'COMMENCEMENT OF TRIAL' IN A CIVIL SUIT: RESOLVING THE INTERPRETIVE IMBROGLIO

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ABSTRACT

Applications for amendment of pleadings form an indispensable aspect of civil trials in India and are governed by Order VI, Rule 17 of the Code of Civil Procedure. The provision allows amendment of pleadings to discover the real question in controversy between the parties. To prevent the provision from being misused, the legislature inserted a proviso to O. VI, R. 17, which prohibited pleadings from being amended after the commencement of trial. However, the provision and the CPC are silent on when a civil trial commences. Furthermore, conflicting judgements by High Courts over the meaning of the phrase 'commencement of trial' in Order VI, Rule 17 have resulted in an interpretive imbroglio. Despite substantial practical usage of the provision, the clash of divergent judicial opinions has received scarce academic attention. As the issue awaits deliberation before the Supreme Court, the paper seeks to fill gaps in academic literature and provide a comprehensive study of the meaning of

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'commencement of trial' under O. VI, R. 17 of the CPC. The paper begins by contextualizing the problem and highlighting the disparate judicial views. It then studies the historical evolution of the law to understand the true legislative intent behind the proviso. The paper then proceeds to critique the various interpretations attributed to the phrase 'commencement of trial' and argues that civil trials commence at the stage of cross-examination. The paper concludes by emphasizing the urgent need for this legal quagmire to be resolved to expedite the disposal of civil suits.

I. INTRODUCTION

Pleadings, comprising plaint and the written statement, form the flesh and blood of a civil suit. They are formal statements by which the opposing parties present material facts and help the court identify the dispute's true nature.[1] Being the primary vehicle of communication between the litigant and the court, pleadings form the foundation on which the case is built.[2] The centrality of pleadings to a civil suit necessitates their accurate drafting. Improper construction of pleadings is detrimental to the cause of the parties and results in precious judicial time being squandered. To ensure that the pleadings are faultless, the Code of Civil Procedure (Code) provides a

[1] *Ram Sarup v Bishnu Narain Inter College* (1987) 2 SCC 555.
[2] *Ganesh Trading Co v Moji Ram* (1978) 2 SCC 91.

mechanism to amend them, but only to determine the real question in controversy between the parties.[3]

Ordinarily, it is expected that the pleadings shall be all-encompassing and complete, but in situations such as the emergence of unknown facts,[4] disclosure of new documents, development in the law, or an error in the original pleading, Order VI Rule 17 (O. VI, R. 17) of the Code grants courts a discretionary power to allow the pleadings to be amended.[5] However, the proviso to O. VI, R. 17 imposes a fetter on courts' discretion and prevents amendments from being allowed after the commencement of trial unless it is proved that the party, despite exercising due diligence, could not have raised the matter earlier.

The provision for amendment of pleadings is widely used, and applications for amendment are moved in courts across the country on a daily basis.[6] However, the interpretation of O. VI, R. 17 is riddled with contradictions. There are divergent judicial opinions on the meaning of what constitutes '*commencement of trial'*. There are three conflicting interpretations attached to the phrase. A trial is said to have commenced: *firstly*, when the court frames issues for determination;[7] *secondly*, when an affidavit in lieu of examination-in-chief is filed;[8] and *thirdly*, when the cross-examination commences.[9] As O. VI, R. 17 prohibits pleadings from being amended post the commencement of trial, lack of clarity around the meaning of the term is damaging to the cause of speedy trials and the right of litigants to be aware of the settled position of law.

[3]The Code of Civil Procedure 1908, Order VI Rule 17; *See also Rajendra Kumar v Dipinder Kumar Sethi* AIR 2005 SC 1592.
[4]*Gopal Krishanamurthi v Shreedhara Rao* AIR 1950 Mad 32.
[5]*Hanuwant Singh Rawat v Rajputana Automobiles Ajmer* [1993] 1 WLC 625.
[6]Arun Mohan, *Courts, Justice, and Delays*, vol 1 (Universal Law Publishing Co 2009) 693.
[7]*Kailash v Nanhku* (2005) 4 SCC 480.
[8]*Anil v Anita* 2021 SCC OnLine Bom 1593.
[9]*Sree Sree Iswar Radha Behari Jew v Malati P Soni* AIR 2019 Cal 131 [*hereinafter* "Behari Jew"].

The Supreme Court, in the case of *Anita v. Anil*,[10] has taken cognisance of this legal quagmire and has decided to interpret the meaning of '*commencement of trial'* with conclusive finality. The Supreme Court is set to consider two disparate views; those of the Bombay and the Calcutta high courts. On the one hand, the Bombay High Court, in the case of *Anil v. Anita*,[11] has opined that a trial commences upon filing of an affidavit in lieu of examination-in-chief, while the Calcutta High Court, in the case of *Sree Sree Iswar Radha Behari Jew v. Malati P. Soni*,[12] has held that a trial commences upon the beginning of cross-examination. Presently, notice has been issued in the case, while the matter remains *sub-juice* and awaits deliberation.

