



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.251 OF 2024

Sau. Anita Anant Kaidalwar,
aged 59 Years,
Occupation – Homemaker,
Resident of Flat D-102, Aakar Nagar,
Near Friends Clony, Katol Road,
Nagpur – 440013.

..... **PETITIONER**
(Original Plaintiff)

...V E R S U S...

Shri Suhas Manoharrao Umathe,
aged 67, Occupation: Private,
Resident of S-4, Second Floor,
Park Plaza, Anand Nagar,
Ramnagar, Near Senior Citizen Hall,
Chandrapur.

2] Smt. Rita Anil Umathe,
Aged about 50 years,
Occupation Household,

3] Kum. Surmai Anil Umathe,
Aged about 24, Occupation Private,

Both 2 & 3 residents of A-10,
Samarth Colony, Near Vivekananda Colony,
Near Gajanan Maharaj Mandir,
Amravati 444 606.

..... **RESPONDENTS**
(Original Defendants)

Mr. U. A. Gosavi, Advocate for Petitioner.
Mr. S. S. Dhengale, Advocate for Respondents.

CORAM: **BHARAT P. DESHPANDE, J.**

DATE OF RESERVING THE JUDGMENT : 07.03.2024
DATE OF PRONOUNCING THE JUDGMENT : 13.03.2024

ORAL JUDGMENT:

Heard.

2. Rule. Rule is made returnable forthwith.

3. Heard with consent for final disposal.

4. Whether in absence of due diligence by the party, an amendment could be allowed after the trial commence, is the question which needs to be answered in the present proceedings.

5. The petitioner is the original plaintiff who filed a suit for partition, separate possession, declaration, cancellation of will and mandatory injunction against the respondent/defendant.

6. The said suit is registered as Special Civil Suit No.355/2021. Learned trial court after the pleadings were completed, framed issues on 23.12.2022 and then posted the matter for evidence. The petitioner/plaintiff filed an affidavit in evidence on 03.02.2023 vide Exhibit-31 and further examination

in chief for the plaintiff was recorded. The matter was then fixed for cross-examination of the plaintiff, however, the defendants sought time. Subsequently on 20.03.2023 respondent No.2 filed an application for amendment of the written statement under Order VI Rule 17 of the Code of Civil Procedure (Exhibit-35). Petitioner/plaintiff objected to such amendment, however, the learned trial court by impugned order dated 20.06.2023 allowed the said application thereby permitting the defendants to amend the written statement.

7. The petitioner challenged the said order before this Court by filing Writ Petition No.4763/2023 on the ground that such order required to be quashed and set aside since there is no finding in connection with due diligence. Vide order dated 19.08.2023, learned Single Judge of this Court (Coram: Anil S. Kilor, J.) partly allowed the said writ petition, quashed and set aside order dated 20.06.2023 and remanded the matter to the learned Civil Court to decide the application afresh. While doing so, this Court observed that the impugned order dated 20.06.2023 nowhere discusses the aspect of due diligence as found in the proviso to Order VI Rule 17 of the C.P.C.

8. After remand, the learned trial court passed separate order below Exhibit-35 dated 18.12.2023 thereby allowing the said application for amendment but by recording specific findings in connection with due diligence, against the defendants.

9. Learned counsel for the petitioner would submit that once the learned trial court observed that defendants failed to file the application for amendment before the commencement of trial and there is no due diligence on the part of defendants for filing such application after the commencement of order, the application ought to have been rejected.

10. Learned counsel for the petitioner would submit that proviso to Order VI Rule 17 of the C.P.C. mandate that once the court observed that there is no due diligence, application needs to be rejected. He would further submit that the learned trial court categorically gave finding on point no.2 which is against the respondent stating that the said respondent failed to prove due diligence however, in spite of this, learned trial court allowed the amendment application which is against the settled proposition of law.

11. Learned counsel for the petitioner would submit that even on merit the application for amendment ought to have been rejected since there is no explanation coming forward as to why such amendment is necessary. He would submit that the application filed for amendment nowhere give any reason about the proposed amendment and why it is necessary to decide the issues in the suit.

