

THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH - BHASKAR RAJ PRADHAN, JUDGE.

WP(C) No. 33 of 2016

Shri Subash Gupta

.... Petitioners.

Versus

Shri Yadap Nepal

.... Respondent.

**An Application under Article 226 and 227 of the Constitution of
India.**

Appearance:

Ms. Laxmi Chakraborty and Ms. Manju Rai, Advocates for the
Petitioner.

Mr. Zangpo Sherpa, Mr. Jushan Lepcha and Ms. Mon Maya
Subba, Advocates for the Respondent.

J U D G M E N T
(15-09-2017)

Bhaskar Raj Pradhan, J.

1. A Title Suit for declaration, possession, injunction and consequential reliefs was filed by the petitioner herein, as the plaintiff, in the year 2012 claiming his right to tenancy in the four storeyed RCC building situated at Pakyong-Rorathang road, Pakyong, East Sikkim owned by late Dilli Ram Nepal and presently by his son the sole respondent, Yadap Nepal as the defendant.

Case of the plaintiff/petitioner

2. The case of the petitioner is based on the allegation that the respondent would use his influence with the local police to threaten the petitioner out of the building tenanted. The situation compelled the petitioner to sign on a document/agreement prepared by the respondent. Subsequently, on 25.11.2005 the petitioner lodge a First Information Report (FIR) against the respondent, the officer-in-charge of the Pakyong P.S and others with the Superintendent of Police who took prompt initiative and directed investigation by the SDPO, which is pending. The respondent's ill intention of evicting the petitioner by any means led to various illegal acts of the respondent. The respondent, without notice transferred the electric connection of the building in the respondent's name from that of his Late father. The respondent also started mass propaganda against the petitioner in social network sites and connived with the officials of the Power and Energy Department of the Government of Sikkim and on 04.04.2012 disconnected the supply of electricity to the building which led to the filing of a pending complaint under Section 499 and 153 A Indian Penal Code, (IPC) for defamation and spreading communal hatred by the petitioner against the respondent. In pursuance of the said illegal purpose of evicting the petitioner, the respondent started a proceeding before the Sub-Divisional Magistrate under Section 133 Code of Criminal Procedure, 1973 (Cr.P.C.) which led to the passing of the Order by the District Magistrate directing the petitioner to immediately vacate the said building. This order of the District Magistrate had been passed without serving a copy of the complaint or the report obtained from the Assistant Engineer, UD & HD, Government of Sikkim. The petitioner further alleged that the respondent had conspired with his kin against

the petitioner to evict him unlawfully and in furtherance of the said plan they had also disconnected the electricity supply and since 04.04.2012 there is in fact no electricity supply in the said building causing huge financial losses. The petitioner sought to rely upon a list of documents which included, *inter-alia*, the copies of the Section 133 of Cr.P.C. proceedings before the District Magistrate.

Case of the defendant/respondent

3. On 03.07.2012 the respondent filed his written statement contesting the Title Suit. The respondent denied that late Dilli Ram Nepal had inducted the petitioner as a tenant in the entire building of the respondent and further stated that as per the version of the attesting witnesses to the agreement dated 10.11.1998, late Dilli Ram Nepal had only agreed to let out the road level floor measuring 18 x 36. However, it now appears that the petitioner had discreetly entered the words "ground floor to top" in the space which was left blank and meant to be filled up by appropriate English term to describe the sweet meat shop which the executants and the witnesses were not able to appropriately coin. The respondent contested the allegation of the petitioner regarding disconnection of electricity by stating that it was a suo-motto action on the part of the Power Department. The respondent also contested the allegation of the petitioner of falsely and illegally obtaining orders under Section 133 Cr.P.C. from the District Magistrate by stating that the respondent had in fact legally moved the competent Authority and followed the due process of law. The respondent would also rely upon a list of documents which *inter alia*, contained copy of the line disconnection notice issued by the Power Department, the eviction notice of the District Magistrate under

Section 141 of Cr.P.C. and the final order under Section 133 of Cr.P.C. also passed by the District Magistrate dated 21.06.2012.

Subsequent events

4. After the filing of the written statement on 20.07.2012, the learned Session Judge, East Sikkim at Gangtok would set aside the final Order dated 21.06.2012 passed by the District Magistrate under Section 133 of Cr.P.C. by holding that the District Magistrate had failed to comply with the mandatory provisions of law and the said Order cannot be sustained. This fact was not brought on record in the Title Suit by the petitioner and obviously not by the respondent too.

