

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT
AURANGABAD**

WRIT PETITION NO. 7721 OF 2019

1. Anil s/o Ramsing Bilawar,
Age : 53 years, Occu.: Business,
R/o.: Phase II, Saivrundavan, Plot No.01,
Near Mahanubhav Ashram,
Paithan Road, Aurangabad.
2. Sunil s/o Ramsing Bilawar,
Age : 50 years, Occu.: Business,
R/o.: Plot No.21,
Nandadeep Housing Society,
Bansilal Nagar, Aurangabad.
3. Sudha w/o Ramsing Bilawar,
Age : 72 years, Occu.: Household,
R/o. : Phase II, Saivrundavan,
Plot No.01, Near Mahanubhav Ashram,
Paithan Road, Aurangabad. ... APPLICANTS

Versus

1. Anita w/o Gopal Kadam,
Age : 46, Occu.: Household,
R/o.: 4/33, Ravi Kiran Poshwara Park,
Jogeshwari (West), Mumbai.
2. Sunita w/o Arjun Mohandas,
Age ; 44 years, Occu.: Household,
R/o.: Plot No. 01, Tejas Palace,
Bhigawan Road, Baramati,
District : Pune RESPONDENTS

Mr. Sushant Choudhari, Advocate for the Petitioners
Mr. Parag V. Barde, Advocate for Respondent nos. 1 & 2

CORAM : AVINASH G. GHAROTE, J.

JUDGMENT RESERVED ON : 30/07/2021
JUDGMENT PRONOUNCED ON : 06/08/2021

JUDGMENT :

1. Heard learned counsel for the parties. The present petitioners, are the original defendants, who are aggrieved by the orders dated 13/03/2019, by which two applications exhibit no. 70 and 77 permitting the plaintiffs to add properties to the disputes and third parties as defendants have been allowed, in Special Civil Suit No. 160 of 2012, seeking partition and separate possession. The issues were settled on 17/07/2013 and the affidavit in lieu of examination-in-chief was filed on 07/08/2014 and the matter was pending for the cross-examination when the applications for amendments were filed.

2. Mr. Sushant Choudhari, learned counsel for the petitioners/original defendants, submits, that since the affidavit in lieu of examination-chief was filed on 07/11/2014, the trial had commenced, in view of which the proviso to order VI Rule 17 of CPC, became applicable. He further submits, that the matter, stood posted for cross-examination of plaintiff no.2, whose affidavit

in lieu of examination-chief, was already filed on the date mentioned above, which position is clearly disclosed from para 1 of Exhibit-70/page 27, in view of which the amendments ought not to have been allowed.

3. He further submits, that by the application at Exhibit-70 the plaintiff, wanted to include in the schedule of properties, in respect of which partition was sought, the land of Gut no.17, situated at village Naigaon, Taluka : Gangapur, which was already sold on 29/08/2006, by a registered sale deed bearing no. 3767, and so also the addition of the purchasers of the said property as defendant nos. 4 to 29. The said application Exh-70, also sought to add the boundaries of Gut no. 43. The application at Exh-70, came to be filed on 17/07/2017, in Special Civil Suit No.160 of 2012. He submits, that in earlier suit bearing Special Civil Suit No. 513 of 2011, which was filed by the defendant nos. 1 and 3 against the plaintiffs and others, in the affidavit evidence at Exh-98 dated 22/10/2012, it was mentioned, that the land of Gut no.17 already stood sold on 29/08/2006 and therefore, the plaintiffs, who are parties to Special Civil Suit No. 513 of 2011, as of 22/10/2012 had clear and specific knowledge of the sale of the land of Gut No. 17 on 29/08/2006 and therefore, the application at Exh-17, filed on

17/11/2017, by suppressing the above, was clearly not maintainable. He further submits that the order by the trial court, passed below Exh-17, does not consider this aspect at all in its proper perspective, viz-a-viz, the requirement of the proviso to order VI Rule 17 of CPC and merely on the ground, that the cross-examination has not been commenced, has allowed the application, which cannot be sustained in law, as the requirement of law in this regard has not been complied with. He submits, that the application at Exh.17, does not given a reason or cause for satisfying the requirement of the proviso to Order VI Rule 17, due to which the order cannot be sustained.

