



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 13th OCTOBER, 2017

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.02 of 2017

Petitioner : Ashok Kumar Subba,
S/o Late Budh Bir Subba,
R/o 31A National Highway,
Sisa Golai, Gangtok,
East Sikkim.

versus

Respondents : 1. Smt. Kamal Kumari Subba,
W/o Shri Ashok Kumar Subba,
S/o Late Bhud Bir Subba,
R/o 31A National Highway,
Sisa Golai, Gangtok,
East Sikkim.

2. Shri Bharat Basnett,
S/o Late Indra Bahadur Basnett,
R/o Ranipool Bazaar,
East Sikkim – 737 135.

3. The District Collector (East),
District Administrative Centre Building,
Sichey, Gangtok,
East Sikkim.

Petition under Articles 226/227
of the Constitution of India

Appearance

Mr. R. P. Sharma, Mr. Sajal Sharma and Ms. Janu Tamang,
Advocates for the Petitioner.

Md. Mazhar Ali, Advocate for the Respondent No.1.

Mr. C. K. Kumai and Mr. Vivek Anand, Advocates for the Respondent
No.2.

Mrs. Pollin Rai, Assistant Government Advocate for the State-
Respondent No.3.



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J U D G M E N T

Meenakshi Madan Rai, J.

1. The Petitioner, (Plaintiff before the Learned Trial Court) is before this Court assailing the Order dated 12-12-2016, of the Learned Civil Judge, East Sikkim, at Gangtok, in T.S. Case No.33 of 2014, *Shri Ashok Kumar Subba vs. Smt. Kamal Kumari Subba and Others*.

2. By the impugned Order, the Learned Trial Court considered an Application filed by the Defendant No.2 (Respondent No.2 herein) under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC") seeking to amend his Written Statement and duly allowed the amendment.

3. While seeking to amend the Written Statement, the Defendant No.2 submitted that the proposed amendment was not incorporated in the Written Statement due to *inadvertent mistake and oversight* and sought to incorporate the following statements;

"4. That Smt. Mim Rani Limboo is legally married wife of Sri Ashok Kumar Subba, the Plaintiff. They were married in the year 1966, according to their custom, rites, rituals and ceremonies in the parent's house of Mim Rani Limboo in the village Tambong, P.O. & P.S. Sombaray, District West Sikkim. Late Dhoj Bir Begha Limboo and Gaurani Limboo were /are father and mother respectfully of Mim Rani Limboo. After the marriage the above spouse lived together as lawfully married husband and wife in the house of Plaintiff at Thurpu, West Sikkim and other places in Sikkim. Out of the said wedlock, three daughters and one son were born to them namely:

- I. Amrita Limboo.....Daughter
- II. Anita Limboo.....Daughter



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III. Sangita Limboo.....Daughter

IV. Amar Kumar Subba.....Son

The above marriage between the Plaintiff and Mim Rani Limboo has not so far been dissolved by a decree of divorce and same is still subsisting one.

5. That Kamal Kumari Subba the Defendant No. 1 in above suit is a Mistress/Concubine of the Plaintiff. She is not his legally married wife, since during the subsistence of valid and lawful marriage with Mim Rani Limboo, the Plaintiff had contracted a second marriage with Defendant No. 1 in the year 1973 in the parents' house of the Defendant No.1 in village Assam Linge, Surani East Sikkim. Dhoj Bir Subba and Gaumaya Subba are the father and mother of Defendant No.1."

It was also canvassed that the proposed amendment is germane for the full and final adjudication of the matter in dispute between the parties and will not change the nature and character of the suit.

4. Aggrieved by the Order allowing the amendment, the Learned Counsel for the Petitioner contends that, in the first instance, the matter was already fixed for filing of evidence by the Plaintiff and witnesses, issues having been settled for determination by the Court. The provisions of the amended Order VI Rule 17 of the CPC does not envisage amendment of pleadings after the commencement of the trial. Hence, the Learned Trial Court ought not to have allowed the amendment.

