

statement. Mr.Hase strenuously contended that defendant No.1 is from Hindu Bhilla community. He is not conversant with the legal niceties. The advocate engaged by defendant No.1 did not properly draft written statement. Defendant No.1, therefore, changed the advocate who advised him to amend the written statement so as to incorporate agreement of sale executed by defendant No.1 on 15/12/2008 in favour of Balu Gangaram Gavli through respondent-plaintiff. Inadvertently, earlier advocate did not incorporate the said plea in the written statement. For deciding real controversy between the parties, the proposed amendment is absolutely necessary. He, therefore, submitted that the impugned order maybe set aside and application at Exhibit 71 may allowed.

4. On the other hand, Mr.Sathaye supported the impugned order. He has invited my attention to paragraph 7 of the impugned order. The learned trial Judge has observed that the plaintiff has examined Balu Gavli. During the course of his cross examination, defendant No.1 did not confront him with the alleged transaction dated 15/12/2008 though it was within his knowledge. Even in the earlier written statement, no contention was raised. The plaintiff's evidence is over. By the proposed amendment, admission given by the said witness will be wiped out. The learned trial Judge, therefore, rejected the application.

5. I have considered the rival submissions made by the

learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff had examined Balu Gavli as his witness. Even if it is accepted for a moment that as defendant No.1 belongs to the Hindu Bhilla community and he is not aware of the legal niceties, nonetheless, the factum of alleged transaction dated 15/02/2008 is within his knowledge. Nothing prevented defendant No.1 from cross examining Balu Gavli during his evidence. It is also evident that plaintiff's evidence is over. Mr.Sathye, upon instructions, states that defendant No.1's evidence is also over and the matter is kept for arguments. Mr.Hase disputed this position. Nonetheless, it is evident that evidence of the plaintiff is over. The learned trial Judge has considered the decision of the Apex Court in the case of *Vidyabai Vs. Padmalatha*, *Vidyabai Vs. Padmalatha*, **2009 (4) Mh.L.J. 30** wherein the Apex Court has considered Order 6 Rule 17 of C.P.C. and in particular, proviso thereto. The learned trial Judge held that by allowing the amendment, admission given by the witness Balu Gavli will be wiped out and it will cause prejudice to the plaintiff. Apart from that, after perusing the application, I find that no case for due diligence is made. In view thereof, I do not find that learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error,

defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)