4. In so far as the application Exh-77 is concerned, the same seeks to implead the persons named therein as defendant nos. 30 to 39, on the ground that they are the purchasers of the land of Gut no. 46, village Ghanegaon, Taluka Gangapur in parts, from one Shaila Laximikant Maniyar by sale deeds dated 23/04/2010 and 18/06/2010, since the said Shaila Laximikant Maniyar had acquired title to the same by sale deed dated 15/03/2007, and so also to include the land of Gut no. 46, in the schedule of suit properties. Learned counsel submits, that in the earlier suit bearing Special Civil Suit No.513/2011, wherein the plaintiffs were parties, there is

mention, about the sale transaction dated 15/03/2007. The trial court, on the same grounds as submitted above, has allowed the application by the impugned order, which cannot be sustained.

5. Mr. Choudhari Learned Counsel for the petitioner further submits that even if the Learned Trial Court has in the impugned orders, kept the issue of limitation open, that however does not address the in issue of the defendants, having the knowledge of the transactions, inspite of which no application was filed within the time, permitted and since third party interests had already stood created in the year 2006 and 2007, multiple years before filing of the suit, permitting any amendment now would not only result in injustice to those third parties but will also cause prejudice to them. He further submits that there are also possibilities of further transactions having been effected, in respect of the above properties.

6. Mr Choudhari learned Counsel for the petitioner places reliance upon :

(a) ***Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N. (2006) 12 SCC 1.***

(b) Vidyabai v. Padmalatha (2009) 2 SCC 409. [followed in **Malhari Mahale v. Monika Pandit Mahale, (2020) 11 SCC 549** on the point of rendering of a finding as to due diligence].

(c) Mahadeo Maruti Bhanje Vs. Balaji Shivaji Pathade, 2012 (7) All MR 546.

(d) The Liquidator, The Maratha Market Peoples Cooperative Bank Ltd. Vs. M/s Jeejaee Estate and others, 2019(1) ALL MR 884.

(e) Vijay Hathi Singh Shah vs. Geetaben Parshottamdas Mukhi, 2019 ALL SCR 1690.

7. Mr. Barde, learned counsel for the original plaintiffs / respondents, submits, that the trial has not been commenced as yet. Accordingly to learned counsel for the plaintiffs / respondents the trial would commence when the cross-examination starts. Learned counsel relies upon :

a) The judgment of the Calcutta High Court, in the case of **Sree Sree Iswar Radha Beehari Jew vs. Malti P. Soni, AIR 2019, Calcutta, 131**, on reference, wherein by considering the judgment in **Vidyabai Vs. Padmalatha, 2009 (2) SCC 409 [AIR 2009 SC 1433]** as well as **Mahadeo Vs. Balaji** (supra), it has been held, that the expression “commencement of trial” in the proviso to

Order VI Rule 17 of CPC would imply the date when the court first applies its mind after affidavit of evidence is filed and when the first witness proves his affidavit of evidence or such seeks to prove a document for it to be tendered in evidence or the cross-examination of such witness begins, whichever is earlier.

