

SA Pathan

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

WRIT PETITION NO.14505 OF 2022

Jayashri Ashok Unale

... Petitioner

V/s.

Pandurang Ananda Jadhav & Ors

... Respondents

Mr. Swaroop Mahavir Karade, for Petitioner.

Mr. N. J. Patil i/by Mr. Patil Akshay Neminath, for
Respondent Nos.1 to 3 & 4A to 4C.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 19, 2023

P.C.:

1. The petitioner is original plaintiff who is challenged order passed by the Trial Court rejecting application for amendment of the plaint to incorporate new property in a suit for partition. The Trial Court rejected the application on the ground that “due diligence” as required under proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908 is not pleaded.

2. The petitioner filed Regular Civil Suit No.499 of 2012. In the said suit, Gat Nos.614 and 659/2B were described as the suit properties. The plaintiff claims 1/5 share in the suit properties. Further, relief that release deed dated 26 September 1997 be declared as null and void is also prayed.

3. The defendants contested the suit by filing written statement.
4. The petitioner filed affidavit in lieu of examination in chief on 19 September 2019.
5. The petitioner on 12 March 2020 filed an application for amendment of plaint to incorporate entire Gat No.614 as suit property and to add averments regarding invalidity of sale of half share in the Gat No.614 in favour of third party purchaser.
6. The Trial Court rejected the application on the ground that the petitioner failed to prove “due diligence” as required under proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908.
7. On perusal of the application for amendment, it appears that in paragraph 1 of the plaint it is stated that, despite plaintiff’s instructions, the Advocate for plaintiff did not incorporate the necessary averments regarding acquisition of Gat No.614. The plaintiff realized the said fact only at the time of filing of affidavit in lieu of examination in chief. The plaintiff thereafter consulted other persons and contacted her Advocate. At that time, she realized that the entire Gat No.614 was not made suit property and the necessary averments raising challenge to the validity of sale deed of 1981 and 1998 were not made in the suit.
8. According to learned Advocate for the petitioner, filing of affidavit in lieu of examination in chief cannot be termed as commencement of trial. He relied on the judgment of Apex Court in the case of **Anita and Another Vs. Anil and Others** reported in 2021 SCC OnLine SC 3250 where the Supreme Court noted

difference of judicial opinion amongst the Bombay High Court and Calcutta High Court. However, the Apex Court in the case of **Vidyabai And Others Vs Padmalatha And Another** reported in (2009) 2 SCC 409 has held that filing of affidavit in lieu of examination in chief is commencement of trial. In the absence of authoritative pronouncement to the contrary, the settled position of law in view of judgment in the case of **Vidyabai** (Supra) is that filing of affidavit in lieu of examination in chief amounts to commencement of trial. The order dated 13 September 2021 does not lay down any proposition of law which is inconsistent with **Vidyabai** (Supra). The order cannot be termed as either ratio or obiter dicta. Hence, it will not help to the petitioner.

9. The Apex Court, in the case of **J. Samuel and Others Vs Gattu Mahesh and Others**, reported in (2012) 2 SCC 300 had occasion to explain the expression "due diligence" in the context of the proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. The Apex Court, in paragraphs 19 and 20 of the said judgment, has held as follows:

“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."

10. In the light of parameters laid down by the Apex Court in the case of **J Samuel** (Supra) interpreting expression "due diligence", the explanation in paragraph 1 of the plaint by the plaintiff does not fulfill the said parameters as the explanation given by the plaintiff cannot be termed as "due diligence". Therefore, the plaintiff has failed to prove jurisdictional fact of "due diligence". Hence, rejection of amendment by the Trial Court need not be interfere.

11. The writ petition is dismissed. No costs.

(AMIT BORKAR, J.)