5. In the next limb of his argument, it was advanced that the Suit in question is a Declaratory Suit. Thus, the question as to whether the Plaintiff was previously married or not is not essential for the determining the real question in controversy between the



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parties. That, the intention of the Defendant No.2 in seeking the amendment is to deny justice by making an effort to get the Suit dismissed by bringing it within the ambit of the provisions of the Prohibition of Benami Property Transactions Act, 1988 (for short "Benami Act"). That, the Defendant No.2 has also invoked the provisions of a Notification, being, Notification No.1520/H dated 03-01-1963 of the Government of Sikkim Home Department, pertaining to "*Rules to provide for Registration and Solemnisation of a Form of Marriage in Sikkim*" (for short "Notification of 1963"). However, the marriage between the parties was not solemnised under this Notification and, therefore, is not relevant for the present purposes. Besides, a plethora of Judgments of the Hon'ble Supreme Court have laid down that, if a man and woman live together for several years as husband and wife, they shall be deemed by the Law to be husband and wife. The Plaintiff and the Defendant No.1 (Respondent No.1 herein) were married in 1973 and from the wedlock, have seven children. Thus, there can be no doubt that they were legally married. The validity of by the marriage between the Plaintiff and the Defendant No.1 cannot be challenged by the Defendant No.2, who has no *locus standi* in the matter. Strength on this count was drawn from the decision of the Hon'ble Supreme Court in ***Satyendra Kumar and Others vs. Raj Nath Dubey and Others***¹.

6. It was next contended that the pleadings and the documents relied on by the Defendant No.2 would indicate that

¹ AIR 2016 SC 2231



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there is an admission that the Plaintiff and the Defendant No.1 are husband and wife as evident from the admissions made by the Defendant No.2 before the DRT, DRAT, this High Court, Gauhati High Court and Calcutta High Court, he cannot now retract this admission. It was also contended that declaratory reliefs cannot be granted by the Benami Adjudicating Authority and neither is the suit property a benami property in view of the provisions of Section 2(9)(A)(iii) of the Benami Act which clearly states that property purchased in the name of the spouse will not be considered to be a benami transaction, hence, the impugned Order be set aside.

7. The *contra* arguments put forth by Learned Counsel for the Defendant No.2 were that, under Section 45 of the Benami Act the jurisdiction of the Civil Courts is specifically barred, therefore, the Learned Trial Court has no jurisdiction in the matter. While supporting the Order of the Learned Trial Court, it was contended that the amendment was allowed as the Learned Trial Court considered the amendment essential for determining the real position of the Defendant No.1 as wife of the Plaintiff, which would strike at the real question in controversy in the Suit, therefore, the Order requires no interference.

8. Learned Counsel for the Defendant No.1 submitted that he was in agreement with the aforestated submissions advanced by Learned Counsel for the Defendant No.2.

9. The opposing arguments of Learned Counsel were heard *in extenso* and carefully considered. I have also carefully perused



the records of the Learned Trial Court as well as the impugned Order and given it my anxious consideration.

10. In the first instance, the argument of Learned Counsel for the Petitioner that the Defendant No.2 has garnered strength from the Notification of 1963 while seeking to establish the non-marital status of the Plaintiff and Defendant No.1, has no bearing in the instant matter as it is not the subject-matter of the amendment and is not being addressed.

11. Now, to consider the relevant legal provision; Order VI Rule 17 of the CPC deals with amendment of pleadings. For clarity in the matter, the provision of law is reproduced below;

"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."

12. The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999), omitted Rule 17 in order to expedite litigation, but due to the controversy generated by this deletion, the Code of Civil Procedure (Amendment) Act, 2002 (Act 22 of 2002), restored the Rule with certain limitations. A proviso, as extracted hereinabove, has been inserted in the Rule.



13. In terms of the proviso, once the trial has commenced ordinarily no application for amendment of the pleadings shall be allowed unless the Court concludes that, in spite of due diligence the party could not have raised the matter before the commencement of trial. Needless to add that whether the party has acted with due diligence or not would depend upon the facts and circumstances of each case. It would be in the correctness of things to mention here that all amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or for correcting any defect thereof. At the same time, the Court has to be alive to the fact that the proposed amendment ought not to cause prejudice to the other side nor should it change the nature and character of the *lis* in question.

14. In *Vidyabati and Ors. vs. Padmalatha and Anr.*² the Hon'ble Supreme Court, while considering the question as to whether the pleadings can be directed to be amended after the hearing of the case begins, discussed the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002) and the proviso thereof. The Hon'ble Supreme Court opined that the proviso is in a mandatory form and the Court's jurisdiction to allow an application for amendment is taken away by the proviso, unless the conditions precedent therefor are satisfied, i.e., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the *commencement of the trial*.

² AIR 2009 SC 1433



15. We may now proceed to the next pertinent question viz; what stage would be commencement of trial. In a Civil Suit, trial commences when issues are framed and the Suit is ready for recording of evidence. It would be appropriate to refer to Order XIV Rule 1(5) of the CPC which provides that;

"1. Framing of issues.—(1).....

.....

(5) At the *first hearing of the suit* the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

....."