Despite the substantial practical usage of O. VI, R. 17 in courts, the provision has received scarce attention from academic commentators. All leading commentaries on the Code have evaded any scrutiny of what constitutes the commencement of trial. For instance, *Mulla* — the foremost commentary on the Code, in its section on *'Proviso and its effect'* of O. VI, R. 17, merely reproduces the findings of various judgements and does not reconcile the judicial disagreement over the meaning of commencement of trial.[13] Mulla rightfully presents two different views to the readers by quoting the judgements of *Vidyabai v. Padmalatha*[14] and *Baldev Singh v. Manohar Singh*.[15] The former holds that a trial commences upon the date of filing of an affidavit in lieu of examination-in-chief, and the latter holds that trial commences upon the time of examination of witnesses. We see that the commentary is successful in demonstrating the diversity of judicial

[10]*Anita v Anil*, Order dated 13 September 2021 in Special Leave to Appeal (C) No 13691 of 2021 [*hereinafter* "Anita"].
[11]ibid.
[12]*Behari Jew* (n 9).
[13]Justice Deepak Verma, Justice C K Prasad and Namit Saxena, *Mulla's The Code of Civil Procedure*, vol 2 (19th edn, LexisNexis 2017) 38.
[14]*Vidyabai v Padmalatha* AIR 2009 SC 1433.
[15]*Baldev Singh v Manohar Singh* AIR 2007 SC 2832.

opinion but fails to engage in a discussion on what meaning would commencement of trial entail under O. VI, R. 17.[16]

Similarly, C.K. Takwani's commentary on the Code is silent on the issue. Its section on *'Amendment after commencement of trial: Proviso'* states that the proviso curtails courts' discretion in allowing applications to amend pleadings by introducing the due-diligence test.[17] The "due-diligence test", as explained by the Supreme Court in *J. Samuel v. Gattu Mahesh*, is a test to determine whether the exercise of the court's discretionary power is truly necessary after the commencement of trial.[18] It also states that the due-diligence test guides the court on whether to exercise its discretion in granting leave to amend pleadings post the commencement of trial.[19] However, there is no discussion on what the commencement of a trial means.[20] As of now, there are no academic articles which engage with what constitutes the meaning of commencement of trial under O. VI, R. 17.

As the Supreme Court's verdict in *Anita v. Anil*[21] is slated to have wide-ranging ramifications on civil suits in India, this article attempts to undertake an extensive study into this indispensable area of procedural law. For this purpose, the paper is divided into four parts. The first part studies the legislative overview of O. VI, R. 17 by briefly explaining the law as it stands and tracing its legislative history. In the second part, the paper shall outline the theoretical underpinnings of the issue. In the third part, we will examine the various interpretations of the meaning of commencement of trial. The paper critiques the view that trial commences upon the stage of framing of issues or filing of an affidavit in lieu of examination-in-

[16]Mulla (n 13) 39-40.
[17]C K Takwani, *Civil Procedure, Limitation and Commercial Courts* (8th edn, EBC Publishers 2020) 218 [*hereinafter* "Takwani"].
[18]*J. Samuel v Gattu Mahesh* (2012) 2 SCC 300.
[19]Takwani (n 17).
[20]ibid.
[21]*Anita* (n 10).

chief and argues that it commences at the stage of cross-examination. In the fourth and final part, the paper concludes by emphasizing the need for a prompt adjudication of the issue and by highlighting the way forward.

II. LEGISLATIVE OVERVIEW

A. The Provision in its present form

In order to appreciate the legislative history of the provision in concern and truly understand the evolution in law, it is imperative to first understand O. VI, R. 17 in its present form. The provision has been reproduced below for the benefit of the readers:

> *"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."*

The provision can be understood in three simple points: *Firstly*, amendment of pleadings is not a matter of right and depends upon the discretion of the Court. Consequently, the Court has the power to allow either party to amend its pleadings on terms it deems fit. *Secondly*, the Court also has the power to decide if the amendment is

necessary for the purpose of determining the real issue between the parties. Such discretion, however, must be exercised judicially and in consonance with the well-established principles of law[22], which would include the law of limitation, the possibility of prejudice being caused to the other side etc.[23] *Lastly*, the proviso puts some fetters on the discretion of the Court by indicating that once the trial commences, no amendments shall be allowed 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.[24] The object of adding the proviso is to prevent frivolous applications which are filed to delay the trial.[25]

It must be noted that the exercise of discretion by the Courts depends on the facts and circumstances of each case. The Courts usually follow a 'cardinal test'[26] in order to decide if the amendment should be allowed. The said test, which was also laid down by the Supreme Court in the case of *P.H. Patil vs. K.S. Patil*,[27] comprises the following questions:

- Whether the amendment is necessary for the determination of the real question in controversy?

- Can the amendment be allowed without injustice to the other side?

If these conditions are satisfied, the amendment should ordinarily be allowed. However, the ultimate discretion rests with the Court. Keeping these points in mind, let us now look at the history of the provision and understand the reasons behind the evolution of the law.

[22]*Ganga Bai v Vijay Kumar* [1974] SCR (3) 882.
[23]ibid.
[24]*Mohinder Kumar Mehra v Roop Rani Mehra* AIR 2017 SC 5822.
[25]*Salem Advocate Bar Association, Tamil Nadu v Union of India & Ors* (2005) 6 SCC 344.
[26]*Rajesh Kumar Aggarwal & Ors v K K Modi & Ors* (2006) 4 SCC 385.
[27]*P.H. Patil v K.S. Patil* AIR 1957 SC 363.

B. History and Evolution of the Law

O. VI, R. 17, before existing in its present form, underwent a series of sweeping changes. In this section, we shall briefly discuss the history of the provision in order to ascertain the legislative intent behind its framing. The aims and objectives for the inclusion of O. VI, R. 17 in the Code will aid in developing a methodology to interpret the meaning of commencement of trial in the rule's proviso.