12. Per contra, learned counsel for the respondent firstly claim that aspect of due diligence will not be applicable to the present matter since proposed amendment is only by way of clarification of the matter which is already pleaded in the original written statement. There is no new defence or plea which has been raised in the amendment application.

13. He would therefore, submit that even though due diligence is not proved, trial court has rightly allowed the amendment application considering it as clarification/elaboration of the pleadings for which the base is already set up in the written statement. He would submit that such application for amendment was necessary in order to clarify the defence raised by the respondent/defendant and no prejudice is going to cause to the

plaintiff.

14. In rejoinder the learned counsel for the petitioner would submit that the application for amendment is filed only by one defendant whereas the written statement is filed jointly by three defendants. It would submit that joint written statement filed by the defendant cannot be permitted to be amended only by one of the defendant.

15. Learned counsel for the respondent, on this contention, would submit that the application of amendment is filed by all the defendants however, it is only signed and verified by one of the defendant.

16. Rival contentions call for determination.

17. It is admitted fact that amendment application is filed after the trial commence i.e. recording evidence of plaintiff partly and fixing the matter for cross-examination. Thus, the proviso to Rule 17 of CPC stand attracted which read thus:

“Provided that no application for amendment shall be 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 trial.”

18. Said proviso was amended by the Amendment Act, 2002 and the main purpose of carrying out such amendment is to curtail/restrict delay in the trial and by filing unwanted application for amendment. Thus, proviso comes to play when the amendment application is filed after commencement of the trial. The commencement of trial as defined under the CPC has to be considered from the date of framing of issues and fixing the matter for evidence of the plaintiff. In this matter, there is no dispute that amendment application was filed after the plaintiff stepped into the witness box and the matter was kept for cross-examination.

19. Perusal of this provision would make it clear that it consists of two parts. In the first part the court may at any stage of the proceeding allow either party to amend pleadings. The second part is that such amendment shall be made for the purpose of determining the real questions in controversy raised between the parties. The above provisions conferred wide powers and discretion on the court to allow the amendment of the pleadings

in such manner and on such terms as it appears to the court as just and proper. However, by adding proviso by Amendment Act, 2002, the right of any party seeking amendment after the commencement of trial is restricted. For that purpose the party applying for amendment must satisfy the court that in spite of due diligence such proposed amendment could not have been sought earlier.

20. Background, under which the proviso was amended is discussed in various decisions of the Apex Court and also by the High Court wherein purpose is to expedite the trial and to restrict unwanted amendments only for the purpose of delay of the proceedings. Further it could be gathered from the various decisions, objects and reasons of the Amendment Act of 2002 that an application under Order VI Rule 17 of the CPC after commencement of trial cannot be allowed unless the court comes to the conclusion that in spite of due diligence such amendment could not have been sought earlier. The main purpose is to prevent frivolous application filed only to delay the proceedings.

21. Admittedly, the provisions contained are procedural in nature with a design to facilitate the parties to seek justice.

The object is to advance the cause of justice and not to prevent the parties on technical grounds. It further shows that it cast an obligation on the party applying for amendment and more specifically after commencement of the trial, to offer explanation to the satisfaction of the court in order to conclude that in spite of due diligence the party could not have raised the matter before the commencement of trial. It is required to be made clear that this proviso does not deal with the power of the court and also does not specifically take away the power of court to allow amendment after the commencement of trial. It only empowers the court to reject the application if it comes to the conclusion that in spite of due diligence the party could not have sought the amendment before the commencement of trial.

22. The main provision in Rule 17 remains the same and there are catenas of decisions passed by the Apex Court and also by the High Court that even amendment could be allowed at the stage of second appeal. However, the party must plead and proved that such amendment could not have been placed in the original pleadings due to the reasons beyond control of the said party. Secondly, the party applying for amendment must prove that such amendment needs to be allowed for the proper determination of

the issues in the suit. The proviso added by Amendment Act, 2002 would only require the court to satisfy itself that the party applying for such amendment, in spite of due diligence was unable to raise such plea before commencement of the trial. Thus, in addition to the earlier principles for the purpose of amending of the pleadings, the proviso added one more aspect which requires to be properly addressed by the party and considered by the court so as to exercise powers to amend the pleadings. When discretion is given, the court is duty bound to exercise such discretion in accordance with law and on the basis of proper averments made by the concerned party.

