IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 1871 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE SMT. JUSTICE ABHILASHA KUMARI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**Yes**
2	To be referred to the Reporter or not ?	**Yes**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?	**No**
5	Whether it is to be circulated to the civil judge ?	**No**

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SAIYED RASHEDAKHATUN D/O TASADUKHUSAIN THRO POA SAMINA....Petitioner

Versus

VISHNUBHAI AMBALAL PATEL DECEASED THRO HEIRS & ORS. ....Respondents

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Appearance:

MR MIHIR J.THAKORE, SENIOR ADVOCATE WITH MR MTM HAKIM, ADVOCATE for the Petitioner
MR KS NANAVATI, SENIOR ADVOCATE & MR.BHASKAR TANNA, SENIOR ADVOCATE, WITH MR JAY KANSARA, MS GARGI VYAS AND MS SOUMYA PRIYADARSHINI, ADVOCATES FOR M/S WADIA GHANDY & CO, for Respondent No. 8
MR SANDIP M PATEL, ADVOCATE for Respondents Nos.10.B & 10.D
NOTICE SERVED BY DS for Respondents Nos.1.A, 1.E, 6.A, 6.B, 6.B/1, 6.B/2, 6.D, 6.E, 6.F, 6.H/1, 6.H/2, 6.I, 6.L, 6.M, 10.A to 10.E, and 11 to 14
DELETED Respondents: Nos.1.B, 1.C, 1.D, 2.A, 2.B, 3, 4.A, 4.B, 4.C, 5, 6.C, 6.G, 6.H, 6.J, 6.K, 7, 9 and 10.

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CORAM: **HONOURABLE SMT. JUSTICE ABHILASHA KUMARI**

Date: 28/08/2014

C.A.V. JUDGMENT

1. Rule. Mr.Jay Kansara, learned advocate for M/s.Wadia Ghandy and Company, waives service of notice of Rule for respondent No.8 and Mr.Sandip Patel, learned advocate, waives service of notice of Rule for respondents Nos.10.B and 10.D. Respondents Nos.1.B, 1.C, 1.D, 2.A, 2.B, 3, 4.A, 4.B, 4.C, 5, 6.C, 6.G, 6.H, 6.J, 6.K, 7, 9 and 10, have been deleted by order dated 06.08.2014, of this Court. Though respondents Nos.1.A, 1.E, 6.A, 6.B, 6.B/1, 6.B/2, 6.D, 6.E, 6.F, 6.H/1, 6.H/2, 6.I, 6.L, 6.M, 10.A, 10.C, 10.E, and 11 to 14, have been served by Direct Service, they have chosen not to appear before this Court. On the facts and in the circumstances of the case and with the consent of learned counsel for the respective parties, the petition is being heard and decided, finally.

2. The challenge in this petition under Articles 226 and 227 of the Constitution of India, is to

the order dated 24.01.2013, passed by the learned 3rd Additional Senior Civil Judge ("the Trial Court"), below the application at Ex.241, in Special Civil Suit No.388 of 2006, whereby, the said application for amendment of the plaint, has been rejected.

3. Briefly stated, the facts relevant for the decision of the petition, are as follows:

The petitioner is the plaintiff of the above-mentioned suit, instituted for declaration and injunction qua land admeasuring 764 acres and 28 gunthas (the suit land), out of Revenue Survey No.506, admeasuring 2814 acres and 28 gunthas. The petitioner claims ownership and possession of the suit land on the ground that she has purchased it from the legal heirs of the family members of the late Nawab. The case appears to have a chequered history and the suit land has been the subject-matter of various transactions between different persons over a long period of time. The specific details and history of the successive transactions, in respect of the suit

land, need not detain us here as the challenge in the petition is to an order passed below an application for amendment of the plaint under Order 6 Rule 17 of the Code of Civil Procedure, 1908 ("the CPC"). The focus of the Court in the present petition would, therefore, be narrowed down to the relevant extent. In the suit, the petitioner has further prayed for the cancellation of the Sale Deed dated 18.08.1969, executed in favour of respondents Nos.1 to 4 herein (defendants Nos.1 to 4 in the suit). The petitioner has also challenged the consent decree dated 18.09.1972, passed in Regular Civil Suit (Old) No.1262 of 1969 (New No.25 of 1972), passed by the Civil Court at Surat. The petitioner has further challenged all transactions executed by respondents Nos.1 to 4, as also the execution of Sale Deeds in favour of respondent No.8. In addition, the petitioner has prayed for the grant of a permanent injunction qua the suit land admeasuring 764 acres and 28 gunthas out of Revenue Survey No.506, admeasuring 2814 acres and 28 gunthas which,

according to the petitioner, is in her possession.

On the other hand, respondent No.8 – Kalpataru Land and Development Pvt. Ltd., claims to have purchased 1603 acres of land out of Revenue Survey No.506 admeasuring 2814 acres, including the suit land claimed by the petitioner, through seventeen separate registered Sale Deeds, from respondents Nos.1 to 4 and 63 others, pursuant to a consent decree in Suit No.2466 of 1986 in the High Court of Bombay. Respondent No.8 has instituted Special Civil Suit No.143 of 2007, wherein the present petitioner is arraigned as defendant No.7.

In the suit instituted by the petitioner, from which the present proceedings emanate, the petitioner preferred an application at Ex.241 for amendment of the plaint. By the proposed amendment, the petitioner, inter alia, seeks to challenge a notarised Agreement dated 18.08.1969, entered into by the predecessors-in-title of respondents Nos.1 to 4 with 63 persons,

as also a decree passed by the High Court of Bombay in the year 1987. The petitioner further seeks to implead those 63 persons who were signatories to the Agreement dated 18.08.1969, the predecessors-in-interest of respondent No.8.

The Trial Court has rejected the application for amendment preferred by the petitioner, inter alia, on the grounds that the petitioner was aware of the Agreement dated 18.08.1969, and the consequential Entry No.594 in the revenue record, and by filing the proposed amendment, the petitioner is trying to delay and prolong the suit proceedings. The Trial Court also found that the amendment sought would change the nature of the suit. The Trial Court further held that the amendment seeking to challenge a decree of the Bombay High Court could not be granted, as such relief could have been sought from the said High Court at the relevant period of time. The Trial Court further concluded that the petitioner has failed to exercise due diligence and the amendment is not bona fide. Aggrieved by the impugned order rejecting the application for

amendment, the petitioner has preferred the present petition.

4. This Court has heard learned Senior Counsel for the respective parties at considerable length. The gist of the submissions advanced at the Bar is as follows:

5. Mr.Mihir J.Thakore, learned Senior Advocate with Mr.M.T.M.Hakim, learned advocate, has appeared for the petitioner. His submissions are to the following effect:

(1) The petitioner has purchased the shares of the original owners of the land and is the owner of 764 acres and 28 gunthas out of a total area of 2814 acres and 28 gunthas. The Sale Deed dated 18.08.1969, in favour of respondents Nos.1 to 4, has been executed by persons who were not the owners of the land. Respondents Nos.1 to 4 executed an Agreement of partition with 63 other parties and respondent No.8 herein claims to have purchased different parcels of land from respondents Nos.1 to 4 and 63 others. The petitioner has prayed in the suit that all acts

and deeds done by respondents Nos.1 to 4 pursuant to their acquisition of the property are illegal, inoperative and null and void and be set aside, including the Sale Deeds executed by respondents Nos.1 to 4 and 63 others in favour of respondent No.8. The petitioner acquired knowledge of the documents sought to be challenged for the first time when they were produced by respondent No.8 on 18.06.2012, in Special Civil Suit No.143 of 2007, instituted by it. The petitioner, therefore, preferred the application for amendment on 04.01.2013. The petitioner, being unaware of the said documents, could not challenge them at the time of the institution of the suit, therefore, there is no question of the petitioner not having exercised due diligence, as held by the Trial Court in the impugned order.

(2) The proviso to Order 6 Rule 17 CPC, will not be applicable in the present case. Though issues have been framed, the trial has not commenced as evidence has not been recorded. The mere framing of issues does not mean that the

trial has commenced. The petitioner is not responsible for the delay in the proceedings of the trial as various applications were filed by third parties. As per the settled position of law, the Courts ought to grant an amendment sought before the commencement of trial and a liberal view ought to be taken in this regard.

(3) The prayer for impleadment of 63 persons as party defendants ought to have been allowed, as it does not fall under the ambit of Order 6 Rule 17. The proposed 63 defendants are necessary parties in view of the amendment by which the Agreement entered into by respondents Nos.1 to 4 with them is sought to be challenged.

(4) The case of the petitioner for amendment falls under the first part of Order 6 Rule 17, therefore, there is no question of the exercise of due diligence. The amendment can be granted at any stage of the suit. Even assuming, though not admitting, that the proviso is applicable, the petitioner has shown due diligence in filing the application for amendment as the petitioner

came to know of the documents sought to be challenged only on 18.06.2012, when they were produced by respondent No.8 in the suit instituted by it.

(5) The plea of limitation is not a good ground for the rejection of the amendment. This issue can be decided in the suit by leading evidence.

(6) The petitioner has challenged all transactions entered into by respondents Nos.1 to 4, in the suit. The prayer has already been made in the unamended suit, therefore, granting the amendment, would not change the nature of the suit.