O. VI, R. 17, in its original form, contained no proviso and an application for amendment of pleadings could be moved at any stage during the proceedings. The judiciary possessed wide discretion in allowing either party to amend their pleadings on the terms it deemed fit. The only requirement was that the amendment should be in pursuance of discovering the real controversy between the parties.[28] Although there is no uniform definition attached to the term "real controversy", some illustrations of the same are: the parties being wrongly described in the plaint,[29] a mistake in the statement in the cause of action,[30] avoiding multiplicity of suits[31] etc.

As the courts exercised unrestricted discretion, amendments were permitted liberally. Leaves were granted after the trial, in the Supreme Court, and even at the stage of execution proceedings.[32] O. VI, R. 17's usage was so widespread that it was invoked in every suit or appeal by both parties.[33]

Due to the liberal approach taken by courts across the country in granting applications for amendments, the provision became a tool in

[28] *Ram Kishore v Sunder Singh* AIR 2005 HP 21.
[29] *Jai Jai Ram Manohar Lal v National Building Material Supply* (1969) 1 SCC 869.
[30] *Sathappa Chettiar v Ramanathan Chettiar* AIR 1958 SC 245.
[31] *LJ Leach & Co Ltd v Jairdine Skinner & Co*. AIR 1957 SC 357.
[32] *Takwani* (n 17) 218; *See also Devendra Mohan v State of UP* [2004] 3 AWC 2162.
[33] Sudipto Sarkar, *Code of Civil Procedure*, vol 1 (11th edn, Wadhwa Nagpur Publisher 2006) 1068.

the hands of those wishing to cause delay.[34] Frivolous applications such as reordering the paragraphs in a plaint or making an inconsequential change in the wording were filed regularly to stall cases.[35] Dr. Arun Mohan calls an application for amendment similar to an *'automatic injunction'* against the progress of the case as deciding it could take *"anything from six months to six years"*.[36]

Against this backdrop, the Parliament, with the intention of expediting the disposal of civil cases, enacted the CPC (Amendment) Act, 1999.[37] This Act, though eventually not enforced, brought radical changes to the Code, including to O. VI, R. 17. Section 16 of the said Act amended Order VI to permanently omit Rule 17 from the Code.[38]

Thus, litigants were no longer left with an option to amend pleadings even if the exigencies of the situation required it. It is interesting to note that the Law Commission deliberated the suggested changes to O. VI, R. 17 before they were codified as law. The 163rd Report on The Code of Civil Procedure (Amendment) Bill 1997, prepared under the chairmanship of B.P. Jeevan Reddy, noted that the proposal to delete O. VI, R. 17 was *"opposed uniformly by all the participants, whether members of the Bar or of the Bench"*.[39]

While all members were in favour of retaining O. VI, R. 17, two divergent viewpoints justifying the continuance of the provision

[34]ibid 1064.
[35]ibid.
[36]Arun Mohan, *Courts, Justice, and Delays*, vol 1 (Universal Law Publishing Co 2009) 693.
[37]The Code of Civil Procedure (Amendment) Act 1999 (not enforced).
[38]Notes on clauses of the Code of Civil Procedure (Amendment) Act 1999 stated thus:
"Order VI of the Code provides for pleadings generally. Clause 16 seeks to provide that person verifying the pleadings shall furnish an affidavit in support of his pleadings. This clause omits rule 5, 17 and 18 of Order VI to bring about consistency with new changes in the Code".
[39]Law Commission of India, *One Hundred Sixty Third Report on the Code of Civil Procedure (Amendment) Bill 1997* (Law Com No 15, November 1998) 38.

emerged. One view argued that O. VI, R. 17 ought to be left the way it is as situations like a change in law or emergence of new facts require the remedy of amendment of pleadings to be available to the parties.[40] The other view, endorsed primarily by judges, posited that no application for amendment must be entertained after the trial in a civil suit has commenced. The second view reasoned that:

> *"very often, application for amendment was filed on the date when the suit was posted for trial only with a view to stopping commencement of the trial because the party was not ready or it was not convenient for it go on with the trial on that occasion".*[41]

The Law Commission understood the misuse of the provision for amendment of pleadings to delay proceedings yet acknowledged the need for it remains a part of the Code. Hence, it sided with the second view and suggested that *"the Rule should state that no amendment of pleadings shall be granted and no such application for amendment should be entertained, on the date the trial is to commence…".*[42]

Despite the Law Commission's sound reasoning, its recommendations were ignored by the Parliament and the CPC (Amendment) Act, 1999 permanently deleted O. VI, R. 17 from the Code. However, this Act was never enforced as the entire legal fraternity erupted in protests against the changes proposed by the legislation.[43] The country saw widespread court-strikes, demonstrations and boycotts as the provision for amendment of pleadings was considered indispensable by members of the Bar.[44] To

[40]ibid 39.
[41]ibid.
[42]ibid.
[43]Arun Mohan, *Courts, Justice, and Delays*, vol 1 (Universal Law Publishing Co 2009) 695.
[44]ibid.

placate the agitations, the Parliament was compelled to reconsider its decision.