23. The matter in hand needs consideration on another aspect since the learned trial court in the impugned order observed that when the proposed amendment though filed after the commencement of trial is in the nature of clarification/explanation of the pleadings already on record, the question of due diligence cannot be considered. Thus, apart from the fact that whether in absence of due diligence the court is empowered to allow the amendment after the trial commenced and whether any application for amendment which is purely clarificatory in nature, the question of due diligence needs to be

ignored, needs consideration in the present matter.

24. The second question as to whether due diligence needs to be pleaded in the application for amendment to the satisfaction of the trial court and that such due diligence needs to be ignored in case of amendment which is purely clarificatory in nature, could be taken for discussion.

25. In the case of *Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd. (2007) 1 Mah LJ 331*, learned Single Judge of this Court (Coram: D. B. Bhosale, J.), had opportunity to discuss in detail the amended provision of Order VI Rule 17 of the CPC. After considering various decisions in the matter, the learned Single Judge culled out the principles/guidelines in para 35 which read thus:

35. From the aforesaid discussion and the judgments the following principles/guidelines broadly emerge:

- (i) The proviso to Order 6 Rule 17 is procedural and not a part of substantive law. It does not deal with the power of the court and also does not specifically take away the power of the court to allow the amendment after the commencement of trial. It only empowers the court to reject the application if it comes to the*

conclusion that in spite of “due diligence”, the parties could not have sought the amendment before the commencement of trial.

- (ii) The proviso to Rule 17 of Order 6 of the CPC, in the present form and context, is directory and not mandatory. While dealing with the application under Order 6 Rule 17 courts can apply the principles/guidelines laid down by the Supreme Court and High Courts before the Amendment Act of 2002 came into force, if the amendment is found to be necessary for the purpose of determining the real questions in controversy between the parties even after the commencement of trial.*
- (iii) While dealing with the application under Order 6 Rule 17 made after commencement of the trial, the court should, all the time and at all the stages, bear in mind the force, impact and vigour of the provision and see that it is maintained and not nullified and that the application is not filed to delay the trial.*
- (iv) The commencement of the trial as mentioned in proviso to Order 6 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 documents.*
- (v) Once a prayer for amendment is allowed the original pleadings should incorporate the changes in a different ink or an amended pleading may be filed wherein with the use of a highlighter or by underlining in red the changes made may be distinctly shown.*

- (vi) *The applicant should specifically set out which portions of the original pleadings were sought to be deleted and what were the averments which were sought to be added or substituted in the original pleadings. The applications giving a vague idea of the nature of the intended amendment and then annex a new written statement with the application to be substituted in place of the original written statement cannot be and should not be allowed.*
- (vii) *The applicant, seeking amendment, should offer sufficient and proper explanation mentioning the particular circumstances against which an amendment was sought to enable the court to reach the conclusion that in spite of due diligence the applicant could not have raised the matter before the commencement of trial.*
- (viii) *Once a prayer for amendment is allowed the party should incorporate the amendment in the pleadings within the time limited for that purpose or else within 14 days as provided by Order 6 Rule 18 of the CPC. As far as possible the courts while allowing the amendment should direct the party to carry out amendment within timeframe.*
- (ix) *When one of the parties has been permitted to amend his pleading, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 of CPC which, of course, would ordinarily and liberally be allowed. Such amendments are known as “consequential amendments”. However, a new plea cannot be permitted to be added in the*

garb of a consequential amendment, though it can be applied by way of an independent or primary amendment.

