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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10691 OF 2025

Sanhita Samir Kumar Das

...Petitioner

Hindu, Indian Inhabitant

Age-47 years, Occupation-Service

Residing at: 105 - Ashirwad 2, Ashirwad C.H.S.

7 Bungalows, off J.P. Road Versova, Andheri (W), Mumbai

Versus

Aaron Joseph Mathias

...Respondent

Christian, Indian Inhabitant

Age - 46 years, Occupation-Service

Residing at: Flat No.1301, Lavender, Mantri Park,

Dindoshi, Goregaon (East), Mumbai.

Ms. Firdous Moosa i/b Prachi Nahar, for the Petitioner.

Mr. Aditya Miskita a/w Deepika Mule & Kartik Malusare i/b Kiran Mohite, for the Respondent.

CORAM: MADHAV J. JAMDAR, J.

DATED: 03 SEPTEMBER 2025

JUDGMENT:

1. Heard Ms. Firdous Moosa, learned Counsel appearing for the Petitioner and Mr. Aditya Miskita, learned Counsel appearing for the Respondent.

CHALLENGE:

2. The challenge in the present Writ Petition filed under Article 227 of the Constitution of India is to the Order dated 10th February 2025

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passed by the learned Judge, Family Court No.2, Mumbai below Exhibit-24 in Petition No. A-1064 of 2017 (“**impugned Order**”). By the impugned Order, the said Application bearing Exhibit-24 filed under Order VI Rule 17 of the *Code of Civil Procedure, 1908* (“**CPC**”) seeking amendment of the Petition has been rejected.

3. The learned Judge of the Family Court has dismissed the Application on that ground that the questions asked in the Cross-examination have been made the basis for filing the Application, however, the questions asked regarding explanation and clarification sought from the Petitioner during her Cross-examination on the issue of bifurcation of the joint property and the questions asked in Cross-examination cannot give rise to any cause and it cannot provide a ground for seeking amendment of pleadings. The learned Judge has further observed that the essential requirement of proviso to Rule 17 of Order VI of CPC has not been fulfilled. It has been further held that the Suit is for dissolution of marriage and by the proposed amendment the relief of declaration of rights and sale of the immovable property is sought to be added and therefore the proposed reliefs cannot be termed as sheer ancillary reliefs in the Divorce Petition and therefore it changes the nature of the Suit and substantially alters the same. It has been further held that the proposed amendment is not necessary for deciding the real controversy involved in the Petition and it is not essential for

the proper and effective adjudication of the Petition.

SUBMISSIONS OF THE PETITIONER:

4. It is main contention of Ms. Firdous Moosa, learned Counsel for the Petitioner that the parameters for considering the application for amendment, even after the commencement of the trial, is whether the amendment is essential for determining the real controversy, the facts which are necessary arose after commencement of the trial, the amendment does not change the nature of the case or cause serious prejudice and that the delay was caused by reasons beyond the party's control. The reliance is placed on the decision of the Supreme Court in ***Abdul Rehman v. Mohd. Ruldu***¹, wherein it has been held that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not changes the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of the Suit.

5. Ms. Firdous Moosa, learned Counsel submitted that the factual basis are already laid down in the Petition. She relied on the decision of the Bombay High Court [Nagpur Bench] in ***Premdeep Nishikant Matlane v. Bhavana***² and submitted that when it comes to change of mind or change of decision, the case is one of a fresh event having

¹ (2012) 11 SCC 341

² 2018 SCC OnLine Bom 1231

taken place which was neither existing earlier nor something in contemplation of a party and therefore the test of due diligence will not apply to such a case. She submitted that due diligence is not an inflexible or absolute bar, the proviso is a safeguard against belated, mala fide amendments. However, the Court's discretion remains concerning the justified amendment.