- (b) ***Baldev Singh Vs. Manohar Singh, AIR 2006 SC 2832.***
- (c) ***Chander Kanta Bansal vs. Rajender Singh Anand, AIR 2008 SC 2234.***
- (d) ***Mohinder Kumar Mehra vs. Rooprani Mehara, AIR 2017 SC 5822.***
- (e) ***Gurbakhsh Singh Vs. Buta Singh, 2018(6) SCC 567***
[following ***Abdul Raheman and another Vs. Mohd. Ruldo, 2012(11) SCC 341***].
- (f) ***Rajbahadur Jiyaram Yadav Vs. Prakash @ Pappu Jiyaram Yadav 2016(1) ALL MR 550 .***
- (g) ***Vitthal Mahasukhe Mandhre vs. Mugutrao Vishnu Sanas, 2019(1) ALL MR 316.***
- (h) ***Shri Bharat Gangabisen Kalantri Vs. Murarka Shivhare Housing Complex Pvt. Ltd., WP No. 554 of 2018***, decided on 07/03/2019.
- (i) ***Kamalkumar Shivkishan Agrawal Vs. Navnirmal Developers and another, 2020 (3) ALL MR 221.***

8. In rebuttal Mr. Choudhari, learned counsel for the petitioner, places reliance upon ***Commissioner of Income Tax Vs. Thana Electric Supply Ltd., 1993 SCC Online Bom.591***, to contend, that though the Division Bench of the Calcutta High Court in ***Sree Sree Ishwar Radha Bihari*** (supra) has taken a different view than ***Mahadev*** (supra), the view taken in ***Mahadev*** (supra) is binding upon this court.

9. The general principle of law, as relating to amendments is that all amendments, ought to be allowed which satisfy the two conditions : (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Thus amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which cannot be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a

good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not? Thus, courts will, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice. There may be an exceptional class of cases where despite the fact that a legal right had accrued to the defendant by lapse of time, yet this consideration is outweighed by the special circumstances of the case, for example, that no new material fact needed to be added at all, and only an alternative prayer in law had necessarily to be made in view of the original plea in law being discarded. The Court also has to consider whether the application for amendment is bonafide or malafide; whether the amendment would cause such prejudice to the other side which cannot be compensated adequately in terms of money; whether refusing the amendment would in fact lead to injustice or lead to multiple litigations.

[see ***Kisandas Roopchand Vs. Rachappa Vithoba Shilwant, ILR (1909) 33 Bom. 644; Pirgonda Hondonda Patil Vs.***

Kalgonda Shidgonda Patil, AIR 1957 SC 363; L.J.Leach & Co. Ltd., Vs. Jardine Skinner and Co. AIR 1957 SC 357; Sampat Kumar Vs. Ayyakannu (2002) 7 SCC 559; and L.C. Hanumanthappa Vs. H.B. Shivakumar (2016) 1 SCC 332.]

10. The principles for considering an application for amendment have been summarized in ***Revajeetu Builders and Developers Vs. Narayana Swsami and sons (2009) 10 SCC 84*** [which have been applied in ***Chakreshwari Constructions Pvt. Ltd. / Manohar Lal (2017) 5 SCC 212***] as under :

“ **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;

(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.

(emphasis supplied)

In ***Vijay Hathisingh Shah & anr / Gitaben Parshottamdas Mukhi, (2019) 5 SCC 360***, it has been held that an application for amendment filed belatedly when the case was fixed for final arguments, could not be allowed.

11. It is equally a well settled position of law, that amendment of plaint, and amendment of written statement, do not stand on the same footing. Whereas, the amendment of a plaint has to be strictly viewed, in respect of the amendment of a written statement generally a liberal view is required to be taken as held in See ***Baldev Singh*** (supra) as under :

“ 15. -----. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.”

(emphasis supplied)

and in ***Usha Balasaheb Swami / Kiran Appasao Swami (2007) 5 SCC 602*** as under :

“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.”

(emphasis supplied)

12. By virtue of the amendment to Order VI Rule 17 of CPC, by way of introduction of the proviso, the rule of due diligence, has been introduced. In ***Chander Kanta Bansal vs. Rajender Singh Anand, AIR 2008 SC 2234***, a case relating to amendment of the written statement, wherein, it was held that reason for adding the proviso to Order VI Rule 17 of CPC, was to stall filing of application for amendment of a pleading subsequent to commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case, so as to curtail delay and expedite the cases, the words “due diligence” have been explained as under:

“11. ----- . As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings

is permitted at any stage of proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of 'due diligence' the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the 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 (Eighth Edition), "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 Edition 13A) "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. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. -----".

