

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 18933 OF 2024

Smt. Shashikala Sriram Shetty }	
Age: 76 years, Occu: Business and }	
Homemaker, R/at: 19B, Cycle }	
Society, Quarter Gate, Pune-411 }	Petitioner
011. }	(Orig. plaintiff)

V/s.

1. Jagannath Honnaya Shetty }
 (deceased) }

2. Nikita Jagannath Shetty, Age: 36 }
 years, Occu: Business, R/at: Modi }
 Baug, D-401, Ganeshkind Road, }
 Pune 411 016. }

3. Smt. Nanda Dayanand Shetty, }
 Age: 65 years, Occ: Business and }
 Homemaker, R/at: 601, Pooja }
 Heritage, Lane#3, Anand Park, }
 Aundh Pune-411 007. }

4. Kunal Dayanand Shetty, }
 Age: 42 years, Occ: Business, R/at: }
 601, Pooja Heritage, Lane #3, }
 Anand Park, Aundh, Pune-411 007. }

5. Ashwin Dayanand Shetty, }
 Age: 39 years, Occu: Business, R/at: }
 601, Pooja Heritage, Lane#3, }
 Anand Park, Aundh Pune-411 007. }

6. Shashindra Sunder Shetty, }
 Age: 69 years, Occ: Business, R/at, }
 B-804, Sahadev Heights, Near }
 Rajwada Hotel, Off Baner Road, }
 Pashan, Pune-411 008. }

Digitally
signed by
VARSHA
DEEPAK
GAIKWAD
Date:
2025.06.09
17:22:17
+0530

7. Salil Sriram Shetty, }
Age: 49 yers, Occ: Business and } (Orig. defendants in Special
Consultant, R/at: 19B, Model Town, } Civil Suit No. 1228/2017)
Quarter Gate, Pune-411 011. }
8. Smt. Vijaya Uday Shetty }
Age: 69 years, Occ: Business and }
Homemaker, R/at 1, Modi Baug, E- }
802, Ganeshkhind Road, Pune-411 }
016. }
9. Smt. Jaya Shetty, } (Orig. plaintiff nos. 2 and 3 in
Age: 63 years, Occ: Teacher and } Special Civil Suit No.
Homemaker R/at: Flat No. 401, } 1228/2017)
Roopganga, Gaikwad Nagar, Aundh, }
Pune-411 007. }

Mr. S.C. Wakankar with Asishwarya Bapat, for the petitioner.

Mr. Saurabh Butala, for the respondent no. 2

CORAM : N.J. JAMADAR, J.
RESERVED ON : 25TH MARCH 2025.
PRONOUNCED ON : 9TH JUNE 2025.

JUDGMENT:

1. Rule.
2. Rule made returnable forthwith and, with the consent of the counsel for the parties, heard finally.
3. The petitioner/plaintiff no. 1 takes exception to an order dated 5th November 2024 passed by the learned Civil Judge, Pune whereby an application preferred by the respondent no. 2/defendant no. 2 seeking amendment in the written statement came to be allowed.

4. The background facts can be stated in brief as under:

4.1 The petitioner and respondent nos. 8 and 9, have instituted the suit, being Special Civil Suit No. 1228 of 2017, for declaration that the plaintiffs have 3/5th share in the suit properties and defendant nos. 1 and 2 together have 1/5th share and defendant nos. 3 to 5 together have 1/5th share in the suit properties, partition, rendition of accounts and the consequential reliefs.

4.2 The plaintiffs are the daughters of Shridhar Shetty. Their sister Shakuntala was married to defendant no. 1. Shankuntala passed away on 24th February 2006. Defendant no. 2 is the adopted daughter of defendant no. 1 and late Shakuntala. The plaintiffs had a brother Dayanand, who passed away on 7th July 2012. The defendant no. 3 is the widow, and defendant nos. 4 and 5 are the sons of Dayanand.

4.3 The plaintiffs assert defendant no. 6 is conducting the business of hotel Roopali (suit property 1B) illegally in collusion with defendant no. 1. Defendant no. 7 is the son of plaintiff no. 1. Defendant no. 7 has been given the rights of administering hotel Roopali by late Appi Shetty, the wife of

Shridhar.

4.4 The plaintiffs assert, Shridhar Babu Shetty, who passed away intestate on 18th February 1961, was the original holder of the suit properties. The defendant no. 1 has usurped the suit properties by creating false and forged documents and illegally claimed to be the absolute owner of the suit properties and thereby deprived the plaintiffs, who are legal heirs of late Shridhar Babu Shetty and late Smt. Appi Shetty, the wife of Shridhar Shetty, of their share in the suit properties. Hence, the suit for declaration, partition and rendition of accounts.