6. On the above grounds, it is prayed that the petition be allowed.

7. Learned Senior Advocate for the petitioner has relied upon several judgments in support of his submissions which shall be dealt with at the appropriate stage.

8. Mr.K.S.Nanavati, learned Senior Advocate and

Mr.Bhaskar Tanna, learned Senior Advocate, have appeared with Mr.Jay Kansara, learned advocate, on behalf of respondent No.8, who is the main contesting respondent.

9. Mr.K.S.Nanavati, learned Senior Advocate, has strongly opposed the submissions advanced on behalf of the petitioner, on the following grounds:

(1) The impugned order of the Trial Court suffers from no legal infirmity or perversity. The Trial Court has rightly observed that the petitioner has not exercised due diligence in bringing the amendment. The observation of the Trial Court that the petitioner was aware of the Agreement dated 18.08.1969, and the consequential mutation entry No.594, is true to the record. Further, the observation of the Trial Court in the impugned order that the intention of the petitioner is to deliberately delay the proceedings is also evident from the record, therefore, this Court may not interfere with the order of the Trial Court in exercise of

its supervisory jurisdiction.

(2) The petitioner has deliberately made a false statement in the application for amendment filed on 04.01.2013, to the effect that she has just come to know on 18.06.2012, for the first time, of the Agreement dated 18.08.1969, when it was produced by respondent No.8 in Special Civil Suit No.143 of 2007. This Agreement is regarding the transfer of plots by respondents Nos.1 to 4 to 63 different persons. This averment of the petitioner is absolutely false, as the petitioner was aware of the mutation entry No.594 which reflects the above transfer of land. In any event, the petitioner was very well aware of the Agreement dated 18.08.1969, in the year 2007, itself, when respondent No.8 produced it in the suit filed by it on 18.06.2007, along with the list of documents. A copy of the list of documents was served upon the lawyer of the petitioner and bears his endorsement and signature. The petitioner was aware of the said Agreement on 18.06.2007, but has kept silent and chosen to make the application for amendment on

04.01.2013, by making a deliberate false statement. Thus, the conduct of the petitioner amounts to suppression of material facts and the petition deserves to be rejected on this ground, alone.

(3) In the present suit, respondent No.8 filed its written statement on 05.02.2007, wherein a list of 17 registered Sale Deeds has been given, vide which the said respondent purchased land admeasuring 1603 acres from different persons. The sellers are now sought to be joined in the year 2013, though the Sale Deeds have never been challenged. Pursuant to the execution of the Sale Deeds, the name of respondent No.8 has been mutated in the revenue record. The factum of the purchase of the land by respondent No.8, is very much in the knowledge of the petitioner, at least from the date of the filing of the written statement. From the rejoinder to the written statement filed by respondent No.8, it is revealed that the petitioner is aware of the revenue entry No.594 dated 09.12.1976, mutated

pursuant to the Agreement dated 18.08.1969, as is evident from paragraph 14.8 thereof. The petitioner also discusses the contents of the Agreement dated 18.08.1969, in the rejoinder, revealing that she is in possession of a copy thereof and is very well aware of its contents. However, the petitioner has deliberately and intentionally tried to feign ignorance before the Trial Court and this Court by making false statements in the application for amendment, in order to get out of the question of limitation. The attempt on the part of the petitioner is to mislead the Court into believing that she had no knowledge of the Agreement prior to July 2012, therefore, she could not have produced it earlier.

(4) The proviso of Order 6 Rule 17 CPC would be applicable in the case of the petitioner. Not only have the issues been framed on 28.10.2010, but the list of documents has been produced by the petitioner and the suit is set down for leading of evidence. The Trial Court has, time and again, fixed the case for leading of

evidence by the petitioner, however, the petitioner is intentionally avoiding stepping into the witness-box and has taken repeated adjournments. The stage of trial has commenced, which is clear from the fact that the petitioner has filed an application under Order 18 Rule 3A for permission to examine her daughter instead of herself, on 05.12.2012. This application was granted on 19.12.2012. Despite this fact, neither the petitioner, nor her daughter, have stepped into the witness-box. The stage of leading oral evidence is reached but the petitioner is intentionally avoiding the leading of evidence in spite of several orders of the Court asking the petitioner to begin her evidence.

(5) Order 14 Rule 1, sub-rule 5 CPC refers to the first hearing after pleadings are filed and the stands of the respective parties have been crystalised. The date of framing of issues is the first date on which the Court applies its judicial mind to the controversy between the parties. Order 15 Rule 1 provides that if no

issues are to be framed, the Court may pronounce judgment at that stage itself. This shows the importance of the framing of issues. If the parties are at variance on facts and law, then the stage of filing the list of witnesses and summoning of witnesses starts. In the present case, all these stages are over. Over fifteen adjournments have been taken by the petitioner for leading oral evidence. The date of framing of the issues is the date of the commencement of the trial, and in the present case this stage has been reached. This being so, the petitioner was required to exercise due diligence, which she has failed to do. Therefore, the application for amendment has been rightly rejected.

(6) In the suit as instituted originally, there is no necessity of joining 63 persons as party defendants. If the amendment were allowed, they would be joined automatically. However, if the amendment is not granted, they are not necessary parties. There is no averment in the application how those 63 persons are necessary parties. The land held by them is not specified

or identified. The interest of those 63 persons in the land has not been mentioned. The application under Order 6 Rule 17 is not an application for joinder of parties under Order 1 Rule 10, therefore, the joining of parties cannot stand independently of the application for amendment.

(7) If allowed, the amendment would not only change the nature of the suit but would also drastically expand the scope of the suit by including land that is much larger in area than the suit land admeasuring 764 acres and 28 gunthas, claimed by the petitioner. Even the suit land has not been identified by the petitioner. The 63 persons proposed to be joined were owners of 1603 acres. The amendment would bring into the purview of the suit, the entire land of respondent No.8, even though the petitioner has claimed only 764 acres and 28 gunthas, and that too, without specifying the area. The nature of the suit is sought to be expanded by the petitioner through the amendment, much beyond the scope of the original

suit or her own claim.

(8) If the amendment is granted, serious prejudice would be caused to respondent No.8 as there is an order of status-quo by the High Court in respect of the suit land, as originally claimed by the petitioner. If the amendment is allowed, the entire holding of respondent No.8, much beyond the claim of the petitioner, would fall under the order of status-quo, which is the intention of the petitioner.

(9) The action of the petitioner in bringing the application for amendment is not bona fide. The intention of the petitioner is to mislead the Court and deliberately delay the proceedings, by seeking to join 63 persons as defendants, even though they have no right, title or interest in the suit land. The petitioner has not specified or identified even the 764 acres and 28 gunthas of land claimed by her and the amendment is aimed at creating confusion with the aim of protracting the litigation for at least a decade. The conduct of

the petitioner, itself, disentitles her from seeking any relief.

10. On the above grounds, it is prayed that the petition be rejected.

11. Mr.K.S.Nanavati, learned Senior Advocate, has placed reliance upon several judgments that shall be discussed hereinafter.

12. Mr.Sandip Patel, learned advocate, for respondents Nos.10.B and 10.D, has made no submissions.

13. In rejoinder, Mr.Mihir J.Thakore, learned Senior Advocate for the petitioner, has more or less reiterated the submissions advanced by him earlier.

14. In the background of the above submissions and in order to consider the rival contentions, it would be appropriate to refer to the provisions of Order 6 Rule 17 CPC, which relate to amendment of pleadings. They read 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."

15. The unamended provision, as it existed, carried no restrictions upon the amendment of pleadings. By the Amendment Act 46 of 1999, this provision was altogether deleted from the statute book. By Amendment Act 22 of 2002, it has been restored. However, a proviso has been added that stipulates that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to conclusion that in spite of **due diligence**, the party could not have raised the matter before the commencement of trial. The proviso has been introduced with the object of avoiding the dilatory tactics adopted by litigants to protract or delay the proceedings. It, to a certain extent, curtails the unfettered discretion vested in the Court to

permit an amendment at any stage of the proceedings. The amended provision has come into effect from 01.07.2002. It is now incumbent upon a party seeking amendment after the trial has commenced to show that in spite of due diligence, such amendment could not have been sought at an earlier stage.

16. It is submitted on behalf of the petitioner that the proviso to Rule 17 of Order 6 CPC would not be applicable as the trial has not commenced and the framing of issues cannot be said to be the commencement of the trial. It is asserted by the petitioner that as the amendment has been sought at the pre-trial stage, the first part of Rule 17 (minus the proviso) would be applicable, therefore, there is no requirement of proving due diligence on the part of the petitioner and there can be no legal impediment in allowing the amendment.

17. On the other hand, the submissions on behalf of respondent No.8 are to the effect that the petitioner was well-aware of the documents that

are sought to be challenged by way of amendment and all the details regarding them much before the application for amendment was moved. The petitioner did not exercise due diligence in bringing the amendment at an earlier point of time. According to the learned Senior Counsel for respondent No.8, the trial has commenced as not only have the issues been framed but the stage of evidence has been reached and the list of documents filed by the petitioner. As per the case of respondent No.8, the petitioner has filed an application under Order 18 Rule 3A CPC to permit her daughter to be examined instead of herself, which has been allowed. The Trial Court has fixed the suit for the evidence of the petitioner on numerous dates. However, the petitioner is deliberately delaying the proceedings by not stepping into the witness-box. The dilatory tactics on the part of the petitioner, in not entering upon her evidence, cannot change the stage of trial, therefore, the proviso to Rule 17 of Order 6 would be applicable.

