

SA Pathan

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

WRIT PETITION NO.15422 OF 2022

Kalabai Vithoba Shinde ... Petitioner
V/s.
Shewantabai Ganpat Thavare
(Deceased)
Through Legal Heirs & Ors ... Respondents

SHABNOOR
AYUB
PATHAN
Digitally signed by
SHABNOOR AYUB
PATHAN
Date: 2023.12.02
10:31:03 +0530

Mr. Rahul S. Kadam, for Petitioner.

Ms. Rekha Musale, for Respondent Nos.1A to 1C.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 1, 2023

PC.:

1. The petitioner is the original plaintiff who filed Regular Civil Suit No.123 of 2003 seeking relief of declaration that the sale deed dated 7 January 1992 executed in favour of defendant No.1 be declared as null and void and further relief of possession based on declaration.
2. The defendants contested the suit by filing the written statement.
3. It is not in dispute that the trial commenced before filing of application for amendment in plaint.

4. The petitioner (original plaintiff) filed an application under Order 6, Rule 17 of the Code of Civil Procedure, 1908 for amendment of plaint to incorporate amendment to add the words “by ownership” in the plaint.

5. The Trial Court rejected the application holding that the application for amendment is filed after 17 years and the petitioner has failed to explain “due diligence” as required by proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. The order of Trial Court is subject matter of the writ petition.

6. Learned Advocate for the petitioner relying on the judgment in the case of **Ganesh Prasad Vs Rajeshwar Prasad and Others** reported in 2023 SCC OnLine SC 256 and the judgment in the case **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Another**, reported in 2022 SCC OnLine SC 1128, submitted that the Trial Court ought to have allowed the application for amendment as it was neither time barred nor changes nature of the suit, or it was malafide. It is further submitted that the Trial Court ought not to have allowed hyper technical approach by insisting of strict compliance of due diligence under proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. Moreover, the petitioner has furnished sufficient explanation as regards “due diligence” as contemplated by proviso.

7. It is not in dispute that the application for amendment of plaint was filed after commencement of trial. Therefore, proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908 comes into operation.

8. The expression “due diligence” has been interpreted by the Apex Court in paragraph 19 of **Vidyabai And Others vs. Padmalatha And Another** reported in (2009) 2 SCC 409 to be a jurisdictional fact and unless reasons satisfying due diligence as interpreted by the Apex Court in the context of proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908, in paragraph 19 has held under:

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

9. In the recent judgment, the Apex Court in the case of **Pandit Malhari Mahale Vs. Monika Pandit Mahale and Another**, reported in (2020) 11 SCC 549, insisted on compliance of satisfaction of due diligence by the Courts before allowing application for amendment filed after commencement of trial. The Apex Court in the said judgment set aside the orders passed by the Trial Court and High Court which were passed without recording satisfaction of due diligence before allowing application for amendment.

10. The contention raised by the petitioner is that the petitioner has furnished an explanation in the application for amendment stating that the petitioner is illiterate and due to inadvertence. However, the expression “due diligence” has been interpreted by

the Apex Court in the context of proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. The Apex Court in paragraphs 19 and 20 of **J. Samuel and Others Vs Gattu Mahesh and Others**, reported in (2012) 2 SCC 300 has held as under:

“**19.** Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term “due diligence” is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.”

11. In the light of observations made in paragraphs 19 and 20, the explanation furnished by the petitioner that the petitioner is illiterate and such application was not earlier due to inadvertence or oversight does not amount to exercise of due diligence as contemplated by the proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. Therefore, the Trial Court was within its

jurisdiction to reject the application for amendment.

12. In so far as, the judgments in the case of **Life Insurance Corporation of India** (Supra) and **Ganesh Prasad** (Supra) are concerned, the Apex Court in both the judgments had no occasion to consider the effect of proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. Therefore, both the judgments are of no help to the petitioner.

13. Considering the reasons assigned by the Trial Court that the plaintiff failed to exercise due diligence before filing of application for amendment, in my opinion, there is no perversity nor error of jurisdiction committed by the Trial Court.

14. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)