CASE NO.:
Appeal (civil) 5667 of 2006

PETITIONER:
Ajendraprasadji N. Pande & Anr

RESPONDENT:
Swami Keshavprakeshdasji N. & Ors.

DATE OF JUDGMENT: 08/12/2006

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
JUDGMENT
(Arising out of SLP (C) No. 12738/2006)

Dr. AR.Lakshmanan, J.
Leave granted.

The above appeal is directed against the final judgment and order dated 09.03.2006 passed by the Gujarat High Court rejecting the Special Civil Application No. 1380 of 2006 discharging the Rule issued thereon and vacating interim relief and rejecting the Civil Application No. 2213 of 2006 for interim relief. By the said special civil application, the appellants challenged the order dated 24.01.2006 of the Second Additional Senior Judge, Nadiad rejecting their application Exh. 95 in Special Civil Suit No. 156 of 2002 for leave to amend their written statement on the ground that the appellants had not been able to show in context or the proviso to Order VI Rule 17 of CPC that before the commencement of the trial, the appellants should not have raised the matter in spite of due diligence.

Concise facts and events:

The respondents filed Civil Suit No. 144 of 2002 in the Court of Civil Judge at Bhavnagar against the present appellants, inter alia, seeking a declaration that in view of the Resolution passed in the meeting held on 11.05.2002, Defendant No.1 (appellant No.1 herein) having ceased to be the Acharya of the Vadtal Gaadi, is not entitled, by himself or through defendant No.2 (Present appellant No.2) or supporters from enjoying any of the privileges or rights in respect of Vadtal Gaadi and at any of the principal temples or Hari temples including the temples falling under the Vadtal Gaadi at Vadtal, Gadhada and Junagadh as well as within any of the Trust property and to further declare that the appellants/defendants have no right to nominate their successors as Acharya of the Gaadi. In the above-referred Suit, the appellant submitted an application contending that the Court at Bhavnagar has no jurisdiction. The said application was dismissed by the Civil Court. The appellants preferred civil revision application in the High Court challenging the jurisdiction of the Bhavnagar Court. To resolve the dispute between the parties, more particularly between the Board and Acharya, Hon'ble Mr. Justice S.D.Dave (retired) was appointed as Arbitrator/Conciliator, whose appointment was accepted by all the parties. The High Court of Gujarat disposed of the Appeal from Order No. 284 of 2002 and Civil Revision Application No. 650 of 2002 and vacated the stay of the order dated 02.07.2002 of the trial Court. Thereupon, the respondents herein withdrew the Civil Suit No. 144 of 2002 from Bhavnagar Court and the said suit was presented in the Court of Civil Judge, Ahmedabad (Rural), where it was numbered as Special Civil Suit No. 190 of 2002.

The said suit was subsequently withdrawn and the plaint was again presented in the Court of Civil Judge at Nadiad which was numbered as Special Civil Suit No. 156 of 2002.
The respondents/plaintiffs filed application for amendment of the plaint of Special Civil Application No. 156 of 2002 and also produced further documents vide list Ex. 25.
The trial Court granted amendment of the plaint and further dismissed the application of the appellants objecting the jurisdiction of the Court. The appellants preferred appeal to the High Court challenging the above order. The High Court admitted the appeal and finally dismissed the application for stay and directed the appeal to be placed for final hearing. On 31.01.2003, the new Acharya was appointed by the Committee constituted pursuant to the Resolution dated 15.05.2002. The appellants preferred special leave petition No. 3351 of 2003 before this Court challenging the order of the High Court. This Court modified the order of the High Court and requested Chief Justice of the Gujarat High Court to ensure that hearing and disposal of the appeal takes place as expeditiously as possible as according to this Court an important question was required to be decided in the matter. The High Court dismissed the appeal from Order No. 421 of 2002. SLP No. 1538 (Civil Appeal No. 3380) was preferred by the appellant No.1 before this Court against the above referred judgment of the High Court. The said appeal was decided and the matter was remanded back to the High Court, inter alia, observed that:

"the dispute centers around the question as to whether the removal of Ajendraprasad Narejdraprasad Pandey from the post of Acharya on the basis of a purported Resolution dated 11.5.2000 passed by a body calling itself as Satsang Mahasabha was valid. Intimately linked to this issue is the legality of the action taken to istall Rakeshprasadji Mahendraprasadji"\005\005.." it is to be noted that legality of the appointment of Rakeshprasadji as Acharya was questioned.
So, as noted above, the basis revolves around the question of legality of the decision taken to remove Ajendraprasadji and legality of appointment of Rakeshprasadji"\005\005.."it is needless to note that while deciding the issue of injunction, the Courts have to consider three cumulative factors, viz. prima facie case, balance of convenience and irreparable loss. Definite findings are to be given on these aspects, on a prima facie basis."

The High Court dismissed the appeal from order No. 421 of 2002 holding that the injunction is running since long against the appellants and that points which have been raised can be raised before the trial Court.
The appellants moved application for amendment on 24.11.2005 in the written submissions in Special Civil Suit No. 156 of 2002, application Ex.95 before the trial Court. This Court dismissed the special leave petition No. 26472 of 2005 summarily and directed the trial Court to proceed with the matter preferably on day-to-day basis. Civil Judge dismissed the amendment application of the appellants on the ground that the trial has commenced and the appellants were not due diligent in preferring the amendment application. The appellants preferred Special Civil Application No. 1380 of 2006 in the High Court against the order passed by the trial Court below in Special Civil Suit No. 156 of 2002.
The High Court dismissed the Special Civil Application No. 1380 of 2006, inter alia, on the ground that the jurisdiction under Article 226 of the Constitution of India is limited. Against the said judgment, the appellants preferred this appeal by way of Special Leave Petition.

We heard Mr. S.B.Vakil, learned senior counsel for the appellants and Mr. K. Parasaran, learned senior counsel for R1 and Mr. Ashok H. Desai, learned senior counsel for R2. Mr. S.B.Vakil, learned senior counsel took us through the pleadings, various earlier proceedings/orders passed by the trial Court, High Court and of this Court and made elaborate submissions with reference to the pleadings and rulings of this Court.

There is inconsistency between the original written statement and the proposed amendments:

According to Mr. S.B. Vakil, in the written statement there is a denial that defendant No.1 wanted to handover his seat or office to defendant No.2, his son. The insertion proposed in draft amendments is that defendant No.2 was appointed in 1984 as the successor of defendant No.1. The two read together mean that though defendant No.1 had in 1984 appointed defendant No.2 as his successor, defendant No.1 had no intention at present to handover the seat/office to defendant No.2.

Order VI Rule 17 CPC:

Learned senior counsel submitted that the proviso enacts an embargo/bar against granting leave to defend after the commencement of trial i.e. a stage of trial rather than delay or procrastination on the part of the party seeking leave to amend. In a given case, according to the learned senior counsel, the stage may reach quietly without loss of time or delay. There is one express qualification, namely, that the party seeking leave to amend could not have in spite of due diligence raised the matter before the commencement of trial. According to him, Order VI Rule 17 sans the proviso has two important features, namely, that the Court can impose such terms as may be just and that all such amendments shall be made as may be necessary for determining the real questions in controversy between the parties.

He also invited our attention to Order VI Rule 17 prior to insertion of proviso and also relied on B.K. Narayana Pillai vs. Parameswaran Pillai and Another, (2000) 1 SCC 712 wherein this Court held that delay on its own, untouched by fraud is not a ground for rejecting the application for amendment opposite party to be compensated by costs.

He placed reliance on Baldev Singh and Ors. vs. Manohar Singh and Another, (2006) 6 SCC 498 for the proposition that Courts are inclined to be more liberal in allowing amendment of written statement than of plaint and, therefore, amendment cannot be disallowed. According to him, Order VI Rule 17 including the proviso is a procedural provision relating to amendment of plaint or written statement and the limitations in respect thereof and, therefore, the same should be interpreted to advance and not retard or defeat justice. He relied on Salem Advocate Bar Association, T.N. vs. Union of India, (2005) 6 SCC 344 and 365 at para 26 (3 Judges) that the object of proviso is to prevent frivolous applications which are filed to delay the trial.