18. In the context of the above rival submissions, learned Senior Counsel for the respective parties have cited several judgments. It would be fruitful, at this stage, to discuss the said judicial pronouncements, in order to throw light on the issue to be decided by this Court which is, whether the Trial Court is correct in holding that the petitioner did not exercise due diligence while bringing the application for amendment which, according to it is not a bona fide one and whether, the amendment, if allowed, would gravely prejudice the case of respondent No.8.

19. First, the judgments relied upon on behalf of the petitioner may be discussed.

(I) In ***Usha Devi v. Rijwan Ahamd And Ors. - (2008)3 SCC 717***, the Supreme Court was dealing with a case where an amendment was sought in the plaint. The Trial Court had rejected the application for amendment and the High Court had affirmed the said order. Issues had been framed in the suit and the witnesses of the plaintiff

were being examined. At this stage, the amendment application was made. It was argued before the Supreme Court on behalf of the appellant that the proviso to Rule 17 of Order 6 would come into play only after the commencement of trial and in this case neither the framing of issues nor the proceedings of the miscellaneous case be taken as commencement of trial. The prayer for amendment having been made at a pre-trial stage, there was no requirement of invoking the due diligence clause. The Supreme Court, in the above decision, considered the judgment in the case of ***Sajjan Kumar v. Ram Kishan — (2005)13 SCC 89***, as being similar to the factual situation obtaining in the case before it, as in that case as well, a correction in the description of the suit premises was sought in the plaint. The amendment in the case of ***Sajjan Kumar v. Ram Kishan (supra)***, was allowed on the ground that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and refusal to

permit the amendment would create needless complications at the stage of execution, in the event that the plaintiff-appellant was successful. Following the judgment of ***Sajjan Kumar v. Ram Kishan (supra)***, the Supreme Court allowed the prayer for amendment. While doing so, the Supreme Court made it clear that it was not making any pronouncement on the larger issue as to the stage that would mark the commencement of trial. The relevant extract of the judgment is reproduced below:

> *15. In view of the decision in Sajjan Kumar we are of the view that this appeal too deserves to be allowed. We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in Sajjan Kumar and following that decision the prayer for amendment in the present appeal should also be allowed."*
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> *(emphasis supplied)*

(II) In ***Baldev Singh And Others v. Manohar***

Singh And Another - (2006)6 SCC 498, the Supreme Court was dealing with a case where the amendment to the written statement had been rejected by the Trial Court and the said order affirmed by the High Court. Allowing the appeal, the Supreme Court held as below:

> *"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted herein after, parties are yet to file their documents, we do not find any reason to reject the application*

for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

(III) The case of ***Sushil Kumar Jain v. Manoj Kumar And Another — (2009)14 SCC 38***, was one pertaining to the amendment of the written statement. In the said case, as is evident from paragraph 20 of the judgment the issues had not been framed, documents had not been filed and evidence had not been adduced. In such a situation, the Supreme Court concluded that the trial had not commenced, therefore, the proviso to Order 6 Rule 17 of the CPC had no application.

(IV) In ***State of Madhya Pradesh v. Union of India And Another — (2011)12 SCC 268,*** a suit had been instituted by the State of Madhya Pradesh invoking the original jurisdiction of the Supreme Court under Article 131 of the Constitution of India and the Supreme Court Rules 1966, were applicable. However, the

Supreme Court noticed the provisions of Order 6 Rule 17 of the CPC and the general principles applicable to the amendment of pleadings. Learned Senior Counsel for the petitioner has relied upon the following paragraphs of the judgment:

> *"16. It is not in dispute that after complying all the formalities even as early as on 16-4-2007, this Court has framed issues and as rightly pointed out by Mr.Prasad, the suit could have been disposed of by that time, however, the plaintiff has filed the present application for amendment of plaint at this belated stage. It is true that there is no embargo in Order 6 Rule 17 of the Code and in Order 26 Rule 8 of the Rules which alone govern the procedural aspects. However, the fact remains that the plaintiff has not assigned any reason for not taking steps when the State had approached this Court under Article 131 by way of a suit even in the year 2004 and waited till 2009."*

After weighing the rival contentions, the Supreme Court held as below:

> *"22. Finally, the original plaint*

proceeds that the exercise of power by the Central Government by passing the impugned Notifications dated 02.11.2004 and 04.11.2004 under Sections 58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities. In our view, after praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the vires of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be rendered infructuous. Moreover, it is settled principle of law that leave to amend will be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit.

23. In spite of the above conclusion, we feel that the plaintiff may be given an opportunity to put forth its stand that the Central Government issued impugned notifications/orders without proper guidelines and affording opportunity to the parties concerned. It is made clear that we have not either accepted or concluded the

said claim of the plaintiff but in the interest of justice, plaintiff State of M.P. is permitted to raise such objections at the time of trial by placing acceptable materials."

In the above case, the issue before the Supreme Court arose out of its original jurisdiction where the vires of certain orders/ notifications were challenged by the State of Madhya Pradesh. What weighed with the Supreme Court in allowing the amendment was that the Central Government had issued the impugned Notifications/ orders without proper guidelines and affording opportunity to the parties concerned. The interest of justice motivated the Supreme Court to allow the amendment. The judgment is rendered on its own facts, however, the Supreme Court has not opined therein when the trial in a civil suit commences.

(V) Learned Senior Counsel for the petitioner has further relied upon two judgments of the High Court of Bombay. The first judgment is ***Nevada Properties Pvt. Ltd. v. Alice***

Infrastructure Pvt. Ltd. & Ors. - Chambers Summons (Lodging) No.45 of 2014 in Suit No.2878 of 2011, decided on 16.04.2014, wherein it is held that the trial in a Civil Court commences from the date of filing of affidavits in lieu of examination-in-chief of the witnesses.

Another judgment of the Bombay High Court relied upon on behalf of the petitioner is of a Division Bench in the case of ***Mahadeo S/o. Maruti Bhanje v. Balaji S/o. Shivaji Pathade and Anr. - Writ Petition No.9659 of 2010,*** decided on 04.09.2012. In this decision, the Division Bench of the Bombay High Court was answering a reference wherein it was called upon to opine regarding the conflicting views expressed by learned Single Judges in certain cases. The questions were (i) whether the trial in a civil suit commences on the date of the framing of the issues or from the date of filing of affidavit in lieu of examination-in-chief and (ii) whether the proviso appended to Order 6 Rule 17 of the CPC is attracted after framing of

the issues or it will come into play only after the stage of filing of affidavits in lieu of examination-in-chief of witness(es)? After discussing several judgments, the Division Bench was of the view that the trial in a civil suit commences from the date of filing of affidavits in lieu of the examination-in-chief of witnesses and the proviso to Order 6 Rule 17 of the CPC will come into play only after the stage of filing affidavits in lieu of examination-in-chief of witness(es).

(VI) Reference is also made to a judgment of the High Court of Sikkim in the case of ***Dibya Prasad Pradhan and Anr. v. State of Sikkim — AIR 2011 SIKKIM 1,*** where a view has been taken, relying upon the judgment of the Supreme Court in ***Baldev Singh And Others v. Manohar Singh And Another (supra)***, that mere framing of issues would not amount to commencement of trial.

(VII) In ***Abdul Rehman And Another v. Mohd. Ruldu And Others — (2012) 11 SCC 341,*** the

Supreme Court held, on the facts of that case, that the amendment sought did not change the nature of the case as the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the unamended plaint. Paragraph-17 of the said judgment reads thus:

> *"17. In Pankaja v. Yellapa [(2004)6 SCC 415 : AIR 2004 SC 4102] this Court held that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the same decision, it was further held that an amendment seeking declaration of title shall not introduce a different relief when the necessary factual basis had already been laid down in the plaint in regard to the title."*

(VIII) In ***Man Mohan Singh v. Veena Sehdev — FAO (OS) No.51 of 2009***, decided on 16.02.2009, a Division Bench of the High Court of Delhi held that, *"the first date for the respondent to produce his witness not having arisen, it cannot be said that the trial has commenced"* (Paragraph-18).

(IX) In ***Akshar Image Through Proprietor Karunaben v. Jahesh Creation & Ors. - 2007(1) GLR 912,*** this Court held, while relying upon the decision of the Supreme Court in ***Baldev Singh And Others v. Manohar Singh And Another (supra),*** that the commencement of trial means the final hearing of the suit, examination of witnesses, etc.

(X) A similar view is taken by this Court in an unreported judgment in ***Dhanlaxmi Rameshchandra Shah Through POA Bhadreshbhai R. Shah v. Hasmukhlal Vajeram Thakkar and Others — Civil Revision Application No.764 of 2001,*** decided on 25.01.2011, wherein it is stated that the evidence is still not recorded and the trial has not commenced, therefore the application for amendment ought not to have been rejected.

