

W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju 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. 35 of 2023

1. Shri Chandu Sherpa,
S/o Late Lakey Sherpa,
Aged about 48 years,
R/o 3rd Mile Bojoghari,
Gangtok District, Sikkim,
Pin No. 737 101.
2. Ms. Lhamu Sherpa,
Daughter of Late Lakey Sherpa,
Aged about 29 years,
R/o 3rd Mile Bojoghari,
Gangtok District, Sikkim
Pin. 737 101.
3. Ms. Dawa Lhamu Sherpa,
Daughter of Lt. Lakey Sherpa,
Aged about 25 years,
R/o 3rd Mile Bojoghari,
Gangtok District, Sikkim
Pin. 737 101.
4. Smt. Phul Maya Sherpa,
Wife of Late Lakey Sherpa,
Aged about 44 years,
R/o 3rd Mile Bojoghari,
Gangtok District, Sikkim
Pin. 737 101.

..... Petitioners

Versus

1. Raju Rai,
S/o of Shri Dhan Bahadur Rai,
R/o 3rd Mile Bojoghari,
District, Sikkim
P.O. Gangtok,
Pin. 737 101.



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

2. District Collector-cum-Registrar,
Office of the District Collectorate,
District Administrative Centre,
Sichey, Gangtok, Sikkim,
Pin No. 737 101.

..... Respondents

**Petition under Article 227 of the Constitution of
India.**

*Impugned order dated 29.08.2023, passed by the learned Civil Judge,
Gangtok in Title Suit Case No. 11 of 2017, titled as Chandu Sherpa
versus Raju Rai & Anr. wherein the Trial Court had allowed the
application of the respondent no.1 for amendment of written statement
under Order VI, Rule 17 read with section 151 of the Code of Civil
Procedure, 1908.*

Appearance:

Mr. Dewen Sharma Luitel and Mr. Bhaichung Bhutia,
Advocates for the Petitioners.

Mr. N. Rai, Senior Advocate with Mr. Yozan Rai and
Mr. Pradeep Tamang, Advocates for the Respondent
No.1.

Mr. S.K. Chettri, Government Advocate for the
Respondent No.2.

Date of Hearing : 07.08.2024

Date of Judgment : 16.08.2024

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This petition is filed under Article 227 of the
Constitution of India challenging the impugned Order dated
29.08.2023 passed by the learned Civil Judge, Gangtok



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

Sikkim disposing of the three applications filed by the respondent no.1 (defendant no.1).

2. It is settled law that the supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the district judiciary within the bounds of their jurisdiction when the Court has assumed jurisdiction which it did not have or has failed to exercise a jurisdiction which it had or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby.

3. Heard the learned counsel for the parties. The learned Government Advocate representing the respondent no.2 submits that as the issue pertains to the objection of the plaintiffs to the amendments in the written statements filed by the defendant no.1 he has nothing to contest.

4. The learned Counsel for the plaintiff is aggrieved by the impugned Order to the extent that it allowed certain amendments in the written statement although, according to him, the defendant no.1 had failed to show “*due diligence*” for not having raised the matter before the



commencement of the trial. The establishment of the exercise of due diligence before the commencement of trial, it is argued, is an imperative requirement before amendment is allowed in cases where amendment is sought after the commencement of trial. Further it was contended that although the application for amendment pleaded that certain typographical errors had crept in for which the amendment was sought, the amendment proposed was much beyond typographical errors. The defendant no.1 sought to introduce certain other facts which were not pleaded in the written statement filed earlier. The learned Counsel submitted that the defendant no.1 was seeking to fill in lacunae in his case which was not permissible.

The question raised

5. The questions therefore, raised by the learned counsel for the plaintiff is whether the defendant No.1 had exercised due diligence?; whether the defendant no.1 was seeking to introduce new facts to fill in the lacunae in his case?; and whether the present petition is a fit case to exercise the discretionary power under article 227 of the Constitution?



The provision of law

6. Central to the question raised by the learned Counsel for the petitioner is the provision of Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC) which is extracted herein 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.”

7. The learned Counsel for the parties cited several judgments seeking to explain to this Court the scope and ambit of the said provisions.