6. Ms. Firdous Moosa, learned Counsel relied on the decision of the Supreme Court in *Dinesh Goyal v. Suman Agarwal (Bindal)* ³, more particularly on Paragraphs Nos.17, 18 of the same and submitted that not in all cases can delay determine the fate of a Suit and case of preventing multiplicity or multiple avenues of litigation, subsumed under the umbrella of one dispute, then the amendment can be allowed. She also relied on the decision of the Supreme Court in *Mohinder Kumar Mehra v. Roop Rani Mehra* ⁴ and more particularly on Paragraph Nos.28 and 29 of the same and submitted that the Court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting mala fide or that mistake of party had caused injury to his opponent which cannot be compensated for by an order of cost. She also relied on the decision of the Supreme Court in *North Eastern Railway Admn. v. Bhagwan Das* ⁵ and more particularly on Paragraph No.16 of the same. She also relied on the

3 2024 SCC OnLine SC 2615

4 (2018) 2 SCC 132

5 (2008) 8 SCC 511

decision of the Supreme Court in *Revajeetu Builders & Developers v. Narayanaswamy & Sons*⁶ and more particularly on Paragraph No.63 of the same. She pointed out the averments which have been raised in the Petition, more particularly in Paragraph No.2 (Page 36), Paragraph No.5 (Pages 48-49) and Paragraph No.10 (Page 51). She also pointed out Paragraph No.37 in the Written Statement of the Respondent (Page 74). She therefore submitted that no new case is made out by the proposed amendment and what is sought to be done is just addition of the reliefs on the basis of the averments already made in the Petition and certain additional and explanatory facts are sought to be added. She therefore submitted that the impugned Order be quashed and set aside and the amendment Application be allowed.

SUBMISSIONS OF THE RESPONDENT:

7. On the other hand, Mr. Aditya Miskita, learned Counsel for the Respondent pointed out proviso to Order VI Rule 17 of CPC and submitted that the Court has no jurisdiction to deal with the amendment Application, if a party fails to aver regarding due diligence. To substantiate the said contention, he relied on the decision of the Supreme Court in *Vidyabai v. Padmalatha*⁷ and more particularly on Paragraph No.10 of the same. He also relied on Paragraph No.19 of the said decision in the case of *Vidyabai* (supra). To clarify the concept of

⁶ (2009) 10 SCC 84

⁷ (2009) 2 SCC 409

the due diligence, he relied on the decision of the learned Single Judge [High Court of Bombay at Goa] in *Antonetto J. D'souza v. Antonio G. Braganza*⁸ and more particularly on Paragraph Nos.12 to 14 of the same. He also relied on the decision of the Supreme Court in *M. Revanna v. Anjanamma*⁹ and more particularly on Paragraph No.7 of the same. He also relied on the decision of the learned Single Judge in *Ganpat Bhagoji Kshirsagar v. Anjana Krushna Jamdade*¹⁰ and more particularly on Paragraph No.14 of the same. He submitted that as due diligence is not established and in the pleadings of the Application seeking amendment, there is nothing to show that the Petitioner has approached the Court with due diligence and therefore, the Court has no jurisdiction to deal with the amendment Application and accordingly the amendment Application has been rightly dismissed by the learned Judge of the Family Court. He submitted that nothing has prevented the Petitioner from seeking the reliefs which are sought by the proposed amendment before the commencement of the trial, however, the Petitioner consciously and knowingly chose not to seek said amendment and therefore at this belated stage, she cannot be allowed to amend the Divorce Petition. He therefore submitted that the Writ Petition be not entertained.

8 Writ Petition No.354 of 2021 alongwith Writ Petition No.261 of 2021

9 (2019) 4 SCC 332

10 2024 SCC OnLine Bom 3273

Reasoning :

8. Before considering the rival submissions, it is necessary to set out certain factual aspects.

i. The marriage between the Petitioner and the Respondent took place on 29th September 2006 under the *Special Marriage Act, 1954*.

ii. The Petitioner and the Respondent jointly purchased the premises bearing Flat No.1301, 13th Floor, Lavender Building, Mantri Park, Dindoshi by a registered sale deed dated 24th April 2009.

iii. The Petitioner i.e. wife filed Divorce Petition under Section 27(1) (d) of the *Special Marriage Act, 1954* being M. J. Petition No.1064 of 2017.

iv. It an admitted position that the Respondent-husband is exclusively occupying the said Flat No.1301.