(XI) In ***Ragu Thilak D. John v. S.Rayappan And Others — (2001)2 SCC 472,*** the Supreme Court held that where it is arguable that the relief sought by way of amendment would be barred by the law of limitation, the amendment should

still be allowed and the disputed matter made the subject-matter of an issue.

(XII) In ***Pankaja And Another v. Yellappa (Dead) By LRs And Others — (2004)6 SCC 415***, the Supreme Court held that even where the relief sought to be added by amendment is allegedly barred by limitation, there is no absolute rule that amendment in such a case should not be allowed and that an amendment subserving the ultimate cause of justice and avoiding further litigation should be allowed.

20. Now, to deal with the judgments relied upon by the learned Senior Advocate of respondent No.8.

(i) In ***Larsen and Turbo Ltd. ECC Division v. Inspector of Motor Vehicles and Anr. - 2006(3) GLH 457,,*** a Division bench of this Court has held as below:

> *"11. It is well settled that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary.*

Prerogative writs mentioned therein may be issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition is liable to be dismissed at the threshold without considering the merits of the claim.

11.1 The Rule of the Court and one which it is of the greatest importance to maintain, is that when an applicant comes to the Court to obtain the relief on an ex parte statement, he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will not examine the merits of the case. As a general rule, suppression of a material fact by a litigant disqualifies

such a litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. The applicant, who does not come with candid facts, cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is not an advocacy. it is a jugglery, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly, but states them in a distorted manner with a view to mislead or deceive the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its power to discharge the rule nisi and should refuse to proceed with further examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duties. In fact, such applicant requires to be dealt with for contempt of court for abusing the process of the Court."

This bunch of writ petitions was rejected with costs of Rs.5,000/- per petition, on the ground of suppression of material facts. This judgment is pressed into service on behalf of respondent No.8 to bring home the contention that the

petitioner is guilty of suppression of material facts not only before the Trial Court but before this Court as well. The petitioner has stated in Paragraph-6 of the petition that respondent No.8, for the first time, produced on record the relevant documents in the proceedings of Special Civil Suit No.143 of 2007, only on 18.06.2012, whereas the documents were produced as far back as on 18.06.2007, in the said suit. As per respondent No.8, a copy of the list of documents was served upon the lawyer of the petitioner and the petitioner was in the knowledge of the said documents ever since then, though she chose to file the application for amendment only on 04.01.2013. It has been asserted on behalf of respondent No.8 that the petitioner has deliberately made a false statement and suppressed material facts, therefore the petition deserves to be rejected, in limine, on this ground, alone.

(ii) In ***M/s.Prestige Lights Ltd. v. State Bank of India – 2007 AIR SCW 5350***, the Supreme Court held as below:

"32. It is thus clear that though the appellant-Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

33. The object underlying the above principle has been succinctly stated by Scrutton, L.J., in R v. Kensington Income Tax Commissioners, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136], in the following words:

> *"(I)t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should made a full and fair disclosure of all the material facts, not law. He must not misstate*

the law if he can help it the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement".

34. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.”

(iii) On the issue when the trial in a civil suit is deemed to commence, learned Senior

Advocate for respondent No.8 has relied upon the judgment in the case of ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others*** reported in ***(2006)12 SCC 1.*** After referring to several of its earlier judgments including ***Baldev Singh And Others v. Manohar Singh And Another (supra),*** the Supreme Court arrived at the following conclusion:

> *"57. It is submitted that the date of settlement of issues is the date of commencement of trial [Kailash v. Nanhku — (2005)4 SCC 480]. Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter-affidavit which proves lack of due diligence on the part of Defendants 1 and 2 (the appellants).*

... ...

59. In the instant case, the appeal was filed in the second round on 09.10.2002 as could be seen from the dates and events mentioned in the counter-affidavit. Special Leave Petition in this Court was filed on 07.07.2004. Additional written statement has been filed on 24.11.2005. Delay in filing the additional written statement from 09.10.2002 to 24.11.2005. From 09.10.2002, the matters sought to be introduced by defendant by way of additional written statement was known to defendant-appellant. The application in respect of additional written statement does not make an unequivocal averment as to due diligence. The averment only reads as follows:-

> *"Under the circumstances, the facts which were submitted in the said Appeal from Order before the High Court and the facts which are now being submitted in the present application could not be submitted before this Court in spite of utmost care taken by the defendants."*

60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held

by this Court in Kailash vs. Nankhu & Ors. [(2005)4 SCC 480], the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."

(emphasis supplied)

(iv) Referring to the case of ***Baldev Singh And Others v. Manohar Singh And Another (supra)***, it has been submitted by the learned Senior Advocate for respondent No.8 that the said case was decided on 03.08.2006, whereas ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra)*** was decided on 08.12.2006. It is contended that *Ajendraprasadji's case*, being later in point of time is required to be followed. Moreover, while deciding *Baldev Singh's case,* the Supreme Court did not refer to the judgment of three Honourable Judges of the Supreme Court in the case of ***Kailash vs. Nankhu & Ors. - (2005)4 SCC 480***, which is good law till date.

(v) In ***Vidyabai And Others v. Padmalatha And Another — (2009)2 SCC 409***, the Supreme Court, after discussing the judgments in the

cases of ***Kailash vs. Nankhu & Ors. (supra)***, ***Baldev Singh And Others v. Manohar Singh And Another (supra)***, and ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra)***, held as below:

> *"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:*
>
> > *"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."*
>
> *It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.*
>
> *11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said pre-condition. The question, therefore,*

which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

(emphasis supplied)

12. Although in a different context, a three-Judge Bench of this Court in Union of India and Others v. Major-General Madan Lal Yadav - [(1996) 4 SCC 127] took note of the dictionary meaning of the terms "trial" and "commence" to opine: (SCC p.136, para 19)

> *19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including **its own** jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial.*
>
> *(emphasis in original)*

The High Court, as noticed hereinbefore, opined that filing of an affidavit itself

would not mean that the trial has commenced.

... ...

16. Reliance, however, has been placed by Ms. Suri on Baldev Singh and Others v. Manohar Singh and Another [(2006) 6 SCC 498], wherein it was opined:

> *"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."*

It is not an authority for the proposition

> *that the trial would not deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence.*
>
> *(emphasis supplied)*

This decision was rendered on 12.12.2008, and is later in point of time than *Baldev Singh* and *Ajendraprasadji*. The principles enunciated in *Baldev Singh* have been read down to the extent that the said judgment is not considered to be an authority for the proposition that the trial would not be deemed to have commenced on the date of first hearing.

(vi) Reliance is placed upon an unreported judgment of this Court in ***Sitaben Madhubhai And Others v. Divisional Controller – Special Civil Application No.15353 of 2013***, decided on 08.10.2013, on the point of due diligence. This Court, placing reliance on the judgments of the Supreme Court in ***Chander Kanta Bansal v. Rajinder Singh Anand – AIR 2008 SC 2234***,

J.Samuel And Others v. Gattu Mahesh And Others — (2012)2 SCC 300, and ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra),*** held as below:

> *"8. It is true that this provision of law confers upon the Court, the discretion to grant an amendment to the pleadings at any stage of the proceedings, in a manner, and upon such terms, as may be just. An amendment that may be granted should be necessary for the purpose of determining the real questions in controversy between the parties. However, the proviso to Rule-17 makes it very clear 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 parties could not have raised the matter before the commencement of the trial. The case of the petitioners squarely falls within the mischief of the proviso to Rule-17, inasmuch as the petitioners had not been prevented by any cause beyond their control from having made the application for amendment at an earlier stage of the proceedings.*
>
> *9. The suit was filed in the year 2002. Issues were framed on 28.12.2005. The*

evidence of both the parties were over and the final arguments were concluded on 21.08.2013. It is at the stage of judgment that the petitioners have filed the application for amendment. The learned advocate for the petitioners has further submitted that issue No.1 regarding adverse possession has been framed by the Court. The issues have not been brought on the record, but a certified copy has been handed over to this Court during the arguments. The said issue reads thus:

> *Do the plaintiffs prove that they are in possession of the disputed property for a period of more than 20 years and by way of adverse possession have become owners of the suit property?*

10. The issue has been framed on 28.12.2005. It is, therefore, evident that the petitioners had ample opportunity to make an application for amendment even at that point of time, had they thought it necessary to do so. The petitioners have chosen not to exercise due diligence at the relevant point of time and have now come with the plea to grant the amendment, on the very day on which the suit is kept for final judgment. While deciding the suit, the Trial Court would render its findings upon all issues, including issue No.1, therefore, the rejection of the prayer for amendment would

not prejudice the petitioners.

*11. In **Chander Kanta Bansal Vs. Rajinder Singh Anand**, reported in **AIR 2008 SC 2234**, the Supreme Court has defined the word due diligence that appears in the proviso to Order-6, Rule-17 in the following terms :*

> *11. ***** The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything*

*possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. ******

The facts of the present case clearly reveal that the petitioners have not exercised due diligence in preferring the application for amendment, in spite of the fact that it was open to them to do so at any stage of the suit. As held by the Supreme Court, unless the parties take prompt steps, it cannot be said that due diligence has been exercised in order to accept the application for amendment at a belated stage. In the present case, the application has been filed after 11 years even though the petitioners had sufficient time to do so in the intervening period. Under such circumstances, the said application has rightly been rejected by the Trial Court.