Two years later, the CPC (Amendment) Act, 2002 was passed, and it restored the provision for amendment of pleadings. The courts were once again granted plenary powers to grant leave to amend pleadings, with one important limitation. A proviso was added to Rule 17, which postulated that no application to amend pleadings can be granted after the trial has commenced unless the court comes to a conclusion that the party exercised due diligence and yet, failed to raise the matter before the commencement of the trial. In 2005, a challenge was mounted against the constitutionality of the CPC (Amendment) Act, 2002, in the case of *Salem Advocate Bar Association v. Union of India.*[45] However, it was held that:

> *"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."*

After a long history of multiple amendments, the Parliament expected to achieve its goal of preventing the misuse of Rule 17 by limiting courts' discretionary power in granting leave to amend pleadings and by introducing the 'due-diligence' test. However, after two decades of the proviso being added to the Rule, the proviso has been unsuccessful in ridding itself of lingering controversy.

As previously mentioned, the courts have struggled to conclusively interpret the meaning of commencement of trial in the proviso. As a

[45] *Salem Advocate Bar Association v Union of India* (2005) 6 SCC 344.

result, Rule 17 continues to be a delaying tactic in the hands of miscreants. Hence, the Supreme Court's decision in *Anita v. Anil*[46] is expected to shed clarity on the Rule and prevent its further misuse.

In the subsequent sections, we shall undertake a comprehensive study of all prevailing interpretations of *"commencement of trial"* — that it commences post the framing of issues; after filing of an affidavit in lieu of examination-in-chief; and once the cross-examination begins. We shall argue that the first two interpretations are not in tune with the aims of Rule 17 and that it is the third interpretation which will succeed in discovering the real issue in controversy between the parties and will also be in furtherance of the legislative intent.

III. THEORETICAL UNDERPINNINGS

Before moving on to analyse the divergent views with respect to the meaning of *'commencement of trial'* in a civil suit, it is also important to understand the theoretical underpinnings of the question that this paper attempts to answer.

Civil procedure, or for that matter, any form of procedural law, should be seen as a means to achieve the ultimate goal of judicial administration, i.e., justice.[47] A number of jurisdictions have faced and are still facing what Professor Zuckerman had described as a 'sense of crisis in the administration of civil justice'.[48] This paper would also mention the statistics which clearly demonstrate that civil litigations move at a very slow place in India. Therefore, apart from the obvious need to invest more (from a financial/resource perspective) in civil justice administration, any form of civil

[46] *Anita* (n 10).
[47] Adrian A.S. Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999).
[48] ibid.

procedure reform should be focused on cutting down on delay and cost.[49]

An examination of Order VI Rule 17 in this context would show that the provision in its current form attempts to balance two competing goals of judicial administration: *speedy trial* and *fair trial*. It does so by placing a limitation upon amendment of pleadings after the 'commencement of trial', while empowering the Court to allow amendments even after the commencement of trial if it comes to the conclusion that, in spite of due diligence, the party could not have raised the matter before the commencement of trial.[50] It is evident that the statute, by allowing pleadings to be amended at any stage, ensures that the trial is just. At the same time, the bar on amendments post commencement of trial ensures that the trial also receives a speedy adjudication.

Any definition of the phrase 'commencement of trial', therefore, must balance the competing goals of a fair and speedy trial. Against this backdrop, the authors wish to briefly explain their interpretive methodology behind discovering the true meaning of 'commencement of trial'. A civil trial can be understood in two broad ways — the wide and the narrow view. As per the wide view, a trial would include the entire proceedings — from the filing of a suit to the eventual pronouncement of the judgement.[51] However, perceiving a civil trial in this lens, for the purpose of O. VI, R. 17 of the Code, would not do justice to the competing goals of fair and just trials. If the trial is deemed to have commenced immediately after filing the suit, the very purpose of amendments would be defeated as the proviso would restrict changes to the pleadings from inception. Therefore, a

[49]Richard L Marcus, 'A Genuine Civil Justice Crisis?' (2015) XV Int'l Assn Proc L World Cong 27.
[50]*Aziz v Ghulam Mohammad*, Order dated 8 October 2021 passed by the Jammu & Kashmir HC in OWP no 873/2017.
[51]*Harish Chandra Bajpai v Triloki Singh* [1957] SCR 370.

narrower (or, rather a more precise) way of perceiving civil trials has to develop.

This view would espouse that a trial would commence at a point that goes beyond the mere mechanical filing of the suit. Such an act must necessarily involve an application of the judicial mind.[52] Fundamentally, a trial involves the act of proving and disproving the allegations made.[53] Perceived in this manner, it becomes clear that a trial begins when the court, for the first time, begins to appraise the evidence before it.[54] All stages preceding it form part of the proceedings and are essential to prepare the matter for the trial. But, the trial, in earnest, will commence only at the stage of judicial examination of evidence in order to discover the truth of the allegations.

With these theoretical underpinnings, we shall now proceed to analyse the divergent judicial views over the meaning of 'commencement of trial' and attempt to provide an interpretation that is in tune with both the object of the provision and its larger goal of aligning a fair trial with a speedy trial.

IV. THE INTERPRETATIONS OF COMMENCEMENT OF TRIAL

A. Framing of issues

Amongst judgements presenting divergent opinions on the meaning of commencement of trial, one view holds that trial commences once

[52]Bryan A Garner, *Black's Law Dictionary* (9th edn, West Publishing Co 2009) 1675.
[53]*Union of India & Others v Major General Madan Lal Yadav (Retd)* (1996) 4 SCC 127.
[54]ibid.

issues in a civil suit are framed.[55] This section of the paper shall critique this view and argue that it is incorrect. It is noteworthy that the interpretation that trial commences upon framing of issues has not been mentioned in the *Anita v. Anil* order. In the said case, the other two views — trial commences upon filing of an affidavit in lieu of examination-in-chief or once the cross-examination begins — have been referred.[56] However, a number of judgements by the Supreme Court and different high courts have denied amendment of pleadings on the ground that issues have been framed.[57] Hence, a study of this interpretation is warranted.