The precedents

8. In *J. Samuel and ors. vs. Gattu Mahesh & Ors.*¹ the Supreme Court considered the provision in a case where application for amendment of the plaint was filed after the arguments were concluded and matter posted for judgment. In that background the Supreme Court

¹ (2012) 2 SCC 300



explained what was meant by the words “*due diligence*” and concluded in the following words:

“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.*

21. *In the given facts, there is a clear lack of “due diligence” and the mistake committed certainly does not come within the preview of a typographical error. The term “typographical error” is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code”.*

9. In ***Chander Kanta Bansal vs. Rajinder Singh Anand***² while examining the provision of Order VI Rule 17 of the CPC to consider and application for amendment the Supreme Court explained “*due diligence*” in this manner:

“16. *The words “due diligence” have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the*

² (2008) 5 SCC 117



word “diligence” means careful and persistent application or effort. “Diligent” means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), “diligence” means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. “Due diligence” means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) “due diligence”, in law, means doing everything reasonable, not everything possible. “Due diligence” means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs”.

10. In *Usha Balashaheb Swami and ors. vs. Kiran Appaso Swami & Ors.*³ the Supreme Court considered an application for amendment of written statement and the provision of Order VI Rule 17 of the CPC and held:

“19. It is equally well-settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

20. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case (see *B.K. Narayana Pillai v. Parameswaran Pillai* [(2000) 1 SCC 712] and *Baldev Singh v. Manohar Singh* [(2006) 6 SCC 498]). Even the decision relied on by the plaintiff in *Modi Spg.* [(1976) 4 SCC 320] clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in *Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary* [1995 Supp (3)

³ (2007) 5 SCC 602



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

SCC 179] . In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in *Basavan Jaggu Dhobi* case [1995 Supp (3) SCC 179] as follows: (SCC p. 180, para 3)

“3. As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands, thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action.”

21. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the courts in the administration of justice between the parties. In *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.* [AIR 1957 SC 357] this Court observed

“that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event”.

In that case this Court also held

“that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice”.

22. Keeping these principles in mind, namely, that in a case of amendment of a written statement the courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement”.



11. In **Revajeetu Builders and Developers vs. Narayanaswamy & Sons & Ors.**⁴ the Supreme Court pronounced on the exercise of discretionary power by court and the governing principles in exercise of powers under Order VI Rule 17 of the CPC after examining several judgments. The Supreme Court held:-

“36. *In the leading English case of Cropper v. Smith [(1884) 26 Ch D 700 (CA)] , the object underlying amendment of pleadings has been laid down by Brown, L.J. in the following words: (Ch D pp. 710-11)*

“... it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”

.....”

xxxxxxx

“63. *On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;*
- (2) whether the application for amendment is bona fide or mala fide;*
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;*

⁴ (2009) 10 SCC 84



(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive”.

The brief facts

12. From the narration of the facts and examination of the records it is revealed that the plaint was filed on 27.06.2017 by the plaintiffs. Pursuant thereto a written statement was filed on 15.06.2018 by the defendant no.1. Issues were framed on 03.08.2018. Thereafter, the plaintiffs sought amendment of the plaint which was allowed on 21.02.2019. The amended plaint was filed on 08.03.2019. In response thereof, on 05.04.2019, the amended written statement was also filed by the defendant no.1. On consideration of the amended plaint and the amended written statement the learned Trial Court concluded that the earlier issues were framed improperly and thus framed issues on 15.10.2019 on its own motion. Thereafter, the plaintiffs filed their evidence on affidavit of their witnesses and admittedly they were also cross examined by the defendants. On 15.06.2022 the plaintiffs closed their evidence. It is at this stage that on



09.08.2022 that the defendant no.1 filed his evidence on affidavit. On 07.02.2023 the plaintiffs filed written objection to the evidence on affidavit filed by the defendant no.1. On 07.02.2023 the defendant no.1 also filed an application for amendment of his evidence on affidavit to correct typographical errors. On 18.02.2023 the plaintiffs filed their reply to the application for amendment of the evidence on affidavit of the defendant no.1 raising various objections. The application for amendment of evidence on affidavit filed by the defendant no.1 was heard by the learned Trial Court. However, a day prior to the pronouncement of orders the defendant no.1 on 13.03.2023 filed two applications.

13. The first application was the application under Order VI Rule 17 of the CPC seeking amendment to the written statement filed by the defendant no.1. The relevant pleading of this application is substantially contained in paragraph 3 thereof and is quoted in verbatim:

“ 3. That the present suit being Title Suit No.11 of 2017 is closely connected to the other four title suits viz. Title Suit No.8 of 2017, Title Suit No. 9 of 2017, Title Suit No. 10 of 2017, Title Suit No. 12 of 2017. In all these title suits pending before this learned Court including the present suit there are the same plaintiffs and the defendants with a variation of the defendant no.1 in the present suit. While in the other four suits the defendant no.1 is Smt. Sunita Rai, the defendant no.1 in the present suit is Raju Rai who is the son of the said Sunita Rai. It is pertinent to mention here that all these title suits relate to the landed properties sold