... ...

13. As held by the Supreme Court in the above-quoted judgment, due diligence is a requirement that cannot be dispensed with and it determines the scope of a party's

constructive knowledge. The petitioners herein had the knowledge of the fact that they could have claimed the relief prayed for in the amendment at an appropriate stage, but did not bother to exercise due diligence in order to do so; therefore, such relief prayed for at the fag end of the suit has rightly been declined by the Trial Court."

(vii) In ***Gopalbhai Karsanbhai Patel v. Vinodchandra Dharamsi And Others — Special Civil Application No.13608 of 2011,*** decided on 27.01.2014, this Court took a view that the trial commences when issues are framed and, held as below:

"14. It is also relevant to note and pertinent to mention that actually by way of proposed amendment the petitioner not only wants to add facts / details which were very much known to and within the knowledge of the petitioner but the petitioner also wants to add new and additional ground of challenge which was never raised until now i.e. until the application came to be preferred two years after the Court framed the issued.

14.1 Therefore the proposed amendment will

not only introduce new fact but will introduce new ground and it will also take away a benefit accrued to the defendant and consequently will affect the interest of the defendant adversely.

14.2 Thus, the proposed amendment does not pass the condition which is prescribed by the proviso of Rule 17 of Order VI. According to Rule 17 of Order VI ordinarily the Court may permit either party to amend the pleadings on such terms as may be just however, the Court shall, ordinarily, not allow any application for amendment after trial has commended.

14.3 Such application may be granted by the Court only if the Court comes to the conclusion that in spite of due diligence the party could not raise the matter before commencement of trial. The proviso of Rule 17 of Order VI postulates that after the trial has commenced, ordinarily, application for amendment of pleadings shall not be allowed. Said proviso also prescribes an exception viz. satisfaction of the Court that the matter could not be raised and request could not be made before commencement of trial despite due diligence. Consequently it would be necessary for the applicant to establish that the amendment

which he seeks to incorporate, after the trial commenced, could not be incorporated at the time of submission of pleadings or before commencement of trial despite due diligence. Furthermore, the Court will have to record its satisfaction and conclusion about such claim and assertion by the claimant and the Court would be obliged to record its satisfaction. Meaning thereby there must be application of mind as to the circumstances and facts mentioned in the application and judicious satisfaction as regards such claim and assertion. So far as facts of present case are concerned it has emerged that the issues were settled on 29.2.2008 whereas the application under order VI Rule 17 came to be made in April 2010 i.e. about two years after issues were framed. Furthermore, facts of the case have also brought out that there is gross and conspicuous absence of due diligence on part of applicant plaintiff."

(viii) Reliance has been placed on behalf of respondent No.8 upon a judgment of the High Court of Rajasthan in ***Smt.Saroj & Ors. v. Prabhu Narain Mathur & Anr. - SB Civil First Appeal No.152/2013***, decided on 07.02.2014, on the ground of due diligence. The relevant

extract from Page 21 of the said judgment is reproduced hereinbelow:

> *"As noticed hereinbefore, the affidavits were filed on 02.05.2012, where after the application was filed, as such, unless the condition as contained in the proviso is first satisfied, the amendment as sought cannot be considered/ granted. Therefore, what is required to be examined is as to whether `in spite of due diligence' the plaintiffs could not have raised the matter before the commencement of trial? As noticed hereinbefore, the so called explanatory facts sought to be alleged pertain to the period around 1973-74 that is almost 36 years prior to the date when the amendment was sought to be moved. In the application filed, the only explanation given is that while discussing with the counsel it was thought appropriate to file the application, which fact does not fulfill the mandatory requirement of the proviso. The present is a case of not only lack of due diligence but a case of gross negligence."*

(ix) In Judgment dated 26th July, 2013, rendered in the case of ***Tej Thakur and Another v. Kulwant Singh Bains and Others – Civil Revision No.7691 of 2011,*** the High Court of

Punjab and Haryana took the view that the amendment application had been moved after commencement of trial because the same was moved after framing of issues and grant of three opportunities to the petitioners therein for their evidence. It was found that the petitioner had not exercised due diligence in bringing the application for amendment and the order of the Trial Court rejecting the same was upheld.

(x) A similar view has been taken by the High Court of Karnataka in Judgment dated 20th September, 2013, passed in the case of ***Ganada Puttavva and Others v. Ganada Ningappa — Writ Petition No.66651/2009 (GM-CPC)***, namely, that the trial in a civil suit commences from the date of raising of issues.

(xi) As regards what can be said to constitute due diligence, the Supreme Court has held, in ***J.Samuel And Others v. Gattu Mahesh And Others — (2012)2 SCC 300,*** thus:

> *"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."

(xii) In ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Others – (1992)2 SCC 524***, the Supreme Court held in the context of joinder of parties under Order 1 Rule 10 of the CPC, as below:

"13. A clear distinction has been drawn between suits relating to property and those

in which the subject matter of litigation is a declaration as regards status or legal character. In the former category, the rule of present interest as distinguished from the commercial interest is required to be shown before a person may be added as a party.

14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought or relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on wider construction of

the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd., (1956) 1 All E.R. 273, wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie S.A v. Bank of England,(1950) 2 All E.R.605, 611, that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin, J. has stated:-

> *"The test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights.""*

This decision has been relied upon on behalf of respondent No.8 to support the contention that it is only if the application for amendment is allowed could the 63 proposed parties be joined,

not independently thereof, as the proposed defendants are neither proper nor necessary parties, having sold the land in question to respondent No.8 long back, and no issues arise between them and the petitioner.

(xiii) In ***Pushpa Devi Bhagat (D) by LR v. Rajinder Singh and Ors. - AIR 2006 SC 2628(1),*** the Supreme Court held as under:

> *"12. The position that emerges from the amended provisions of Order 23, can be summed up thus:*
>
> *(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.*
>
> *(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1, Order 43.*
>
> *(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.*
>
> *(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.*

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise....”

This judgment has been cited in support of the aspect that the proposed amendment purports to challenge a consent decree of the High Court of Bombay, before the Civil Court at Surat, which is not permissible in law. Moreover, it is submitted on behalf of respondent No.8 that neither the petitioner nor her predecessors-in-title were parties to the said decree and it has not been shown in the pleadings how the subject-matter of the said decree is relevant to the present suit filed by the petitioner.

(xiv) Reliance has further been placed on behalf of respondent No.8 upon a judgment of the Supreme Court in ***Revajeetu Builders And Developers v. Narayanaswamy And Sons And Others*** reported in ***(2009)10 SCC 84***, wherein the Apex Court enumerated some important factors to be taken into consideration while dealing with

applications for amendment. The relevant extract is quoted hereinbelow:

> *"64. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*
>
> *(1) whether the amendment sought is imperative for proper and effective adjudication of the case;*
>
> *(2) whether the application for amendment is bona fide or mala fide;*
>
> *(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
>
> *(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;*
>
> *(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and*
>
> *(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.*
>
> *These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.*
>
> *64. The decision on an application made*

under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

(xv) Regarding the nature and scope of the power of High Courts under Article 227 of the Constitution of India, the Supreme Court has held thus in ***Jai Singh And Others v. Municipal Corporation of Delhi And Another — (2010)9 SCC 385***:

"15. We have anxiously considered the submissions of the learned counsel. Before we consider the factual and legal issues involved herein, we may notice certain well-recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the

powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognized constraints. It can not be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

16. The High Court cannot lightly or liberally act as an appellate court and re-

appreciate the evidence. Generally, it can not substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi judicial tribunals. The power to reappreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice."

(xvi) In Judgment dated 21.10.2013, passed in the case of ***Kanchangiri Narangiri Goswami & Ors. v. Munakhan Yasinkhan Pathan & Ors. - Appeal From Order No.298 of 2012 with Civil Application No.8790 of 2012***, this Court has taken a view, relying upon a judgment of the Supreme Court in the case of ***Wander Ltd. And Anr. v. Antox India P. Ltd. - 1990 (Supp.) SCC 727***, that normally an appellate Court would not interfere with a discretionary order passed by the Trial Court on the basis of prima-facie material even if a different view is possible.

(xvii) Learned Senior Counsel for respondent

No.8 has further relied upon a judgment of this Court in the case of ***Ajendraprasadji Narendraprasadji Pande And Another v. Swami Keshavprakashdasji Gurupujya Narayanpriyadasji And Others,*** reported in ***AIR 2006 GUJARAT 204***, wherein, this Court, held as below:

> *"18. As to when can one say, with certainty, that trial has commenced is not an issue which requires to be dealt with at length. Order XVIII Rule 4 deals with recording of evidence. Order XVIII of CPC specifically pertains to hearing of the suit and examination of witnesses. Under Rule 4 of Order XVIII, sub-rule (1) provides that examination-in-chief of a witness shall be on affidavit. Under Sub-rule (2) of Rule 4 of Order XVIII of CPC, a provision is made that the evidence (cross examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by the Court. The provision is clear and unambiguous. The moment witness files affidavit, it tantamounts to examination-in-chief; this is of course, subject to the powers available to the Court to record oral evidence, even*

in such a case, where the Court finds it necessary. But from an enabling power, it cannot be contended, and if contended, cannot be accepted that till oral evidence is recorded, it could not be stated that the stage of recording of evidence has been arrived at, once the Legislature has prescribed that examination-in-chief is permissible by way of filing of affidavit. The Apex Court has laid down in no uncertain terms the efficacy of such affidavits filed as is clear from the enunciation made in paragraph No.5 (p.3357) of the decision in the case of Salem Advocate Bar Association (AIR 2005 SC 3353) (supra). Therefore, to contend that till the point of time, a witness steps into the box and the Court records oral evidence, trial cannot be stated to have commenced, does not merit acceptance. In the case of Kailash (AIR 2005 SC 2441) (supra), the Supreme Court while stating the law regarding 'Trial of Election Petition' has held that in a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial.

