

W.P. (C) No. 38 of 2021
Jigmi Phunchok Bhutia vs. Aishwarya Rai & Anr.
AND
W.P. (C) No. 19 of 2022
Jigmi Phunchok Bhutia vs. Aishwarya Rai & Anr.

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extraordinary Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 38 of 2021

Mr. Jigmi Phunchok Bhutia,
S/o late Sonam Topden Bhutia,
Residing at Children Park,
Tibet Road, Gangtok,
East Sikkim.

..... Petitioner

Versus

1. Miss Aishwarya Rai,
D/o late Gyanson Rai,
Permanent R/o Dokan Dara, Kurseong,
District Darjeeling, West Bengal,

Presently residing at Maskey Villa,
Near Durga Mandir, Lower Sichey,
P.O. Gangtok, East Sikkim.

2. General Public.

..... Respondents

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

*(Petition challenging Order dated 25.09.2021, passed by
learned Civil Judge, East Sikkim at Gangtok in Title Suit No. 39 of
2014).*

Appearance:

Mr. Souri Ghosal and Mr. Amresh Kumar Mandal,
Advocates for the Petitioner.

Mr. N. B. Khatiwara, Senior Advocate with Ms. Navtara
Sarda, Legal Aid Counsel for Respondent No.1.

AND

W.P. (C) No. 19 of 2022

Mr. Jigmi Phunchok Bhutia,
S/o late Sonam Topden Bhutia,
Residing at Children Park,
Tibet Road, Gangtok,
East Sikkim.

..... Petitioner

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Versus

1. Miss Aishwarya Rai,
D/o late Gyanson Rai,
Permanent R/o Dokan Dara, Kurseong,
District Darjeeling, West Bengal,

Presently residing at Maskey Villa,
Near Durga Mandir, Lower Sichey,
P.O. Gangtok, East Sikkim.

2. General Public.

..... Respondents

Application under Article 227 of the Constitution of India.

*(Petition challenging Order dated 21.03.2022 passed by
learned Civil Judge, East Sikkim at Gangtok in Title Suit No. 39 of
2014).*

Appearance:

Mr. Souri Ghosal and Mr. Amresh Kumar Mandal,
Advocates for the Petitioner.

Mr. N. B. Khatiwara, Senior Advocate with Ms. Navtara
Sarda, Legal Aid Counsel for Respondent No.1.

26.07.2022

J U D G M E N T (ORAL)

Bhaskar Raj Pradhan, J.

1. This judgment shall dispose of two petitions filed under Article 227 of the Constitution of India. W.P. (C) No.38 of 2021 seeks to assails the order dated 25.09.2021 passed by the learned Civil Judge, East Sikkim at Gangtok in Title Suit No.39 of 2014. By the Order dated 25.09.2021 the learned Civil Judge disallowed the application filed by the petitioner to exempt him from paying the cost imposed for the failure

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to file written statement to the amended plaint filed by the respondent no.1. W.P. (C) No. 19 of 2022 assails the order dated 21.03.2022 passed by the learned Civil Judge, East Sikkim at Gangtok in the same suit by which an application under Order 1 Rule 10 (4) CPC filed by the respondent no.1 was allowed in toto.

2. At this juncture it would be relevant to note certain facts crucial for deciding these petitions. In the year 2014 the respondent no.1 filed a suit for declaration of title. It was the respondent No.1's claim that she is the daughter of late Sonam Topden Bhutia and accordingly a declaration was sought to the effect. A further declaration was also prayed that she should be called Aishwarya Bhutia daughter of late Sonam Topden Bhutia in all her official documents. The suit was filed against the general public. By a judgment dated 24.07.2015 the learned Civil Judge dismissed the suit. In an appeal filed by the respondent no.1 on 22.07.2016 the learned District Judge found that the petitioner was a necessary party as he would be directly affected by the outcome of the case and added him as a defendant. Subsequently on 25.09.2017 the learned District Judge held that given the nature of the suit and the reliefs prayed for there could be no doubt that the petitioner, the respondent