9. At this stage, it is important to note the averments which have been raised in the said Divorce Petition.

(a) In Clause II (Page 36), the Petitioner has stated, as follows :-

“(II) The respondent then a Bachelor, at the time of marriage was 27 years of age, resided with his parents at C/o Mr. Joseph Mathias, Mulund (W), Mumbai, after the marriage reside with the petitioner at leave and license premises at Versova, Andheri (W). There after both the petitioner and respondent jointly purchased the premises at 1301, Lavender Mantri Park, Goregaon East, Mumbai and at present

the respondent is residing at the same place situated above 1301, LavenderMantri Park, Goregaon East, Mumbai.”

(Emphasis added)

(b) In Paragraph 5 (Pages 48-49) the Petitioner has raised the following contentions :-

“(5) In the background narrated above, the respondent's intention from March 2014; was clearly a coldly calculated and deliberate plan to create an impossible, untenable and irreconcilable situation for the petitioner to live together; the sole intention to gain full ownership of the jointly purchased marital apartment. Therefore, the petitioner has no other alternative but to file this Petition for divorce and S.C. Suit in City Civil Court Dindoshi for sale of the jointly purchase property, the flat at present the respondent is residing and apportion the sale proceed in the ratio of 50:50.”

(Emphasis added)

(c) In Paragraph 10 (Pages 51-52) the Petitioner has raised the following contentions :-

“(10) It's a matter of record that due to the conduct of the respondent narrated herein above; the petitioner was forced to leave the place, in other words the petitioner is completely duped as:

- (i) The down-payment money was given by the petitioner out of her own funds to purchase the apartment, currently occupied by the respondent.***
- (ii) The jewellery of the petitioner including Shridhanaisat present in custody of the respondent.***
- (iii) The petitioner is residing in leave and license premises for which the petitioner requires to pay a license fee of Rs. 40,000/- per month and a deposit***

of Rs. 1.5 lacs. The petitioner is ready to produce the agreement in support, as and when required.

- (iv) *The petitioner forced into additional and unnecessary expenditure for purchasing household articles like fridge, gas, microwave oven etc. for the premises that she was forced into taking on leave and license.*

In the background above, the petitioner has no other alternative but to file a suit In Dindoshi City Civil Court to request for forcible sale of the property that is in fact in the joint names of the petitioner and the respondent. But it remains a fact that the respondent is enjoying the same and in Exhibit "D", in Paragraph No. 5, the respondent is bold enough to say that

"Your client's demand is very exorbitant".

In other words, it was clearly the long term planned intention of the respondent to grant divorce and absorb the joint property, in fact the conduct of the respondent is "Blow hot and cold". The petitioner states that, for the conduct "Blow hot and cold narrated above, the petitioner is filling the S.C. Suit in City Civil Dindoshi. The petitioner herein is relying on all the averments and submissions of the said proposed suit as part and parcel of this suit. The petitioner herein is ready to produce the copy of the said suit as and when required or demanded."

(Emphasis added)

- (d) The Petitioner has sought following reliefs in the said Divorce Petition (Page 53) :-

“(a) That the marriage between the petitioner and the respondent solemnized on 29-9-2006 as per Exhibit "A" be dissolved by a decree of divorce under section 27(1) (d) of the Special Marriage Act.

(b) Cost of this petition be provided for.

(c) For such further and other reliefs, order and direction as

the nature and circumstances of the case may require or justify as this Hon'ble Court may deem fit and proper be granted in favour of the petitioner.”