... ...

> *23. The meaning of the word 'diligence' is careful and persistent application or effort, as opposed to the meaning of the word 'negligence', which means a lack of proper care and attention; carelessness. Therefore, when one talks of due diligence, the conduct has to show that a careful and persistent effort was made as opposed to a lack of proper care and attention in putting up one's defence or case, as the case may be. On this count also, the defendants have not been able to show that there was an effort which was careful and persistent. To the contrary, having raised the same issues in other proceedings, it denotes a lack of proper care and attention necessary for establishing one's defence before the trial Court.*"
>
> *(emphasis in original)*

This judgment has been affirmed by the Supreme Court in ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others - (2006)12 SCC 1.*** It is, therefore, submitted on behalf of respondent No.8 that the principles of law enunciated in this judgment would be binding upon this Court.

(xviii) In ***Liliben Wd/o. Gabubhai Narsinhbhai Through Power of Attorney and Ors. v. Ramilaben W/o. Mohanbhai Govindbhai Patel,*** a Division Bench of this Court held as below:

> *"15. It is an admitted fact, as evident from the record, that it was well within the knowledge of the appellants (original plaintiffs) that a sale deed has been executed dated 21st July 1993. When the suit came to be preferred in the year 2003, there was no challenge to this sale deed. The suit was for declaration and permanent injunction. Assuming for the moment that the appellants learnt about the sale deed in the year 2003, they could have very well challenge the same in the suit, which was preferred on 17th May 2003. However, this was not done but it is only by way of an amendment application preferred on 11th June 2006 that the plaint was sought to be amended by including the challenge to the so-called illegal and bogus sale deed dated 21st July 1993. There is no doubt in our mind that the challenge is belated and time-barred as per the law of limitation. Not only this, but it will also change the entire nature of the suit causing grave prejudice to the defendants.*

... ...

25. In view of our findings made hereinabove that on the date of filing of the amendment application, seeking to challenge the legality and validity of the sale deed of the year 1993 in the year 2006, the claim as made by the appellants (original plaintiffs) in their amendment application was already barred, no purpose would be achieved by allowing the amendment which has already stood barred by the law of limitation."

This judgment is cited on behalf of respondent No.8 to press the point that the prayer sought by way of the amendment is to challenge the Agreement dated 18.08.1969, which claim is time-barred.

(xix) The last judgment cited upon by learned Senior Advocate for respondent No.8 is that rendered by three Honourable Judges of the Supreme Court in ***Kailash vs. Nankhu & Ors. - (2005)4 SCC 480.*** Though the Supreme Court was dealing with an election petition, it has also expressed a view regarding the commencement of the trial in a civil suit. The relevant extract

of the judgment is quoted hereinbelow:

> *"13. At this point the question arises : when does the trial of an election petition commence or what is the meaning to be assigned to the word "trial" in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and upto the date of decision therein are included within the meaning of the word "trial"."*
>
> *(emphasis supplied)*

21. In the background of the above factual and legal submissions, the rival contentions advanced on behalf of the respective parties may now be examined, as also the findings rendered by the Trial Court in the impugned order, so as to ascertain whether the said Court has exercised

the jurisdiction vested in it in a proper manner, or not.

22. The case of the petitioner before the Trial Court, and this Court is that the Agreement dated 18.08.1969, and other documents were produced by respondent No.8, for the first time on 18.06.2012, in Special Civil Suit No.143 of 2007 filed by the said respondent. According to the petitioner, before that date the petitioner was unaware of the said documents. With regard to this statement, learned advocate for respondent No.8 has forcefully submitted that the petitioner has deliberately made a false statement in order to mislead the courts. That the petitioner was very well aware of the said Agreement and the consequential mutation entry No.594 in the revenue record at the time of the institution of the suit, and this has also been observed by the Trial Court, in its order. It has been emphasised that the Agreement dated 18.08.1969 formed a part of the documents submitted by respondent No.8 in its suit. The list of documents was submitted on 18.06.2007,

and a copy thereof was served upon the lawyer for the petitioner. Therefore, the petitioner was aware of the said Agreement ever since 18.06.2007, but has chosen to file the application for amendment only on 04.01.2013.

23. A paper-book of the relevant documents has been produced by the learned Senior Counsel for respondent No.8, wherein the list of documents (Ex.29) filed in Special Civil Suit No.143 of 2007, instituted by respondent No.8 has been produced. This document clearly reveals that the said list was filed on 18.06.2007. A copy of the Agreement dated 18.08.1969 is at Sr.No.1 of the list. There is an endorsement on the said document by the learned advocate for the petitioner dated 18.06.2007, to the effect that he has received it. This document has not been denied by the learned Senior Advocate for the petitioner. When it was pointed out, he merely submitted that the petitioner seems to have "missed it". This aspect cannot be taken lightly by this Court, as the entire case of the petitioner is based upon her assertion that she

was unaware of the Agreement upto 18.06.2012. This assertion, made in Paragraph-6 of the petition filed before this Court, is false to the record. It appears to be a deliberate misstatement of fact, therefore, this Court is inclined to agree with the submissions advanced by the learned Senior Advocate for respondent No.8, that the petitioner has suppressed material facts and has deliberately made a false statement in order to mislead the courts by feigning ignorance of the document. Moreover, the details of the seventeen Registered Sale Deeds vide which respondent No.8 has purchased the land have been disclosed by it in the written statement filed by it on 05.02.2007, therefore, the petitioner is aware about this aspect as well ever since the year 2007. The petitioner therefore, cannot claim equity as it is evident that she has not come to the Court with clean hands. This fact, alone, is sufficient to reject the petition. However, looking to the nature of the issues raised before this Court, it would be appropriate to

discuss the rival contentions.

24. The Trial Court has held in the impugned order, that the petitioner has averred in Paragraph-9 of the plaint, that she went to the Talati to get her name entered in the revenue record and came to know of the Agreement dated 18.08.1969. She also found that Entries Nos.497 and 591 were mutated in the revenue record. However, she has not mentioned Entry No.594, which was mutated in the year 1976, pursuant to the said Agreement. The Trial Court is of the view that if the petitioner is aware of Entries Nos.497 and 591, then it would follow that she is also aware of Entry No.594. In fact, there was prolonged litigation before the revenue authorities. The petitioner had filed Misc. Civil Application No.10313 of 2007, in Special Civil Application No.8848 of 2002, in this Court, wherein those 67 persons who were parties to the Agreement dated 18.08.1969, were also parties. This clearly shows her knowledge regarding the documents that she now states she learnt about only on 18.06.2012.

25. The petitioner, obviously, has not denied the proceedings that took place in this Court. From a scrutiny of the record, it is evident that the petitioner was aware of the Agreement dated 18.08.1969 and the 67 persons party to it (respondents Nos.1 to 4 and 63 others to whom the land transferred), ever since the year 2007, though the application for amendment was filed only on 04.01.2013. It is stated by the petitioner in the plaint of the present suit that after she purchased the land, she went to the revenue officers to get it mutated in her name. Entry No.594 was mutated and certified in the revenue record on 09.12.1976. It is difficult to believe that a person who has purchased the land would not check the revenue record before doing so. The petitioner mentions Entry Nos.497 and 591 in the plaint but deliberately omits any reference to Entry No.594. It is not possible that though she is aware of the other revenue entries, she was oblivious of Entry No.594. Besides, the litigation in the High Court centered around the

controversy regarding the suit land. The petitioner sought to be impleaded therein by way of a civil application, in the year 2007. From the above facts, which are not denied, it appears that the petitioner, intentionally and deliberately, has withheld material facts from the Trial Court and this Court. The conduct of the petitioner does not appear to be bona fide and the findings rendered by the Trial Court to this effect, cannot be said to suffer from any perversity or irregularity, as they are sufficiently borne out from the record.

26. The Trial Court has further held that the petitioner has filed the application for amendment with the intention of prolonging the suit proceedings, though the High Court has issued directions to dispose of the suit speedily. It has been noticed by the Trial Court that the petitioner is not cooperating in the proceedings of the suit.

27. A copy of the “Rojkam” (order sheets) of the Trial Court has been produced before this Court.

A perusal thereof reveals that after the framing of the issues on 28.10.2010, the petitioner has taken a series of adjournments, even though the suit has been set down for her evidence. She had filed an application under Order 18 Rule 3A to examine her daughter instead of herself, which was allowed. Though some other applications were filed by third parties as well, it is obvious from the record that the petitioner has taken over twenty adjournments and has avoided stepping into the witness-box. This conduct which is reflected from the record, further fortifies the view taken by the Trial Court that the intention of the petitioner is not bonafide. This Court, after scrutinizing the record, cannot find fault with this finding of the Trial Court.