Placing reliance on Kailash vs. Nanhku and Others, (2005) 4 SCC 480, 495 para 28, Mr. Vakil submitted that all the rules and procedures are hand maids of justice and the language employed by the draftsmen of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. Arguing further, learned counsel submitted unless compelled by express and specific language of the statute, the provisions of C.P.C. or any other procedural enactment ought not to be construed in a manner which would make the court helpless to meet extraordinary situations in the ends of justice. If the proviso is interpreted as providing an absolute bar or embargo,

ends and interests of justice are likely to suffer. O.6.R.17 would apply not only to suit, but also to all proceedings in any court of civil jurisdiction by virtue of scetion141 of the C.P.C. The question of amendment of pleadings can raise in a representative suit, admiralty suit, matrimonial proceedings, proceedings involving fundamental rights under the constitution of India and proceedings involving high Public Interest. If the embargo or bar against amendment were to be absolute with sole qualification specified in the proviso, considerable injustice would occur, based solely on the conduct of the party seeking amendment, even to other persons. It would also lead to a strange result that a party who could not have raised the matter with due diligence before the commencement of trial is not hit by the embargo, but a party which in fact raised the matter in the suit or proceeding, albeit not by way of written statement, would be hit by the bar. Therefore, the proviso is required to be interpreted not mechanically or literally, but purposively. Keeping the purposes of O.6.R.17 in tact, the proviso intends to serve the purpose of keeping out matters from pleadings which could have with due diligence been pleaded, but in fact not pleaded. However, the purpose could not have been hyper-technical to bar amendment when matter sought to be raised was in fact raised, though not in form of written statement. Therefore for purposive interpretation, the proviso can be read as follows: "Provided that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that the party has raised or in spite of due diligence could not have raised the matter in the suit or proceeding before the commencement of trial".

The proviso is directory and not mandatory and calls for substantial and not rigid compliance:
Mr. Vakil submitted that merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts may keeping in view the entire context in which the provision came to be enacted, held the same to be directory [As held in Kailash vs. Nankhu & Ors. (supra)].
According to him, the rigid interpretation of the proviso can lead to manifest injustice and that the word 'shall' in the proviso should be interpreted to mean 'may'. According to Mr. Vakil, in this case, there is substantial compliance with the purpose underlying the proviso viz. that matter sought to be urged by proposed amendments have been raised in the suit before the commencement of trial and is/are not new matters raised for the first time by way of amendment of the written statement.
In the facts of the present case, it is not disputed that the contention in proposed amendment were already raised in the proceeding at the earlier point of time as well as before this Court. The civil application for production of documents as additional evidence was also preferred in Appeal from Order No. 421 of 2002 and the said civil application was dismissed by the High Court in a common judgment in Appeal from Order No. 421/02 and it was observed that the present applicant would be at liberty to raise all the contentions before the trial court in accordance with law. Interpretation of the proviso should be purposive and not literal or mechanical.
Commencement of trial:
It was submitted that the observations of this Court that in ordinary litigation trial commences when the issues are framed and the suit is placed for hearing is a passing observation as held in Kailash vs. Nankhu & Ors. (supra). The same would not constitute any precedence as observed by

this Court in Smt. Saiyada Mossarrat vs. Hindustan Steel Ltd., Bhilai Steel Plant, Bhilai (M.P.) and Ors., AIR 1989 SC 406.

Explaining further, learned senior counsel submitted that filing of the affidavit in place of examination-in-chief of a witness is akin to production of evidence under Order VII Rules 14 and 17, Order XI Rule 14, Order XI, Rule 8 (affidavit answering interrogators) and Order XII Rule 2, Order XI, Rule 22 makes it clear that filing of interrogatories is not part of a trial. Filing of affidavit of examination-in-chief does not involve any participation of the other party to the suit or of the Court or its agency and it stands on the same footing as documents to be filed by a party unilaterally. Filing of documents by a party unilaterally is not recording of evidence, much less by Court. Such affidavit may include irrelevant and inadmissible evidence. In fact the proviso to Order 18 Rule 5(1) expressly provides that the proof and admissibility of documents filed with such affidavit shall be subject to the orders of the Court. Order 18 Rule 4(2) provides that the evidence (cross-examination and re-examination) of the witness, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or the Commissioner appointed by it. Order 18 Rule 4(2) mentions furnishing of evidence (examination-in-chief) by affidavit and not recording of evidence by Court. Therefore, filing of affidavit of examination-in-chief is not commencement of trial and that trial would commence only when the Court rules on the proof and admissibility of evidence in the affidavit of examination-in-chief of documents produced or takes evidence by cross-examination of any witness in presence of both the parties and the Court or its agency.