Thus, it is evident that the first hearing of the Suit is on the date on which the issues are settled for determination.

16. In *Kailash vs. Nanhku and Others*³ the Hon'ble Supreme Court held as follows;

"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."

17. In *Baldev Singh and Others vs. Manohar Singh and Another*⁴ the Hon'ble Supreme Court held as follows;

³ (2005) 4 SCC 480
⁴ (2006) 6 SCC 498



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"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 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 hereinbefore, 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 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

In the said matter, amendment was allowed as documentary evidence was yet to be filed and, therefore, it was held that the trial had not commenced.

18. From a perusal of the records herein, the Petition under Order VI Rule 17 of the CPC was filed after the trial commenced, i.e., after settlement of issues for determination. That, having been said, the hands of the Court are not tied and it can permit an amendment or amendments, subject to the fact that the party could not have raised the matter in spite of due diligence, before the commencement of trial. As pointed out by Learned Counsel for the Plaintiff and as the pleadings would reveal, the portion sought to be inserted by way of amendment was not due to the inability of the party to raise the matter before the trial had commenced and in



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spite of due diligence, but was admittedly an “inadvertent error” as revealed in the pleading of the Defendant No.2.

19. Besides, the pleadings of the Defendant No.2 indicates that he has addressed the Defendant No.1 as the wife of the Plaintiff. Paragraph 2 of the “PARAWISE REPLY” in his Written Statement is as follows;

“2. That, the contents of para 2 of the plaint are partly denied. The answering Defendant is an acquaintance of the Plaintiff and well known to the Defendant No. 1 sharing relation as “*miteri*” brother and co-villager prior to her marriage with the Plaintiff herein.”

20. Thus, the Defendant No.2 is now attempting, by the amendment sought, to approbate and reprobate as now he seeks to put forth that the Defendant No.1 is the mistress of the Plaintiff which is not permissible.

21. It thus emerges that not only has the amendment been sought after trial commenced, but was admittedly on account of an “inadvertent error” and not due to inability to raise the matter despite due diligence, besides the Defendant No.2 is approbating and reprobating on the marital status of the Defendant No.1.

22. The Learned Trial Court in its impugned Order has erroneously placed reliance on the decision of **A. K. Gupta and Sons Ltd. vs. Damodar Valley Corporation**⁵, at which period there was no amendment to Order VI Rule 17 of the CPC as already explained

⁵ AIR 1967 SC 96



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hereinabove and, therefore, would not be relevant for the present purposes.

23. I have also perused the provisions of the Benami Act relied on by the Learned Counsel for the Defendant No.2, but restrain myself from making any observations on this count having limited my Judgment to the provisions of Order VI Rule 17. In any event, it would be pre-mature to reach a finding on Section 2(9)(A)(iii) and Section 45 of the Benami Act as it would tantamount to delving into the merits of the case.

24. Thus, in conclusion, having considered the facts and circumstances of the matter and in view of the discussions hereinabove, the impugned Order of the Learned Trial Court is set aside.

25. However, it may be noticed that the Plaintiff in Paragraph 1 of the Plaint has pleaded as follows;

"1. That the Plaintiff is a businessman by profession and had purchased immoveable properties in the Town of Gangtok, more fully detailed in Schedule hereunder and at the relevant time of the purchase of the said suit premises the Plaintiff was carrying on the business of Lottery. The Plaintiff herein is also the absolute owner of the building standing in Plot No. 1104/1676 and 1104/1805 [ANNEXURE 1] and the said land on which the building is super constructed was purchased by the Plaintiff *in the benami of his wife above named, viz., Smt. Kamal Kumari Subba, herein the Defendant No.1, which was the prevalent practice at that time.*"

The Defendant No.2 has repudiated this in his Written Statement "PARAWISE REPLY" as follows;



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"1. That, the contents of para 1 of the plaint are denied."

26. Consequently, in such a situation, for a just decision in the matter, the Learned Trial Court is to frame an appropriate Issue in view of the claim of benami transaction by the Plaintiff and denial thereof by the Defendant No.2. The Learned Trial Court shall take steps accordingly and thereafter, proceed with the trial in terms of the legal provisions.

27. It is clarified that the observations made herein are not to be construed as opinions on the merits of the case, by this Court.

28. The Writ Petition stands disposed of accordingly.

29. No orders as to costs.

30. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance.

31. Records of the Learned Trial Court be remitted forthwith.

Sd/-
(**Meenakshi Madan Rai**)
Judge
13-10-2017

Approved for reporting : **Yes**

Internet : **Yes**