28. That brings us to the crucial question whether the petitioner has exercised due diligence in bringing the application for amendment and whether the proviso to Order 6 Rule 17 is attracted in the present case.

29. As already discussed hereinabove, in ***Usha Devi v. Rijwan Ahamd And Ors (supra),*** the Supreme Court did not make any pronouncement on the larger issue as to the stage that would mark the commencement of the trial in a suit.

30. In ***Baldev Singh And Others v. Manohar Singh And Another (supra),*** the Supreme Court held in relation to the proviso to Order 6 Rule 17, that the commencement of trial as used in the proviso to Order 6 Rule 17 of the CPC must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. This judgment by two Honourable Judges of the Supreme Court was delivered on 03.08.2006. It does not appear from a reading of the reported judgment that the judgment of three Honourable Judges of the Supreme Court in ***Kailash vs. Nankhu & Ors (supra)*** was either cited or considered.

31. In a later judgment in the case of ***Ajendraprasadji N.Pandey And Another v. Swami***

Keshavprakeshdasji N. And Others (supra) delivered on 08.12.2006, the Supreme Court, having referred to ***Kailash vs. Nankhu & Ors (supra) and Baldev Singh And Others v. Manohar Singh And Another (supra)***, held that either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as the due date of commencement of trial, the matter will fall under the proviso to Order 6 Rule 17 of the CPC (Paragraph-57). Relying upon the judgment in the case of ***Kailash vs. Nankhu & Ors (supra),*** the Supreme Court has categorically held in paragraph 60, **"As held by this Court in *Kailash vs. Nankhu & Ors (supra)*, the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."**

32. This is a later judgment than in the case of ***Baldev Singh And Others v. Manohar Singh And Another (supra),*** which has also been referred to. There is a clear enunciation of the

principle of law in ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra)*** relying on ***Kailash vs. Nankhu & Ors. (supra),*** by three Honourable Judges, that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence. It may be kept in mind that in ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra),*** the Supreme Court has affirmed a judgment of this Court in ***Ajendraprasadji Narendraprasadji Pande And Another v. Swami Keshavprakashdasji Gurupujya Narayanpriyadasji And Others (AIR 2006 GUJARAT 204)*** wherein reliance was placed on ***Kailash vs. Nankhu & Ors. (supra),*** and it was held that *"therefore, to contend that till the point of time, a witness steps in to the box and the Court records oral evidence, trial cannot be stated to have commenced, does not merit acceptance".* This view has been endorsed by the Supreme Court and would be binding upon this Court.

33. A similar view is taken by this Court in judgment dated 27.01.2014, rendered in the case of ***Gopalbhai Karsanbhai Patel v. Vinodchandra Dharamsi And Others — Special Civil Application No.13608 of 2011.*** It has been submitted on behalf of the petitioner that in this judgment no authorities of the Supreme Court have been noticed. However, this contention would not hold ground in the face of the fact that a similar view from this Court has been endorsed by the Supreme Court.

34. Insofar as the judgments of this Court in ***Akshar Image Through Proprietor Karunaben v. Jahesh Creation & Ors. (supra)*** and ***Dhanlaxmi Rameshchandra Shah Through POA Bhadreshbhai R. Shah v. Hasmukhlal Vajeram Thakkar and Others — Civil Revision Application No.764 of 2001,*** decided on 25.01.2011, are concerned, though the judgments in the cases of ***Baldev Singh And Others v. Manohar Singh And Another (supra)*** and ***Ajendraprasadji Narendraprasadji Pande And Another v. Swami Keshavprakashdasji Gurupujya***

Narayanpriyadasji And Others (AIR 2006 GUJARAT 204 : 2006(2) GLR 1696) have been referred to, there is no reference to the judgment of the Supreme Court in ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra)***, which had already been delivered on 08.12.2006, whereas this judgment was delivered on 10.01.2007. In the second judgment, no judgments are referred to.

35. As already discussed earlier, in ***Vidyabai And Others v. Padmalatha And Another (supra)***, a later judgment, the Supreme Court has read down the judgment in the case of ***Baldev Singh And Others v. Manohar Singh And Another (supra)***, by stating that the said judgment is not an authority for the proposition that the trial would not be deemed to have commenced on the date of first hearing.

36. ***State of Madhya Pradesh v. Union of India And Another (supra)*** was a case under Article 131 of the Constitution of India. As held by the Supreme Court in a recent judgment in the case

of ***State of Tamil Nadu v. State of Kerala & Anr. — 2014(5) Supreme 224,*** a suit filed in original jurisdiction of the Supreme Court would not be governed by the procedures prescribed in the Civil Procedure Code or subject to Supreme Court Rules, 1966. The relevant observation of the Supreme Court reads thus:

> *"38. As a general observation, before we embark upon the discussion on diverse issues, it must be stated, that a suit of this nature cannot and ought not to be decided with very technical approach insofar as pleadings and procedure are concerned. A suit filed in original jurisdiction of this Court is not governed by the procedure prescribed in Civil Procedure Code save and except the procedure which has been expressly made applicable by the Supreme Court Rules...."*

37. In the background of the above judicial pronouncements, it would be appropriate to take a look at the stage of the proceedings at which the petitioner filed the application for amendment in the present case.

38. The issues were framed on 28.10.2010. On

04/05.12.2012, the petitioner made an application under Order 18 Rule 3A (Ex.234) saying that she be permitted to examine her daughter, instead of herself, as she is suffering from Alzheimer's disease. This application was allowed by the Trial Court, on 19.12.2012. The record reveals that since that date the suit has been set down for the leading of evidence by the petitioner (plaintiff). The petitioner has consistently sought adjournments upto 04.01.2013, when the application for adjournment was filed. Even before the filing the application under Order 18 Rule 3A on 04.12.2012, and after the framing of issues on 28.10.2010, the petitioner did not begin her evidence. The record reveals that a list of documents was produced by the petitioner on 19.10.2012 vide Mark 230/1 to 230/78. However, the petitioner has successfully evaded stepping into the witness-box, though the Trial Court has granted several 'last opportunities' for her to do so. One can count almost about twenty-one occasions from the record when the case has been

set down for the evidence of the petitioner and been adjourned as such evidence was not forthcoming. This clearly reveals the dilatory tactics practiced by the petitioner.

39. When the issues were framed on 28.10.2010, the list of documents filed by the petitioner on 19.10.2012, the application under Order 18 Rule 3A of the CPC of the petitioner filed on 14.12.2012 and allowed on 19.12.2012, it is clear that the stage of evidence has been reached in the suit. In ***Ajendraprasadji N.Pandey And Another v. Swami Keshavprakeshdasji N. And Others (supra)***, the Supreme Court held ***"As held by this Court in Kailash vs. Nankhu & Ors. (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence"*** (Paragraph-60) (emphasis supplied). In the present case, both these stages have arrived. The issues have been settled and the case has been set down for recording of evidence.

40. In ***Vidyabai And Others v. Padmalatha And Another (supra)***, the Supreme Court held *"The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceedings. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding"*. In the same judgment, the Supreme Court quoted with the approval an extract of a three-Judge decision in ***Union of India and Others v. Major-General Madan Lal Yadav*** reported in ***(1996) 4 SCC 127***, where it is held that *"The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial* (Paragraph-19)". Ultimately, the view taken in ***Baldev Singh And Others v. Manohar Singh And Another (supra)***, that the trial would not commence on the first date of hearing, was read down.

41. What emerges from a close reading of the above judgments is that the trial in a civil suit

commences when the issues are settled and the case is set down for recording of evidence.

42. ***Kailash v. Nankhu & Ors. (supra),*** a decision by a three judge Bench of the Supreme Court, though delivered in the context of an election petition, categorically and consciously lays down the trial in a civil suit would commence and that is *"when issues are framed and the case is set down for recording evidence"* (Paragraph-13). This judgment of three Honourable Judges still holds the field and the above principle of law has not been varied or modified by a bench of higher strength.

43. The framing of issues is the date of first hearing of the suit as is evident from the provisions of Order 14 Rule 1 Sub-rule 5, which reads as below:

> *"1.* ***Framing of Issues:***
>
> *(1)* *** *** ***
>
> *(2)* *** *** ***
>
> *(3)* *** *** ***
>
> *(4)* *** *** ***

> *(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

44. Issues are the backbone of the trial in a civil suit and at the stage of framing of issues, the Court would have to deeply and actively apply its judicial mind, as by framing issues the points of controversy on between the parties, facts and law, are narrowed down and pin-pointed in a succinct and precise manner. Issues are framed to aid the Court in arriving at the right decision. The evidence led by the parties would pertain to the issues settled by the Court. Therefore, the trial commences when the issues are settled and the case set down for evidence, which is the next stage.

45. This Court is, therefore, of the view that in the present case, as the issues have been framed, list of documents produced by the petitioner and the case set down for evidence,

the trial has commenced. It is a different matter that the petitioner has deliberately evaded stepping into the witness-box. In spite of the fact that her application for permission to examine her daughter, instead of herself, was allowed on 19.12.2012, neither her daughter nor any other witness has led evidence on her behalf. The record reveals that a series of adjournments have been taken for this purpose. Though this reflects the conduct of the petitioner, it does not change the stage of the suit. The conduct of the petitioner has been noticed by the Trial Court as well, in the impugned order.

