

Nikita

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

WRIT PETITION NO.6859 OF 2022

Rajmal Alias Rajesh Chandanmal Luniya
and Anr.

... Petitioners

V/s.

Pankaj Amrutlal Navalakha and Ors.

... Respondents

Mr. S.L. Vaswani for the Petitioners.

Mr. Mandar Limaye for the Respondent.

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CORAM : AMIT BORKAR, J.

DATED : DECEMBER 15, 2023

PC.:

1. The petitioners are plaintiffs in Special Civil Suit No.6 of 2017 who have filed a suit for declaration that the agreement dated 30th June 2011 has been cancelled and, therefore, the agreement is not enforceable. Further relief seeking injunction against defendants restraining them from taking benefits of agreement dated 30th June 2011 was sought. Injunction restraining defendants from disturbing plaintiff's possession over the suit property is also sought. The plaintiff also claimed damages.

2. It is not in dispute that the trial commenced in the year 2019.

3. On 17th December 2021, the plaintiff filed an application for amendment to incorporate relief of possession along with injunction restraining defendants from creating third party rights.

4. The Trial Court rejected the application for amendment on two grounds.

1) The amendment sought is inconsistent.

2) Due diligence as required under proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908 is not pleaded.

5. On perusal of the application for amendment, it is evident that the plaintiff has failed to plead due diligence as required under proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908.

6. The law in this regard is settled in view of Judgment in the case of **Vidyabai & Ors. vs. Padmalatha & Anr.** reported in (2009) 2 SCC 409.

“**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.”

7. The expression due diligence is 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 paragraph No.19 and 20 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 it 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.”

8. The judgment in the case of **Vidyabai & Ors.** (supra) has been consistently followed by the Apex Court thereafter. Recently, in the case of **Pandit Malhari Mahale vs. Monika Pandit Mahale & Ors.** reported in (2020) 11 SCC 549, the Apex Court set aside the orders passed by the High Court and Trial Court allowing amendment without recording finding of due diligence as required under proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908. The Apex Court considering the judgment in the case of **Vidyabai & Ors.**, (supra) set aside the orders passed by the Courts below which permitted amendment without recording finding of due diligence.

9. Therefore, in view of failure to plead due diligence, the Trial Court has not committed error of jurisdiction by rejecting application for amendment.

10. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)