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no.1 and other legal heirs ought to have been arrayed as parties in the suit as they were necessary parties. The impugned judgment of the trial court of the learned Civil Judge rendered in the absence of necessary parties was set aside and the matter remanded for impleading the legal heirs of late Sonam Topden Bhutia as defendant in the suit. The respondent no.1 who was the plaintiff in the suit was allowed to amend her pleadings to the extent required. On 09.11.2017 the respondent no.1 filed the amended plaint. On 14.05.2018 the amended plaint filed by the respondent no.1 was accepted by the Trial Court dismissing the objection raised by the petitioner that the amended plaint sought to change the nature and character of the original suit. The learned Civil Judge held that the suit was remanded with permission to make all necessary changes after impleading the necessary parties which meant that the respondent no.1 could also claim the properties which had come to their knowledge subsequently lest it is barred by law. It interpreted the term "*extent required*" used by the learned District Judge in the remand order to be a broad term which would permit such an amendment. Accordingly, the objection filed by the petitioner was dismissed. The same order dated 14.05.2018 also referred to an application under Order 6 Rule 17 and Order 7 Rule 14(3) filed by the

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petitioner which was decided to be heard subsequently. On 08.06.2018 these applications were considered and allowed. On 29.03.2019 this court in CRP No. 05 of 2018 examined the order dated 14.05.2018 passed by the learned Civil Judge. The respondent no.1 conceded that the procedure prescribed by law had not been adhered to and therefore, he had no objection if the order is set aside. Accordingly, the order dated 14.05.2018 passed by the learned Civil Judge was set aside. An application for withdrawal of plaint under Order 23 Rule 1 (3) of the CPC filed on 27.05.2019 by the respondent no.1 was rejected by the learned Civil Judge on 28.06.2019. Thereafter, on 09.07.2019 the respondent no.1 filed an application under Order 6 Rule 17 for amendment. By this application various amendments were sought for including additional facts and additional prayers which, according to the petitioner, would change the nature and character of the original suit itself. It included prayers with regard to various properties which was not the subject matter of the original suit. On 10.09.2019 this application under Order 6 Rule 17 CPC was allowed by the learned Civil Judge. On 23.09.2019 the respondent no.1 filed the amended plaint and the learned Civil Judge fixed the date 01.10.2019 for filing amended written statement. On 01.10.2019 instead of filing the amended written statement

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as directed the petitioner chose to file an application under Order 39 Rule 1 and 2 CPC. The learned Civil Judge granted the petitioner further time till 14.10.2019 to file the amended written statement as a final opportunity and observing that failure to do so would entail a cost of Rs.10,000/- for trying to delay the matter. Since, the learned Civil Judge did not preside over the court on 14.10.2019 the matter was taken up on 17.10.2019 on which date the petitioner filed yet another application under order 7 Rule 10 (4) CPC challenging the pecuniary jurisdiction of the learned Civil Judge. The learned Civil Judge also passed an order on the same date reminding the learned counsel for the petitioner about the cost imposed upon them on 01.10.2019 and directed them to either comply with the order or file an appropriate application on the next date. On 05.11.2019 the petitioner filed an application seeking exemption from paying the cost imposed. On 07.11.2019 the petitioner's appeal being FAO No 3 of 2018 against the order dated 25.9.2017 passed by the learned District Judge, Special Division-I was admitted and further proceedings in the suit was suspended. On 06.03.2021 this court dismissed the appeal preferred by the petitioner and the order passed by the learned District Judge was upheld with the observation that the parties were

