

THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION NO. 3 OF 2003

In the matter of a petition under Article 227 of
the Constitution of India

and

in the matter of

1. Umesh Agarwal,
S/o Late Bhaskarananda Agarwal
2. Master Mudit Agarwal
S/o Umesh Agarwal
3. Master Sohail Agarwal
S/o Umesh Agarwal,
All residents of M.G. Marg,
Gangtok,
East Sikkim. **... Petitioners**

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1. Mahesh Agarwal,
S/o Late Bhaskarananda Agarwal
2. Master Mihir Agarwal
S/o Mahesh Agarwal
3. Mrs. Mridula Agarwal
W/o Mahesh Agarwal
All residents of M.G. Marg,
Gangtok,
East Sikkim. **... Respondents**

For the petitioners : U.R. Moitra, Advocate.

For the respondents : Messrs S. P. Wangdi, Senior
Advocate with N. Rai, Advocate.

**PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.**

Date of judgment: 23rd August, 2004.

J U D G M E N T

R. K. PATRA, C.J.

The petitioners are plaintiffs in Civil Suit No. 10 of 1994 pending on the file of Civil Judge, East at Gangtok. In this petition under Article 227 of the Constitution of India they seek quashing of the order dated 31.10.2002 passed by the learned trial Judge refusing their prayer to amend the plaint, details of which are hereinafter referred to.

2. The suit was filed by Bhaskarananda Agarwal as plaintiff No. 1 and the three writ petitioners as plaintiffs no. 2, 3, and 4 against the respondents. During the pendency of the suit Bhaskarananda Agarwal expired. Writ petitioner no. 1, Umesh Agarwal is his son and writ petitioners no. 2 and 3 are the minor sons of writ petitioner no.1. Respondent no. 1, Mahesh Agarwal who is the defendant no. 1 is another son of the deceased original plaintiff no.1, Bhaskarananda Agarwal. Respondent no. 3 (defendant no.3) is the wife of respondent no. 1 and respondent no. 2 (defendant no. 2) is their minor son.

3. In the suit the following reliefs are claimed :-

- (i) for a declaration that Schedule 'A' properties are joint family properties and/or the coparcenary properties of the plaintiffs and defendants.
- (ii) the deed of gift executed by the respondent no.1 in favour of respondent no. 3 in respect of the

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properties mentioned in schedule 'B' is void and inoperative in law.

- (iii) for permanent injunction restraining the respondents from transferring, alienating or disposing of any of the properties described in Schedule 'A'.

4. Briefly stated the petitioners' case is that in the year 1968 there was an amicable partition and/or arrangement for settlement of all the joint family properties and Schedule 'A' properties were allotted in favour of the coparceners of original plaintiff no. 1 Bhaskarananda Agarwal and the respondent no. 1 (defendant no.1) being one of the coparceners has no independent or separate interest in the properties mentioned in schedule 'A' and cannot meddle with them. In the written statement the respondents deny all the allegations and assert that in the partition held in 1968 all the properties in Sikkim were given to respondent no. 1 (defendant no.1) and petitioner no.1 Umesh Agarwal, was given properties separately. There was no co-parcenary formed or existed between the parties or any of them nor was there any co-parcenary or ancestral property of the parties.

5. Considering the pleadings, the trial Judge framed seven issues out of which issue no. 4 is relevant which is as follows:

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“4. Whether the properties as described in Schedule ‘A’ to the plaint are co-parcenary property/joint family property of the plaintiffs and the defendants?”

6. On 1.11.2000, the petitioners filed a petition under Order VI Rule 17 C.P.C. for amendment of the plaint. The proposed amendments - subject matter of challenge in this petition - are extracted hereunder:

“12A. That it is submitted by the plaintiffs that out of the fund of the joint family created in the aforesaid manner, the plaintiff, Umesh Agarwal, the defendant No. 1, Mahesh Agarwal and the deceased plaintiff, Bhaskaranand Agarwal did commence a business forming a private Ltd. Company styled as Agarwal Wire Industries Private Ltd., in short ‘AWIPL’ registered under the companies Act, Sikkim, 1961, having each equal share.

