

Nikita

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

WRIT PETITION NO.10430 OF 2023

Pramila Khimji Swali @ Khatav Thr.
Power of Attorney Holder Mangilal
Tarachand Sharma and Ors. ... Petitioners

V/s.

Digvijay @ Dilip Khimji Swali (since
deceased) and Ors. ... Respondents

WITH

WRIT PETITION NO.10431 OF 2023

Pramila Khimji Swali @ Khatav and
Ors. ... Petitioners

V/s.

Digvijay @ Dilip Khimji Swali (since
deceased) Thr. Legal Representatives. ... Respondents

Mr. Sanjeev Gorwardkar Sr. Adv. i/b Mr. Gurudas
Gorwadkar for the Petitioners.

Mr. Harshad M. Inamdar for Respondent Nos. 5 to 6.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 1, 2023

P.C.:

1. By this writ petition, order of Appellate Court rejecting application for amendment of plaint and for leading additional evidence under Order 41 Rule 27 is rejected.

2. The petitioner is original plaintiff who had filed suit for

specific performance. The Trial Court dismissed the suit mainly on the ground that plaintiff has failed to prove payment of part consideration.

3. The petitioner, therefore in the appeal filed application under Order 6 Rule 17 to add in the plaint, averments regarding payment of Rs.3,36,300/- from the year 1997 to August 2005. Additional pleadings and readiness and willingness is also pleaded. In addition to the application for amendment, the petitioner prayed to place on record additional documents to indicate various payments made by the plaintiff.

4. The Appellate Court by the impugned order rejected both the applications. Insofar as, the application for amendment under Order 6 Rule 17 is concerned, the suit having been filed after the amendment of 2002, it was obligatory on the plaintiff to plead 'due diligence' as required under Order 6 Rule 17. On perusal of the application of amendment, I do not find pleadings of due diligence. Therefore, order of Appellate Court rejecting the application for amendment cannot be faulted.

5. In so far as the application under Order 41 Rule 27 of Code of Civil Procedure, 1908 is concerned, the Apex Court in the case of **Union of India Vs. Ibrahim Uddin and Anr.** reported in (2012) 8 SCC 148, has held that Appellate Court should postpone adjudication of the application under Order 41 Rule 27 at the time of final hearing. Since, the Appellate Court has adjudicated the application Under Order 41 Rule 27 before the final hearing, the impugned order to the extent of rejecting the application under

Order 41 Rule 27 needs to be set aside and the Appellate Court needs to be directed to adjudicate on the application at the time of final hearing. Accordingly Appellate Court is directed to decide application under order 41 Rule 27 at the final hearing of appeal.

6. With this clarification the petition stands disposed of.

(AMIT BORKAR, J.)