

IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CIVIL EXTRAORDINARY JURISDICTION)

DATED : 12.08.2010

CORAM

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

Writ Petition (C) No. 41 of 2009

1. Shri Dibya Prasad Pradhan,
S/o Late Punya Pd. Pradhan,
Permanent R/o Turuk Kothi,
P.O. Turuk, P.S. Melli,
Turuk, South Sikkim.

2. Shri Hitendra Prasad Pradhan,
S/o Late Punya Pd. Pradhan,
Permanent R/o Turuk Kothi,
P.O. Turuk, P.S. Melli,
Turuk, South Sikkim.

...Petitioners

-versus-

The State of Sikkim,
Represented by the Secretary,
Transport Department,
Government of Sikkim,
Gangtok, Sikkim.

...Respondent.

For the petitioners : Mr. B. Sharma, Sr. Advocate with
Mr. S.K. Sarraf, Ms. Sabita Sharma,
Ms. Januka Sharma and Ms. Dawa
Jangmu Sherpa, Advocates.

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



JUDGMENT

Dinakaran, CJ

"Whether amendment in the pleading is permissible after framing of issues, in view of provision to Rule 17 of Order VI of CPC?" is the core issue that arises for consideration in this writ petition.

1.1 The writ petitioners are the defendants No. 3 & 4 in Money Suit No. 02 of 2006 on the file of learned District Judge, East and North Sikkim at Gangtok, filed by the respondent/plaintiff in the suit for a decree against the writ petitioners/defendants No. 3 & 4 jointly and severally for a sum of Rs.38,78,283/- and for the pendentelite interest on the principal amount of Rs.34,50,000/- .

1.2 The suit amount namely Rs.38,78,283/- represents the advance paid by the respondent/ plaintiff namely Rs.34,50,000/- towards the consideration value viz. Rs.69,00,000/- for purchase of the suit premises which includes the land and RCC building mentioned in the plaint, namely Plot No. 291 under Khatian No. 432 which was recorded as Maharaja Sir Tashi Namgyal; and a further sum of Rs.4,28,283/- representing the interest at the bank rate per annum from the



date of payment i.e. 09.09.2002 till the filing of the suit, thus totalling Rs.38,78,283/-.

2.1 The writ petitioners/ defendants No. 3 & 4 in the suit filed their written statement on 21.07.2006. The defendants No. 1 and 2 filed their written statement on 25.11.2006. In the light of the pleadings made by the respective parties in their plaint, the trial court also framed the issues. But, before submitting the list of witnesses, the writ petitioners herein/defendants No. 3 and 4 filed an application on 02.09.2008, under Order VI Rule 17 read with Section 151 of CPC, seeking permission to amend their joint written statement, for amending their pleadings in the written statement.

2.2 The relevant portion of the said application is extracted below:

"7. That the Defendants (3 & 4) propose the following amendments – at Para 10 of the Written Statement, after the word – 'to make', the following sentences be inserted:-

"the Defendants submit that there is an un-reserved dispute between the State of Sikkim, and the Central Government with respect to the property of Maharaja of Sikkim, Maharaja Saheb, the Maharaja in Council, Sikkim Darbar and Private Estate. The averments made therein at para 3 of the Plaint is not supported by any document. The plaintiff is put to prove the same strictly in accordance with Law. The defendants further submit that the land bearing Plot No. 291, the portion of which was leased out to the then Maharaja of Sikkim is still recorded in the name of Late Punya Prasad Pradhan, the late father of the defendants."

8. That the Defendants (3 & 4) propose the following amendments – at Para 11, after the word – "thereof", the following sentences be added -



"That at the relevant, the independent Country, i.e. Sikkim, took a Lease, of the property covered by Plot No. 291, Khatian No. 423, for a period of 51 years by duly executing a Lease Deed with certain terms and conditions. The tenure of the Lease Deed expired on 20.6.2004. After 20.6.2004, the State Government is in illegal possession of the scheduled premises for which the State Government must compensate the defendants by way of measne profits and other compensation the defendants bring a Counter-Claim for their reliefs".

