NOTES ON THE PROVISO TO ORDER VI RULE 17 OF THE CODE OF CIVIL PROCEDURE, 1908.

By
Sri S.M. Deka
Director
North Eastern Judicial Officers' Training Institute (NEJOTI)

1. THE TEXT

The provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 (the Code) as substituted by Section 7 of the Code of Civil Procedure (Amendment) Act, 2002 with effect from the 1st of July 2002 read thus :-

> **"***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 inspite of due diligence, the party could not have raised the matter before the commencement of trial***."**

The only significant and substantial change made in the text of the provision existing prior to the first of July, 2002 consists of the addition of the proviso. A perusal of a few reported cases in the matter of amendment of pleadings involving application of the proviso leaves one with the impression that confusion abounds in understanding and application of the proviso. Two examples from reported cases should suffice to support the above statement. In a suit for partition of the year 2005 the plaintiff after close of his evidence sought an amendment relating to correction of the date of execution of a Will appearing in the relief portion of the plaint. Acting under the proviso a Civil Judge (Sr. Division) did not allow the amendment because trial had already commenced. In a suit of the year 2002 for declaration of Title and for possession a Civil Judge (Jr. Division) despite pointed objection from the defendant based on the proviso allowed the amendment after the suit was fixed for evidence without spending one word on the proviso. The former example exhibits mis-apprehension of the true scope of the proviso while the latter exhibits inability to recognize the new law in the overwhelming shadow of the law before the first July, 2002. It is thus necessary to explore and understand the text of the new law regarding amendment of pleadings before it can be properly applied in a given case.

2. UNDERSTANDING THE TEXT

It is not generally known that to assuage the protest by the legal fraternity following total deletion of Rule 17 of Order VI by the Code of Civil Procedure (Amendment) Act, 1999 the Govt. first dangled the Code of Civil Procedure (Amendment) Bill 2000 whereby Rule 17 in particular was sought to be reintroduced in the following language :

> **"***The Court may allow either party to alter or amend his pleadings where it is satisfied that either new facts have come into existence subsequent to the institution of the Suit necessitating the amendment or the amendment is necessitated by change of law."*

This proposed reintroduction of a provision for amendment of the pleadings patently restrictive, could not satisfy the lawyers. Finally, by the Code of Civil Procedure (Amendment) Act, 2002 the old provision for amendment of pleadings was resurrected but with some restrictions. The proviso enacts the restrictions but unlike in the Bill of 2000 the rigour of the restrictions has been considerably relaxed by introducing the concept of "commencement of trial" and exercise of "due diligence". Whereas in the proposed Bill subsequent facts coming into existence only during pendency of the suit or change in law during pendency were enabled to be introduced by amendment the proviso covers facts in existence even before the pendency of the suit but which could not be in the knowledge of the party despite exercise of due diligence. These two concepts in the proviso constitute the key to a proper understanding of the proviso.

2.1. Due diligence

Due diligence or more precisely the phrase "exercise of due diligence" has been there at least since the days of the uniform Code of Civil Procedure, 1859, in Order XLVII Rule 1 relating to review. The concept was introduced in two other provisions relating to additional evidence in Suit and appeal respectively in Order XVIII Rule 17A and Order XLI Rule 27 by the Civil Procedure (Amendment) Act 1976. However, by the latest amendment operational since the first of July, 2002 Rule 17A of Order XVIII has been deleted. The statutory provisions in proviso (b) to Order XLVII Rule 4 Sub-Rule 2 and the decisions of the Privy Council and the Supreme Court not to speak of the High Courts relating to the two provisions of Order XLI Rule 27 and Order XLVII Rule 4 Sub-Rule (2) leave no room for doubting that the content of the concept of due diligence has to be the same in the new provision of the Order VI Rule 17 operational since the first of July , 2002. Strict proof of exercise of due diligence would thus be necessary to introduce an amendment of the pleadings after the commencement of the trial. Mere mention of the phrase in the application for leave to amend should not work any magic to produce an order of leave to amend.

2.2. Commencement of Trial.

The Code does not even define what constitutes a trial and as such there is no occasion to define commencement of a trial. To apply the proviso in accordance with the intention of the legislature implicit in the legislative history of the new provision this new concept of commencement of trial has to be understood in the light of the statutory indications available in the Code.