4.5 The defendant nos. 1 and 2 contested the suit by filing written statement on 6th March 2018. Issues were settled. The plaintiffs filed an affidavit in lieu of examination-in-chief. A further affidavit in lieu of examination-in-chief came to be filed on 6th April 2022.

4.6 When the matter was posted for cross-examination, the defendant no. 2 filed an application under the provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 ('the Code') seeking amendment in the written statement filed on

behalf of defendant nos 1 and 2. It was, inter alia, contended that after filing of the written statement the plaintiffs had filed application for temporary injunction, appointment of Court Receiver and recast of issues. Upon perusal of the pleadings and record, it was realised that amendment in the written statement was necessary to give better particulars, additional information, explanations and raise additional defences and contentions in the light of the averments in the plaint. It was, therefore, necessary to amend the written statement.

5. The application was resisted by the plaintiffs.
6. By the impugned order, the learned Civil Judge was persuaded to allow the application observing, inter alia, that the proposed amendment would not change the nature of defence of the defendant no. 2. The facts sought to be introduced by way of amendment in the written statement were explanatory in nature. Thus, to decide all the questions in controversy between the parties, the proposed amendment was necessary. Though the learned Civil Judge explicitly recorded that the defendant no. 2 was not diligent in seeking the amendment yet considered it appropriate to allow the application

subject to payment of costs.

7. Being aggrieved, the plaintiff no. 1 has invoked the writ jurisdiction.

8. I have heard Mr. Wakankar, the learned counsel for the petitioner, and Mr. Saurabh Butala, the learned counsel for the respondent no. 2, at some length. Learned counsel for the parties took the Court through the original pleadings, averments in the application seeking amendment in the written statement and the draft text of the amendment which was sought to be introduced, by the defendant no. 2, in the written statement.

9. Mr. Wakankar, learned counsel for the petitioner, would submit that the trial Court has committed a jurisdictional error in allowing the application for amendment in the written statement despite recording a categorical finding that the defendant no. 2 was not diligent in seeking the amendment. Once a finding of want of due diligence was recorded, the trial Court could not have permitted the defendant no. 2 to amend the written statement. Taking the Court through the averments in the application seeking amendment in the written statement, Mr. Wakankar submitted that the only reason which can be culled out from the said application is that there was a change

in the advocates who represented the defendant no. 2. That cannot be a justifiable ground to allow the amendment in the written statement after the commencement of the trial, in the face of the interdict contained in the proviso to Order VI Rule 17 of the Code. Neither the defendant no. 2 has made any endeavour to satisfy the test of due diligence nor the draft text of the amendment indicates that the contentions sought to be raised by way of amendment were such that those contentions could not have been raised by the defendant no. 2 before the commencement of the trial. Thus, the impugned order deserves to be quashed and set aside.

10. To buttress these submissions, Mr. Wakankar placed reliance on the judgments of the Supreme Court in the cases of '*Vidyabai and Ors. Vs. Padmalatha and Anr.*¹, '*Samuel and Ors Vs. Gattu Mahesh and Ors*², '*Chander Kanta Bansal Vs. Rajinder Singh Anand*³ and '*Dinesh Goyal @ Pappu Vs. Suman Agarwal (Bindal) & Ors*⁴

11. Mr. Wakankar also relied upon the judgment of Allahabad High Court in the case of '*Shri Firoz Uddin and Ors. Vs. Shri Anwar Uddin*⁵, to lend support to the submission that change in advocates

1 (2009) 2 SCC 409

2 (2012) 2 SCC 300

3 (2008) 5 SCC 117

4 Civil Appeal No. --- of 2024 dated 24th September 2024

5 2023: AHC:98352

does not constitute a justifiable ground to permit a party to amend the pleading, post the commencement of the trial.

12. Mr. Saurabh Butala, the learned counsel for the respondent no. 2, on the other hand, would submit that, in fact, it is the plaintiffs who are to be blamed for the delay in the disposal of the suit. Mr. Butala invited attention of the Court to orders passed by the trial Court wherein observations have been made which reflect upon the conduct of the plaintiffs as well. In any event, according to Mr. Butala, the proposed amendment does not materially alter the nature of the defence of the defendant no. 2. At best, the proposed amendment is in the nature of amplification of the contentions already raised by the defendant no. 2. By way of proposed amendment, the defendant no. 2 has sought to offer additional explanations and also demonstrate as to how the claim of the plaintiffs is not sustainable. Since the amendment is in written statement, according to Mr. Butala, a more liberal approach in the matter of permitting the amendment in the pleading is warranted, and, thus, no interference is warranted in the impugned order.