- (x) *An amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. 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. However, 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. The courts are, therefore, required to take more liberal view in allowing amendment of written statement than of plaint and question of prejudice is less likely to operate with same rigour in former than in latter case.*
- (xi) *The courts while deciding the application for amendment should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Amendment need to be allowed to avoid uncalled-for multiplicity of litigation.*
- (xii) *The defendant has a right to take an alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn and it should not result in defeating a legal right accruing to the plaintiff on account of lapse of time.*
- (xiii) *The delay in filing the petition for*

amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

- (xiv) If it is permissible for the plaintiff to file an independent suit, the same relief which could be prayed for in a new suit should be permitted to be incorporated in the pending suit by way of an amendment. Such amendment would curtail multiplicity of legal proceedings.*
- (xv) Inconsistent plea, in a given case, can also be allowed to be raised by the defendants in the written statement. However, an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement, however, cannot be allowed. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants.*
- (xvi) The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments should be allowed more liberally than those which are sought to be made after commencement of the trial and after conclusion thereof.*
- (xvii) The court can allow amendment of pleadings even at the appellate stage for the purpose of determining the real question in controversy between the parties or if it is necessary for the effective*

decision of the case. However, the delay in seeking an amendment must be explained satisfactorily and that it should not cause injustice to the other side or it should not affect the right already accrued to the other side. At appellate stage none of the parties could be allowed to withdraw the admissions or pleadings, if the rights are accrued to the other side.

- (xviii) If the application for amendment is allowed after the commencement of trial and if the proposed amendment has the effect of altering the nature of the defence the plaintiff can claim re-examination of the witness/es and if he makes such claim the court should allow such prayer.*
- (xix) While considering whether an application for amendment should be allowed, the court is not expected to go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.*
- (xx) An Amendment once incorporated relates back to the date of the suit. However, the doctrine of “relation-back” in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking amendment was filed.*

(xxi) An application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation. On the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing the amendment in the interest of justice. The plea of limitation being a mixed question of law and fact can be made a subject matter of the issue after allowing the amendment prayed for.

26. The learned Single Judge thereafter observed that the above principles are only illustrative and not exhaustive and the court must keep in mind that whenever application is filed for amendment, it has to be decided on its own merit for the purpose of determining the real questions in controversy between the parties. However, point (vii) as quoted above clearly disclosed that the application seeking amendment should offer sufficient and proper explanation mentioning the particulars against which an amendment was sought to enable the court to reach to the conclusion that in spite of due diligence the applicant could not raise the matter before commencement of trial.

27. In the case of *Conception Fernandes and another v. Tasneem Shaikh and others (2014) 5 Mah LJ 494*, learned Single Judge (Coram: S. B. Shukre, J.) observed that in absence of

pleadings of due diligence is required to be disclosed by the party who is applying for amendment. Due diligence contemplated by the said provision is something akin to situation of helplessness or of beyond one's own control and thus it needs to be mentioned in the application.

28. In the case of *Vidyabai and others v. Padmalatha and another (2009) 2 SCC 409*, the Apex Court had an occasion to deal with proviso of Order VI Rule 17 of the CPC wherein it has been observed in para 10 that proviso was inserted by Amendment Act, 2002 which shows that such proviso is couched in a mandatory form. The jurisdiction of court to allow such an application is taken away unless the conditions precedent therefor are satisfied i.e. 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 Apex Court further observed that in para 19 it is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's

jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

29. In the case of *Revajeetu Builders & Developers v. Narayanaswamy & Sons & others* 2009 AIR SCW 6644, the Apex Court discussed the provisions in detail and observed in para No.67 that the parameters which are necessary to be taken into consideration while dealing with an application for amendment are:

- (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. The Apex Court further observed that these parameters/important factors are only illustrative and not exhaustive.

30. In the case of *Jayashree Subhash Kalbande and another v. Bhaurao Nagorao Derkar and others* 2014(4) *Mh.L.J.* 168, the learned Single Judge (Coram: R. K. Deshpande, J.) while dealing with the proviso to Order VI Rule 17 of CPC and more specifically clause due diligence, discussed that due diligence is distinct from ignorance. In spite of knowledge, ignorance of a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake. Unless this hurdle is crossed of due diligence, it is not permissible to allow application for amendment after commencement of trial. The contention that the written statement was not properly drafted, is not a case which should be considered under the clause of due diligence as it is only negligence of the party in properly drafting the written statement having knowledge of all the facts.

