

VRJ

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

WRIT PETITION NO.1793 OF 2021

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Dharmendra Maryappa Sawant & Ors. ... Petitioners

V/s.

Sharad Laxman Chavan & Ors. ... Respondents

Mr. Tejpal S. Ingale for the petitioners.

Mr. Umesh R. Mankapure with Ms. Stefy J. Dias for the respondents.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 4, 2023

P.C.:

1. The defendants in a suit for injunction restraining them from disturbing plaintiffs' possession over the suit property are challenging the Trial Court's order allowing amendment to incorporate pleadings regarding relief of partition.

2. Respondent No.1 has filed Regular Civil Suit No.367 of 2012 seeking injunction against the defendants from disturbing plaintiffs' possession over western portion of Gat No.42 and further restraining defendants from creating new road over Gat No.42 and for enforcement of rights conferred by authorities under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

3. It is undisputed that the trial had commenced. After commencement of trial plaintiffs filed an application under Order

6 Rule 17 of the Civil Procedure Code, 1908 to incorporate pleadings regarding relief of partition, however, prayer for partition was not pleaded. The Trial Court, by the impugned order, allowed the amendment holding that defendants' evidence is yet to start.

4. In view of judgment in the case of **Vidyabai And Others vs. Padmalatha And Another** reported in (2009) 2 SCC 409, the Apex Court in paragraph 19 has held as 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.”

5. In view of the said judgment, it was obligatory on the Trial Court to hold an inquiry as to whether the plaintiff had pleaded due diligence as required under proviso to Order 6 Rule 17 of the Civil Procedure Code, 1908.

6. The expression “due diligence” has been interpreted by the Apex Court in the case of **J. Samuel and Others vs. Gattu Mahesh and Others**, reported in (2012) 2 SCC 300. The Apex Court in paragraphs 19 and 20 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.”

7. In the application plaintiff has not furnished explanation as regards due diligence as contemplated by paragraphs 19 and 20 of **J. Samuel and Others** (supra). Therefore, such amendment cannot have been allowed by the Trial Court.

8. Hence, following order:

a) The impugned order dated 17th January 2020 passed by the Trial Court in Regular Civil Suit No.367 of 2012 below Exhibit-63 is quashed and set aside.

b) The application below Exhibit-63 in Regular Civil Suit No.367 of 2012 is dismissed.

c) However, it is made clear that rejection of application for amendment shall not preclude the plaintiff from instituting suit for partition if permissible in law.

9. The writ petition stands disposed of. No costs.

(AMIT BORKAR, J.)