(Emphasis added)

Thus, the contentions raised by the Petitioner-wife are very clear. She has stated that both the Petitioner and the Respondent jointly purchased the said flat bearing Flat No.1301. Various factual aspects are set out in Paragraph No.4 and therefore in Paragraph No.5 it has been stated in the background of the facts narrated in Paragraph No.4 that the Respondent has created such a situation that it would be impossible for the Petitioner to live together and the sole intention to gain full ownership of the jointly purchased marital apartment. It has been further stated that therefore the Petitioner has no other alternative but to file the Divorce Petition and she will file a Suit in the City Civil Court at Dindoshi for sale of the jointly purchased property and the apportion the said proceedings in ratio of 50:50. In Paragraph No.10 she has again reiterated that she has no other alternative but to file a Suit in Dindoshi City Civil Court seeking sale of the property which is in the joint names of the Petitioner and the Respondent which Respondent is enjoying exclusively and it has been further stated that it was clearly the long term planned intention of the Respondent to take complete control of the joint property.

10. In this background of the matter, it is relevant to note the

contention which has been raised in the Written Statement of the Respondent and more particularly in Paragraph No.37 (Page 74), which reads as under :-

“37. The contents of para 10 are partially correct in respect of down payment made by the Petitioner, Rest of the contents in para under reply are false. He has never compelled the Petitioner to leave the house. On the contrary he tried his best to adjust with the mood swings of the Petitioner. He has not duped the Petitioner. They are husband and wife and contribution made for making house does not fall in the category of alleged duped.”

(Emphasis added)

Thus, in effect the Respondent has accepted that down payment has been made by the Petitioner and it is further stated that both the Petitioner and the Respondent are husband and wife and therefore cannot be considered that the husband has duped the wife as she had contributed for the flat.

11. In view of the above pleadings, it is necessary to consider the Examination-in-chief and Cross-examination of the Petitioner - wife, more particularly in view of the issues which have been framed by Order dated 17th March 2018 and the main issue is to the effect whether the Petitioner proves that after solemnization of marriage, she has been subjected to cruelty and whether she is entitled for divorce.

12. As far as Examination-in-chief of PW-1 i.e. of the Petitioner is concerned, the same is almost identical as per the pleadings in the

Petition. As far as Cross-examination is concerned, the Petitioner i.e. wife has been subjected to extensive Cross-examination with respect to the purchase of the said house and her share. The relevant portion reads as under :-

“11. ... It is true to say that after staying on rent for one year at Goregaon, we decided to acquire a our own property. I say that first premises at Goregaon was acquired in joint name then we shifted from Varsova to Goregaon in a rented premises. It is true to say that the flat in Lavender Park was acquired in 2009 and we shifted in that property in 2010. It is true to say that respondent has purchased a car in 2008. I am not aware it was not our joint decision. It is true to say that, purchase of flat at Lavender park society was our joint decision. It is true to say that while purchasing a flat in Lavender Park in society, we had decided to live our life happy in that flat. It is not true to say that at the time when we shifted to Lavender park society our relationship was cordial. It is not true to say that I falsely say that my relationship with respondent was cordial only for 2 years after the marriage.”

“12. It is not true to say that when I left the flat at Lavender park society respondent was not present at home. I say that he was very much present in home and there was physical abused and I walked out. Witness voluntarily say that on 21/12/2015 I have walked out after house without any of my belongings. ...”

“13. It is not true to say that I paid Rs. 8 Lakh as a down payment for purchasing flat in Lavender Park in 2009. I say that I paid more than that, Rs. 8 Lakh was the loan component and there was cash component as well. It is not correct to suggest that except my payment Rs. 8 Lakh rest of the consideration amount was shouldered by respondent while purchasing the flat. It may be true that respondent has paid Rs. 19,641/- towards home loan process fee while purchasing flat. I cannot say if respondent has paid more than 2 Lakh to Income Tax department to clear the liability from the property court to the builder. I need to check the record. It is not true to say that respondent has paid Rs. 2.15 Lakh

towards VAT charges by mortgaging FD's. I cannot say if respondent has paid Rs. 2,07,960/- towards advance maintenance charges toward the flat. I cannot say if respondent has paid Rs. 99,772/- to Axis bank towards home loan. It is not true to say that apart from down payment towards purchase of flat, respondent has shouldered all other expenses while purchasing the flat. It is true to say that, respondent has paid all the EMIs till date towards home loan of the said flat."