5. In the meantime, on a query made by the petitioner under the Right to Information Act, (RTI) 2005 the Power and Energy Department vide its reply dated 09.01.2013 (the learned Counsel of the Petitioner, during the hearing of the present matter on 09.09.2017, orally pointed out the inadvertent typographical error in the proposed amendment where the date of the said reply was inadvertently written as 19.01.2011) would give certain information with regard to the reasons for the alleged disconnection of electricity from the said building. This subsequent development was also not brought on record by the petitioner till 09.06.2015.

Issues framed

6. On 11.11.2013 issues were framed in the said Title Suit.

Application for amendment

7. On 09.06.2015 an application for amendment of the plaint was filed by the petitioner under Order VI Rule 7 read with Section 151 of the Code of Civil Procedure, 1908 (CPC).

8. In the said application for amendment under Order VI Rule 7 of the CPC the petitioner averred that at the time of preparation of evidence on affidavit of the petitioner on close scrutiny of the plaint and documents, it was discovered that there were certain developments in the facts which transpired during the pendency of the Title Suit and it was felt necessary that those facts were pertinent and required to be incorporated in the plaint. The said facts which the petitioner sought to be incorporated in the plaint, as detailed in the said application for amendment were:-

"Proposed amendments prayed for

I. After paragraph 21 of the plaint, following paragraph may be added as paragraph 21 A

"That on 21.06.2012, the District Magistrate, East Sikkim at Gangtok passed final order in Misc. CrI. Case No. 03/DM/E of 2012, under Section 133 of CrPC against the Plaintiff and in favour of the Defendant and directed the Plaintiff to vacate the questioned building within 30 days from the date of the order. It was also ordered by the District Magistrate that should the Plaintiff fail to do so; authorised Officer-in-Charge, Pakyong Police Station to evict the Plaintiff, if necessary, by using force after expiry of the given period.

The Plaintiff then preferred revision of the impugned order passed by the District Magistrate, East Sikkim in the Court of the Hon'ble Sessions Judge, East and North Sikkim at Gangtok being Criminal Revision Case No. 04 of 2014. The Defendant contested the said Revision Case and after hearing the parties, the Hon'ble Sessions vide order dated: 20.07.2012 thereby set aside the order dated: 21.06.2012 passed by the District Collector East Sikkim at Gangtok."

II. In paragraph 25, after the words 'financial loss', the following sub paragraphs may be added

[Upon query of plaintiff under Right to Information Act with respect to the electricity connection/disconnection of the suit building from Energy and Power Department, Government of Sikkim. On 19.01.2011, Energy and Power Department responded as under:

(i) The electricity connection registered in the name of Late Dilli Ram Nepal having account no. A/39 of his RCC house situated at Pakyong Bazar has been changed in the name of his son Shri Yadap Nepal w.e.f. November 2011. Shri Yadap Nepal has made the written request for change in name vide application dated: 21.11.2011 stating that the land where the house stands has been registered in his name. He has submitted the Xerox copy of land parcha khatiyani.

(ii) Shri Yadap Nepal failed to pay his electricity arrears/bills. Disconnection notice was served on him on 12.3.2012 with due date for payment on 26.3.2012 which he did not pay. Hence the electricity supply/service to the house of Shri Yadap Nepal, consumer account No. A/39 was disconnected on 07.04.2012.

(iii) The arrears of electricity bills in the house of Shri Yadap Nepal, consumer account no. A/39 is Rs. 10,775/-.

*(iv) Enclosed: a) Xerox copy of application dated: 21.11.2011.
b) Xerox
copy of land parcha khatiyani.*

On 12.02.2013, the Plaintiff made an application under Section 151 of the CPC, incorporating above facts thereby praying for reconnection of supply of electricity in the suit building after depositing arrears, which was outstanding due to the ill motive of the Defendant. After hearing the parties, Hon'ble Court was pleased to pass following orders on 14.08.2013.

....."14. From the facts put forth it is also apparent that the power/electricity connection was not disconnected by the Power Department on account of the condition of the building but the disconnection was made only on account of the arrears of power bills not being paid by the defendant due to the reasons as already indicated above. Hence in the above circumstances, I find that it will not be essential to send a Commission as prayed by Ld. Counsel for the defendant and I also find no reason not to allow the petition of the Plaintiff.