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at liberty to take recourse of law as permissible while deciding the suit afresh on its restoration. On 03.08.2021 W.P. (C) No. 26 of 2021 challenging the order dated 10.09.2019 passed by the learned Civil Judge allowing the application under Order 6 Rule 17 CPC seeking amendment of the plaint was allowed and the order dated 10.09.2019 was set aside. This court further observed that considering the judgment of the learned District Judge dated 25.09.2017 which was affirmed by this court on 06.03.2021 in FAO No. 3 of 2018 the legal heirs of late Sonam Topden Bhutia should be impleaded as defendants in the suit and amendment for the said purpose to the extend required can be permitted if prayed by the respondent no.1. With the said observation this court permitted the respondent no.1 to amend the plaint afresh. On 06.08.2021 the learned Civil Judge noted the order passed by this court on 03.08.2021 in W.P. (C) No. 26 of 2021. The learned Civil Judge granted time to the respondent no.1 to file objection to the application filed by the petitioner for exemption in paying the cost imposed. The objection was filed on 25.08.2021, matter heard on 13.09.2021 and on 25.09.2021 the order impugned in W.P. (C) No. 38 of 2021 was passed. Thereafter, on 28.12.2021 the respondent no.1 filed an application under Order 1 Rule 10 (4) read with section 151 CPC

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praying for various amendments once again not only adding the legal heirs of late Sonam Topden Bhutia as necessary parties but also seeking to amend the entire suit with various pleadings and praying for various reliefs. The application stated that subsequent to the filing of the suit certain new facts were revealed to the respondent no.1 which has a direct bearing on the outcome of the case and as such the respondent no.1 seeks to introduce a new cause of action which is arisen to the respondent no.1 during the pendency of the suit. It further averred that the respondent no.1 came to know that on 18.12.2015 that the properties belonging to her father late Sonam Topden Bhutia had been transferred to the names of the petitioner (defendant no.1, defendant no.2 and defendant no.3) and further that the Certificate of Identification of the defendant nos. 1 and 2 have been cancelled by the Additional District Magistrate, East and South Sikkim on the basis of a complaint filed by the respondent no.1. Thus, the respondent no.1 vide the application under Order 1 Rule 10 (4) CPC sought to change the cause title of the plaint making the petitioner, Angela Penzum Bhutia and Elimith Lepcha as necessary parties; to change the suit from a declaratory suit to a suit for ejectment, recovery of possession and other reliefs as well. It also sought to insert various paragraphs in the plaint

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necessary for grant of the prayers for ejectment, recovery of possession and other reliefs as well. The respondent no.1 also sought for the following:-

“

(xxxii) *To redraw the prayers in Paragraph 32 of the Plaint which will read, “PRAYERS In the facts and circumstances as stated herein above, the Plaintiff prays for the following reliefs:-*

- (i) *A decree declaring that the Plaintiff is the daughter of Late Sonam Topden Bhutia.*
- (ii) *A decree declaring that the Plaintiff shall henceforth be known and called as Aishwarya Bhutia daughter of Late Sonam Topden Bhutia;*
- (iii) *A decree declaring that the Defendants No. 1 & 2 Jigmi Phunchok Bhutia and Angela Penzum are not the son and daughter of Late Sonam Topden Bhutia.*
- (iv) *A decree declaring that the Defendant No.3 is not the daughter in law of the Plaintiff's father Late Sonam Topden Bhutia;*
- (v) *A decree declaring that the Plaintiff is the sole inheritor and absolute owner of Schedule A property by being only biological child of Late Sonam Topden Bhutia.*
- (vi) *A decree declaring that the transfer of Schedule B and C property unto the name of Defendant No.1 is null and void being void ab initio;*
- (vii) *A decree declaring that the transfer of Schedule D property unto the name of Defendant No.2 is null and void being void ab initio;*
- (viii) *A decree declaring that the transfer of Schedule E property unto the name of Defendant No.3 is null and void being void ab initio;*