"17. It is true to say that in Sept. 2015 I have sent a legal notice to respondent through Adv. Veena Gawda asking him for divorce. It is true to say that, respondent has replied that notice. I have made a claim that we will take a divorce by mutual consent and he should give me 50% share of the flat. It is not true to say that all utility bills of the said house were shouldered by respondent. It is true to say that, while respondent was unemployed he took care of EMI of home loan. It is not true to say that while he was unemployed he took care of all house. I say that during that period both shared of outings of the house. It is not true to say that I have not paid for any of the household expenses on the date of marriage till I separate."

"20. ... It is true that while purchasing flat in question, I had only paid down payment and rest of the expenses processing fees, VAT charges, advance maintenance etc. were paid by respondent. I say that we were staying in a rented premises till we got possession of the flat in dispute, I used to pay rent of that property and respondent used to pay EMI of the flat. It is true that rent of the said property was Rs.10,000/-p. m. and EMI of home loan was Rs.44,000/-. It is not true that respondent has never denied his responsibility towards me and household expenses."

"23. It is not true that respondent had given an offer to settle the matter amicably after he received notice from me. It is true that I had made an offer to pay me 50% value of the flat and even came down to 40% value of the flat. It is true that duration of loan was 20 years and for last 10 years he is paying EMIs of the home loan."

(Emphasis added)

13. Thus, it is clear that extensive Cross-examination has been conducted of the Petitioner on behalf of the Respondent concerning the Petitioner's contribution to the flat and her share of ownership.

14. In this background of the matter, it is required to note the contents of the amendment Application. The relevant reasons seeking amendment are set out in Paragraph Nos.2 to 5, which read as under :-

"2) I say that, I have no other alternative but to present this application for amendment to the Petition to take the amendment on record since initially intention of mine to file separate suit for partition of joint property in the City Civil Court Dindoshi since at the time of filing of petition my object is to take the Divorce first as there is no marital relations between me and the respondent since last 10 years or more. Further at that time I want Divorce immediately, but due to Corona Pandemic and attitude of the respondent to take dates on one reason or the other as on today my cross examination is not yet completed.

3) Apart from whatever stated herein above in the proceedings there is no issue of Partition of joint property that acquired during subsistence of marriage, but the respondent advocate again and again demanded explanation, clarification from me during my cross examination on the issue of bifurcation of the property purchase jointly during the subsistence of marriage as

1) At Page No 24 of cross examination last line as "It is true to say that, purchase of flat at Lavender Park Society was our joint decision".

2) At Page No 25, Paragraph No 13, last line of cross examination as "It is true to say that, I paid Rs. 8 Lakh as a down payment for purchasing Flat in Lavender Park in 2009. I say that I paid more than Rs. 8 Lakh".

- 3) *At Page No 26, Paragraph No 14 of cross examination as "it is true to say that, the said Flat was renovated twice first in 2010 and 2014".*
- 4) *At Page No 27, first three lines of cross examination as "It is not true to say that, respondent has exclusively taken care of expenses of renovation work. I say that, we both shared those expenses".*
- 5) *At Page No 28, Paragraph No 17, middle portion of cross examination as "I have made a claim that, we will take Divorce by mutual consent and he should give 50% of the share of the flat".*
- 6) *At Page No 31, Paragraph No 20, middle portion of cross examination as "It is true that, while purchasing the flat in question, I had only paid down payment".*
- 7) *At Page No 32, Paragraph No 32 of cross examination it admitted by me as "It is not true that, the respondent had given an offer to settle the matter amicably after he received notice from me. It is true that I had made an offer to pay me 50% value of the flat and even cave down to 40% value of the Flat".*

In the background of the cross examination in between the Hon'ble Court suggested to attend the "Reconciliation Officer" to arrive proper terms of settlement on the issue of bifurcation of the property that jointly acquired and convert the Petition in to Divorce by mutual consent but due to bickering nature and or conduct of the respondent the affords of the reconciliation officer failed.