46. The above discussion would lead the Court arrive at a conclusion that in the present case, the proviso to Order 6 Rule 17 of the CPC would be applicable. This brings us to the question of due diligence. It has been submitted on behalf of respondent No.8 that the petitioner was aware of the Agreement dated 18.08.1969, ever since 18.06.2007 when it was produced along with a list of documents by respondent No.8 in the suit

filed by it, in which the petitioner is one of the defendants. The petitioner is also aware of the seventeen Sale Deeds executed in favour of respondent No.8, which have been enumerated in the written statement filed by the said respondent on 05.02.2007. The list of documents has been duly received by the lawyer of the petitioner who has endorsed it by appending his signature. This fact shows that the petitioner was very well aware of the said documents in the year 2007, itself but chose to move the application for amendment, seeking to challenge the said documents, only on 04.01.2013. This aspect has not been disputed by the petitioner. Rather, it stands admitted, as the learned Senior Counsel for the petitioner has clearly stated before this Court that the petitioner has somehow "missed" the fact that the list of documents was supplied on 18.06.2007. The glaring fact is that the petitioner had knowledge of the documents but did not exercise due diligence in bringing the amendment soon after acquiring such knowledge. On the contrary,

as discussed earlier, the petitioner has deliberately made a false statement before the Trial Court and this Court that she was unaware of the Agreement dated 18.08.1969, upto 18.06.2012, when she came to know of it for the first time. This statement is falsified from the record produced before this Court.

47. There is nothing on record to show that the petitioner was prevented by any circumstances beyond her control from moving the amendment after acquiring knowledge of the document sought to be challenged by the proposed amendment. There are no pleadings whatsoever, to the effect that despite due diligence the petitioner could not bring the amendment at an earlier point of time. In the entire application for amendment, there are no pleadings regarding the aspect of due diligence, at all.

48. In ***J.Samuel And Others v. Gattu Mahesh And Others (supra)***, quoted hereinabove, the Supreme Court has held that a party requesting a relief stemming out of a claim is required to

exercise due diligence and this is a requirement which cannot be dispensed with. The Supreme Court has further held that the term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit (Paragraph-20). In the present case, the petitioner has grossly failed to meet with the requirement of showing due diligence, in spite of having constructive knowledge of the document since the year 2007. This aspect has been correctly noted and dealt with by the Trial Court while rejecting the application for amendment.

49. It has been submitted on behalf of the petitioner that there is necessity to join those 63 persons who were parties to the Agreement dated 18.08.1969. It has been contended that this part of the amendment would not fall under Order 6 Rule 17, but under Order 1 Rule 10 of the CPC, therefore, it deserves to be granted independently. This Court cannot agree with this submission. The application for amendment has been filed under Order 6 Rule 17 and is a

composite one. Had it been allowed, then the proposed parties would have been joined. When the application, itself, has been rejected, there is no justification or requirement for joining the 63 parties mentioned in it. Besides, the proposed defendants no longer have any interest in the suit land and would not be affected by the decision in the suit.

50. Learned Senior Counsel for respondent No.8 has submitted that the proposed amendment seeks to expand the scope of the suit much beyond the area of land claimed by the petitioner. The petitioner claims to be the owner of 764 acres and 28 gunthas of land. The exact location and boundaries of this land have not been specifically mentioned in the suit. By bringing the amendment application, the petitioner seeks to include 1603 acres of land in the suit, owned at one point of time by those 63 persons who were parties to the Agreement dated 18.08.1969, and which is now owned by respondent No.8. This area is much beyond the claim of the petitioner in the suit. It has been pointed out that by

judgment dated 12.03.2008, in Appeal from Order No.375 of 2007, and connected matters, wherein the petitioner challenged the Ex.5 order granting an interim injunction in favour of respondent No.8, in Special Civil Suit No.143 of 2007 filed by it, and refusing the interim injunction to the petitioner in the present suit, this Court passed an order regarding maintenance of status-quo by the parties, which is still in operation. It is submitted that by expanding the scope of the suit, the petitioner seeks to include the entire parcel of land under the order of status-quo, though she does not lay claim to the entire land. Examining this submission made on behalf of respondent No.8 on the basis of the record, it appears that it carries considerable weight. The claim of the petitioner in the suit is only for 764 acres and 28 gunthas of land, and that too is unspecified. The amendment seeks to expand the scope of the suit to include 1603 acres, in spite of the fact that this area has not been claimed by the petitioner. By way of the amendment, the entire

area would fall under the order of status-quo which is operative. This would include the entire land held by respondent No.8, and would be much beyond the suit land. Under the circumstances, the proposed amendment would certainly cause prejudice to respondent No.8, if allowed.

51. It has been submitted by the learned Senior Counsel for the petitioner that the petitioner will confine her claim to 764 acres and 28 gunthas, only. However, the application for amendment reads otherwise. There can be no oral amendment of an application for amendment, at this stage. The record has to be read as it is.

52. By way of the amendment, the petitioner also seeks to challenge a consent decree of the High Court of Bombay, before the Civil Court at Surat. The settled position of law in this regard is that such challenge is maintainable only before Court that has passed the decree.

53. In ***Revajeetu Builders And Developers v. Narayanaswamy And Sons And Others (supra),*** the

Supreme Court has enumerated certain important factors to be considered by Courts while dealing with applications for amendment. Applying those factors to the proposed amendment, it emerges that :

(1) The amendment sought is not imperative for the proper and effective adjudication of the case as the petitioner claims to be the owner of 764 acres and 28 gunthas of land, but by way of the amendment is seeking to expand the area of land much beyond the suit land to include land not even claimed by her.

(2) The application for amendment does not appear to be bonafide as there is a serious suppression of facts and a false statement has been made as to the date of knowledge of the petitioner regarding the Agreement dated 18.08.1969.

(3) The intention of the petitioner appears to be to delay the proceedings of the suit as is evident from the record.

This, in spite of the fact that this Court has issued directions that the suit be speedily disposed of.

(4) The amendment would cause prejudice to the other side which cannot be compensated in terms of money as it would include a much larger area of land, including the entire land owned by respondent No.8. The entire area would fall under the operation of the status-quo order issued by this Court.

(5) No injustice would be caused to the petitioner if the amendment is not granted as her original claim for 764 acres and 28 gunthas can be adjudicated in the original suit.

(6) By expanding the scope of the suit, the nature of the suit would be altered.

(7) The amendment would bring in a claim barred by limitation on the date of the application, as the petitioner seeks to

challenge an Agreement dated 18.08.1969.

Besides the above, no exceptionally hard circumstances or factors beyond her control are shown by the petitioner for her lack of due diligence.

54. In ***Surya Dev Rai v. Ram Chander Rai and Others*** reported in ***AIR 2003 SC 3044:(2003)6 SCC 675,*** the Apex Court defined the parameters of jurisdiction available to the High Court under Article 227 of the Constitution. The relevant extract is quoted hereinbelow:-

> *"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as here-under-:-*
>
> *(1) xxx xxx*
>
> *(2) xxx xxx*
>
> *(3) xxx xxx*
>
> *(4) xxx xxx*
>
> *(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact*

or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) *xxx xxx*

(8) xxx xxx

(9) xxx xxx"

The Supreme Court has further stated that "*The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of*

justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate Court..."

55. Having scrutinized the record and examined the impugned order passed by the Trial Court, this Court does not find that the present is a case where the certiorari or supervisory jurisdiction of this Court ought to be exercised. The Trial Court has arrived at a view which is eminently possible in the matter, on the basis of the record. The findings arrived at by the Trial Court that the petitioner had knowledge of the Revenue Entry No.594 pertaining to the Agreement dated 18.08.1969, executed in favour of 63 persons; that the petitioner has suppressed facts and not come to the Court with clean hands; that the petitioner is intentionally delaying the adjudication of the suit and is evading stepping into the witness-box in spite of sufficient opportunities; that the amendment

seeks to bring in relief that is time barred and against law; that the petitioner has not exercised due diligence; that the amendment is not bonafide and the parties proposed to be joined are not necessary parties;- all these aspects are clearly borne out by the record. Under the circumstances, this Court does not find that the view taken by the Trial Court could not possibly have been taken on facts and in law.

56. In light of the above discussion, it is not possible for this Court to state that the Trial Court has committed any error of law or jurisdiction so as to warrant the exercise of jurisdiction under Article 227 of the Constitution of India.

57. The cumulative effect of the above discussion is that the petition is devoid of merit and deserves to be rejected. It is, accordingly, rejected. Rule is discharged. There shall be no orders as to costs.

58. Considering, that vide order dated 12.03.2008,

passed in Appeal from Order No.375 of 2007 and connected matters, this Court has directed the Trial Court to hear and decide Special Civil Suit Nos.143 of 2007 and 388 of 2006, as expeditiously as possible and preferably, on or before 30.12.2008 (which date has long passed), the Trial Court shall expedite the hearing and decision of the said suits.

(SMT. ABHILASHA KUMARI, J.)

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