13. Mr. Butala placed reliance on the judgment of Supreme Court in the cases of *'Usha Balasaheb Swami and Ors Vs. Kiran Appaso*

*Swami and Ors.*⁶, *'Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors.'*⁷, *'Andhra Bank Vs. ABN Amro Bank N.V. and Ors'*⁸, *Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Anr.*⁹ and *'Surender Kumar Sharma Vs. Makhan Singh'*¹⁰.

14. The aforesaid submissions now fall for consideration.

15. There is not much controversy over the facts which are germane while determining the legality, propriety and correctness of the impugned order, which allowed the defendant no.2 to amend the written statement post commencement of the trial.

16. Incontrovertibly, after completion of pleadings, issues were initially settled on 15th November 2008. Pursuant to the order passed by the trial Court on 5th July 2024, at the instance of the plaintiff, the issues were recast. Prior thereto, the plaintiff had filed affidavit in lieu of examination-in-chief and with the permission of the trial Court, an additional affidavit in lieu of examination-in-chief was filed on 6th April 2022. Indisputably, the trial had commenced before the defendant no. 2 filed application for amendment in the written statement.

6 (2007) 5 SCC 602

7 (2009) 10 SCC 84

8 (2007) 6 SCC 167

9 (2022) 16 SCC 1

10 (2009) 10 SCC 626

17. Before adverting to appreciate the core question as to whether the defendant no. 2 could have been permitted to amend the written statement, post commencement of the trial, it is necessary to note the overarching principles which govern the exercise of jurisdiction to permit the parties to amend the pleadings. All amendments which are necessary for the determination of real questions in controversy between the parties are required to be allowed, unless the proposed amendment has the propensity to cause irretrievable prejudice to the adversary. The considerations like the proposed amendment would completely alter the nature and character of the suit, the relief sought to be claimed by way of proposed amendment is barred by law of limitation, the proposed amendment, if permitted would embrace the trial, are few of the important factors, which also weigh in the exercise of the jurisdiction.

18. It is equally well settled that at the stage of the consideration of the application for amendment in the pleading, the merits of the proposed amendment are not required to be delved into. More liberal approach is warranted where the defendant seeks amendment in the written statement as the potentiality of prejudice to the plaintiff is relatively less. The defendant is also entitled to take

inconsistent defences and alternative pleas more freely than the plaintiff.

19. The stage at which the amendment is sought assumes significance where the case is covered by the proviso to Order VI Rule 17 of the Code. The proviso envisages, that the Court shall not allow an application for amendment after the trial had commenced unless it comes to the conclusion that, in spite of due diligence, the party seeking the amendment could not have raised the matter before the commencement of the trial. In a sense, the element of due diligence and satisfaction by the Court about its existence, is a jurisdictional condition to permit the amendment in the pleadings after the commencement of the trial.

20. Ordinarily, mere delay in seeking amendment in the pleading by itself, cannot be the sole ground on which the application for amendment can be rejected. However, where the proviso to Order VI rule 17 of the Code comes into play, the jurisdictional fact needs to be satisfied.

21. In the case of '*Vidyabai and Ors*' (supra), the Supreme Court after adverting to the overarching principles which govern the jurisdiction to permit the amendment in the pleadings including the

decision in the case of **‘Rajesh Kumar Aggarwal Vs. K.K. Modi’**¹¹ enunciated that the Court should allow amendments that would be necessary to determine the real question in controversy between the parties but the same indisputably would be subject to the condition that no prejudice is caused to the other side. Thereafter, with regard to the effect of the proviso appended to Order VI Rule 17 of the Code, the Supreme Court enunciated the law as under:

‘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’.

(emphasis supplied)

22. The Supreme Court has, thus, emphasised that due diligence and satisfaction by the Court about the inability of the party seeking amendment in the pleadings, despite due diligence, to raise the said matter before the commencement of the trial is a jurisdictional condition. Unless the jurisdictional fact, as envisaged by the proviso to Order VI Rule 17 is satisfied, the Court will have no jurisdiction at all to allow the amendment in the pleadings, post the commencement of

¹¹ (2006) 4 SCC 385

the trial.

23. In the case of *Chander Kanta Bansal (Supra)*, the Supreme Court expounded the import of the term 'due diligence' in the following words:

"15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the 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.

16. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 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 (18th Edn.), "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 Edn.13-A) "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.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition

was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness.

18. As rightly referred to by the High Court in [Union of India vs. Pramod Gupta](#) (dead) by LRs and Others, (2005) 12 SCC 1, this Court cautioned that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings".