- 4) ***I say that, in view of cross examination narrated above, I say that, due to the proposed amendment the nature of the Petition doesn't change. The issue in respect of joint property and share of the petitioner and respondent is to be added. The advantage for amendment is the future litigation and west of time money and energy shall be***

saved. The main object of the suit is as "snapping of marriage ties" between the petitioner and the respondent doesn't change, the consequential issue as bifurcation of joint property is added.

- 5) *In the background say that, the proposed amendment of mine annexed as Exhibit I to this amendment application is to mend the Petition and introduce the amendment to the Petition. In fact, the purpose of amendment is to the addition of issue as partition of joint ownership of the property that myself and the petitioner acquired during subsistence of our marriage. Further in view of cross examination that recorded, it's not proper on my part to wait further couple of years for partition of the property that jointly acquired, therefore this endeavourer of mine to allow me to amend the Petition as per Schedule I that annexed as Exhibit I. Apart from this the agreement of purchase of Flat No 1301 on 13th Floor, Lavender Building, Mantri Park, Dindoshi is an Registered Agreement doesn't mention the share of investment. I say that I am ready to produce the same on demand as such I possess the zero and original is with Bank, as Bank officers kept in their possession as security."*

(Emphasis added)

15. Thus, what the Petitioner has stated that it was her intention to file a separate Suit for partition of joint property in the City Civil Court, Dindoshi, at the time of filing of Divorce Petition as the object was to take the divorce first and thereafter file the said Suit. However, as the matter remained pending for last about 8 years, she has changed her mind and in view of the pleadings and in view of extensive Cross-examination, she has decided to also sought relief regarding the said flat in the Petition filed in the Family Court only seeking divorce.

16. In this behalf, it is significant to note that the Petitioner has filed

her evidence Affidavit on 2nd September 2018 and her Cross-examination has commenced on 25th September 2019 and still the Petitioner is under Cross-examination i.e. for last about 6 years the Respondent is conducting Petitioner's Cross-examination. Thus, in view of the above position, it is required to adjudicate whether the Petitioner has shown due diligence for filing the amendment Application.

17. Before considering the said aspect, it is necessary to set out Sections 7 and 8 of the *Family Courts Act, 1984* concerning jurisdiction. Said Sections 7 and 8 read as under :-

“7. Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

8. *Exclusion of jurisdiction and pending proceedings.—*
Where a Family Court has been established for any area,—

(a) no district Court or any subordinate civil Court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in

the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),—

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.”

(Emphasis added)

18. Thus, the Family Court has exclusive jurisdiction to decide the Suit or proceeding between the parties to a marriage for a decree *inter alia* for deciding the dissolution of marriage and also a Suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. Thus, the Family Court has jurisdiction to decide Suit or proceeding even with respect to the property of the parties or of either of them.

19. Thus, at the outset, it is required to be noted that the reliefs which are being sought by the proposed amendment are not within the jurisdiction of the City Civil Court and in fact they are within exclusive jurisdiction of the Family Court. It is the submission of Ms. Firdous Moosa, learned Counsel that Section 8 of the *Family Courts Act, 1984* is

very clear which provides that where a Family Court has been established for any area, no district Court or any subordinate civil Court referred to in Sub-Section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section. Explanation (c) to Section 7 clearly provides that a Suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them, shall be entertained by the Family Court. In view of the provision of Sections 7 and 8 of the *Family Courts Act, 1984*, it is the contention of Ms. Firdous Moosa, learned Counsel appearing for the Petitioner that in fact the Family Court has got exclusive jurisdiction to deal with such a Suit and City Civil Court will have no jurisdiction.