(emphasis supplied)

13. The issue of 'due diligence', cannot be encapsulated into a strait-jacketed formula, but has to be considered on a case to case basis. However some factors can definitely be considered, one side of the spectrum being :

(a) Where the record indicates absence of knowledge regarding the proposed amendment which could not otherwise have been obtained by a prudent person.

(b) where the information was within the knowledge of the other side, who inspite of a duty to disclose, deliberately, conceals the same.

the other end of the spectrum being :

(c) where the information was disclosed, but was not taken note of by filing an application within reasonable time.

the above are some circumstances which would be pointers, for application of the 'due diligence' position.

There can be incidences where the issue of 'due diligence' could be outweighed by the need to avoid multiplicity of litigation; the amendment being necessary to decide the real controversy between the parties; the injustice or prejudice which may be caused to the party seeking amendment upon its refusal and other

factors. Thus the grant or refusal of an amendment, does not depend on any singular factor but on an amalgam of several, as indicated above, each having its own weight and importance. The dictum as laid down in ***M. Revanna / Anjanamma (2019) 4 SCC 332***, where the application for amendment of the plaint was rejected as being belated, not bonafide and so also having the effect of changing the character of the suit being relevant is quoted as under :

“ 7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money. ”

(emphasis supplied)

[Also see ***Gurubaksh Singh*** (supra); ***Rajabahadur Jiyaram Yadav*** (supra) and ***Kamalkumar Shivkisan Agrawal / Navnirmal Developers & anr (2020) 3 ALL M R 221***]

14. The question of interpretation of the expression “commencement of trial”, as occurring in the proviso, to Order VI Rule 17 of CPC, is turning out to be a vexed question. There are judgments, which have taken a wider view, in which inspite of the trial having commenced, the amendment to the plaint, was allowed, considering, that the law abhors multiplicity of litigation and absence of prejudice. On the other hand, there are judgments, which have taken a narrower view, holding, that unless ‘due diligence’ is strictly established, the amendment ought not to be permitted. The earliest view, though it was a case relating to the amendment of the written statement, was that “commencement of trial” as used in the proviso to Order VI Rule 17 of CPC, must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments [See **Baldev Singh** (Supra)]. It thereafter was restricted to hold that ‘trial commenced’, on the framing of the issues [see **Vidyabai** (Supra) & **Bharat Gangabisan Kalantri** (supra)]. This view, later on came to be expanded to hold, that technically ‘trial commences’ when the date is fixed for leading evidence by the plaintiff [See **Mohinder Kumar Mehra & Ajendraprasadji N. Pandey** (supra)], which subsequently has been further expanded to hold that the ‘trial commences’, on the

filing of the affidavit evidence by the plaintiff [see ***Mahadeo and The Liquidator, the Maratha Market Peoples Co-op Bank Ltd.*** (supra)]. Some cases, have taken a view, that merely filing of an affidavit in lieu of oral evidence would not mean that the trial would commence but something more, in the nature of the plaintiff entering into the witness box, to prove the affidavit in lieu of oral evidence, has to be done for the trial to commence [see ***Smt. Basanti Satapathy & ors / Rakesh Kumar Satapathy (2003) SCC Online Ori 286*** and ***Neelakandan Nair / Parameswara Kurup (2003) SCC Online Ker 124***]. Yet another view, has been taken, that the trial would commence, when the first witness proves the affidavit of evidence or seeks to prove a document for it to be tendered in evidence or the cross-examination of such witness begins [see ***Sree Sree Ishwar Radha Bihari Jew*** (supra)].