9. That at Para 12, after the word - "in process", the following sentences be inserted -

"as stated above, Sikkim was an independent country prior to 1975. After the merger of Sikkim with Indian Union, the Central Govt. and the State Government, so far has not decided as to the ownership of the properties which actually belonged to the then Chougyal, i.e. Maharaja of Sikkim, Private Estate, Property of Sikkim Country. Even assuming, but not admitting, the property covered by Plot No. 291 is recorded in the name of Maharaja Sir Tashi Namgyal, it does not 'epso facto' mean that after the merger the suit property belonged to the State Government. As stated in the main written statement, the ownership of the schedule property never neither vested to Sir Maharaja Tashi Namgyal, nor the ownership of the father of the defendants Late Punya Pd. Pradhan, has been taken away. The record of right clearly shows that - Sikkim Sarkar, Maharaja Sir, S/o Tashi Namgyal, as a 'tenant'/'lessee' who needs to **"pay the rent"**."

10. That at Para 15, after the word - "present case", the following sentences be inserted -

"As submitted above, the father of the Defendants is still recorded owner of the schedule premises, being Plot No. 291, Khatian No. 432, as such any statement contrary to this fact is denied by the Defendants. It is denied that with the enforcement of the W.B.E.A. Act, 1953, the Plaintiff is the owner of the schedule premises. The Plaintiff has mis-interpreted the provisions of law under the West Bengal Estates Acquisition Act, 1953.

The Plaintiff is trying to mis-lead the Hon'ble Court, and trying to wrongly interpret the provisions of the W.B.E.A. Act, 1953. It is submitted that after the death of Punya Pd. Pradhan, the Defendants herein have succeeded the entire movable and immovable property left by him, and accordingly the Defendants have made an application. When the Defendants found that the record of right as filed by the Plaintiff, was in Bengali vernacular, they engaged Lawyer to verify the same in concerned office. After verification in the concerned Office, it transpired that the ownership of suit property is



still with our father Late Punya Prasad Pradhan. Accordingly the Defendants have approached the concerned authority for necessary correction. The copy of the Letter is enclosed herewith and marked with Letter- **R-1.**

11. That at Para 16, after the word – "defendant No. 1" following sentences may be inserted -

"The Plaintiff expressed their willingness to purchase 23 Kottas of land out of Plot No. 291. Since the negotiation was going on, the defendant also did not care to pay the rental for the entire Plots of land, even after expiry of the lease period. It is worth mentioning here that the Plaintiff failed to pay the rental of the Lease premises since 20.6.2004 as stated above, and as such the defendants are entitled for their entire claims." "

3. The respondent/plaintiff, objected the said amendment, contending that as per the proviso to Rule 17 of Order VI of CPC, the petitioners/defendants No. 3 & 4 are not entitled to file an amendment after the trial has commenced.

4. Learned District Judge, East and North at Gangtok, by his order dated 30.07.2009, agreeing with the contention made on behalf of the respondent/plaintiff, rejected the prayer for amending the written statement filed by the petitioners/defendants 3 & 4. Hence, the petitioners/defendants No. 3 and 4 filed the present writ petition seeking to quash the order dated 30.07.2009.

5. The main issue that arises for the consideration in the above writ petition is: whether the writ petitioners/defendants No. 3 & 4 are entitled to amend the pleadings raised in the



written statement invoking Order VI Rule 17 of CPC, which reads as follows:

"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."

(emphasise supplied)

6. For the purpose of deciding the above issue, there is no need to go into merits of the pleadings raised in the proposed amendment, as the scope of this revision petition lies in a narrow campus viz. whether the writ petitioners/defendants No. 3 and 4 are entitled to amend the pleadings in the written statement after the trial has commenced, invoking Order VI Rule 17 read with Section 151 CPC.

