result in the miscarriage of justice for want of correct description.



12.2 But in the instant case, it is rightly observed by the learned Civil Judge in his order dated 30.07.2010 that the amendment proposed to be brought in was well within the mind of the revision petitioner/ 10th defendant, however, he failed to take bonafide steps even during the examination of witnesses and cross-examination of witnesses. That apart, the revision petitioner/10th defendant also seeks counter-claim based on the same easementary right, which according to the learned Civil Judge is barred by limitation. Further, the revision petitioner/10th defendant came with a new plea for counter-claim after the closure of the trial, the same was considered by the learned Civil Judge and rightly rejected.

13. It is true that the revision petitioner/10th defendant has also sought for alternative prayer, while incidentally challenging the framing of additional issues, seeking liberty to cross-examine the 1st respondent/ plaintiff or his witnesses. But, I find that the evidence has already been closed and the matter posted for final argument. If the revision petitioner seeks such liberty to cross-examine the 1st respondent/plaintiff or his witnesses, my considered opinion is that he can only do so, by filing an appropriate application before the Court concerned , if so advised, for re-opening of the case and to cross-examine the



1st respondent/plaintiff, within the limited scope of the pleadings originally raised in the plaint and written statement and not otherwise. Therefore, suffice to make it clear, if the revision petitioner/10th defendant approaches the Court as referred above, to re-open the case, the same may be considered and disposed of in accordance to law.

The revision petition stands disposed of accordingly.

(P.D. DINAKARAN, CJ)
18.08.2010

Index : Yes/No
Internet : Yes/No

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