According to him, the issues were framed on 28.09.2005 and application for re-casting issues was rejected on 21.10.2005 and the respondent/plaintiffs filed affidavit in examination-in-chief of plaintiffs' witness No.1 on 21.11.2005. The application Ex.95 for leave to amend the written statement was filed on 24.11.2005 and at this stage the Court had not relied on the proof or admissibility of any document as contemplated by the proviso to Order 18 Rule 4 (1) or taken the evidence (cross examination) and re-examination of P.W. No. 1 as contemplated by Order 18 Rule 14 (2). Therefore, he submitted that the application Ex.5 has not been filed after the commencement of the trial. It was further submitted that the contention of the applicant that for the first time that simple copy was made available only on 19.11.2005 was not denied by the respondent and the present application Ex. 95 moved on 24.11.2005. Under the circumstances as the applicant has already raised this point before the High Court as well before this Court and as the High Court directed to raise the points before the trial Court, the applicant was diligent in filing the application Exh.95 and it cannot be said that there was no due diligence on the part of the applicant.

Concluding his arguments, learned senior counsel appearing for the appellant submitted that:

(a) the proviso to Order VI Rule 17 of the CPC is directory and not mandatory;

(b) The phrase commencement of trial in the said proviso is not synonymous with framing of the issues. The trial does not commence unless and until the suit is set down for recording of evidence. Filing of affidavit of the plaintiff's first witness by way of his examination-in-chief is not recording of evidence;

(c) raising the matter in the said proviso means raising the matter in any proceeding in the suit and not

necessarily in the amendment application;
(d) the appellants have raised the matter covered by the proposed amendment before the commencement of trial;
(e) the appellants could not have in spite of due diligence raised the matter before the commencement of trial.
(f) this Court would allow the proposed amendment under Article 142 of the Constitution of India as necessary for doing complete justice between the parties.
Mr. K. Parasaran, learned senior counsel submitted that the amendment application under Order VI Rule 17 is signed by the advocate purporting to represent defendant Nos. 1 and 2 (the appellants). The signature is only by one counsel who appears for defendant No. 1 and not by counsel for defendant No. 2. Below the declaration there does not appear the signature of the parties. The affidavit in support of the application is at page 581. In the copy served, it is signed 'illegible \026 Deponent'. The contention before the trial court on behalf of the plaintiff, inter alia, was as follows:
"\005\005\005.Thus, the present application filed by the defendant only with a view to delaying the judicial process and it is filed without bonafide intention and therefore, liable to be rejected. In para 15, it is stated that in the written reply against the suit application, the defendant No. 1 was aware about the present application containing amendment/changes. The defendant No. 2 cannot carry out amendment in the affidavit filed by the defendant No. 1 in reply of suit application. As per the charge sheet produced before the court, the defendant No. 1 is absconding. Thus, in the present application, the prayer is not made by the appropriate party and therefore, it is liable to be rejected."

The finding of the trial Court is at page 608 of Vol.III:-

"As per the say of Shri Patel the judicial proceedings of the present case started on 28.09.2005 and in that connection present application was filed on 24.11.2005. Therefore, the defendant No. 1 should satisfy the Court that he was aware about the present application. I have no reason to disbelieve the same."

The above submission assumes significance for the reason that first defendant is a proclaimed offender. The proclamation has been issued under Section 82 of Cr.P.C. for the alleged commission of certain offences. He has not yet surrendered to the Court. In page 4 of the counter affidavit, it is stated as under:
"The petitioner No. 1 is still absconding and has been declared as a proclaimed offender under Section 82 of the Criminal Procedure Code."