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- (ix) *A decree of ejectment against the Defendant No.1 from Schedule B and C properties.*
- (x) *A decree of ejectment against the Defendant No.2 from Schedule D property.*
- (xi) *A decree of ejectment against the Defendant No.3 from Schedule E property.*
- (xii) *A decree transferring the khas possession of Schedule B and C properties from Defendant No.1 to the Plaintiff.*
- (xiii) *A decree transferring the khas possession of Schedule D property from Defendant No.2 to the Plaintiff.*
- (xiv) *A decree transferring the khas possession of Schedule E property from Defendant No.3 to the Plaintiff.*
- (xv) *A decree for mesne profit.*
- (xvi) *Any order or direction or declaration as this Hon'ble Court may deem fit and proper, in the interest of justice and equity.*

.....”

3. This application was allowed by the learned Civil Judge on the ground that the respondent no.1 had rightly filed an application under Order 1 Rule 10(4) CPC to amend the plaint upon impleading new defendants to the suit in the light of the orders passed by the court of the learned District Judge as well as this Court. The learned Civil Judge not only allowed the impleadment of the legal heirs of late Sonam Topden Bhutia but also allowed the respondent no.1 to amend the plaint from a suit for declaration to a suit of

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ejectment and recovery of possession of properties changing the nature and character of the original suit itself.

4. It would be relevant to consider the two applications filed by the respondent no.1. One was under Order 6 Rule 17 CPC and the other under Order 1 Rule 10 (4) CPC. Admittedly, the amendments sought for in both these applications and the prayers therein were substantially the same. The first application under Order 6 Rule 17 CPC which was initially permitted by the learned Civil Judge was subsequently set aside by this court and therefore, the amendments sought for in that application were disallowed. The order dated 03.08.2021 in W.P. (C) No. 26 of 2021 was clear. The order dated 10.09.2019 allowing the application under Order 6 Rule 17 CPC was set aside. This court not only did that but made it further clear that the respondent no.1 shall be permitted to amend the plaint only to the extent of impleading the legal heirs of late Sonam Topden Bhutia as defendants in the original suit filed by the respondent no.1 and amendment to the extent required was permitted. However, without any deference to the order passed by this court the respondent no.1 sought to use Order 1 Rule 10 (4) CPC to annul the consequence of the

application filed by her under Order 6 Rule 17 CPC. Order 1 Rule 10 (4) CPC provides:

“10.(4) Where defendant added, plaint to be amended.- Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.”

5. Order 6 Rule 17 CPC provides:

“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”.

6. In **Asian Hotel (North) Ltd. vs. Alok Kumar Lodha**¹ the Supreme Court considered the impugned common judgment and order dated 15.09.2021 passed by the High Court of Delhi in applications filed in commercial suits under Order 1 Rule 10 and Order 6 Rule 17 CPC, by which, all the applications submitted on behalf of the original plaintiff was allowed. The High Court had permitted the original plaintiff

¹ 2022 SCC OnLine SC 844

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to amend the respective suits and had also ordered impleadment of the mortgagees. The Supreme Court held that. *“As per the settled proposition of law, if, by permitting plaintiffs to amend the plaint including a prayer clause nature of the suit is likely to be changed, in that case, the court would not be justified in allowing the amendment. It would also resulting mis-joinder of causes of action”*. The Supreme Court further held that the High Court had committed serious error in allowing the application under Order 6 Rule 17 and under Order 1 Rule 10 CPC by permitting the original plaintiffs to amend the plaint including prayer clause by which, the plaintiffs have now prayed to declare the charges/mortgages on the entire premises as void ab-initio and permitting the original plaintiff to join/implead the respective banks/financial institutions as party defendant. It held that in a suit challenging revocation of respective licenses, the plaintiffs cannot be permitted to challenge the respective mortgages/charges created on the entire premises as void ab-intio. Thus, the impugned orders passed by the High Court allowing the applications under Order 6 Rule 17 and under Order 1 Rule 10 CPC were quashed and set aside.