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

by late Lakey Sherpa which is challenged by the plaintiffs. The defendant no.1 in all other connected title suits Smt. Sunita Rai is the biological mother of Shri Raju Rai, the defendant no.1 in the present suit. The material facts and circumstances of all these suits are all similar and all these suits are being considered simultaneously by these learned Court. Reliance by the parties on the documents on record in one of the connected suits mentioned above is also placed for other connected suits. In such circumstances, the written statement of the defendant no.1 (Smt. Sunita Rai) in other connected title suits were by and large adopted for the present title suit. As such, this has resulted in the error with respect to the reference of the gender of the defendant no.1 as 'she', 'her' etc. also few activities such as purchase of the suit properties in other title suits made by Smt. Sunita Rai has been attributed to the defendant no.1 in the present suit."

14. The second application dated 14.03.2023 was for withdrawal of the petition and evidence on affidavit dated 09.08.2022. The reason given by the defendant no.1 for moving the application was that he had already moved an application for amendment of the written statement and as such the application dated 07.02.2023 for rectifying the errors in the evidence on affidavit had become redundant.

15. The plaintiffs filed response to the second application as well on 23.03.2023 pursuant to which the learned Trial Court heard the learned Counsel for the parties and rendered its impugned Order on 29.08.2023. The impugned order decided all the three applications filed by the defendant no.1. The plaintiffs are however, only aggrieved by the impugned order to the extent that it allowed the amendments sought for by the defendant no.1.



The consideration

16. The learned Trial Court examined each of the amendments sought, allowed some of the amendments and rejected the others by a reasoned order. While doing so the learned Trial Court was guided by the judgment of the Supreme Court in ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited & Anr.***⁵ in which it was held:

“71.2. All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order 6 Rule 17CPC.

71.3. *The prayer for amendment is to be allowed:*

71.3.1. *If the amendment is required for effective and proper adjudication of the controversy between the parties.*

71.3.2. *To avoid multiplicity of proceedings, provided*

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment do not seek to withdraw any clear admission made by the party which confers a right on the other side, and

(c) the amendment does not raise a time-barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

71.4. *A prayer for amendment is generally required to be allowed unless:*

71.4.1. *By the amendment, a time-barred claim is sought to be introduced, in which case the fact that the claim would be time-barred becomes a relevant factor for consideration.*

71.4.2. *The amendment changes the nature of the suit.*

71.4.3. *The prayer for amendment is mala fide, or*

⁵ (2022) 16 SCC 1



71.4.4. *By the amendment, the other side loses a valid defence.*

71.5. *In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.*

71.6. *Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.*

71.7. *Where the amendment merely sought to introduce an additional or a new approach without introducing a time-barred cause of action, the amendment is liable to be allowed even after expiry of limitation.*

71.8. *Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.*

71.9. *Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.*

71.10. *Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.*

71.11. *Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi [Vijay*



Gupta v. Gagninder Kr. Gandhi, 2022 SCC OnLine Del 1897.]”

17. This Court has examined the detailed reasoning of the learned Trial Court for allowing the amendments and rejecting the others and finds no fault with it. Wherever and whenever the defendant no.1 in his application had proposed an amendment which was not permissible the learned Trial Court has rejected the amendment sought.

18. Having allowed the application for amendment of the written statement under Order VI Rule 17 of the CPC the learned Trial Court had to deal with the remaining two applications. The first was for leave to correct typographical errors in the evidence on affidavit of defendant no.1 and the second was for withdrawal of that application and also to withdraw the evidence on affidavit of the defendant no.1. The learned Trial Court sought to resolve this issue by disallowing the application for withdrawal of the evidence on affidavit and instead allowing the defendant no.1 to file additional affidavit explaining the mistake that has occurred in his evidence on affidavit.

19. An application for amendment under Order VI Rule 17 of the CPC can be allowed “*at any stage of the proceedings.*” The language used is not circumscribed or



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

limited. If it is necessary for the purpose of determining the real questions in controversy it can be allowed at any stage of the proceedings. Therefore, the learned Trial Court allowing the application for amendment after the plaintiffs had closed his evidence was permissible if on the facts of the case it was “*necessary for the purpose of determining the real questions in controversy between the parties.*” The learned Trial Court on examination of the pleadings has concluded that the amendment was necessary for the purpose of determining the real questions in controversy between the parties. The learned Trial Court was of the view that the proposed amendment could be allowed although the application was brought at a belated stage since if it was not done it would cause prejudice to the defendant no.1. Further it would not alter or substitute a new cause of action and cause prejudice to the plaintiffs. For bringing the application at a belated stage the learned Trial Court imposed a cost of Rs.5000/- to be paid to the plaintiffs by the defendant no.1 for the inconvenience caused. This Court finds no fault in that conclusion as well.

