

VRJ

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

WRIT PETITION NO.12210 OF 2023

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Sagar Prabhale & Associates

Through Its Partner Sagar Ramchandra

Prabhale

... Petitioner

V/s.

Dilip Sandipani Pore & Ors.

... Respondents

Mr. Nikhil Wadikar with Ms. Shweta Pandey i/by Mr.
Nandu Pawar for the petitioner.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 5, 2023

P.C.:

1. By this petition under Article 227 of the Constitution of India the petitioner/original defendant is challenging rejection of an application for amendment to incorporate pleadings as regards agreement dated 6th December 2003.

2. The respondent who is original plaintiff filed suit for injunction restraining the defendant from creating third party rights over the suit property, mandatory injunction to hand over Flat No.9 and common hall on ground floor and for mandatory injunction to complete construction as per development agreement. The plaintiff filed suit on 1st October 2012.

3. The defendant filed written statement on 25th July 2006.

4. The evidence of the plaintiff is over.

5. After completion of plaintiff's evidence, the defendant on 17th August 2019 filed an application for amendment of written statement to incorporate pleading of execution of agreement dated 6th December 2003. The Trial Court rejected the application mainly on the ground that evidence of the plaintiff is over and, therefore, allowing of amendment would cause prejudice to the plaintiff.

6. Learned advocate for the petitioner submitted that the document of agreement dated 6th December 2003 was not in possession of the defendant and, therefore, the factum of execution of such agreement was not pleaded in the written statement. According to him, amendment is essential to decide real controversy between the parties. In support of his submission he relied on judgment of the Apex Court in the Case of **Baldev Singh & Ors. vs. Manohar Singh & Anr.** reported in (2006) 6 SCC 498.

7. On perusal of the record, it appears that the application for amendment was filed after commencement of trial and after evidence of the plaintiff is over. The due diligence as required under proviso to Order 6 Rule 17 pleaded in paragraph No.2 of the application i.e. the defendant got copy of agreement dated 6th December 2003 while searching old files. Based on such agreement, the defendant is seeking incorporation of pleadings in relation to agreement dated 6th December 2003.

8. Perusal of the written statement indicates that factum of execution of agreement dated 6th December 2003 was not pleaded

in the written statement. The defendant being party to the agreement dated 6th December 2003, it was within his knowledge that such agreement was executed. However, according to the petitioner, unless such document is in possession of the defendant, he could not have pleaded existence of the agreement. In my opinion, said explanation cannot be accepted.

9. For the purpose of pleading execution of agreement in the pleading, it is not necessary that the party needs to be in possession of such document. The document can be placed on record by the defendant as per Order 7 Rule 14 of the Civil Procedure Code, 1908 along with the leave of the Court at any stage thereafter. However, since the fact of execution was within the knowledge of the defendant, he was not precluded from pleading such fact in the written statement.

10. Relying on judgment of the Apex Court in the Case of **Baldev Singh & Ors.** (supra), it is submitted that if the amendment is necessary for deciding real controversy between the parties, the Court should be liberal in allowing such amendment. However, the Apex Court in later judgment in the case of **Vidyabai & Ors. vs. Padmalatha & Anr.** reported in (2009) 2 SCC 409, considered the judgment in the case of **Baldev Singh & Ors.** (supra) and has held that pleading of due diligence in an application for amendment is jurisdictional fact and unless Court record such finding of exercise of due diligence court cannot allow the amendment.

11. The Apex Court, thereafter, in the case of **J. Samuel And**

Others vs. Gattu Mahesh And Others reported in (2012) 2 SCC 300, in paragraphs 18, 19 and 20, held as under:

“**18.** The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their complaints. The court’s discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that;

“...no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of *due diligence*, the party could not have raised the matter before the commencement of trial.”

(emphasis supplied)

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.”

12. 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. The Apex Court considering the judgment in the case of **Vidyabai & Ors.**, set aside the orders passed by the Courts below which permitted amendment without recording finding of due diligence.

13. On overall view of the matter, in my opinion, there is no legal infirmity in the impugned order passed by the Trial Court.

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

(AMIT BORKAR, J.)