20. In view of the above factual and legal position, it is necessary to find out whether the due diligence test as contemplated by Order VI Rule 17 of CPC has been complied with.

21. Before considering whether the Petitioner has complied with “Due Diligence” test, it is necessary to consider the contention of Ms. Firdous Moosa, learned Counsel for the Petitioner that in this particular case “Due Diligence” test is not applicable as this is a case of change of mind. However, there is no substance in the said contention. As held by the Supreme Court in the case of *Vidyabai* (supra), proviso to Order VI

Rule 17 is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent thereof are satisfied and the Court 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. It has also been held in the case of **Vidyabai** (supra) that, it is the primary 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. Proviso appended to Order VI Rule 17 of CPC restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. It has been held that 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. Thus, the contention of Ms. Firdous Moosa, learned Counsel for the Petitioner that in this particular case, "Due Diligence" is not required to be fulfilled is contrary to the legal position. Ms. Moosa, learned Counsel to substantiate her contention has heavily relied on the Judgment of a learned Single Judge in the case of **Premdeep Matlane** (supra). However perusal of the Order passed by the learned Single Judge in **Premdeep Matlane** (supra) clearly shows that the law laid down by the Supreme Court in the case of **Vidyabai** (supra) holding that unless due diligence is pleaded and established the Court has no jurisdiction to

deal with amendment application preferred after commencement of the trial has not been pointed out to the learned Single Judge. Thus, the decision of learned Single Judge is per incuriam. As the decision of learned Single Judge in **Premdeep Matlane** (supra) completely overlooks the legal position as held in **Vidyabai** (supra), the said decision has no binding effect.

22. The Order VI Rule 17 concerning amendment of pleadings is as under :-

“17. Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

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.”

(Emphasis added)

23. The Black’s Law Dictionary (Eighth Edition) defines “due diligence” as the diligence reasonably expected from and ordinarily exercised by, a person who seeks to satisfy a legal requirement. The common diligence is the diligence that a person of average prudence would exercise in handling his affairs. Reasonable diligence is a fair degree of diligence expected from someone of ordinary prudence. In

“Advanced Law Lexicon” (Third Edition - 2007) of P. Ramanatha Aiyar, “Due Diligence” is defined as “Such watchful caution and foresight as the circumstances of the particular case demands”.

24. Thus, it is clear that “Due Diligence” is diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement. It means the diligence as a prudent man would exercise in the conduct of his own affairs. The same also means “Such watchful caution and foresight as the circumstances of the particular case demands”. Thus, it is very clear that where a party had acted with due diligence or not would depend upon the facts and circumstances of the case and no hard and fast rule or straitjacket formula can be laid down.

25. Thus, for determining the concept of due diligence there cannot be a straitjacket formula. Due diligence depends on the facts and circumstances of each case. In this particular case, the Petitioner has specifically raised the contention in the Divorce Petition filed before the Family Court that she has 50% share in the property in question and she will file a Suit in the City Civil Court. In fact, the contention has been raised in the original Divorce Petition that the Respondent has subjected the Petitioner to cruelty *inter alia* to gain full ownership of the jointly purchased marital apartment and therefore she has no other alternative but to file the Petition for divorce and also she intends to file a Suit in

the City Civil Court seeking her right of 50% share.

26. Perusal of the Written Statement of the Respondent clearly shows that the Respondent has accepted that the down payment has been made by the Petitioner. Thus, it is accepted that the Petitioner is the co-owner of the property. It is also an admitted position that the registered agreement of sale of said flat is in the joint name of the Petitioner and the Respondent. The position on record shows that the issues were framed on 17th March 2018 and the Petitioner filed her Affidavit of Evidence on 10th September 2018 and for last about 6 years the Petitioner is under Cross-examination and still the Cross-examination of the Petitioner is not concluded.