Framing of issues is the stage which presses into action when pleadings are completed. Pleadings are said to be complete once the plaint of the plaintiff and the written statement of the defendant are on record. The next important stage is that of framing of issues. Based upon the allegations in the plaint and the written statement, the court crystallises issues to be determined in the trial. The date of framing of issues is also called the first hearing of the suit.[58] Order XIV[59] of the Code governs the procedure for framing of issues, and before moving forward, the authors shall provide a brief outline of the law on framing of issues.

Order XIV Rule 1(1) provides that an issue arises when material propositions are affirmed by one party and denied by the other. Rule 1(2) elaborates the scope of a material proposition and specifies that a material proposition is one which the plaintiff or defendant alleges in order to constitute a cause of action or defence, respectively. Each material proposition contested by the parties becomes a distinct issue. Rule 1(5) provides that the court shall ascertain, after perusing the plaint and the written statement, the propositions of law and fact upon

[55] *Kailash v Nanhku* (2005) 4 SCC 480.
[56] *Anita* (n 10).
[57] *Saiyed Rashedakhatun v Vishnubhai Ambalal Patel* 2014 SCC OnLine Guj 5527.
[58] *Sangram Singh v Election Tribunal* AIR 1955 SC 425.
[59] The Code of Civil Procedure 1908, Order XIV.

which the parties are at variance and frame relevant issues.[60] Once all the issues are framed, under Order XV Rule 3, the court assesses whether the evidence in the form of documents on record is sufficient to determine the issues.[61] If not, an opportunity has to be provided to the parties to furnish the evidence necessary for deciding the issues.

Three integral facets of a civil suit emerge from the process of framing of issues. Firstly, the evidence led by the parties and the points to be determined by the court are guided by the issues and not by the relief claimed in the prayer.[62] Secondly, the relief claimed in the plaint is consequential to the determination of issues.[63] Thirdly, and most importantly, the framing of issues narrows the scope of the trial, and the real dispute between the parties is concretised.[64]

The discussion above demonstrates that framing of issues could be tantamount to the commencement of trial as the framing of issues is determinative of the real question of controversy between the parties, and it is the issues upon which the judgement is to be pronounced. Thus, once the points of contention are distilled, a trial may be said to have been commenced.

This notion has been given the position of law by a three-judge Supreme Court bench in the case of *Kailash v. Nanhku (Kailash).*[65] In *Kailash*, it was observed that:

> *"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*

[60] *Anil Kumar v Devender Kumar* MANU/DE/1869/2019.
[61] ibid.
[62] ibid.
[63] ibid.
[64] *Makhan Lal Bangal v Manas Bhunia* (2001) 2 SCC 652.
[65] *Kailash v Nanhku* (2005) 4 SCC 480 [*hereinafter* "Kailash"].

> *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*."[66]

The law laid down in *Kailash* was followed again by a two-judge bench of the Supreme Court in *Ajendraprasadji N. Pande v. Swami Keshavprakeshdasji*.[67] The observation of the Supreme Court in Kailash and the subsequent reliance placed on it by future benches is not relevant in the context of civil suits since *Kailash* was decided in the specific factual context of election petitions and cannot be treated as the binding ratio. The primary questions before the Supreme Court in *Kailash* were whether certain provisions of the Code apply to the trial of an election petition and whether the time limit of ninety days to file a written statement under O. VIII, R. 1 is mandatory.[68] To determine these questions, the Court needed to decide when a trial for the purposes of an election petition commences.[69] This is evident from the aforementioned paragraph as the Court clarifies its intention to ascertain the meaning of commencement of trial in the context of an election petition.

The observation that civil trials begin when issues are framed is simply a passing reference and is not substantiated by any reasoning. As ratio-decidendi of a verdict can only be something with direct correlation to material facts at hand or the issues determined by a court,[70] the present observation of the Supreme Court in *Kailash* cannot be treated as having the binding effect of law. It is trite law that a judgement is not Euclid's Theorem and that its ratio is to be

[66]ibid.
[67]*Ajendraprasadji N Pandey v Swami Keshavprakeshdasji N* (2006) 12 SCC 1.
[68]*Kailash* (n 65).
[69]ibid.
[70]Louis Lai Wei Kang, 'OBITER, OBITER, OBITER' (2016) Singapore Law Review Juris Illuminae Vol 8.

understood in its factual matrix.[71] Furthermore, a judgement, as held by the Supreme Court in *Ambica Quarry Works v. State of Gujarat*,[72] is an authority for what it actually decides and not what follows from it.

For the purposes of O. VI, R. 17, the view that trial commences upon framing of issues is unfounded not only legally but also jurisprudentially, for at least two reasons. Firstly, the act of framing of issues is devoid of any application of judicial scrutiny to the evidence. The court simply peruses the plaint and the written statement to narrow the area of dispute and ascertains the direction the suit will eventually take. Its purpose is to give each party an indication of the burden of proof they have to bear. Post the framing of issues, each party will place relevant material as evidence on record, evidence will be proved or disproved, witnesses will be cross-examined and so on. As a 'trial' means the act of judicial examination of evidence or the first step towards proving or disproving facts,[73] framing of issues does not constitute commencement of trial.