However, he appeared in the contempt proceedings on 03.10.2005 and 05.10.2005.
On the above facts, the submissions are as follows:
(a) There is no valid application for amendment by the first defendant.
(b) Defendant No.1 in the written statement in para 21 has averred as follows:
"the fact that the defendant No.1 Acharya wants to hand over the seat to his son is false and imaginative."
In the additional written statement which is not subscribed to by defendant No.1, but subscribed to by

defendant No.2, is as follows:

"\005In fact, the appointment of defendant No.2 was made in the year 1984 as a proposed Acharya of Vadtal seat' which was, at the relevant time, acclaimed and approved by all the sects and since then defendant No.2 has been working as proposed Acharya\005"

Mr. K. Parasaran submitted that the appellants \026 defendant Nos. 1 and 2 are not entitled to set up such conflicting cases. It would embarrass the trial as the respondent/plaintiff would be in a predicament as to which of the two cases he has to meet and, therefore, he submitted that the amendment prayed for changes the very complexion of the defence. It is further submitted that Defendant No.1 had to appear in person in the contempt proceedings. He appeared before court and received the sentence. However, he continues to be an absconder in the criminal proceedings in which there is an allegation of alleged commission of offence. He still continues to be an absconder. He does not, respect the rule of law and a person who does not respect the rule of law cannot seek protection of rule of law and pray for relief of amending written statement. In any event, this Court under Article 136 may not exercise its discretionary jurisdiction in favour of such party.

The learned senior counsel submitted that the period during which written statement can be filed are two. Similarly there are two periods during which amendment of a pleading may be sought.

(i) Under Order VIII Rule 1, the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.

(ii) Under proviso to Rule 1, the defendant who fails to file the written statement within the said period of thirty days, shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

(iii) Under Order VI Rule 17, a defendant may at any stage of the proceedings be allowed to alter or amend the written statement.

(iv) Under proviso to Order 6 Rule 17, 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.

Order VI Rule 17 main part uses the phrase 'the court may at any stage". The proviso uses the phrase "no application for amendment shall be allowed".

The submission of the learned senior counsel is that when in the same section of an Act the word may is used in one place and shall in another place, may will have to be interpreted as may and shall will have to be interpreted as shall. In such instances, may should not be interpreted as shall and shall should not be interpreted as may. The following rulings were relied on by the learned counsel for the above proposition:-

1. Labour Commissioner vs. Burhanpur Tapti Mills (1964(7) SCR 484 at 488)
2. Jamatraj Kewalji Govani vs. State of Maharashtra (1967(3) SCR 415 at 420)
3. T.R. Sahrma vs. Prithvi Singh and another (1976(2) SCR 716 at 721)
4. Mahalaxmi Rice Mills vs. State of U.P (1998 (6) SCC 590 at 594)
5. Chairman, Canara Bank vs. M.S. Jaera (AIR 1992 SC 1341 at 1346)

He further submitted that the proviso to order 6 rule 17 enacts an embargo, it vests jurisdiction in the Court for permitting amendment of the pleadings even after the trial has commenced. But this is subject to the condition that "\005the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial." If the word 'shall' in the proviso is construed as 'may' and not 'shall', the explanation carved out of permitting the party to amend or alter the pleadings only if he proves that in spite of due diligence he could not have raised the matter and would be unnecessarily rendered redundant.

Mr. Ashok H. Desai, learned senior counsel for respondent No.2 also made elaborate submissions and also relied on various rulings in support of his contentions. He has also taken us through the pleadings and other records. He also invited our attention to the proviso to Order VI Rule 17 as it existed before 1999.

Order 6 Rule 17

"R.17. Amendment of pleadings. \026 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."

The provision was omitted by the CIVIL PROCEDURE CODE (AMENDMENT ACT) 1999
Section 16 of the Amendment Act reads as follows:
"16. Amendment of Order VI. \026 In the First Schedule, in Order VI. \026
\005..
(iii) Rules 17 and 18 shall be omitted."