The three stage legislative evolution – that is total deletion by the 1999 Amendment Act, unsuccessful attempt at reintroduction with rigorous restrictions by the 2000 Bill and eventual finalization by the 2002 Amendment Act – of the text seems to send a loud and clear message about the intention of the legislature. The message is that the proviso is meant to be mandatory. It will be useful to begin from the word commencement, defined in Section 3(13) of the General Clauses Act, 1897. That definition in strict sense is applicable to commencement of a statute but the definition shows alongwith the Dictionary meaning of the word that in essence commencement must be at a point of time as distinguished from a period of time. In otherwords the trial has to begin at a particular point or stage of the proceedings in a Suit. It is trite to say that even under the un-amended law there are judgments using the word pretrial and post trial when it was necessary to convey the proposition that pretrial amendments are liberally allowed as distinguished from post trial amendments. Generally speaking stages indicated in the provision of Order X, XI, XII and XIII of the Code are known as pretrial proceedings. Framing of issues is governed by the provision of Order XIV. Summoning and attendance of witness is governed by the provisions of Order XVI and Order XVIII deals with hearing of the Suit and examination of witnesses. Order XX deals with Judgment. These provisions contain the statutory indication that trial begins with framing of the issues and ends when the judgment is delivered. These indications are further supported and improved upon by the Rules in the Civil Rules and Orders framed under Section 122 by the High Courts.

Two samples from the Rules framed by the Gauhati High Court would suffice. Rule 115(2) begins thus :- "On the date finally fixed for hearing of the suit, the trial shall begin ……."

Rule 118 says thus :-

> **"** *Presiding Judges should be careful to see that steps in connection with Discovery, Inspection and Admission are taken at proper stages of the suits before they come on for hearing ……., One or more dates after the issues have been framed for completion of this preliminary work***."**

From experience one can say that in pursuance of above-noted provisions the practice in Courts is to fix a date designated as S.D.P.H. (Old practice), S.B.P.H. (New practice) which are shorthand legalese for "settling date of peremptory hearing" in case of the former and "steps before peremptory hearing" in case of the latter. From all these it is clear that once the date of peremptory hearing is fixed after completion of the preliminary work either before or after framing of the issues the trial begins. Thus even without any definition of trial and of commencement of trial the statutory indications

enable the Court to fix a stage or a point of time as regards commencement of trial. After such a date no amendment is permissible as a matter of law unless the condition mentioned in the proviso is established.

It is trite to state that caselaw on amendment of pleadings emanating from the Privy Council, the Supreme Court and the High Courts dealing as they mostly do with the law before the cut off date of the first of July, 2002 cannot do any duty as precedents in cases where the proviso of Order VI Rule 17 is applicable. Even if a case passes the real controversy test provided in the substantive provision of Order VI Rule 17 the proviso if applicable will not permit the grant of the application for leave unless the condition laid down there is satisfied.

Lastly, delay as a factor influencing the decision of an application for leave to amend should be kept apart from the proviso. Indeed the proviso in a way enacts a statutory limit for delay.

3. THE INTERPRETATION OF THE TEXT – THE HIGH COURTS

Not a lot of decisions of the High Courts are available where the new provision of Order VI Rule 17 fell for consideration. A very detailed consideration of the proviso can be read in JEET RAM KISHORE AND OTHERS Vs SUNDER SINGH, AIR 2005 H.P. 21 dated 02.04.2004. The Himachal Pradesh High Court in the aforementioned judgment noticed a judgment of the Andra Pradesh High Court on the proviso reported in E. PRASAD GOUD Vs B. LAKSHMANA GOUD, (2003) 3 Andh. LT 386. Both these judgments appear to advocate strict construction of the proviso. The essence of these Judgments is that unless the requirement of exercise of due diligence is fulfilled after the commencement of the trial no amendment can be allowed even if the real controversy test for allowing amendment under the un-amended law is passed. The following from paragraph 30 of JEET RAM (Supra) is the essence of the interpretation of the proviso :