That the company so constituted, did take a loan amounting to Rs.23.58 lakhs from Sikkim Industrial Development and Investment Corporation Ltd., in short SIDICO for the promotion of it's business and the plaintiff, Umesh Agarwal, the defendant No. 1 Mahesh Agarwal and Bhaskaranand Agarwal (since deceased), besides executing different documents as required by SIDICO, as the Directors of the Company, had mortgaged, of the coparcenary properties, the coparcenary property as described against item Nos. 3,4,7, & 8 of schedule ‘A’ to the plaint, as collateral security being the condition of loan, by executing the mortgage deed jointly on 26.05.1983 and bond of guarantee being the one supplemental to the mortgage deed, but however, on failure to repay the loan in terms of the repayment schedule or otherwise, the SIDICO did put in execution of the Decree, being the certificate issued by the District Collector/Magistrate of East

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District, Gangtok in the case initiated by SIDICO against the company, it's Directors and guarantors as well for recovering of the sum of Rs. 43,10,636.06.

b)
That it is of worth to state here that even when the SIDICO was about proposing to sale the mortgaged properties in auction for recovery of it's dues in the said execution proceeding, the defendant No.1, in consonant to his character, was a silent spectator and it is the plaintiff No.2, being a co-mortgagor &/or guarantor and coparcenar with respect to the properties mortgaged, with the consent and approval of another co-mortgager, guarantor and coparcenar, Bhaskaranand Agarwal (since deceased) settled the claim of SIDICO form AWIPL on negotiation and somehow arranged the amount as settled amounting to Rs. 20.50 lakhs from his cousin brother, Sri Gangadhar Agarwal upon an agreement as to repayment thereof with interest, for no reason except to save the ancestral &/or coparcenary property from being sold in auction.

.....

That the plaintiff further contend that for the amount arranged & by which the mortgage of the properties as described against item Nos. 3, 4, 7 and 8 of schedule 'A' to the plaint, are liable to be charged, for, the debts incurred to save &/or preserve the coparcenary properties, have to be met out, out of the income of the joint family property and it's business.

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1) In the prayer after para/prayer (b) the following be added as "(bb)". For declaration declaring that the properties as described in schedule 'A' to the plaint are charged for the debts incurred by Umesh Agarwal to preserve/save the coparcenary property from being sold in auction in

execution case No. 3 of 1995 arising out of Certificate case No. 57 of 1994 initiated by SIDICO.”

The respondents filed their objection to the prayer for amendment. After hearing counsel for the parties the learned trial Judge rejected the aforementioned proposed amendments on the ground that they are alien to the controversy involved in the suit. The trial Judge observed that the petitioner, Umesh Agarwal without the consent of the respondents obtained loan from a third party and inclusion of such new matter in the plaint would change the entire character of the suit and therefore the petitioners cannot be allowed to introduce an alien subject in the garb of amendments.

7. Learned counsel for the petitioners submitted that by the proposed amendments simply additional facts are sought to be pleaded which would not change the nature and character of the suit and the respondents would not be prejudiced in any manner in the event the proposed amendment is allowed. In support of his submission he placed reliance on the judgment of the Supreme Court in Ragu Thilak D. John vs. S. Rayappan (2001) 2 SCC 472, Prem Bakshi vs. Dharam Dev (2002) 2 SCC 2 and Sampath Kumar vs. Ayyakannu (2002) 7 SCC 559. In the case of Ragu Thilak D. John (supra) the plaintiff filed the suit against the defendants for a decree of permanent injunction