The Provision as it exists now after the CIVIL PROCEDURE CODE (AMENDMENT ACT), 2002
Order VI Rule 17.
"R.17. Amendment of Pleadings. \026 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 question 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."
It is seen that before the amendment of Order 6 Rule 17 by the Act 46 of 1999, the Court has taken a very wide view of the power to amend the pleadings including even the plaint as could be seen from H.J. Leach vs. Jardine Skinner, 1957 SCR 438 at 450 and Gurdial Singh vs. Raj Kumar Aneja, AIR 2002 SC 1003.
By Act 46 of 1999, there was a sweeping amendment by which Rules 17 and 18 were wholly omitted so that an amendment itself was not permissible, although sometimes effort was made to rely on Section 148 for extension of time for any purpose.
Utlimately to strike a balance the Legislature applied its mind and re-introduced Rule 17 by Act 22 of 2002 w.e.f.

1.7.2002. It had a provision permitting amendment in the first part which said that the Court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the Court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration.

Reliance was placed on the judgment of this Court in Salem Bar Association case (supra). In this case, this Court dealt with Order 6 Rule 17 at para 26. Chief Justice Y.K. Sabharwal speaking for the Bench observed as under:

"Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act, 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

In the present case, the position is that the suit was filed on 06.09.2002 and the written statement was filed on 27.09.2002 and an application under Order VII Rule 11 was filed on 16.09.2002.

In this context, we may also usefully refer to order passed by this Court on 13.05.2005 in a matter arising in the same suit. This Court directed that the suit must be completed by 30.11.2005.

Mr. Desai also submitted that the issues were framed on 28.09.2005 and on 21.11.2005 the respondents filed an affidavit of examination in chief and it is after the trial had commenced that appellant No.2 moved an application on 24.11.2005 seeking leave to amend the written statement. According to him, there is absence of due diligence on the part of the appellants.

We have carefully considered the submissions made by the respective senior counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter affidavit filed by respondent No.1, various dates of hearing and with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.

It is to be noted that the provisions of Order VI Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

Under the proviso no application for amendment shall be allowed after the trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The

amended Order VI Rule 17 was due to the recommendation of the Law Commission since Order 17 as it existed prior to the amendment was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the Amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of Courts and, therefore, by Civil Procedure Code (Amendment} Act, 2002, provision has been restored by recognizing the power of the Court to grant amendment, however, with certain limitation which is contained in the new proviso added to the Rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their Court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.

The following dates would show that the appellant is precluded by the proviso to the Rule in question from seeking relief by asking for amendment of his pleadings. Though several dates have been mentioned right from the date of presentation of the plaint on 06.09.2002, we confine ourselves only to the relevant dates from 18.10.2005.

18.10.2005 Appellants\026 defendants produced list of witnesses at Exh.63.

21.10.2005 Application of the plaintiffs at Exh. 59 and that of the defendants at Exh. 63 respectively filed, seeking amendment to the issues rejected by the trial Court. Suit posted for recording of evidence on 24.10.2005. (The said order was not challenged by the appellants}

24.10.2005 Respondents \026 plaintiffs applied for time. Adjourned to 26.10.2005

26.10.2005 Respondents \026 plaintiffs applied for time. Adjourned to 27.10.2005.

27.10.2005 Suit posted for recording of evidence of the respondents \026 plaintiffs on 28.10.2005.

28.10.2005 Time applied for by the respondents \026 plaintiffs for production of examination in chief of the respondents \026 plaintiffs. Adjourned to 29.10.2005.

29.10.2005 Adjourned at the request of the respondents \026 plaintiffs to 17.11.2005.

17.11.2005 Time taken to produce affidavit of the respondent No.1 \026 plaintiff No.1. Adjourned to 19.11.2005.

19.11.2005 Adjourned to enable the respondents \026 plaintiffs to produce examination in chief on affidavit. Adjourned to 21.11.2005.

21.11.2005 That in view of the amended provisions of the code, the deposition of respondent No.1 i.e. plaintiff No.1 filed in Court on affidavit.

Note:

1. Recording of evidence has thus begun.
2. The appellant No.1 \026 defendant No.1 sought time to cross examine the plaintiff No.1.