> **"***It hardly needs to be reiterated that court has to follow the letter of law in its spirit, as it exists, unless the same is repugnant to the main provision or is found to be superfluous. With the addition of proviso to Rule 17 of Order VI, C.P.C. it can safely be said that the Legislature was well aware of its consequences. Still it chose to add it. This shows that the object that was sought to be achieved, was to curtail the delay once the trial has commenced. Exception to this was that if it is shown that after due diligence it could not be applied for before commencement of trial, which is not the situation in this case. And language of the proviso being simple and clear, ordinary meaning is required to be given to it."*

In that case dates mentioned in paragraph 3, 4 and 5 of the judgment show that after framing of the issues the suit was set down for evidence and thus the trial commenced and thereafter the application for amendment was filed. The trial court seems to have dismissed the application not because of the proviso. But the High Court affirmed the order of dismissal

by reason of the proviso. The suit was filed on 19.09.1995. The Written Statement was filed on 29.09.1995. The application for amendment was filed on 03.07.2003. In view of the provisions of Section 16(2) (b) of the Code of Civil Procedure (Amendment) Act, 2002 the proviso could not have been applied to the application for amendment in that case. This is the fly in the ointment in JEET RAM (Supra).

On 10.02.2006 the Gauhati High Court decided JAGNABALKYA CHAKRABORTY Vs BIDYARTHI CHAKRABORTY & ORS, 2006(1) GLT 560 where the correction of the date of a Will, already indicated in paragraph 1 of this writing, was involved in the amendment sought after commencement of trial. The High Court read a clash between the provisions of Section 153 of the Code and those of Order VI Rule 17 as amended and eventually ruled that in exceptional circumstances an amendment which cannot be allowed under the proviso can be allowed under Section 153 of the Code. The Judgment seems to have failed to appreciate the true scope of the aforesaid two provisions for amendment one general and the other special to pleading alone. The judgment also did not notice that the word "proceeding" in Section 153 of the Code covers pleadings as well. See Black's Law Dictionary, Eight Edition, 2004 at page 1241 and Code of Civil Procedure by Justice C.K. THAKKER at page 975, Vol.2

On 09.03.2006 the Gujarat High Court decided AJENDRA PRASADJI NARENDRA PRASADJI PANDE & ANR Vs SWAMI KESHAVPRAKASH DASJI GURUPUJYA NARAYAN PRIYADASJI & ORS, AIR 2006 GUJ 204. In that case in Special Civil Suit No. 156 of 2002 the defendants filed their Written Statement on 27.09.2002, that is after the coming into force of the amended Order VI Rule 17, issues were framed on 28.09.2005 and the Suit was posted for evidence on 24.10.2005. On 24.11.2005 the defendants moved an application for amendment. The trial Court rejected the application relying on the proviso as trial has alreadsy commenced. This interpretation and application of the proviso was squarely put in issue before the High Court and the High Court concurred with the decision of the Trial Court.

On 01.12.2006 a Full Bench of the Madras High Court in M/S Hi SHEET INDUSTRIES Vs LITELON LIMITED AND ORS, A.I.R. 2007 Madras 78 (FB) posed one of the questions involved in the case there thus : "Whether such amendments is permissible despite the present proviso to Order 6 Rule 17 C.P.C. ?" That was a case relating to an amendment sought under Section 40(2) of the Specific Relief Act, 1963. It is obvious that the discipline of Order VI Rule 17 does not govern mandatory amendments provided under Section 21, 22, 26 and 40 of the specific Relief Act. However the Full Bench considered a wealth of decisions on Order VI Rule 17, went into the proviso and recorded at para 12 with the heading "Result" item (3) that " commencement of trial must be understood as final hearing of the suit i.e. examination witnesses, filing of documents, addressing of arguments etc.……". the above statement of law seems to have been based on AIR 2006 S.C. 2832, which will be considered later.

On 08.03.2007 the Gauhati High Court decided ABDUL KHALIQUE Vs ABDUL SATTAR & Ors., 2007 (2) GLT 644. In the suit the issues were framed and the suit was fixed for evidence. At that stage the prayer for

amendment was made on 04.10.2004. The prayer was forcefully objected to relying on the proviso but the trial court appears to have decided the application for amendment basing on the unamended law without meeting the objection under the proviso. The High Court considered (2002)4 SCC 480, (2006)6 SCC 498 and (2002) 7 SCC 559 and held that "the trial in its real sense has not started" and upheld the trial court's order allowing the amendment.