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restraining them from demolishing the compound wall of the schedule property. During the pendency of the suit, defendants unauthorizably demolished the compound wall. The plaintiff accordingly sought for amendment of the plaint by incorporating the above events with the relief of claiming damages. The prayer for amendment was disallowed on the ground that if the amendment was allowed it would result in introducing a new case and cause of action. While accepting the prayer of the plaintiff the Supreme Court held that the aforesaid amendment does not change the nature of the suit and the main purpose of order VI rule 17 CPC is to minimize litigation. The facts of that case are quite different from the facts in the present case. In Prem Bakshi (supra), the plaintiffs filed a suit for declaration that they and the defendants have joint ownership over the suit properties and for permanent injunction. An application for amendment of the plaint was filed pleading that in the year 1943, the plaintiffs predecessor-in-interest suit was decreed relating to the disputed property. The application for amendment was allowed by the trial court but was refused by the High Court. The plaintiff went in appeal and the question for consideration before the Supreme Court was whether the said order was revisionable under section 15 C.P.C. The Supreme Court further observed that the amendment would not cause any prejudice or injury to the parties. In Sampath

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Kumar (supra), the amendment was refused on the ground that it was belated. While considering the matter the Supreme Court accepted the prayer for amendment since no parties would be prejudiced.

8. On careful perusal of the proposed amendments, it would appear that the deceased plaintiff no. 1 Bhaskarananda Agarwal and his two sons (Umesh Agarwal, petitioner no.1 and respondent no. 1 Mahesh Agarwal) formed a Private Limited Company in the name of Messrs Agarwal Wire Industries Private Limited, (in short AWIPL) under the Companies Act, Sikkim, 1961 each having equal share and the Company took a loan amounting to Rs.23.58 lakhs from the Sikkim Industrial Development and Investment Corporation Ltd., (in short SIDICO) and mortgaged the coparcenary properties (items no. 3, 4, 7 and 8 of the schedule 'A' of the plaint) as collateral security being the condition of loan and on failure to repay the loan, SIDICO got a decree in Certificate case no. 57 of 1994 and put it in execution for recovery of Rs.43,10,636.06 and when the decree-holder SIDICO was about to propose the sale of the mortgaged properties in auction for recovery of the dues, Umesh Agarwal (petitioner no. 1) with the consent of another co-mortgager i.e. deceased original plaintiff Bhaskarananda Agarwal settled the claim of SIDICO on negotiation at Rs.20.50 lakhs and by borrowing the said amount from one

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Gangadhar Agarwal, repayment was done to save the ancestral coparcenary properties from being sold in auction. In the proposed relief claimed, the petitioners seek a declaration that the properties in schedule 'A' are charged for the debts incurred by petitioner no. 1 to preserve/save the coparcenary properties from being sold in the auction in Execution Case no.3/1995.

In course of the hearing Shri S.P. Wangdi learned counsel for the respondents made us available a copy of the Memorandum and Articles of Association of AWIPL. We have carefully gone through that document from which it appears that the AWIPL was constituted in the individual capacity of the original deceased plaintiff Bhaskarananda Agarwal and petitioner no. 1 Umesh Agarwal and respondent no 1 Mahesh Agarwal. It was a private limited Company by shares. It's first Directors were Umesh Agarwal, petitioner no.1, Mahesh Agarwal, respondent no. 1 and Bhaskarananda Agarwal, original deceased plaintiff no. 1. - with liberty to appoint any other person to be Directors but at no point of time, the number of Directors shall exceed the maximum number of three. The capital of the company was Rs. 20,00,000/- divided into 20,000 equity shares of Rs. 100 each. The above facts would show that the company was floated purely on the individual capacity of its Directors and the so-called coparcenary or ancestral family properties has

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nothing to do with its business. The petitioner no. 1 and the deceased plaintiff no. 1, Bhaskarananda Agarwal if at all had taken loan to save the copacenary property from being sold in auction as alleged in the proposed amendment, the respondents cannot be held responsible and the same cannot be the charge in respect of schedule 'A' property. The proposed introduction of the above averments are totally outside the substratum of the dispute. They are all new aspects and the amendment sought for is not necessary for deciding the actual dispute between the parties, the dispute being whether schedule 'A' properties are copacenary properties/joint properties of the petitioners and respondents.

9. For the reasons aforesaid, the impugned order of the learned trial Judge refusing permission to the petitioners to amend the plaint cannot be faulted with.

10. In the result, there is no merit in this petition which is accordingly dismissed. No orders as to costs.

I agree.


(R. K. Patra)
Chief Justice
23.8.2004


(N. Surjamani Singh)
Judge
23.8.2004