The appellant No.2 \026 defendant No.2 filed application, inter alia directing the plaintiffs to supply documents.

22.11.2005 The appellant No.2 \026 defendant No.2 filed an application for adjournment and sought time, which was rejected by the trial Court.

24.11.2005 The appellants\026 defendants in the suit filed application Exh.95 for amendment of the written statement.

1. It is in the said application facts and grounds which were within the knowledge of the appellants and which were raised in earlier proceedings now were being raised; and also new and inconsistent pleas for the first time are sought to be raised by the appellants.

29.11.2005 Reply to the application for written statement was filed by the plaintiffs \026 respondents at Exh. 97. The appellants \026 defendants requested for time for filing the rejoinder thereto.

03.12.2005 The appellants\026 defendants filed rejoinder.

05.12.2005 The hearing of the amendment application commenced and since the Court time was over, the matter was adjourned to 09.12.2005.

09.12.2005 That as the learned Presiding Judge of the trial Court was on leave, therefore, the matter was adjourned to 14.12.2005.

14.12.2005 The plaintiffs' Advocate made submission opposing the amendment application. The matter was thereafter adjourned to 17.12.2005.

17.12.2005 By an administrative order, the matter was transferred to another Court.

23.12.2005 The learned Presiding Judge was on leave.

25.12.2005 The defendants' Advocate argued the amendment application.

02.01.2006 The plaintiffs made submissions, opposing the amendment application and for rejoinder matter was adjourned to 09.01.2006.

06.01.2006 The Special Leave Petition No. 26472 of 2005 and 334 of 2006 filed by the appellants herein, challenging the judgment and order dated 05.12.2005 passed by the High Court in Appeal from Order No.421 of 2002, pursuant to the remand order of this Court was dismissed. Directions issued to the trial Court for expeditious hearing, preferably on day-to-day basis.

09.01.2006 submissions in rejoinder by the appellants \026 defendants in the application for amendment.

24.01.2006 Amendment application of the appellants\026 defendants to amend the written statement rejected by the trial Court by an order of the said date in view of the proviso to Order VI Rule 17 of C.P.C.

On 13.3.2006, Shri K.P.Swami, respondent No.1 offered in the witness box for cross-examination, however, he was not cross-examined and the application of appellant No.1 for 15 days' adjournment was rejected. Hence, the right to cross-examination was closed and the matter was adjourned to 16.3.2006.

On 16.3.2006, Deposition on affidavit of witness No.2 was filed as Ex. 135 i.e. examination-in-chief and deposition of witness No.3, Patel Vasanthbhai was filed in Court as Exh. 136. Application of the appellants for permission to cross-examine witness No.1 and the right to cross examination was reopened by the Court. Another application of the appellants i.e. Exh. 140, to grant stay till 28th March, 2006 was rejected. Three other different application were filed by the appellants (Exh.141,142 & 143).

On 16.3.2006, the appellants-respondents filed Civil Misc. application No. 43 of 2006 before the District Judge, Nadiad under Section 24 of the C.P.C. Notice was issued but

no stay was granted.
In view of the transfer application having been filed before the District Court, the appellants filed application before the trial Court again for stay of the proceedings but the prayer for stay was rejected and the matter was adjourned to 17.3.2006.
On 17.3.2006, the appellants moved another application for stay of the proceedings of the trial Court in transfer petition before the District Court. The District Court granted ex parte stay of further proceedings and the matter was adjourned.
On 27.3.2006, the respondents sought time to file reply which was filed on 15.4.2006.
On 28.03,2006, the appellants filed the transfer case before this Court under Section 25 of the CPC.
On 29.04.2006, the appellants filed an application for revoking the stay of further proceedings.
Thus, after a number of adjournments, the evidence of 3rd witnesses, namely, plaintiff No.1 as well as 2 and other witnesses on behalf respondents/plaintiffs were completed.