31. In the case of *Life Insurance Corporation of India v.*

Sanjeev Builders Private Limited & Anr. 2022 LiveLaw (SC) 729,

the Apex Court while dealing with the aspect of delay in applying for amendment has observed in para No.70, held thus:

70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is

not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

*(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See **Vijay Gupta v. Gagninder Kr. Gandhi & Ors.**, 2022 SCC OnLine Del 1897).*

32. The learned counsel for the respondent while placing reliance in the case of **Harpal Singh Dhillon and Ors. v. District Judge, Lucknow and Ors.** 2019(11) ADJ605, wherein the learned Single Judge held that the proviso appended to Order VI Rule 17 of the Code though applicable, concept of “due diligence” would

arise only in case new pleadings are sought to be introduced by of amendment and the same would be in applicable in case only pleadings made earlier are sought to be elaborated, clarified or substantiated by means of amendment.

33. With due respect to the above observations of the learned Single Judge of Allahabad High Court, the proviso appended to Order VI Rule 17 CPC nowhere discriminate/bifurcate the application for amendment into two different parts i.e. amendment clarifying the earlier pleas or adding further facts and amendment with regard to addition of new pleas. The interpretation of the proviso has to be construed as per the words mentioned therein. It is not permissible to introduce some different interpretation by adding or subtracting words from the said proviso. If the language of the proviso is clear and unambiguous, it is not permissible to add or subtract something from the said provision. The amendment may be clarificatory in nature however, as per the decisions of the Apex Court as discussed above, the embargo put on the court jurisdiction needs to be crossed both by the party applying for amendment and the court, once the trial commenced. It did not restrict the power of the court to dilute the said provision by interpreting the

amendment sought for is only clarificatory in nature. Even in that case, the party applying for amendment must mention the aspect of due diligence, to the satisfaction of the court. The observations of the Apex Court in the case of ***Vidyabai*** (supra) as found in para 10 clearly discloses that the proviso is couched in a mandatory form. The jurisdiction of the court to allow such amendment is taken away after the trial commenced unless the condition precedents therefor are satisfied. Thus, the decision of Allahabad High Court is clearly in the teeth of the observations in ***Vidyabai*** (supra).

34. The application for amendment must disclose the reasons as to how the party applying for amendment was prevented from filing such application before the commencement of the trial. This is the first aspect which the court has to consider as the proviso is couched in a mandatory form. Unless this hurdle is crossed, the court is not entitled to look into the other aspects of the amendment. Thus, the party applying for amendment after commencement of trial is to first plead as to why the said party was unable to apply prior to commencement of the trial. If the court comes to the conclusion that in spite of due diligence the party was prevented from applying for amendment, then only the

other aspects as to whether the amendment is necessary for the purpose of deciding the real controversy in question etc. will have to be looked into.

35. The matter in hand would clearly go to show that by the earlier order passed by this Court on 19.08.2023, the matter was remanded to the learned court to decide and give findings on due diligence and accordingly the learned trial court discussed this aspect of due diligence by framing points which are found in the impugned order. Point no.2 read thus along with the answer of the trial court.

Sr.	Points	Findings
1	---	---
2	Whether despite due diligence parties could have raised matter before commencement of trial ?	Yes

36. The learned trial court observed that though due diligence is not proved by the respondent/defendant, the amendment could be allowed since it is not introducing a new plea but it is in the form of clarification. This observation of the learned trial court in spite of the finding that defendant failed to prove due diligence, is completely against the observations of the Apex Court in the case of **Vidyabai** (supra). The jurisdiction of the

court to allow such amendment is only if the party satisfy the court that in spite of due diligence the said party was prevented from filing application for amendment, before commencement of the trial.

37. Once the court observed that the defendant failed to establish due diligence, the jurisdiction of the court to entertain application stands outstayed. Thus, in the present matter, once the court observed that defendant failed to prove due diligence, the proviso comes into play and the jurisdiction to entertain application for amendment stands outstayed. Admittedly, this observation of the learned trial court on point no.2 is not challenged by the defendants/respondents. Accordingly, impugned order needs to be quashed and set aside.

38. The petition stands allowed. The impugned order is quashed and set aside. The amendment application filed by defendants stands rejected. Rule is made absolute in above terms.

(BHARAT P. DESHPANDE, J.)