7. Mr. B. Sharma, learned senior counsel appearing for the writ petitioners/defendants No. 3 and 4, placing reliance on the decisions of the Apex Court in -

(i) **Baldev Singh & Ors vs. Manohar Singh & another** reported in **AIR 2006 SC 2832**, and

(ii) **Sushil Kumar Jain vs. Manoj Kumar & Another** reported in **AIR 2009 SC 2544**



contends that

- (i) the petitioners are entitled to seek the amendment as prayed for as per Order VI Rule 17 of CPC;
- (ii) framing the issues, by itself, is not the commencement of the trial of the suit; and
- (iii) the proviso to Rule 17 Order VI of CPC is not attracted in the instant case.

8. Per contra, Mr. J.B. Pradhan, learned Additional Advocate General placing reliance on the decision in ***Vidyabai and others vs. Padmalatha and another*** reported in (2009) 2 SCC 409 contends that the petitioner is not entitled to seek the amendment of the pleadings after framing of issues from which date the trial has commenced. According to Mr. J.B. Pradhan, the learned Additional Advocate General, the framing of issues is the starting point of the commencement of the trial.

9. I have given careful consideration to the submissions of both the sides.

10. The core issue that arises for consideration in the above writ petition is "whether amendment in the pleading is permissible after framing of issues, in view of provision to Rule 17 of Order VI of CPC?"



11. It is true that the apex Court in ***Vidyabai and others vs. Padmalatha and another*** reported in **(2009) 2 SCC 409**, held as herein under: -

"11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. **The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion would amount to "commencement of proceeding".**

12. Although in a different context, a three-Judge Bench of this Court in *Union of India v. Major-General Madan Lal Yadav* took note of the dictionary meaning of the terms "trial" and "commence" to opine: (SCC p.136, para 19)

"19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial."

The High Court, as noticed hereinbefore, opined that filing of an affidavit itself would not mean that the trial has commenced.

13. Order 18 Rule 4(1) of the Code reads as under:



"4. *Recording of evidence.*-(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court."

This aspect of the matter has been considered by this Court in *Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.* in the following terms: (SCC p.707, paras 15-16)

"15. The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

16. The aforementioned provision has been made to curtail the time taken by the court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it."

14. In *Kailash v. Nanhku* this Court held: (SCC pp.490-91, para 13)

"13. At this point the question arises: when does the trial of an election petition commence or what is the meaning to be assigned to the word 'trial' in the context of an election petition? *In a civil suit, the trial begins when issues are framed **and** the case is set down for recording of evidence.* All the proceedings before that stage are



treated as proceedings preliminary to trial or for making the case ready for trial.

(emphasis supplied)

12. The plain language of Order VI Rule 17 of CPC, namely, "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", indicates the objects of the legislation that -

- (i) the dominant purpose of allowing the amendment is to minimise the litigation;
- (ii) to avoid the multiplicity of the litigations and
- (iii) to try the merits of the case that come before the Court and allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause any injustice or prejudice to the other side (vide ***Rajesh Kumar Aggarwal vs. K.K. Modi***, AIR 2006 SC 1647).

The power to allow the amendment is wide and can be exercised at any stage of the proceedings, in the interest of justice. Liberal approach in allowing the amendments should be the general rule. Therefore, the Court should not adopt a hyper-technical

approach. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties.

13. 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 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 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 a mere hypertechnical. It should be exercised liberally. With this background, now let us consider the submissions made by either side.



14.1 In *Baldev Singh & Ors vs. Manohar Singh & another* reported in **AIR 2006 SC 2832**, interpreting the powers of the Court conferred under Order VI Rule 17 of CPC to amend the pleadings, particularly with reference to the language "after the trial has commenced", employed in proviso to Order VI Rule 17 of CPC, wherein it is held as follows:

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, **commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.** As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

(emphasis supplied)



14.2 In *Sushil Kumar Jain vs. Manoj Kumar and Another* reported in **AIR 2009 SC 2544**, wherein the Apex Court held as follows:

"11. Similar view has also been expressed in *Usha Balashaheb Swami & Ors. V. Kiran Appaso Swami & Ors.*, AIR 2007 SC 1663. It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed.

...