15. *It is accordingly ordered that the electricity to the suit building be reconnected by the concerned Department and the Plaintiff be allowed to deposit the outstanding arrears of electricity bills amounting to Rs. 10,775/-.*

16. *The defendant shall refrain from creating any hindrance in the reconnection of the electricity supply in the Suit building and from the Plaintiff depositing the outstanding arrears."*

It is submitted that despite the above orders of the Hon'ble Court, the Energy and Power Department did not comply the orders of this Hon'ble Court delayed reconnection of the electricity. The Plaintiff then filed another application praying for implementation of the orders passed on 14.08.2013. Eventually, Energy and Power Department complied the orders of the Hon'ble Court and the Plaintiff was allowed to deposit arrears and supply of electricity was restored in the suit building in the month of October 2013. Since then, the electricity bills of the suit building are delivered by the Energy and Power Department to the Plaintiff and he has been regularly depositing the same.]"

The objection to the proposed amendment

9. The said application was contested by the respondent by filing an objection dated 23.07.2015 on the ground that the issue having been framed on 11.11.2013 the Title Suit had begun on 11.11.2013 and therefore, as per the proviso to Order VI Rule 17 of the CPC, 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, no application for amendment shall be allowed after the trial has commenced. It was also contested by the respondent that the pleadings which the petitioner intended to incorporate in the plaint by way of proposed amendment, related to events and matters prior to the settlement of the issues, which could have been easily raised by the petitioner before commencement of trial if the petitioner had been diligent.

Impugned Order

10. The learned Civil Judge, East Sikkim at Gangtok vide impugned Order dated 07.06.2016 rejected the application for amendment filed by the petitioner. The first amendment sought by the petitioner regarding the factum of the order under Section 133 of Cr.P.C. passed by the learned District Magistrate on 21.06.2012 and the subsequent Order of the learned Session Judge, setting aside the Order dated 21.06.2012 passed by the District Magistrate under Section 133 of Cr.P.C. was not allowed to be incorporated on the ground of delay of four years without any cogent reason. It was also observed by the learned Civil Judge that the defendant had filed the copy of the order under Section 133 of Cr.P.C. passed by the learned District Magistrate on 21.06.2012 along with other documents and had also mentioned the same in paragraph 20 of the written statement and therefore, is an admitted fact. The second amendment regarding the filling of the RTI regarding non-payment of electricity of the said building and the reply thereto from the Power and Energy Department and the order dated 14.08.2013 passed by the learned Civil Judge in a Section 151 CPC application filed by the petitioner was also rejected on the ground of delay and also that the records thereof were already on the case record.

The hearing

11. At the hearing of the present petition preferred under Article 226 and 227 of the Constitution of India Mrs. Laxmi Chakraborty, Learned Counsel for the petitioner would rely upon:- (1) ***Baldev Singh & Ors. etc. v. Manohar Singh & Anr.***¹ (2) ***Sampath Kumar v.***

¹(2006) 6 SCC 498

Ayyakannu & Anr.² (3) **Ganesh Trading Company v. Moji Ram**³ (4) **Ragu Thilak D. John v. S. Rayappan & Ors.**⁴ (5) **Messrs. Trojan & Co. Ltd. v. Rm N. N. Nagappa Chettiar**⁵. Mr. Zangpo Sherpa Learned Counsel for the respondent contesting the said Writ Petition would rely upon: (1) **Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N.**⁶ (2) **Vidyabai v. Padmalatha**⁷ (3) **J Samuel v. Gattu Mahesh**⁸. He would submit that the judgment of the Apex Court in re: **Baldev Singh (supra)** has been distinguished in re: **Vidyabai (supra)** and thus issues having been framed on 11.11.2013 and due diligence having not been shown by the petitioner the Writ Petition is liable to be dismissed.