15. In so far as the view laid down in ***Mahadeo*** (supra) is concerned, the same has been rendered in a reference made to the learned Division Bench due to difference of opinion of learned Single Judges of this Court. Though the judgment rendered in ***Sree Sree Ishwar Radha Bihari Jew*** (supra), by the Division Bench of the Calcutta High Court, again in reference, also considers

the judgment in ***Mahadeo*** (supra), as well as the dictum of the Hon'ble Apex Court in ***Vidyabai*** (supra), and takes a wider view, than what has been taken in ***Mahadeo*** (supra) judicial propriety, would dictate, that I follow the view taken by the learned Division Bench of this Court in ***Mahadeo*** (supra). In this regard, what has been held in ***Thana Electricity Supply Ltd.***, (supra), being material is quoted as under :

10. Though there is no provision like article 141 which specifically lays down the binding nature of the decision of the High Courts, it is a well-accepted legal position that a single judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction and of the Division Benches and of the Full Benches of his court and of the Supreme Court. Equally well-settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench of the same High Court. If the co-ordinate Bench in the subsequent case wants the earlier decision to be reconsidered, it should refer the question at issue to a larger Bench.

11. It is equally well-settled that the decision of one High Court is not a binding precedent on another High Court. The Supreme Court in *Valliamma Champaka Pillai v. Sivathanu Pillai*, (1979) 4 SCC 429 : AIR 1979 SC 1937, dealing with the controversy whether a decision of the erstwhile Travancore High Court can be made a binding precedent on the Madras High Court on the basis of the principle of stare decisis, clearly held that such a decision can at best have persuasive effect and not the force of binding precedent on the Madras High Court. Referring to the States Reorganisation Act, it was observed that there was nothing in the said Act or any other law which exalts

the ratio of those decisions to the status of a binding law nor could the ratio decidendi of those decisions be perpetuated by invoking the doctrine of stare decisis. The doctrine of stare decisis cannot be stretched that far as to make the decision of one High Court a binding precedent for the other. This doctrine is applicable only to different Benches of the same High Court.

12. It is also well-settled that though there is no specific provision making "the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would conform to the law laid down by it. It is in that view of the matter that the Supreme Court in *East India Commercial Co. Ltd. v. Collector of Customs*, AIR 1962 SC 1893 (at page 1905) declared:

"We, therefore, hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it....."

13. This position has been very aptly summed up by the Supreme Court in *Mahadeolal Kanodia v. Administrator-General of West Bengal*, AIR 1960 SC 936 (at page 941) as follows:

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

14. The above decision was followed by the Supreme Court in *Barada-kanta Mishra v. Bhimsen Dixit*, (1973) 1 SCC 446 : AIR 1972 SC 2466, wherein the legal position was reiterated in the following words (at page 2469):

“It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer.”

(emphasis supplied)

It is thus, apparent that the decision of the learned Division Bench of this Court, rendered in a reference, on account of the divergent views on the subject therein, in ***Mahadeo*** (supra) is binding upon me. In that view of the matter, in so far as the question, as when the trial commences, the same shall have to be held in consonance with what has been held in ***Mahadeo*** (supra), that it so commences from the date of filing of affidavit in lieu of examination-chief of the witness/es, and considering that in the instant matter, the applications at Exhs-70 & 77 came to be filed at the stage when the matter was pending for cross-examination of

the plaintiff, it can definitely be said that the trial had commenced, in view of which the proviso to O.6 R. 17 CPC, became attracted.

16. It, therefore, needs to be seen, whether, the requirement of due diligence, as contained in the proviso to Order VI Rule 17 was satisfied or the other factors outweigh the requirement of 'due diligence'. It is not disputed by Mr. Barde, learned counsel for the respondents, that, in so far as the sale deed dated 29/08/2006, of the land of Gut No. 17, in respect of which the amendment was sought to be made in the plaint as well as the purchasers were sought to be added as parties / defendant nos. 4 to 29, the information regarding the same, already stood disclosed to the plaintiffs, in the earlier SCS No. 513 of 2011, by virtue of the affidavit in lieu of evidence filed by the plaintiff therein, at Exh.98 on 22/10/2012. That being the case, the application at Exh.70, suffers from suppression of this knowledge on part of the plaintiff, which was already with them, on 22/10/2017 as against which the application at Exh.-70 for amendment of the plaint was made on 17/11/2017, nearly after a period of more than five years from the date of acquiring knowledge, presuming they were unaware of the sale deed dated 29/08/2006. This is also the situation, in respect of the sale deed dated 15/03/2007 and its purchasers, where were