14. Before parting with this judgment, a short submission as advanced by the learned counsel for the respondents may be dealt with. Referring to the proviso to Order 6, Rule 17 of the CPC, the learned counsel for the respondents argued that the proviso clearly bars that any application for amendment either of plaint or of written statement can be allowed after 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 the trial. Therefore, the learned counsel for the respondents submitted that in view of the proviso to Order 6, Rule 17 of the CPC, the High Court as well as the Rent Controller had acted within their jurisdiction in rejecting the application for amendment of the written statement on the ground that the trial has already commenced and, therefore, no interference can be made in respect of the same.

15. We are unable to agree with this submission of the learned counsel for the respondents. In this case, in our view, the trial has not yet commenced. In para 17 of *Baldev Singh (supra)*, this Court observed: -



"It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, **commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments.** As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to **Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings.**" "

(emphasis supplied)

14.3 It is a settled proposition that the procedural law is intended to facilitate and not to obstruct the course of substantive justice. Amendment in the pleadings is a matter of procedure and such procedure which is discretionary has to be exercised consistent with settled legal principles, held with reference to Order VI, Rule 17 of CPC. The rule of procedure are intended to be a handmaid to the administration of justice and a party cannot be refused just relief merely because of some mistakes, negligence, inadvertence or even infraction of the rules of procedure, unless the party applying was acting malafide.



(Vide: ***State of Maharashtra vs. Hindustan Construction Company Limited***, reported in **(2010) 4 SCC 518**)

15.1 The Apex Court, in clear terms, in

- (i) ***Baldev Singh & Ors vs. Manohar Singh & another*** reported in **AIR 2006 SC 2832**,
- (ii) ***Sushil Kumar Jain vs. Manoj Kumar and Another*** reported in **AIR 2009 SC 2544** and
- (iii) ***State of Maharashtra vs. Hindustan Construction Company Limited***, reported in **(2010) 4 SCC 518**

has held that the Courts jurisdiction to allow amendment to the pleadings is wide; and the same has to be exercised liberally but not with a hypertechnical approach. The procedure contemplated in this regard should only give way to render substantial justice; but should not defeat the same. Commencement of trial has been repeatedly interpreted by the Apex Court only from the date of the filing of an affidavit of list of witnesses and recording of evidence; but not merely from the date of framing issues.

15.2 The Apex Court in ***Vidyabai's*** case (supra) has clearly held that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of proceeding and that in a civil suit, the trial begins when,

- (i) the issues are framed, and



- (ii) the case is set down for recording of evidence.

15.3 In the instant case, the second condition viz. "the case is set down for recording of evidence" is not complied with, as the affidavit of witnesses has not been filed. Therefore, mere framing of issues would not amount to commencement of the trial.

15.4 It is settled law that commencement of trial as used in proviso to order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense, as meaning,

- (i) the final hearing of the suit,
- (ii) examination of witnesses,
- (iii) filing of documents, and
- (iv) addressing of arguments.

[Vide: (i) **Baldev Singh's** case (supra) and (ii) **Sushil Kumar Jain's** case (supra)].

16. It is, therefore, difficult to hold that the suit has already been commenced, as I am satisfied that the bar to seek amendment on the pleadings in the written statement filed by the writ petitioners/defendants No. 3 and 4, on the ground that the suit has already been commenced, as per the proviso to Order VI Rule 17 of CPC, is not attracted to. Hence, the rejection



of the application to amend the pleadings in the written statement filed by the writ petitioners/defendants No. 3 and 4, by the learned District Judge is erroneous as the learned District Judge in the impugned order dated 30.07.2009 has failed to exercise the power conferred on him under Order VI Rule 17 of CPC, in rejecting the application to amend the pleadings raised in the written statement filed by the writ petitioners/defendants No. 3 and 4. Hence the order dated 30.07.2009 is set aside.

The writ petition is, therefore, allowed. Order dated 30.07.2009 made in Money Suit No. 2 of 2006 is set aside. The writ petitioners/defendants No. 3 and 4 in the suit are permitted to amend their pleadings in the written statement filed by them, as sought for. However, no orders as to costs.



(P.D. Dinakaran)
Chief Justice

Index : Yes/No ✓
Internet : Yes/No

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