The consideration

12. It is interesting to note that the application for amendment beside stating that while preparing the evidence on affidavit and on close scrutiny of plaint and documents, it was discovered that certain developments in the facts during the pendency of the Title Suit was felt necessary to be incorporated in the plaint and that the said amendments are formal in nature and would in no way change the nature and character of the case, did not plead anything else. Similarly, as stated above, the sole objection of the respondent to the amendment was on the ground that the trial having commenced as issues had been framed on 11.11.2013, the proviso to order VI Rule 17 of the CPC would be attracted and due diligence having not pleaded or proved by the petitioner the application for amendment was required to be necessarily rejected. It was not the case of the respondent that the pleadings sought to be incorporated by insertion

² (2002) 7 SCC 559

³ AIR 1978 SC 484

⁴ (2001) 2 SCC 472

⁵ AIR 1953 SC 235

⁶ 2006 (12) SCC 1

⁷ 2009 (2) SCC 409

⁸ 2012 (2) SCC 300

of the paragraphs reproduced above in the application for amendment were not necessary for the purpose of determining the real question in controversy between the parties. Interestingly, the impugned order also does not examine the necessity or the lack of it in the proposed amendment for the purpose of determining the real questions in controversy between the parties. The Learned Civil Judge while examining the proposed amendment was also required to be mindful of the well settled law that the decision of a case cannot be based on grounds outside the pleadings of the parties.

13. Order VI Rule 17 as stood prior to the Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 01.07.2002 would read thus:-

"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."

14. The Parliament inserted a proviso to the aforesaid Order VI Rule 17 of the CPC by the Civil Procedure Code (Amendment) Act, 2002, which reads now as under:-

"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."

15. It should be noticed that Order VI Rule 17 of the CPC read as it stood prior to the amendment in 2002 was the same, save the addition

of the proviso. Prior to the insertion of the proviso to Order VI Rule 17 of the CPC by the Civil Procedure Code (Amendment) Act, 2002, the Apex Court would examine Order VI Rule 17 of the CPC in re: **Ganesh Trading Co. (supra)** and hold as under:-

"4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its Counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.

5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional Court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.

6. In the case before us, the appellant-plaintiff Ganesh Trading Co., Karnal, had filed a suit "through Shri Jai Parkash", a partner of

that firm, based on a promissory note, dated August 25, 1970, for recovery of Rs 68,000. The non-payment of money due under the promissory note was the real basis. The suit was filed on August 24, 1973, just before the expiry of the period of limitation for the claim for payment. The written statement was filed on June 5, 1974, denying the assertions made in the plaint. It was also asserted that the suit was incompetent for want of registration of the firm and was struck by the provisions of Section 69 of the Indian Partnership Act."

16. In re:- **B. K. N. Pillai v. P. Pillai & Anr.**⁹ the Apex Court after referring to various judgments of the privy Council as well as the Apex Court on the un-amended Order VI Rule 17 of the CPC would hold:-

"The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and to such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

17. In re:- **Ragu Thilak D. John (supra)** the Apex Court would examine a case in which due to subsequent developments, the appellant therein had filed an application under the un-amended Order VI Rule 17 of the CPC in a pending suit which was rejected by the trial court and the revision thereof was also rejected by the High Court. The Apex Court would hold that if the test as pointed out in re:- **B. K. N. Pillai (supra)** quoted above was applied, the amendment sought could not be declined. It was held that the dominant purpose of allowing the amendment is to minimise the litigation. It was further held that the plea that the relief sought by way of amendment was barred by time is arguable in the

⁹ JT 1999 (10) SC 61

circumstances of the case, as is evident from the perusal of averments made in the plaint which was sought to be incorporated by way of amendment. It was also held that in the circumstances of the case the plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment.

18. In a case relating to an application for amendment filed in the year 1999, before the commencement of the trial by a judgment rendered on 13.09.2002, the Apex Court in re: **Sampath Kumar (supra)**, while explaining the mandate of Order VI Rule 17 of CPC would hold :-

"9. Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. (See observations in Siddalingamma v. MamthaShenoy (2001) 8 SCC 561)"

19. In re: **Salem Advocate Bar Association v. Union of India**¹⁰, the Apex Court would examine the legality of Order VI Rule 17 of the CPC as amended by the Civil Procedure (Amendment) Act, 2012 and hold:-

"Order 6 Rule 17

26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

20. The Apex Court in a post amendment case in re: **Baldev Singh and Ors. (Supra)** would examine the legality of a judgment of the High Court affirming an Order rejecting an application for amendment of a written statement passed by the Additional Civil Judge. In the said case a suit had been filed for declaration by the plaintiff/respondent No.1 therein. The defendant/appellant therein entered appearance and filed the written statement. During the pendency of the suit, an application for amendment of the written statement was filed. The Apex Court would thus hold:-

"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,

¹⁰(2005) 6 SCC 344

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 to the court to allow an amendment of the written statement at any stage of the proceedings."