7. Order 1 Rule 10 (4) CPC enables the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settled all the questions involved in the suit. The Supreme Court in **Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay**² held that if addition of parties means the addition of new cause of action and widening of a particular issue, the party should not be added in such a situation. The mere fact that a fresh litigation could be avoided is also no ground. The addition of a party may be allowed when it is found by the court that the party sought to be added is a necessary party or a proper party in whose absence the suit cannot be decided or no effective decree can be passed.

8. Whereas Order 1 Rule 10(4) CPC relates to impleadment of a new defendant it also permits amendment of the plaint as may be necessary in view of the impleadment of the new defendant. Order 6 Rule 17 CPC relates to amendments of pleadings. The amendment sought for by the respondent no.1 in her application under Order 6 Rule 17 has already been decided by this court vide order dated

² (1992) 2 SCC 524

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03.08.2021 in W.P. (C) No. 26 of 2021. The respondent no.1 as well as the learned Civil Judge was required to comply with the same. Instead the respondent no.1 sought to reopen and re-agitate the same amendments which had already been considered by this court and rejected by filing the application under Order 1 Rule 10 (4) CPC. The impugned order dated 21.03.2022 decided the application under Order 1 Rule 10 (4) CPC seeking not only impleadment of parties but also various amendments beyond the scope of the provision. On the touch stone of the law clearly laid down by the Supreme Court it is quite evident that the learned Civil Judge has failed to consider whether the amendment sought for by the respondent no.1 in their application under Order 1 Rule 10 (4) CPC would change the nature and character of the original suit itself which would have been clear if the orders passed by this court (supra) would have been carefully considered. Further, by allowing the application under Order 1 Rule 10 (4) CPC of the respondent no.1 filed after the order dated 03.08.2021 in W.P. (C) No. 26 of 2021 the learned Civil Judge seems to have brought to naught the order of this court dated 03.08.2021 in W.P. (C) No.26 of 2021 by which identical prayers of amendment was disallowed. This is simply impermissible. The application under Order 1 Rule 10 (4)

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CPC was clearly ill advised. The amendments prayed for in the application under Order 1 Rule 10 (4) CPC beyond what was permitted by this court on 03.08.2021 could not have been allowed by the learned Civil Judge. To that extent the amendment sought for would have changed the nature and character of the original suit itself which is impermissible. The prayers as prayed for in paragraph (iii) to (xv) in the application under Order 1 Rule 10 (4) CPC which would change the nature and character of the original suit cannot be granted in the application. Accordingly, the impugned order dated 21.03.2022 passed by the learned Civil Judge, East Sikkim at Gangtok is set aside.

9. Insofar as W.P. (C) No.38 of 2021 is concerned considering the totality of the case and the fact that till date there is no amended plaint as permitted by this court and the order dated 10.09.2019 passed by the learned Civil Judge having been set aside by this court by order dated 03.08.2021 the question of filing written statement even at this stage would not arise. In such view of the matter the cost imposed upon the petitioner for not filing the written statement within the time frame prescribed by the learned Civil Judge is also set aside.

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10. The respondent no.1 is given a final opportunity to file an amended plaint only to the extent of impleading the legal heirs of late Sonam Topden Bhutia as defendants and making the necessary pleadings to substantiate the same in the plaint without changing the nature and character of the original suit. On receipt, after giving an opportunity of hearing to the petitioner, the learned Civil Judge shall consider the impleadment and consequential amendments sought for by examining the original plaint, the order dated 03.08.2021 passed by this court in W.P. (C) No. 26 of 2021 as well as Order 1 Rule 10 (4) CPC and thereafter, implead them and allow only such amendments as has been directed by this court. The respondent no.1 shall file the amended plaint within a period of 20 days from today, failing which the learned Civil Judge shall proceed further as per law. Both the petitions are allowed and disposed of.

**(Bhaskar Raj Pradhan)
Judge**

to/ Approved for reporting: **Yes/No**
Internet : **Yes/No**