27. In these circumstances, the contention raised in the Application seeking amendment that the Petitioner filed Divorce Petition and in the Divorce Petition stated that she would file a separate Suit seeking partition of joint property as her object was to take divorce expeditiously, however, since last 8 years or more the divorce proceedings are pending and as the Respondent is taking dates after dates for completion of the Cross-examination, she has changed her mind. Thus, in the facts and circumstances, it cannot be said that the Petitioner has not shown due diligence. As noted herein above, there cannot be any straitjacket formula for deciding the due diligence. In this particular case, it is not the case that for the first time the Petitioner has

raised contention that she has got share in the flat.

28. In view of this position the reliance of learned Counsel for the Respondent on the decision of ***Ganpat Bhagoji Kshirsagar*** (supra) and more particularly on Paragraph 14 is misconceived. The said Paragraph No.14 reads as under :-

“14. The test of deciding the real controversy is applicable when the amendment is asked for prior to the commencement of the trial. After commencement of the trial, the only test of due diligence is to be seen. This proviso is added only for curtailing the vexatious amendments. Why it is so, because the parties have taken their positions. If it is so, then they cannot be permitted to take an additional stand which will damage the plea already taken. This is particularly necessary when the Defendants have objected for not praying for certain reliefs. In fact, that was a proper stage for the Plaintiff to take steps for collecting the sale-deeds. Once, the cross-examination is started, I think, the amendment ought not to have been allowed. Furthermore, if we go by the dates of these sale-deeds, it can certainly be said that the amendment is done after a long gap. The Suit was filed in the year 2015 and the amendment is sought in the year 2022. When the dates are clear, this Court can certainly make certain observations about the limitation.”

(Emphasis added)

In fact, what has been held by the learned Single Judge in ***Ganpat Bhagoji Kshirsagar*** (supra) that once the parties have taken their positions, parties are not permitted to take an additional stand. The said observations have no application to the present case as the Petitioner has already raised contention that she is the co-owner of the property and that she has 50% share in the flat. Thus, it is clear that no new case is made out by the proposed amendment and what is sought to be done

is just addition of the reliefs on the basis of the averments already made in the Petition and certain additional and explanatory facts are sought to be added.

29. Learned Counsel for the Petitioner has also relied on the decision of the learned Single Judge in the case of *Antonetto J. D'souza* (supra). However, the learned Single Judge in the said decision has reiterated the position held by the Supreme Court in the case of *Vidyabai* (supra) and other Judgments of the Supreme Court. What has been held that a party applying for the amendment after commencement of the trial has to show that such party has despite exercise of due diligence could not have raised the matter by way of amendment. As already held, there cannot be a straitjacket formula for determining the due diligence. It has also been held that in the facts and circumstances, the Petitioner has shown the due diligence.

30. Accordingly, the impugned Order dated 10th February 2025 passed by the learned Judge, Family Court No.2, Mumbai below Exhibit-24 in Petition No. A-1064 of 2017 is quashed and set aside. The said amendment Application bearing Exhibit-24 filed in Petition No. A-1064 of 2017 is allowed. Amendment to be carried out and amended Petition to be served on the Respondent within a period of 30 days from today. The Respondent is at liberty to file additional Written Statement within a period of 30 days thereafter.

31. At this stage, Ms. Moosa, learned Counsel for the Petitioner, on instructions of the Petitioner, who is personally present in Court, states that the Petitioner will not file an additional Affidavit of evidence pursuant to said amendment. In view of the said statement made by Ms. Firdous Moosa, learned Counsel for the Petitioner, Mr. Aditya Miskita, learned Counsel for the Respondent, on instructions of the Respondent who is personally present in Court, states that the Respondent is accepting this Order. Both these statements are accepted.

32. The Writ Petition is allowed in above terms with no order as to costs, subject to above.

[MADHAV J. JAMDAR, J.]