21. In re: **Ajendraprasadji N. Pandey (supra)** was a case in which issues had been framed and the plaintiffs had filed their affidavit of examination-in-chief. The amendment application had not pleaded any facts or grounds raised to even remotely contended that despite exercise of due diligence those matters could not be raised. The Apex Court would examine the implication of the amended Order VI Rule 17 of CPC to the said facts and hold :

"42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

Then again:

"54. *In our opinion, the facts abovementioned would also go to show that the appellants are lacking in bona fides in filing this special leave petition before this Court. It is also to be noticed that the High Court has recorded relevant points in its elaborate judgment dated 5-10-2005 and have been dealt with despite the opposition of the contesting respondents that these pleas were not taken in the written statement. Under these circumstances, non-seeking of appropriate amendment at appropriate stage in the manner envisaged by law has disentitled the appellants to any relief. The amendment, in our view, also seeks to introduce a totally new and inconsistent case. [emphasis supplied]*

55. *We have carefully perused the pleadings and grounds which are raised in the amendment application preferred by the appellants at Ext. 95. No facts are pleaded nor are any grounds raised in the amendment application to even remotely contend that despite exercise of due diligence these matters could not be raised by the appellants. Under these circumstances, the case is covered by proviso to Rule 17 of Order 6 and, therefore, the relief deserves to be denied. The grant of amendment at this belated stage when deposition and evidence of three witnesses is already over as well as the documentary evidence is already tendered, coupled with the fact that the appellants' application at Ext. 64 praying for recasting of the issues having been denied and the said order never having been challenged by the appellants, the grant of the present amendment as sought for at this stage of the proceedings would cause serious prejudice to the contesting respondent-original plaintiffs and hence it is in the interest of justice that the amendment sought for be denied and the petition be dismissed. [emphasis supplied]*

56. *An argument was advanced by Mr Parasaran that affidavit filed under Order 18 Rule 4 constitutes examination-in-chief. The marginal note of Order 18 Rule 4 reads recording of evidence. The submission is that after the amendments made in 1999 and 2002 filing of an affidavit which is treated as examination-in-chief falls within the amendment (sic ambit) of phrase "recording of evidence".*

57. *It is submitted that the date of settlement of issues is the date of commencement of trial. (Kailash v. Nanhku [(2005) 4 SCC 480]) Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in*

the counter-affidavit which proves lack of due diligence on the part of Defendants 1 and 2 (the appellants)."

Then again:

"60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence. As held by this Court in Kailash v. Nanhku [(2005) 4 SCC 480] the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

61. We can also usefully refer to the judgment of this Court in Baldev Singh v. Manohar Singh [(2006) 6 SCC 498] for the same proposition. A perusal of the proposed amendment would show that it contains numerous averments. So far as the averments in the proposed amendments are concerned, at p. 12 of the order in para 22, the appellants admit that all the issues raised by way of proposed amendment in the written statement were taken before this Court in the appeal from order filed by the present defendants in the civil appeal filed before this Court and again in the special leave petition filed subsequently. As rightly pointed out by learned Senior Counsel, any section should not be so interpreted that part of it becomes otiose and meaningless and very often a proviso itself is read as a substantive provision it has to be given full effect."

22. In re: **Vidyabai (supra)**, was a case in which an application for amendment was filed under Order VI Rule 17 of the CPC seeking to amend the written statement in a suit for specific performance of a contract filed by the appellant/plaintiff therein where issues were framed, affidavits were filed regarding evidence and dates were fixed for cross examination. The application for amendment having been rejected by the Civil Judge and the writ not allowed by the High Court, the Apex Court would examine the proviso to Order VI Rule 17 of the CPC in such facts. The High Court in that case had held that according to Order VI Rule 17 of the CPC, an amendment application can be filed at any stage of the proceeding and filing of an affidavit by way of evidence itself is not a

good ground to reject the application filed seeking amendment of written statement. The Apex Court would re-examine the mandate of Order VI Rule 17 of the CPC, the various precedents of the Apex Court regarding the meaning of the terms "trial" and "commence" and hold :-

"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

"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."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. 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.

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".

Then again:

"19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

20. In Salem Advocate Bar Assn. [(2005) 6 SCC 344] this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question.

Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly."

