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

WRIT PETITION NO.12388 OF 2023

Mahadev Pandurang Chandgude ... Petitioner
V/s.
Pandurang Waman Chandgude & Ors ... Respondents

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Mr. Pradeep Salgar, for petitioner.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 9, 2023

PC.:

1. By the impugned order dated 17 July 2023, the Appellate Court rejected the application for amendment and for production of documents under Order 41, Rule 27 of the Code of Civil Procedure, 1908.
2. The petitioner is the original plaintiff who filed Regular Civil Suit No.31 of 2011 for partition of properties.
3. The Trial Court dismissed the suit on the ground that the plaintiff did not join all joint family properties.
4. The plaintiff, therefore, filed an appeal.
5. In the said appeal, the plaintiff filed application for amendment to incorporate joint family properties which were not part of the suit properties. The appellate Court rejected such

application by the impugned order.

6. Learned Advocate for the petitioner, relying on the judgment in the case of **Mahila Ramkali Devi & Others Versus Nandram (Dead) Through Legal Representatives & Others**, reported in (2015) 13 SCC 132, submitted that the Court needs to allow amendment liberally. In the facts of the case to avoid multiplicity of the proceeding, amendment is necessary.

7. On perusal of the application for amendment, it appears that the petitioner has not even pleaded due diligence as required under proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908.

8. The Apex Court in the case of **Vidyabai and Others Versus Padmalatha and Another**, reported in (2009) 2 SCC 409, has held that due diligence is the jurisdictional fact and in absence of recording finding on such jurisdictional fact, the Court has no power to allow the amendment. The said judgment has been recently followed by the Apex Court in the case of **Pandit Malhari Mahale Versus Monika Pandit Mahale & Ors**, reported in (2020) 11 SCC 549 wherein the Trial Court and High Court allowed the amendment without recording finding on due diligence. The Apex Court set aside of such order holding that without recording finding on due diligence, the Courts below could not have allowed the application for amendment.

9. In the facts of the case of **Mahila Ramkali Devi** (Supra), the Apex Court was not considering proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908. In absence of consideration of

proviso to Order 6, Rule 17 of the Code of Civil Procedure, 1908, the judgments in the case of **Vidyabai** (Supra) and **Pandit Malhari Mahale** (Supra) would governing the facts in issue. There cannot be dispute about the proposition of law laid down by the Apex Court in paragraph 20 of the judgment in the case of **Mahila Ramkali Devi** (Supra). However, in view of absence of pleading of due diligence of rejection of the plaint by the Appellate Court cannot be faulted.

10. In so far as application under Order 41, Rule 27, is concerned, as per judgment in the case of **Union of India Versus Ibrahim Uddin & Anr**, reported in (2012) 8 SCC 148, such application needs to be considered by the Appellate Court at the time of final hearing of the appeal.

11. The Appellate Court shall consider the application under Order 41, Rule 27 of the Code of Civil Procedure, 1908 at the stage of final hearing of the application.

12. With this clarification, the writ petition stands disposed of. No costs.

(AMIT BORKAR, J.)