Secondly, under O. XV, R. 5,[74] courts have been granted the power to amend or strike out issues. One of the prime motivations for refusing pleadings to be amended post the commencement of trial is to prevent prejudice from being caused to the other party. It is presumed that by allowing pleadings after the stage of framing of issues, the determined key questions between the parties might get affected, and the course of the trial might change.[75] However, this understanding is misplaced as even the amendment of issues is not fatal to the suit.[76] Issues can

[71] *Deepak Bajaj v State of Maharashtra* AIR 2009 SC 628.
[72] *Ambica Quarry Works v State of Gujarat* [1987] AIR 1073.
[73] *Union of India & Others v Major General Madan Lal Yadav (Retd)* (1996) 4 SCC 127.
[74] The Code of Civil Procedure 1908, Order XV, Rule 5.
[75] Sudipto Sarkar, *Code of Civil Procedure*, vol 1 (11th edn, Wadhwa Nagpur Publisher 2006) 1068.
[76] C K Takwani, *Civil Procedure, Limitation and Commercial Courts* (8th edn, EBC Publishers 2020) 291.

be amended at any stage during the trial, and the amendment can also be made by the appellate or revision court.[77] Therefore, when issues can be amended at any stage without vitiating the trial,[78] an application of amendment of pleadings can surely be entertained for the purposes of determining the real question in controversy between the parties.

To summarise, in this section, the authors have demonstrated that the judgement holding trial to commence upon framing of issues is incorrect as its holding was made in the context of election petitions and cannot be extrapolated to O. VI, R. 17. Furthermore, disallowing the amendment of pleadings on the ground that issues have been framed, and hence trial has commenced, is incorrect as the stage of framing of issues does not involve any judicial scrutiny of evidence and issues themselves can be amended throughout the trial.

B. Affidavit in lieu of Examination- in-Chief

The next view related to the issue of commencement of trial in a civil suit is that the trial commences from the date of filing of affidavits in lieu of the examination-in-chief of the witness/witnesses. In this section, we will attempt to critique this view, both, from a theoretical as well as a practical perspective. However, before analysing the decisions that support this view and the rationale behind those decisions, it is important to understand the meaning and utility of an affidavit in lieu of the examination in chief.

As defined in the Black's Law Dictionary, an "affidavit" is a written declaration of facts, made voluntarily, and confirmed by the oath of the party making it, taken before a person having authority to administer such an oath.[79] Order 18 Rule 4 of the CPC provides that *"in every case, the examination-in-chief of a witness shall be on an*

[77] *Devendra Mohan v State of UP* [2004] 3 AWC 2162.
[78] *Nagubhai Ammal v B Shama Rao* AIR 1956 SC 593.
[79] Bryan A Garner, *Black's Law Dictionary* (9th edn, West Publishing Co 2009) 80.

affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence".[80] The Bombay High Court, in the case of *Harish Loyalka & Another v. Dileep Nevatia & Ors*, had explained that "*an affidavit in lieu of examination-in-chief can only contain such material as is properly admissible in examination-in-chief, in a manner no different than if the witness was in the witness box and his direct evidence was being taken by his advocate*."[81] Therefore, an affidavit in lieu of the examination-in-chief is filed as written evidence of witness of fact (and of expert witness)[82] and forms an important part of a civil proceeding in so far as examination of witnesses and recording of evidence is concerned.

With regard to the meaning of commencement of trial, the view taken by a number of judgments is that the filing of an affidavit in lieu of examination-in-chief by the plaintiff can be regarded as the first act or step taken by the plaintiff to prove his case, and should therefore be seen as the initiation point of a civil trial. These judgments have been quoted and will be discussed in the subsequent paragraphs of this section. The authors would then go on to explain in the later part of this section as to why this argument does not hold much water.

Any commentary with respect to this view must begin with the case of *Vidyabai & Ors. vs. Padmalatha & Anr.,*[83] wherein the Supreme Court was deciding the question as to whether pleadings can be amended after the hearing of a case begins. In this case, the issues had been framed, and parties had filed their respective affidavits by way of evidence. The Court answered the question in the following terms:

[80]The Code of Civil Procedure 1908, Order XVIII, Rule 4.
[81]*Harish Loyalka & Another v Dileep Nevatia & Ors* 2019 SCC OnLine Bom 68.
[82]M P Bharucha and Sneha Jaisingh, 'Evidence in civil proceedings in India ' (*Lexology*, 2018) <https://www.lexology.com/library/detail.aspx?g=68c8c17b-d9ce-456b-a433-7c36317526e0> accessed 13 December 2021.
[83]*Vidyabai & Ors v Padmalatha & Anr* AIR 2009 SC 1433.

> *"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'."*

However, it remained unclear as to whether the aforementioned observation could be treated as the *ratio decidendi* of the decision. This confusion was clarified by a division bench of the Bombay High Court in *Mahadeo vs. Balaji & Anr.*[84] Treating the aforementioned observations in *Vidyabai* as the *ratio decidendi* of the decision, the Court (in *Mahadeo)* held that, "*the quest for answers to the questions-what is 'proved' or 'disproved' or 'not proved', constitutes the trial."* The Court further opined that affidavit in lieu of examination-in-chief can be regarded as commencement of trial as it is the, "*first act or step taken by the plaintiff to prove his case."* In this sense, the Court ruled, *"The observations (in Vidyabai) are directly on the point in issue in the said case and offer reason for decision in the said case in clear terms."*

A number of other High Courts have taken a similar view.[85] The decision in *Mahadeo* was also followed by the Bombay High Court in the case of *Anil vs. Anita*[86] — which now forms the basis of challenge in the Supreme Court.

