

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6263 OF 2017

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Mukund Sitaram Tambe & Ors.

... Petitioners

V/s.

Yashwant Shankar Tambe & Ors.

... Respondents

Mr. Sushil A. Inamdar for the petitioners.

Mr. Shailendra S. Kanetkar for respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 2, 2023

P.C.:

1. The petitioners are original defendant Nos.1 to 8 and defendant Nos.10 to 14 in Regular Civil Suit No.6 of 2011 filed for partition and separate possession.
2. On 15th March 2011, defendant No.1 filed a written statement.
3. On 28th September 2015, the plaintiff filed affidavit in lieu of examination-in-chief. Therefore, the Trial Court commenced the trial on 28th September 2015.
4. The respondent No.1 filed an application for amendment on 20th September 2016. The Trial Court, by order dated 15th February 2017, allowed the amendment.
5. On perusal of the impugned order, it appears that the Trial

Court has not considered the aspect of exercise of due diligence by the plaintiff. In absence of adjudication on the jurisdictional fact, there is illegality in decision making process.

6. The Apex Court in the case of **Vidyabai and Others vs. Padmalatha and Another** reported in (2009) 2 SCC 409 has held that the Court while allowing amendment needs to record finding about exercise of due diligence by the party applying for amendment after commencement of trial. In the absence of such adjudication, the impugned order cannot be sustained.

7. Hence, following order:

a) The impugned order dated 15th February 2017 in Regular Civil Suit No.6 of 2011 passed by Joint Civil Judge, Junior Division, Dapoli is quashed and set aside.

b) The application below Exhibit-115 is restored to file of Trial Court.

c) The Trial Court shall decide the application below Exhibit-115 afresh and shall record a finding as to due diligence as mandated by the judgment of the Apex Court in the case of **Vidyabai and Others** (supra).

8. The writ petition stands disposed of in above terms. No costs.

9. The application shall be decided uninfluenced by the observations made in the present order.

(AMIT BORKAR, J.)