23. In re: **Vidyabai (supra)** the Apex Court would explain that the judgment passed by the Apex Court in re: **Baldev Singh (supra)** in the following words:-

"16.....it is not an authority for the proposition that the trial would not be deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence."

24. In re: **J Samuel (supra)** the Apex Court would examine the effect of seeking an amendment under the amended Order VI Rule 17 of the CPC, on the sole ground that the omission of the specific averment was by "type mistake". This was found to be a clear lack of "due diligence". In such circumstances the Apex Court would hold:-

"19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

25. The Apex Court would once again be called upon to examine the amended Order VI Rule 17 of the CPC, in a case in which the application for amendment had been rejected by the trial court and the revision thereof was also dismissed by the High Court. In re: **Abdul Rehman & Anr. v. Mohd. Ruldu & Ors.**¹¹ would hold:-

"11. The original provision was deleted by Amendment Act 46 of 1999, however, it has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The above proviso, to some extent, curtails absolute discretion to allow amendment at any stage. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimise the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case. The above principles have been reiterated by this Court in J. Samuel v. Gattu Mahesh [(2012) 2 SCC 300 : (2012) 1 SCC (Civ) 801] and Rameshkumar Agarwal v. Rajmala Exports (P) Ltd. [(2012) 5 SCC 337 : (2012) 3 SCC (Civ) 92] Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment."

26. The petitioner as well as the respondent are ad idem that the issues was framed on 11.11.2013. On a query raised by this Court the Learned Counsel appearing for the petitioner submits that the petitioner is yet to file his evidence on affidavit. The application for amendment also pleads that while preparing the evidence on affidavit the need to file

¹¹ (2012) 11 SCC 341

the application for amendment was felt. The respondent has not contested the aforesaid facts. The relevant pleading in the application for amendment as to why the petitioner was filing the said application for amendment is found in paragraph 3 and 4 thereof which states:-

"3. That at the time of preparation of Evidence-on-affidavit of the plaintiff and on close scrutiny of the plaint and documents, it is discovered that there are certain developments in the facts during the pendency of the instant suit. It is submitted that it is felt necessary that those facts are pertinent and requires to be incorporated in the plaint. Hence this application.

4. That the amendment sought for are very much formal in nature and shall in no way change the nature and character of the case."

27. A perusal of paragraph 3 and 4 of the application for amendment extracted above makes it clear that it was only at the time of preparation of evidence on affidavit of the petitioner and on close scrutiny of the plaint and documents it was felt necessary to incorporate certain developments in the facts during the pendency of the Title Suit.

28. The proposed amendment seeks to incorporate the fact of passing of the Order dated 21.06.2012 by the District Magistrate under Section 133 of Cr.P.C. and the subsequent Order of the Learned Sessions Judge dated 20.07.2013 setting aside the said Order dated 21.06.2012 passed by the District Magistrate and the passing of the order dated 14.08.2013 passed by the learned Civil Judge. The Order dated 21.06.2012 passed by the District Magistrate was passed after the filing of the plaint. It is seen that the proceedings under Section 133 of Cr.P.C. had already been initiated before the filing of the plaint. Necessary pleadings regarding the same have been incorporated in paragraphs 18, 19, 20, 21 and 22 of the plaint and related documents have also been filed in the list of documents filed as item Nos. 10, 11 and 12 thereof by

the petitioner. The Order of the Learned Sessions Judge is dated 20.07.2012 and as such this fact was also not available at the time of filing the plaint. The proposed amendment also seeks to incorporate the factum of the information received from the Energy and Power Department, Government of Sikkim on an application filed by the petitioner under the Right to Information Act, 2005. The said application was filed by the petitioner on 21.12.2012 and the information provided by the Power & Energy Department was on 19.01.2013. These facts were also subsequent to the filing of the plaint on 05.05.2012. The proposed amendment also seeks to incorporate facts relating to the non payment of electricity bills of the building and related facts thereto. The foundation of the said facts is found in paragraph 2 of the plaint in which it is stated that the petitioner had been continuously depositing the electricity bill of the building as per his consumption. Similarly, paragraph 25 of the plaint also avers about the disconnection of the electricity supply by the respondent. It is quite evident that the subsequent facts are necessary for the purpose of determining the real questions in controversy between the parties. The reliefs sought for under the proposed amendment had already been set out in the un-amended plaint. The necessary factual basis for amendment being already incorporated in the plaint the proposed amendments would also not change the nature of the suit.