20. From a reading of the averments made in the application for amendment of the written statement what is



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

apparent is that although care was taken to draft the written statement properly because of multiple suits filed by the plaintiffs while filing multiple written statements on almost similar facts and circumstances certain typographical and other errors crept in. It is also apparent that these errors crept in at the time of drafting of the written statements by the counsel for the defendant no.1 and therefore, it was more error committed by the counsel than the defendant no.1. The application is a little shy of admitting that in fact the mistake was of the counsel for the defendant No.1. However, a holistic reading of the application makes it apparent. The errors were rather mistakes committed inadvertently by the counsel for the defendant no.1 than a fraudulently act of the defendant no.1 intended to overreach. It is also apparent that the amendments sought is imperative for proper and effective adjudication of the case; it is bona fide; the amendments would not cause prejudice to the plaintiff which cannot be compensated adequately in terms of money; refusing amendment would in fact lead to injustice or lead to multiple litigation; and the proposed amendment constitutionally or fundamentally did not changed the nature and character of the case. Quite clearly the



defendant no.1 in spite of due diligence could not have seen through the drafting errors committed by the counsel.

21. However, having allowed the amendment to the written statement the learned Trial Court could not have left the defendant no.1 to navigate between the earlier evidence on affidavit based on the un-amended written statement. Additionally the learned Trial Court was also required to decide whether it should allow the application of the defendant no.1 to withdraw the evidence on affidavit as well. To resolve these issues the learned Trial Court sought guidance from a well reasoned judgment of the High Court of Bombay in the case of **Banganga Cooperative Housing Society Ltd. vs. Vasanti Bajanan Nerukar**⁶. The questions before the Bombay High Court were:

“Is it permissible for a Court to order the deletion or redaction of any portion of any such affidavit if that part is found to be inadmissible as evidence? If so, at what stage of the proceedings should this be done? Can a party ‘withdraw’ an evidence affidavit without consequence? Can an evidence affidavit, once filed, ever be ‘returned’? What are the consequences if an affidavit is filed and then it is found, perhaps a long time later, that the deponent of that evidence affidavit is either unavailable or cannot be tendered for cross examination? Where documents are admitted in evidence on the basis of an evidence affidavit and the witness is then not made available or tendered for cross examination, how are those documents to be treated?”

22. The Bombay High Court held that:

⁶ (2015) SCC OnLine Bom 3411= (2015) 4 AIR Bom. R 639



“11. Once an evidence affidavit is filed, and since there is no absolute requirement of it being required to be reaffirmed by the deponent from the witness box before that affidavit forms part of the evidentiary record, it follows that it is examination-in-chief as soon as it is affirmed (or, at any rate, affirmed and filed) and it is not thereafter, possible to “withdraw” and evidence affidavit. Once an evidence affidavit is filed, the examination-in-chief of the deponent has, to all intents and purposes, begun. It may be permissible for the deponent to file a further affidavit, since order XVIII Rule 4 does not limit itself to a single affidavit, and although there is some authority for the proposition that a witness may not continuously file fresh affidavits to keep improving his case, the view of our court is somewhat different, viz., that there is no impediment to the taking of additional examination in chief or the filing of a further or additional or supplemental affidavit in lieu of examination in chief. This was the view taken by a learned Single Judge of this Court (Khanwilkar, J., as he then was) in *Rajesh Verma vs. Aminex Holdings & Investments*. Not only am I in most respectful agreement with that decision, but it binds me; and it is also the view that I took in a recent order.

12. What is not in doubt is that there can never be a withdrawal of an evidence affidavit just as their can never be a withdrawal of an examination in chief conducted directly in court.”

The conclusion

23. In view of what has been discussed above both in fact and in law this Court is of the considered view that the impugned Order passed by the learned Trial Court is a well reasoned one. It is clear that that in spite of due diligence, the defendant no.1 could not have raised the matter before the commencement of trial. The learned Trial Court has meticulously examined each of the proposed amendment and rejected all such amendments which were not permissible. The learned Trial Court allowed only those amendments which were attributable to the reasons



W.P. (C) No.35 of 2023
Chandu Sherpa & Ors. vs. Raju Rai & Anr.

pleaded in the application for amendment and which would not change the nature and character of the defense taken earlier. These amendments would not cause any injustice to the plaintiffs. The learned Trial Court has not assumed jurisdiction which it did not have or has failed to exercise a jurisdiction which it had or the jurisdiction though available was exercised by it in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby.

24. Consequently, the petition under Article 227 of the Constitution of India fails and is thereby rejected along with the pending application.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting : **Yes**
Internet : **Yes**
to/