4. THE INTERPRETATION OF THE TEXT – THE SUPREME COURT.

It has already been indicated in paragraph 2 of this essay that "trial" and "commencement of trial" have not been defined in the Code and that there are statutory indications in the Code as regards both of them. Indeed, before the proviso came into existence in 2002 it was not even necessary to pinpoint the exact content of and the exact starting point of a trial. But because of the peculiar statutory nature of Election Petitions it was necessary to pinpoint the exact content of the trial of an Election Petition under the Representation of the People Act 1951. One example will suffice. Under Section 90 (2) of the Representation of the People Act, 1951 "Subject to the provisions of this Act and the Rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure 1908 to the trial of suits." Before a Four Judge Bench of the Supreme Court in HARISH CHANDRA BAJPAI AND ANOTHER Vs TRILOKI SINGH AND ANOTHER, AIR 1957 S.C. 444 one of the contentions urged was that the provisions of Order VI Rule 17 of the Code cannot apply to proceedings before the Tribunal as amendment precedes trial and under Section 90 (2) of the Act only trial of the Election Petition had to be in accordance with the provision of the Code. The Four Judge Bench thus had to decide what constitutes trial. The Bench considered the limited sense of trial as canvassed by the counsel for the appellants as meaning the final hearing of the petition, consisting of examination of witnesses, filing of documents and addressing of arguments as also the wide meaning urged by the Respondent's Counsel. Considering the provisions of the Act the Four Judge Bench held that the entire proceedings before the Tribunal from the time when the petition is transferred to it under Section 86 until the pronouncement of the award constitute trial. The Supreme Court in that case thus was not so much concerned with commencement of the trial as with the content of trial because the institution of the petition is the commencement of its trial.

(i) The first decision where the Supreme Court spoke about commencement of trial was KAILASH Vs NANKHU AND OTHERS, (2005)4 SCC 480, AIR 2005 S.C. 2441 decided by a Three Judge Bench of the Supreme Court on 06.04.2005. The point arose in the trial of an Election Petition. The Three Judge Bench spoke thus :

> **"***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 evidence. All the proceedings before that stage are treated as proceedings preliminary to the trial or for making the case ready for trial."

(ii) **RAJESH KUMAR AGGARWAL AND OTHERS Vs K.K. MODI AND OTHERS, (2006)4 SCC 385, AIR 2006 S.C. 1647 decided on 22.03.2006 only mentions the amended provision of Order VI Rule 17 at paragraph 14 of the Judgment but turns on the old law. On the list of dates mentioned at paragraph 26 of the Judgment there cannot be any doubt that the proviso is not applicable to the case there.**

*(iii)***On 03.08.2006 a Two Judge Bench of the Supreme Court decided BALDEV SINGH AND OTHERS Vs MANOHAR SINGH AND ANOTHER, (2006) 6 SCC 498, AIR 2006 S.C. 2832. In paragraph 9 and 17 of the Judgment mention has been made of the proviso to Order VI Rule 17 of the Code. The date of the Suit, of the filing of the Written Statement and of the framing of the issues if any have not been mentioned. Indeed except for the two dates of two sale-deeds of 1968 no other date is there in the entire judgment. The application for amendment was rejected by the trial court as well as the High Court. In para 11 of the judgment the Supreme Court listed the three grounds on which the application was rejected. Then from para 12 to 16 the Supreme Court dealt with the grounds of rejection and held that the trial court and the High Court went wrong in rejecting the application. None of the grounds of rejection dealt with by the Supreme Court related to the proviso to Order VI Rule 17. Then in para 17 of the Judgment the Supreme Court found it necessary to speak on the proviso and noted that the parties have not yet filed their documentary evidence in the suit and the trial has not yet commenced. Lastly the paragraph contains the following :**

"*That apart the commencement of the 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 ……."*

The footprint of HARISH CHANDRA (Supra), quoted earlier, in the above extract cannot be missed. The only difficulty is that HARISH CAHNDRA (Supra) was not at all concerned with commencement of a trial but was concerned only with the content of a trial. The above has been followed in ABDUL KHALIQUE (Supra) as well as by the Full Bench of the Madras High Court.