29. It is well settled that Order VI Rule 17 of CPC is intended for promoting the ends of justice and definitely not for defeating them. As held in re: **Ganesh Trading Co. (supra)** even if a party or his council is inefficient in setting out his case initially the short coming can certainly be removed generally by appropriate steps taken by a party to meet the ends of justice. Order VI Rule 17 of CPC confers jurisdiction on the Court to allow the amendment "at any stage of the proceedings" if the said

amendments are necessary for the purpose of determining the real questions in controversy between the parties. This law hasn't changed. Order VI Rule 17 of CPC remains identically worded, save the new proviso. The object of the incorporation of the proviso to Order VI Rule 17 of CPC by the Civil Procedure Code (amendment) Act, 2002 is to prevent frivolous application which is filed to delay the trial. The proviso curtails, to some extent, the absolute discretion to allow amendment at any stage. After the incorporation of the proviso, if the application is filed "after commencement of trial" then the party seeking amendment must also show "due diligence". As held in re: **Vidyabai (supra)** the date of first hearing in the present case was 11.11.2013 when the issues were framed and filing of an affidavit in lieu of examination of chief of the witness would amount to "commencement of proceedings". However, in the present case, admittedly, the evidence on affidavit of the petitioner is yet to be filed.

30. In the present case the date of first hearing was set on 11.11.2013 when issues were framed under Order XIV Rule 1, CPC. After the framing of issues parties are required to present to the Court a list of witnesses and obtain summonses to such persons for their attendance under Order XVI, CPC. Hearing of the suit and examination of witnesses are to be done in the manner provided under Order XVIII, CPC. The plaintiff has a right to begin unless the defence admits the facts. On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. In the present case, admittedly, the Petitioner as the plaintiff has not filed his evidence on affidavit and is yet to lead his evidence. It is thus clear that although the date of first hearing was set on 11.11.2013 when

the issues were framed and thus the trial is deemed to have commenced then, the trial had not effectively commenced as the petitioner was yet to file his affidavit in evidence. In such circumstances it is also quite evident that no prejudice would occasion the respondent if the proposed amendment which have been found necessary for the purpose of determining the real questions in controversy between the petitioner and the respondent, is allowed. The respondent would have full opportunity of meeting the case of the petitioner as amended. It is also clear that in spite of due diligence the petitioner could not have incorporated the proposed amendment in the plaint as all of it transpired after the filing of the plaint. The facts would, however, reveal that the final Order of the District Magistrate dated 21.06.2012 was set aside by the Order of the Learned Sessions Judge on 20.07.2012. Similarly, the application of the petitioner under the Right to Information Act, 2005 was made on 21.12.2012 and the reply thereto obtained on 19.01.2013. All these events were prior to the issue being framed on 11.11.2013. The trial having not effectively commenced, a liberal approach is required while considering the application for amendment. Mere delay cannot be ground for refusing a prayer for amendment. Mrs. Laxmi Chakraborty, Learned Counsel for the petitioner, fairly concedes that the inadvertent error of not seeking to amend the plaint earlier was due to her and the same may not be allowed to prejudice the petitioner. Due diligence of the petitioner cannot in such circumstances be equated to the due diligence of the Counsel for the petitioner. After all as held by the Apex Court in re: **Rani Kusum (SMT) v. Kanchan Devi (SMT) & Ors.**¹²

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in

¹² (2005) 6 SCC 705

the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

31. This Court, thus, is of the opinion that the impugned judgment of the Learned Civil Judge dated 07.06.2016 which has failed to even consider whether the proposed amendment was or not necessary for the purpose of determining the real questions in controversy between the parties must be set aside.

32. The Writ Petition is allowed, the impugned judgment of the Learned Civil Judge dated 07.06.2016 is set aside, the proposed amendment vide the application for amendment sought for by the petitioner is also allowed. The typographical error in the date of the reply to RTI application as pointed out by the Learned Counsel for the petitioner and noted above may be allowed to be rectified, if sought for.

33. However, this is a fit case in which cost should be imposed on the petitioner. Accordingly the petitioner shall pay a cost of ₹2000/- (Rupees two thousand) to the respondent.

Sd/-
(Bhaskar Raj Pradhan)
Judge
15-09-2017