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**(2017) 12 SHI CK 0033**  
**In the High Court Of Himachal Pradesh**  
**Case No : 193 of 2017**

Shri Jagat Ram

APPELLANT

Vs

Shri Lachhmi Chand and another

RESPONDENT

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**Date of Decision :** 15-12-2017

**Acts Referred:**

<a href=3998>Constitution of India</a>, <a href=3998-227>Article 227</a> -  
Power of superintendence over all courts by the High Court  
<a href=3859>Code of Civil Procedure, 1908</a>, <a href=3859-151>Section 151</a>,  
<a href=3859 — Order 6Rule 17>Order 6Rule 17</a> - Saving of Inherent  
powers of Court

**Citation :** (2017) 12 SHI CK 0033

**Hon'ble Judges :** Ajay Mohan Goel

**Bench :** Single Bench

**Advocate :** Ajay Kumar, Dheeraj Vashisht, Tara Singh Chauhan

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## Judgement

1. By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 18.03.2017, passed by the Court of learned Civil Judge, Court No. II, Una, in Civil Suit No. RBT 223/17/13, vide which, learned Court below has dismissed an application filed by the present petitioner under Order 6, Rule 17 of the Code of Civil Procedure praying for amendment of the plaint.

2. Brief facts necessary for adjudication of the present case are that petitioner/plaintiff (hereinafter referred to as "plaintiff" for convenience) filed a suit against the present respondents (hereinafter referred to as "defendants") praying for the following reliefs. "It is therefore prayed that a decree for declaration to the effect that the plaintiff is owner in possession of land measuring 0-29-56 Hects comprised of Khewat No. 42, Khatauni No. 42, Khasra No. 737/76(0-07-87), 599(0-14- 31), 605 (9-02-25) 611 (0-05-13) kita 4 as entered in the jamabandi for the year 2010- 2011 situated in Mohal Nurghari, Mauza Tehra, Tehsil Bangana, District Una (HP) by way of afflux of time and fore closure of right of equity of redemption and the defendants have no right, title or interest of any

kind in the suit land and has lost right of equity of redemption by afflux of time and fore closure of equity of redemption with a consequential relief of permanent injunction restraining the defendants from interfering in any manner in the lawful possession of the plaintiffs in the suit land, be granted in favour of the plaintiff and against the defendants with cost. Any other relief which the plaintiff may deem entitled under the facts and circumstances of the case may also be granted in favour of the plaintiff and against the defendants."

3. In the body of the plaint, in para 2 (d) against rate of interest, it stood mentioned "it was usefactory Mortgage". Para 2 of the original plaint is reproduced herein-below. "2. That the following are the particulars of the mortgaged land:-

a) Date: date not know. The mortgage is depicted in the Jamabandi for the year 1891-92 i.e. more than 122 years back.

b) Name of Mortgager and Mortgagee:-The original mortgagor was Dullo son of Jai Kishan and Original Mortgagee Ghanaiya and Jaind sons of Jiwan.

c) Mortgaged money:- Rs. 98/- as depicted in Jamabandi for the year 1891-92.

d) Rate of interest:- It was usefactory Mortgage.

e) Property subject to mortgage:- The Village came under consolidation and settlement operation and the mortgaged land is now depicted in jamabandi for the year 2010-11 as fully detailed in the head note of the point.

f) If the plaintiff title is derivated from his ancestors."

4. The written statement so filed by the defendant with respect of para 2 of the plaint is quoted hereinbelow. "Para 2 of the plaint is wrong, incorrect hence denied, since the predecessors of the answering defendants never mortgaged the suit land in favour of anyone muchless said Ghanaiya and Jaind sons of Jeevan."

5. During the pendency of the suit, an application was filed by the plaintiff before the learned trial Court under Order 6, Rule 17 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as "CPC") wherein it was prayed that while preparing the case for evidence it had come to the notice of plaintiff that in para 2(d) against column Rate of Interest words "it was usufructory Mortgage" are required to be replaced with words "Not Applicable" as due to typographical error it was written as "Usufructory Mortgage" and in this background, prayer was made that plaintiff be permitted to amend the plaint by incorporating words "Not applicable" in place of "it was usufructory Mortgage" in sub head (d) of para 2 against column "Rate of interest".

6. The application so filed by the plaintiff was resisted by the defendants by filing reply in which inter alia it was mentioned that the amendment which was sought by the plaintiff would change the nature of the suit as well as cause of action and amounts to filing of a new suit.