sought to be impleaded by virtue of the application at Exh.77 as the fact, that a disclosure as to the sale deed dated 15/03/2007, already stood made in SCS No. 513 of 2011 is not disputed. The factum about this disclosure, is duly noted by the trial court in para 11 of the order below Exhs.70 and 77, however, inspite of having noted this, the learned trial court has not examined the aspect of due diligence, as contained in the proviso to Order VI Rule 17 of CPC, as there is no discussion in that regard whatsoever. Nor has the learned Trial Court considered the other factors, indicated above, which are necessary to be considered while deciding an application for amendment. The only reason for allowing the amendment, as spelt out from para 11 of the impugned orders is that though the plaintiffs have given the affidavit of evidence on record, however, as the cross has not commenced, the defendants would not be prejudiced. This in my considered opinion, does not satisfy the requirement of considering the issue of due diligence or for that matter the factors as indicated above, to be taken into account while deciding an application for amendment. In fact in ***Vidyabai*** (*supra*), the Hon'ble Apex Court, has held, that the proviso to Order VI Rule 17 of CPC is couched in a mandatory form and the court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it

must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. The impugned orders, in as much as, they do not consider the aspect of due diligence, at all, cannot be sustained.

17. It is further material to note that though the learned Trial Court has while allowing the amendments, kept the issue of limitation open for adjudication, that however, cannot be a justification, for allowing the amendment, without compliance with requirement of the proviso to Order VI Rule 17 of CPC. That apart, the dictum as laid down in ***L.C. Hanumanta*** (supra), that the courts will as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application, would also be attracted, in view of the undisputed position, in the present matter, that the plaintiffs were aware of the documents of sale, as of 22/10/2012 in SCS No.513 of 2011, on account of its disclosure, in the affidavit in lieu of evidence, Exh-98 as filed by the plaintiff therein, which would make the claim viz-a-viz the said two sale deeds clearly barred by limitation and merely keeping the point of limitation open, would be of no use, other than dragging the purchasers in to litigation, the result of such a plea, being forgone.

18. It however cannot be disputed that the land of Gut no. 43, was a subject matter of the suit filed by the plaintiffs bearing SCS No. 160 of 2012 and by the amendment application at Exh-70, a portion of the amendment, as stated in para 4(B), related to the insertion of the boundaries of the said Gut No. 43 and to that limited extent and amendment would be permissible, as it would only be of a clarificatory nature for the purpose of fixing the boundaries of the land, which is already the subject matter of the dispute in the lis. [see **Vitthal Mahasukhe Mandre** (supra)].

19. The impugned order dated 13/03/2019, below Exh-70, passed by the learned Trial court, is therefore, quashed and set aside, except to the extent that it permits the insertion of the boundaries in the description of the land of Gut No. 43, as detailed in para 4(B) of the application at Exh.70. The amendment application Exh-70, except to the extent as indicated above stands dismissed.

20. The impugned order dated 13/03/2019 below Exh.77 passed by the learned Trial court, is hereby quashed and set aside and the application for amendment, at Exh-77 is dismissed.

21. Petition is partly allowed to the above extent. Rule made absolute in the above terms. No order as to costs.

22. Learned counsel appearing for the respondents seeks a stay of six weeks to the judgment. In view of the fact, that by an order dated 09/07/2019, the orders below Exhibits-70 and 77, already stood stayed during the pendency of the petition, I do not see any reason to grant any stay, the request is therefore declined.

(AVINASH G. GHAROTE)
JUDGE

VSM/