(emphasis supplied)

24. In the case of '*Samuel and Ors*' (supra), the Supreme Court again emphasised that the term 'due diligence' is used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of the trial. The observations in Paragraph Nos. 19 to 23 are material and hence extracted below:

"19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

21. In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term "typographical error" is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

22. The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip.

23. Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [vide [Aniglase Yohannan vs. Ramlatha and Others, \(2005\) 7 SCC 534](#), [Ajendraprasadji N. Pandey and Another vs. Swami Keshavprakeshdasji N. and Others, Chander Kanta Bansal vs.](#)

Rajinder Singh Anand, (2008) 5 SCC 117, Rajkumar Guraward (dead) through LRS. vs. S.K.Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364, Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409, and Man Kaur (dead) By LRS vs. Hartar Singh Sangha, (2010) 10 SCC 512.

(emphasis Supplied)

25. Whether the defendant no. 2 had succeeded in satisfying the test of due diligence?

26. Of necessity, recourse is required to be made to the averments in the application seeking amendment in the written statement. The only paragraph in the application, which can be said to contain an explanation as to the circumstances on account of which the defendant no. 2 could not seek the amendment before the commencement of the trial is Para No. 3, which reads as under :

“3. It is submitted that the undersigned advocate has been recently engaged by this defendant to represent her in the present suit. After going through the record, pleadings, etc. it has been revealed that certain amendments to the written statements are necessary to give better particulars, additional information, explanations, additional defenses and certain contentions in the light of allegations in the plaint etc. by way of an amendment to the written statement which would in turn enable the Hon’ble Court to determine the real question in controversy between the parties thereto”.

27. On a meaningful reading of the application for amendment and, in particular, the aforesaid paragraph, it becomes explicitly clear that the only reason sought to be ascribed for seeking amendment in

the written statement is that the learned advocate who filed the said application was recently engaged by the respondent no. 2 and after perusal of the record and pleadings, he realised that certain amendments in the written statement were required.

28. Conversely, the application seems to be conspicuously silent about the circumstances on account of which, despite due diligence, the defendant no. 2 could not seek amendment in written statement before the commencement of the trial. No effort whatsoever was made by the defendant no. 2 to satisfy the test of due diligence. It is in this context, the observations in the impugned order by the trial Court that the defendant no. 2 was not diligent in preferring the application seeking amendment in the written statement deserve to be appreciated.

29. The situation which, thus, obtains is that, on the one hand, no endeavour to satisfy the test of due diligence, by ascribing the reasons and circumstances for not seeking the amendment before the commencement of the trial, was made by defendant no. 2 and, on the other hand, the trial Court has recorded a categorical finding that the defendant no. 2 was not diligent in seeking the amendment in the written statement. In the absence of any material which could enable

the Court to satisfy itself that despite the due diligence the defendant no. 2 could not have raised the matter before the commencement of the trial (nay after recording a finding that there was no due diligence on the part of the defendant no. 2), I am afraid, it was open for the trial Court to permit the defendant no. 2 to amend the written statement as the jurisdictional fact cannot be said to have been fulfilled.

30. I find substance in the submission of Mr. Wakankar that the change in advocates cannot be considered to be a circumstance which would satisfy the test of due diligence. Reliance by Mr. Wakankar on the decision of Allahabad High Court in the case of '*Shri Firoz Uddin*' (supra), wherein it was observed that law is very much settled that change of counsel cannot be a ground for filing application for amendment, appears well founded.

31. There can be no quarrel with the general propositions that a prayer for amendment of the plaint and prayer for amendment of the written statement stand on different footings. 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 and that in case of amendment of written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case {‘***Usha Balasaheb Swami***’ (supra)}.

32. However, these general propositions would not advance the cause of the submissions on behalf of the defendant no. 2, where the defendant no. 2 failed to cross the initial threshold of due diligence. Had it been a case that the trial Court, on the basis of the averments in the application seeking amendment in the written statement, recorded the satisfaction that there was due diligence, this Court, in exercise of writ jurisdiction, would have been slow to interfere with the exercise of discretion by the trial Court. It could have been then said that the order permitting the amendment does not suffer from such patent error of law as to warrant interference in exercise of writ jurisdiction. However, by the impugned order the learned Civil Judge has permitted the defendant no. 2 to amend the written statement despite recording a categorical finding that there was no due diligence on the part of defendant no. 2.

33. The impugned order, thus, suffers from the vice of jurisdictional error in permitting the amendment.

34. For the foregoing reasons, I am inclined to interfere with the impugned order, and allow the petition.

35. Hence, the following order:

ORDER

- i) The petition stands allowed
- ii) The impugned order stands quashed and set aside.
- iii) The application for amendment in the written statement (Exhibit-156) stands rejected.
- iv) Rule made absolute to the aforesaid extent.

No costs.

(N.J. JAMADAR, J)