7. Learned trial Court vide order dated 18.03.2017, dismissed the application so filed by the plaintiff. While passing the said order it was held by the learned trial Court that a bare reading of provisions of Order 6, Rule 17 of CPC suggests that no application for amendment shall be allowed after the commencement of trial, unless 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. Learned trial Court thereafter held that in the original plaint in para 2 in sub head (c) Mortgage money was mentioned as Rs.98/- and sub head (d) adjacent to the rate of interest column it was mentioned that "it was a usufructory mortgage". Learned trial Court also held that in the plaint, status of parties was shown as that of a mortgagor and mortgagee. It further held that plaintiff claimed mortgage to be a "Usufructory mortgage", which clearly shows that plaintiff claims to be in possession of the suit property. It further held that defendants had denied the mortgage by their predecessor in interest in favour of predecessor in interest of the plaintiff and delivery of possession to plaintiff was also denied but said denial by defendants would not give any right to plaintiff to withdraw his earlier admission made in favour of the defendant. Learned trial Court thus held that by way of the present amendment plaintiff was trying to withdraw his admission made in favour of the defendant, which cannot be allowed. It further held that proposed amendment could not be held as typographical error and the same suggests that plaintiff is trying to withdraw his admission made in favour of the defendant. Learned trial Court held that proposed amendment was neither based on subsequent circumstances nor it was required for advancement of justice and the same was just an effort by the plaintiff to withdraw his admission made in favour of the defendants. On these bases, learned Court below dismissed the application.

8. I have heard learned Court for the parties and gone through the impugned order. The suit which stands filed by the plaintiff against the defendants is for declaration to the effect that plaintiff is owner in possession of the suit land by efflux of time and fore closure of right of equity of redemption and defendants have no right, title or interest upon the same and had lost right of equity of redemption by efflux of time and fore closure of equity of redemption. Consequential relief for issuance of permanent injunction restraining the defendants from interfering in any manner in the lawful possession of the plaintiff over the suit land has also been sought for.

9. Claim so put forth by the plaintiff has been categorically denied by the defendants in the written statement and the stand of the defendants is that suit land was never mortgaged by their predecessor in interest, neither the plaintiff nor his predecessor in interest ever came into possession of the suit land in any capacity at any point of time. According the defendants, they were owner in possession of the suit land as absolute owners.

10. Be that as it may, the issue which has to be decided by this Court is as to whether the findings returned by the learned trial Court in the impugned order

that the proposed amendment sought by the plaintiff was to withdraw his admission made in favour of the defendants are sustainable or not.

11. The amendment which has been sought by the plaintiff is that in sub para (d) of para 2 against column of rate of interest words "it was usufructory mortgage" be substituted with words "Not applicable". As is evident from the respective stands taken by the parties in their respective pleadings, whereas the contention of the plaintiff is that he has become owner in possession of the suit land by efflux of time, which land was earlier mortgaged by predecessor in interest of the defendants to his predecessor in interest, this contention of plaintiff has been denied in totality by the defendants, as per whom, they are in possession of the suit land as its absolute owners. Therefore, it is but evident that factum of mortgage stands denied by the defendants in totality. In these circumstances, onus obviously is upon the plaintiff to prove that the suit land was earlier mortgaged by the predecessor in interest of the defendants to his predecessor in interest and thereafter, he has become owner in possession of the same by efflux of time and fore closure of right of equity of redemption, as stands pleaded in the plaint. In this background, it is not understood as to how the amendment sought by the plaintiff amounts to withdrawal of admission made by plaintiff in favour of defendants especially when the defendants had not accepted the status of the predecessor in interest of the plaintiff as mortgagee over the suit land which fact has also been acknowledged by the learned trial Court. In my considered view, this very important aspect of the matter has not been appreciated by the learned Court below while dismissing the application for amendment of plaint. The contention of learned Counsel for the respondents herein that the amendment was sought to wriggle out the rigours of law as declared by Hon''ble Supreme Court in Singh Ram (Dead) through Legal Representatives vs. Sheo Ram and others, (2014) 9 Supreme Court Cases 185, in my considered view, has no force. It is not understood that when defendants have denied the very factum of creation of mortgage qua the suit land by their predecessor in interest in favour of plaintiff or his predecessor in interest, how the law declared by the Hon''ble Supreme Court in the judgment referred supra is applicable. Even otherwise, the factum of the law so laid down by the Hon''ble Supreme Court in Singh Ram (Dead) through Legal Representatives vs. Sheo Ram and others, (supra) is to be seen by the learned trial Court at the stage of trial. Further this judgment even otherwise does not find mention in the order so impugned. Besides this, one more factor which has not been appreciated in its correct perspective by the Court below is that proposed amendment sought by the plaintiff was in para 2(d) of the plaint wherein against column of rate of interest it stood mentioned that "it was usufructory mortgage". It is not as if against any column of kind of mortgage, the words "usufructory mortgage" were earlier mentioned in the plaint which subsequently were sought to be withdrawn under the garb of amendment of plaint. Accordingly in view of above discussion, this petition is allowed. Order dated 18.03.2017, Annexure P- 6, passed by the Court of learned Civil Judge, Court No. II, Una, in case No. RBT 223/17/13 is quashed and set aside and the

application so filed by the present petitioner under Order 6, Rule 17 of the CPC for amendment of plaint before the learned trial Court stand allowed as prayed for. The petition stands disposed of in the above terms, so also pending miscellaneous application(s), if any. No order as to costs.