In our opinion, the facts above-mentioned would also go to show that the appellants are lacking in bona fide in filing this special leave petition before this Court. It is also to be noticed that the High Court has recorded relevant points in its elaborate judgment dated 05.10.2005 and have been dealt with despite the opposition of the contesting respondents that these pleas were not taken in the written statement. Under these circumstances, non-seeking of appropriate amendment at appropriate stage in the manner envisaged by law has dis-entitled the appellants to any relief. The amendment, in our view, also seeks to introduce a totally new and inconsistent case.
We have carefully perused the pleadings and grounds which are raised in the amendment application preferred by the appellants at Ex. 95. No facts are pleaded nor any grounds are raised in the amendment application to even remotely contend that despite exercise of due diligence these matters could not be raised by the appellants. Under these circumstances, the case is covered by proviso to Rule 17 of Order 6 and, therefore, the relief deserves to be denied. The grant of amendment at this belated stage when deposition and evidence of three witnesses is already over as well as the documentary evidence is already tendered, coupled with the fact that the appellants' application at Exh. 64 praying for recasting of the issues having been denied and the said order never having been challenged by the appellants, the grant of the present amendment as sought for at this stage of the proceedings would cause serious prejudice to the contesting respondents \026 original plaintiffs and hence it is in the interest of justice that the amendment sought for be denied and the petition be dismissed.
An argument was advanced by Mr. Parasaran that affidavit filed under Order 18 Rule 4 constitutes Examination-in-Chief. The marginal note of order 18 rule 4 reads recording of evidence. The submission is that after the amendments made in 1999 and 2002 filing of an affidavit which is treated as examination in chief falls within the amendment of phrase recording of evidence.
It is submitted that the date of settlement of issues is the date of commencement of trial. [Kailash vs. Nankhu & Ors. (supra)] 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 the defendant Nos. 1 and 2 (appellants).
The judgment of the High Court recording concession by counsel for the defendant reads thus:
"22. However, when one examines the facts of the case, and applies that the conduct of the defendants goes to show that the exercise, namely, filing of application Exh. 95, is directly in conflict with the object of the amendment, i.e. to adopt a dilatory tactic. It is admitted by learned senior Advocate appearing on behalf of the defendants that all the issues raised by way of proposed amendment in the written statement were taken before this Court in the Appeal from Order filed by the present defendant in the Civil Appeal filed before the Apex Court, in the Appeal From Order in the second round before this Court and again in a special leave petition filed before the Apex Court in the second round. Hence the defendants can not plead absence of knowledge after exercise of due diligence. If this be the position the approach adopted by the trial Court can not be stated to suffer from any infirmity so as to call for intervention at the hands of this Court in a petition under Article 227 of the Constitution of India."

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 inspite of utmost care taken by the defendants."
The above averment, in our opinion, does not satisfy the requirement of Order VI 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. (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

We can also usefully refer to the judgment of this Court in Baldev Singh and Others vs. Manohar Singh and Another, (2006) 9 SCC page 498 for the same proposition. A perusal of the proposed amendment would show that it contains numerous averments. So far as the averments in the proposed amendments are concerned, at page 12 of the order in para 22, the appellants admit that all the issues raised by way of proposed amendment in the written statement were taken before this Court in the appeal from order filed by the present defendants in the civil appeal filed before this Court and again in the special leave petition filed subsequent. As rightly pointed out by learned senior counsel in any section should not be so interpreted that part of it becomes otiose and

meaningless and very often a proviso itself is read as a substantive provision it has to be given full effect.

It is sad and unfortunate that the Swamijis/Sanyasis/ members of the Sangh seem to have paid their attention more to litigation than to the propagation of the teachings of Swami Narayan. This situation should change. If the time, energy and money spent on litigations and feuding had been spent for carrying on the wishes of the founder of the institution, things would have reached very great and amazing heights. We have, therefore, to voice our anxiety in this matter and request that the system and administration should be fairly and properly bridled, to prevent recurrence or repetition of feuds, which have already to some extent shattered the reputation of this great majestic institution, which has very vast resources and assets. Therefore, it is high time that proper remedial measures are taken by all concerned.

For the foregoing discussions, we are of the opinion that the appeal deserves to be dismissed and the appellants are not entitled to any relief. However, we direct the trial Court to proceed with the trial on priority forthwith and on day-to-day basis and dispose of the same on merits. No costs.