

AGK

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

WRIT PETITION NO.9862 OF 2022

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Deepa Suresh Dixit & Anr.

... Petitioners

V/s.

Prasad Madhukar Dixit & Ors.

... Respondents

Mr. K.P. Shetye for the petitioners.

Mr. Ketan Chothani with Ms. Gayatri Kapse and Ms.
Aastha Desai for respondent Nos.1 and 2.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 26, 2023

P.C.:

- 1.** The petitioners are original defendant Nos.1A and 1B in a suit for partition and possession.
- 2.** On 25 October 2007 defendant No.1 expired. Hence, on 9 September 2009 the plaintiff filed chamber summons to bring defendant Nos.1A and 1B on record. The said chamber summons was allowed on 24 March 2015. The petitioners (defendant Nos.1A and 1B) on 14 September 2015 filed written statement.
- 3.** Since defendant Nos.1A and 1B raised defense of previous partition, burden to prove was on defendant Nos.1A and 1B and, therefore, defendant Nos.1A and 1B filed affidavit in lieu of examination-in-chief on 11 November 2016. Therefore, the trial of the suit commenced on 11 November 2016.

4. On 24 July 2019 the petitioner filed chamber summons for amendment of the written statement. By the impugned order, the chamber summons is rejected.

5. The Trial Court rejected the chamber summons on the ground that the defendants do not appear to be due diligent in raising their defense.

6. Since the suit is filed after 2002, the proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908 comes into operation. It is not in dispute that trial of the suit commenced on 11 November 2016. It is, therefore, obligatory on defendant Nos.1A and 1B to plead due diligence as required by proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908 in the chamber summons. Only pleading giving explanation for due diligence is that due to oversight such plea was not incorporated in the written statement. Such defense cannot be termed as 'due diligence'. The expression "due diligence" has been explained by the Apex Court in **J. Samuel & Ors. v. Gattu Mahesh & Ors.** reported in (2012) 2 SCC 300.

7. Since the petitioner has failed to plead due diligence in view of judgment of the Apex Court in **Vidyabai & Ors. v. Padmalatha & Anr.** reported in (2009) 2 SCC 409 where the Apex Court has held that due diligence is the jurisdictional fact and without recording satisfaction of due diligence, the Court has no power to allow amendment. Since the petitioner has failed to make out a case of due diligence, no error can be found with the order passed by the Trial Court.

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

(AMIT BORKAR, J.)