(iv) **On 01.12.2006 the Supreme Court decided STATE BANK OF HYDERABAD Vs TOWN MUNICIPAL COUNCIL, 2006 (13) SCALE 332. There the appellate court in a suit filed in the year 1998 allowed an amendment of the plaint. The High Court held that in view of the proviso to Order VI Rule 17 the application for amendment was not**

maintainable. The Supreme Court in view of the provision of Section 16 (2) (b) of the amending Act of 2002 held that the proviso is not applicable to the suit which was filed in 1998.

(v) **On 08.12.2006 the Supreme Court decided AJENDRAPRASADJI N. PANDE & ANR Vs SWAMI KESHAVPRAKESHJI N. & ORS., 2006(13) SCALE 525, (2006)12 SCC 1 and AIR 2007 S.C. 806 where the proviso to Order VI Rule 17 fell squarely for decision by the Supreme Court. Indeed the case reached the Supreme Court by way of an appeal by special leave from the decision of the Gujrat High Court, AIR 2006 GUJ 206 already noticed. The Supreme Court followed the Three Judge decision in KAILASH (Supra) and held that the trial commenced when the issues are framed and the suit is set down for recording of evidence. Paragraph 54 and 57 (AIR report) of the Judgment lays down the law in this regard thus :-**

> **"***54. It is submitted that the date of settlement of issue is the date of commencement of trial. [Kailash Vs Nankhu & Ors.]. 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 the 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……"*

Then commenting on the averment made in the application for leave to amend as regards due diligence the Supreme Court, further illucidated the law thus :-

> **"***57. 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."*

Responding to the submission of the respondent/plaintiff that the word "shall" in the proviso has to be interpreted as shall and not "may" to prevent the proviso being altogether redundant the Supreme Court further held as follows :

> **"***As rightly pointed out by the 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."*

The Judgment also refers to BALDEV SINGH (Supra). Reference seems to be only casual because the observations in BALDEV (Supra)

quoted earlier cannot be read as laying down a similar law. As indicated earlier commencement of trial by the very nature of it has to be a point of time and not a period of time. From the stage of examination of witnesses to hearing of arguments will always be an indefinite period of time. BALDEV (Supra) also makes no mention of KAILASH (Supra), a Larger Bench decision.

(vi) **On 18.04.2007 the Supreme Court decided USHA BALASAHEB SWAMI & ORS Vs KIRAN APPASO SWAMI & ORS., A.I.R. 2007 S.C. 1663 where the proviso to Order VI Rule 17 was mentioned but was held to be inapplicable as the trial had not commenced.**

5. THE LAW DECLARED

In the strictest sense the holding in KAILASH (Supra) as regards commencement of trial may be an obiter dictum. But there cannot be any doubt as indicated earlier that the observation in BALDEV (Supra) on the same point is an obiter dictum of the first water. BALDEV (Supra) also is not free from the vice of being a decision per incuriam. An obiter dictum has been listed as one of the four categories of persuasive precedents in SALMOND ON JURISPRIDENCE TWELFTH EDITION at page 146. Obiter dictum of the Supreme Court may also be binding on all other courts except the Supreme Court. But even for Supreme Court its obiter dictum has clear persuasive authority. See para 23 of ORIENTAL INSURANCE CO. LTD. Vs MEENAVARIYAL & ORS., AIR 2007 S.C. 1609, (2007) 5 SCC 428 dated 02.04.2007. Since the Supreme Court itself has accepted the authority of KAILASH (Supra) in AJENDRAPRASADJI (Supra) on the 8th December, 2006 KAILASH (Supra) has shed whatever characteristics it had of an obiter dictum and is the law declared within Article 141 of the Constitution of India on the amended provision of Order VI Rule 17 of the Code as regards commencement of trial in a Civil Suit. KAILASH (Supra) has to be followed in letter and spirit in this regard. Talking of letter of the law declared one has to remember that if, as is the prevalent practice sanctioned by the Rules framed by the High Court, one or two dates are fixed in the suit for steps before peremptory hearing or for settling a date for peremptory hearing cut off date for application of the proviso would be a date when finally the date for peremptory hearing that is for recording of evidence (filing of affidavit evidence) is fixed and not the date of settlement of issues.