However, the Court in *Anil* explicitly did so because of judicial propriety and did not go into the soundness of the view itself. The single judge bench of the Bombay High Court in *Anil vs. Anita* was

[84] *Mahadeo v Balaji & Anr* [2012] 5 Bom CR 777.
[85] *Mr Sasidharan v Mr Sasidharan*, Kerala High Court Order dated 19 October 2020 in OP (C) No 1316 of 2020.
[86] *Anil v Anita* [2021] SCC OnLine Bom 1593.

bound to follow the decision of the division bench in *Mahadeo*. The single judge acknowledged that the reasoning in *Mahadeo* has duly been considered and rejected by the Calcutta High Court, yet he could not venture into discussing the correctness of *Mahadeo* due to the doctrine of *stare decisis*. The single judge in *Anil v. Anita* held that:

> *"15. Though the judgment rendered in Sree Sree Ishwar Radha Bihari Jew, by the Division Bench of the Calcutta High Court, again in reference, also considers the judgment in Mahadeo, as well as the dictum of the Hon'ble Apex Court in Vidyabai, and takes a wider view, than what has been taken in Mahadeo judicial propriety, would dictate, that I follow the view taken by the learned Division Bench of this Court in Mahadeo."*

Even though the rule of precedents plays an important role and is often employed to ensure stability and reliability in the legal system,[87] it should not act as a barrier for a later court (usually a subordinate court) to provide its own reasoning and analysis on a particular question of law, while following the precedent laid down by the higher Court.[88] As stated earlier, the Court in *Anil* did not provide any independent analysis on the question of commencement of trial in a civil suit. As such, any reliance upon *Anil vs. Anita,* to substantiate the strength of the view that has been dealt with in this section does not stand on a strong foundation.

Furthermore, the view that stipulates the filing of an affidavit in lieu of examination-in-chief as the "commencement" point of a civil trial, is incorrect theoretically and bound to create problems from a practical viewpoint as well. Firstly, it must be remembered that "trial" means the act of proving or judicial examination of the evidence filed

[87]Sebastian Lewis, 'Precedent and the Rule of Law' (2021) 41 OJLS 873.
[88]Adam Rigoni, 'Common Law Judicial Reasoning and Analogy' (2014) 20 Legal Theory 133.

before the Court.[89] As such, there is no judicial examination attached to an affidavit in lieu of examination-in-chief, since an affidavit cannot be admitted as evidence unless the witness takes to the box and testifies its correctness.[90] Therefore, to say that the mere filing of the affidavit initiates the trial is incorrect, as the veracity of the affidavit has not yet been proved and the affidavit cannot be recorded as evidence without an order of the court.[91] An unverified affidavit cannot speak to the testimony's genuineness and no court can apply its mind to such an affidavit.[92]

Secondly, it is possible that affidavits of evidence may be filed, and the matter may not be taken up for a long time thereafter. There have been frequent discussions on the massive case pendency in India, and as per the latest data accumulated by the National Judicial Data Grid (District and Taluka Courts), around 25.47 % of the civil suits are 1-3 years old, whereas, approximately 15.03 % of the civil suits are 3-5 years old.[93] Further, even after one or more affidavits of evidence are filed, no prejudice would be suffered by any party if a necessary amendment were to be allowed. This is because an order allowing the amendment would surely permit fresh affidavits of evidence to be filed without any delay.[94] Thus, the view that trial commences upon the stage of filing of affidavits in lieu of examination-in-chief is incorrect.

[89]*Union of India & Others v Major General Madan Lal Yadav (Retd)* (1996) 4 SCC 127.
[90]*Khandesh Spg & Wvg Mills Co Ltd v The Rashtriya Girni Kamgar* [1960] AIR 571.
[91]The Code of Civil Procedure 1908, Order XVIII, Rule 4.
[92]*A K K Nambiar v Union of India & Another* AIR 1970 SC 652.
[93]National Judicial Data Grid <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 31 December 2021.
[94]*Basudeb Das v Malati P Soni* AIR [2019] Cal 131.

C. Commencement of cross-examination

The third and final view advocates that trial commences upon the initiation of cross-examination of witnesses.[95] O. XVIII of the Code deals with matters relating to the examination of witnesses, but it is the Evidence Act that provides its definition.[96] Under Section 137 of the Evidence Act, cross-examination is defined simply as the examination of a witness by the adverse party.[97] Section 138 sets out the order in which examination of witnesses is to take place and lays down that the process shall begin with the examination-in-chief, followed by cross-examination, and conclude with re-examination.[98]

The authors submit that it is this stage — the initiation of cross-examination — when the trial commences within the meaning of O.VI, R.17. The reasons for this argument are two-fold. Firstly, the stage when a witness enters the witness box to prove a document or to face cross-examination is the stage where the court, for the first time, applies judicial mind to the evidence, examines whether documents are to be admitted as evidence and ascertains the permissibility of questions put forth in the cross-examination. The court, at this stage, may also put its own questions to the parties in order to understand the suit.[99] Therefore, a thorough application of the judicial mind is administered on the evidence for the first time at the stage of cross-examination. The previous two stages — framing of issues and filing of an affidavit in lieu of examination-in-chief — lack this finality as the act of proving and disproving evidence begins at the stage of cross-examination. Framing of issues merely identifies the dispute between the parties, and affidavit in lieu of examination-in-chief is merely a testimony, the veracity of which has to be tested either at the stage of cross-examination or by the witness himself or herself by

