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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.12069 OF 2015.

Sou. Chabutai Ulhas Rumale	]	
age 37 years, Occn. Service	]	
r/at Lolgewada, House 400/C	]	Petitioner.
Ubha Maruti Chowk, Shivaji Peth,	]	
Kolhapur	]	

V/s.

Ulhas Madhav Rumale,	]	
age: 57 years, Occn. Service	]	
r/o flat No.38, Apte Nagar	]	Respondent.
Radha Nagari Road	]	
Kolhapur	]	

Mr. Mandar Limary a/w Ms. Gauri Velankar, for
the Petitioner.
None for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATED : 12th OCTOBER, 2017.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioner. Respondent is
duly served, but failed to remain present.

2] Rule.

3] Rule made returnable forthwith with the consent of learned counsel for the petitioner.

4] This petition is preferred challenging the order dated 11.2.2015, passed by the Family Court, Kolhapur in Petition No.A. 94 of 2013, thereby rejecting petitioner's application at Exh.44 seeking amendment to her written statement, by invoking provisions of Order VI Rule 17 of Code of Civil Procedure Code.

5] The submission of learned counsel for petitioner is that the proposed amendment is only by way of elaboration of facts, which are already stated in the written statement. The petitioner does not intend to bring any new facts on record so as to cause prejudice to the respondent and in such situation, according to learned counsel for petitioner, the trial Court should have allowed the proposed amendment as in such matters the approach of the Court must be liberal.

6] Learned counsel for the petitioner has in support of his

submission relied upon the judgment of the Apex Court in **Ram Niranjan Kajaria -vs- Sheo PrakashKajaria and ors (2015) 10 SCC 203**, to contend that delay in itself may not be crucial in case of application for such amendment, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. According to him, the facts which are stated in the written statement can be clarified by the petitioner by proposed amendment. Hence the amendment should have been allowed by the trial Court. The trial Court has rejected the same only because no explanation is offered for not seeking such amendment with due diligence at earlier stage. Hence the impugned order needs to be set aside.

7] However, this Court is unable to accept this submission. It is to be noted that the provisions of **Order VI Rule 17 CPC** have been substantially **amended** by the **CPC (Amendment) Act, 2002**. By way of amendment, the new proviso is inserted and as per the Proviso, no application for amendment shall be allowed after the trial has commenced, unless Court comes to conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

8] Therefore, for exercise of power of allowing application for amendment, first and foremost jurisdictional fact which needs to be established is that the Court has to come to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. Hence unless and until this condition precedent or hurdle is crossed, Court cannot enter into question whether the said amendment is necessary or not. In this respect one can place reliance on the judgment of the Apex Court, in the case of of ***Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409***. In this case, the Apex Court while considering the effect of this Proviso, was pleased to observe that, “this proviso is couched in a mandatory form and as a result the Court's jurisdiction to allow such an application for amendment is taken away, unless the conditions precedent therefor are satisfied and the said conditions are that the Court must come to the conclusion that in-spite of due diligence, the parties could not have raised the matter before commencement of the trial”.

9] In the instant case, as observed by the trial Court, absolutely no explanation is offered by the petitioner as to why

before commencement of the trial the petitioner could not amend her written statement. If she wanted to elaborate certain facts and as observed by the trial Court, she was very much aware of those facts and she has also produced documents on record to that effect, she could have elaborated those facts as stated in the proposed amendment at earlier stage. The fact that she has not done so, shows that she has not acted with due diligence.

10] The observation made by the trial Court also go to reveal that this application for amendment was one more attempt made by the petitioner to prolong the hearing of the petition. Up till then she has failed to cross examine the petitioner on one or the other pretext and was, thus, trying to protract the hearing of the petition. If the amendment application is filed with such intention, as observed by the trial Court and when the petitioner has failed to cross the hurdle laid down in the Proviso that she acted with due diligence, the trial court has rightly rejected her application. As she failed to cross first hurdle, this Court need not enter into the question whether said amendment is necessary or not. Here the question is also not of delay simpliciter in filing of application but question is exercise of due diligence, which is made mandatory by

the Proviso, otherwise the Proviso would lose its object.

11] The Writ Petition, therefore, does not hold merits and hence stands dismissed.

12] Rule discharged.

(DR. SHALINI PHANSALKAR-JOSHI, J.)