[95] *Sree Sree Iswar Radha Behari Jew v Malati P Soni* AIR [2019] Cal 131.
[96] The Code of Civil Procedure 1908, Order XVIII.
[97] The Indian Evidence Act 1872, s 137.
[98] The Indian Evidence Act 1872, s 138.
[99] The Indian Evidence Act 1872, s 165.

appearing in court.[100] As has been explained previously in this paper, trial means the act of proving or judicial examination of the evidence before the court. This examination can occur at no stage before cross-examination.

Secondly, allowing pleadings to be amended at the stage of cross-examination has the potential of causing prejudice to the other party. It will also defeat the purpose of the proviso to O. VI, R. 17, which is to expedite the disposal of civil suits. As stated elsewhere in this paper, the cardinal test to determine whether to allow amendment of pleadings is to ensure that no injustice is caused to either party. We saw that allowing pleadings to be amended at the stage of framing of issues causes no prejudice, as issues themselves can be amended throughout the trial. It was also noted that no prejudice is caused by allowing pleadings to be amended at the stage of filing an affidavit in lieu of examination-in-chief as, inter-alia, the matter may not be taken up for a considerable time post the filing of the affidavit and fresh affidavits may be filed without any delay if a necessary amendment is permitted. This is because the trial, in earnest, has not yet started. However, by the time the suit reaches the stage of cross-examination, the pleadings are completed, issues determining the real question of controversy between the parties are identified, and all evidence to be relied upon in the trial has been placed before the court for examination.

Furthermore, the opposite party is now aware of the allegations and contentions against it. Since all pre-trial requirements are met, readily granting leave to amend pleadings at the stage of cross-examination, without exercising the due-diligence test, is detrimental as the litigant can set up an entirely new case,[101] introduce grounds that would alter the trajectory of the suit,[102] and cause the trial to be unnecessarily

[100] *A K K Nambiar v Union of India* (1969) 3 SCC 864.
[101] *Upendra v Janaki*, 45 C 305.
[102] *Phoolrani v Naubat A* [1973] SC 2110.

delayed.[103] The term 'new case' has been interpreted to mean introducing a new set of ideas[104] , and no party is allowed to introduce new ideas unless it is proved that they could not have been raised earlier. There ought to be a valid ground to show that at such a late stage, the amendment sought will not be inconsistent with the original pleadings.[105] Therefore, until the due-diligence test is satisfied, no leave to amend pleadings must be granted at the stage of cross-examination as the trial, by virtue of the application of judicial scrutiny to evidence, has commenced.

For the aforementioned reasons, the authors concur with the finding of the Calcutta High Court in the case of *Sree Sree Iswar Radha Behari v. Malati P. Soni*, which observed:

> *"'commencement of trial' in the proviso to Order VI Rule 17 of the Code of Civil Procedure would imply the date when the court first applies its mind after the affidavit of evidence is filed and when the first witness proves his affidavit of evidence or such witness seeks to prove a document for it to be tendered in evidence or the cross-examination of such witness begins."*[106]

To summarise, in this section, the authors have demonstrated that a civil trial commences at the stage of cross-examination as it is the first instance of the court applying the judicial mind to the evidence. Examination of evidence attaches finality to the proceedings, and the matter is rendered ripe for arguments. Furthermore, it was also seen that allowing leave to amend pleadings at the stage of cross-examination without exercising the due-diligence test causes

[103] *Cool Chand v Ram Nivas* [1998] AIHC 1480.
[104] *A K Gupta and Sons Ltd v Damodar Valley Corpn* [1966] 1 SCR 796.
[105] *JS Tins Fabricators v UCO Bank* AIR 1994 HP 33.
[106] *Behari Jew* (n 9).

prejudice to the other party and defeats the purpose behind the proviso to O. VI, R. 17.

V. CONCLUSION

O. VI, R. 17 of the Code is a regularly used provision and applications to amend pleadings are moved in courts across India on a daily basis. Unfortunately, this indispensable and practical area of procedural law has not attracted any academic commentary. Unclarity over the provisions' interpretation has troubled both courts and the litigants. The proviso was explicitly included in the Code to prevent unnecessary delay in the adjudication of civil suits, but different interpretations given to it by various high courts have defeated that purpose. As the matter awaits deliberation before the Supreme Court, this paper has attempted to put years of incertitude over the meaning of 'commencement of trial' to rest.

In summation, this article first identified the various meanings given to the term 'commencement of trial' and highlighted the absence of a uniform interpretation. Second, the paper studied the historical evolution of the law to determine that its true purpose was to expedite the disposal of suits and prevent delay. Furthermore, it was seen that the correct interpretation of 'commencement of trial' can only be one which advances this legislative intent. Third, the paper critically analysed all interpretations of commencement of trial and, agreeing with the Calcutta High Court view, argued that a civil trial commences at the stage of cross-examination as it is the first instance of the application of judicial mind to the evidence. Finally, by virtue of this paper, the authors have attempted to prompt an ignored academic discourse on O. VI, R. 17 of the Code and to assist in resolving the interpretative inconsistencies regarding the term 'commencement of trial'.