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IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Judgment Delivered on: 10.09.2010***

+ CM(M) 685/2010

GOPAL KRISHAN DUA Petitioner
Through: Mr.Prabjot Johar, Advocate

versus

RAJNI DUA @ DOLLY DUA Respondent
Through: Mr.Sunil Mittal and Mr.Asim Naeem,
Advocates for respondent.

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

G.S.SISTANI, J. (ORAL)

1. Present petition is directed against the order dated 19.04.2010 passed on an application under Order VI Rule 17 of the CPC filed by the respondent (petitioner before trial court) for amendment of the petition. The undisputed facts which emerge are that marriage between the parties was solemnized in the month of August, 1989. Thereafter on account of marital discord, respondent filed a petition under section 13 (1) (i) (a) of the Hindu Marriage Act, seeking divorce on the ground of cruelty. A written statement was filed wherein an objection was taken that petition has not been framed in accordance with Rules. Issues were framed

in the matter on 12.05.2008 and thereafter cross-examination of the respondent (petitioner before trial court) concluded in January, 2010. During the cross-examination it was put to the respondent that the petition had not been framed as per Rules 8 and 9 of the Hindu Marriage Act, 1955 Rules (Delhi High Court). Thereafter an application was filed by the petitioner herein under Order VII Rule 11 CPC, seeking rejection of the petition. Immediately, thereafter an application was filed by the respondent herein seeking amendment of the petition.

2. Counsel for the petitioner submits that as per Rule 8 of the Hindu Marriage Act, 1955 Rules (Delhi High Court), every petition is to be accompanied by an affidavit to the effect that it has not been presented or prosecuted in collusion with the respondent. He also submits that this mandatory requirement was not complied with by the respondent herein. He has assailed this order *primarily* on two grounds. Firstly after the commencement of the evidence, the amendment could not have been allowed, in view of the amendment in the Code of Civil Procedure in the year 2002, elaborating on this contention further counsel submits that the application is completely devoid of particulars is vague and extremely casual in nature. He also submits that bare reading of the application would show that the application does not state that on account of due diligence the amendment could not be

carried out prior in time. The second submission made by counsel for the petitioner is that the application for amendment as also the amended petition which has been filed along with the application for amendment, and particularly the affidavit does not contain the amendments which are sought to be made in the main petition. It is submitted that neither in the body of the application it has been prayed that permission be given to amend the affidavit, nor in the amended petition which is sought to be relied upon by the respondent herein. In support of the submissions made, Mr.Johar, counsel for the petitioner has relied upon **Ajendraprasadji N. Pandey & Anr. Vs. Swami Keshavprakeshdasji N. and Anr.** (2006) 12 SCC and more particularly paragraphs 33, 36, 43, 45 and 57, which read as under:

33. Section 16 of the Amendment Act reads as follows:

“16. *Amendment of Order 6.*—In the First Schedule, in Order 6,—

* * *

(iii) Rules 17 and 18 shall be omitted.”

The provision as it exists now after the Civil Procedure Code (Amendment) Act, 2002

Order 6 Rule 17

“17. *Amendment of pleadings.*—The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided 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)

36. Ultimately, to strike a balance the legislature applied its mind and reintroduced Rule 17 by Act 22 of 2002 w.e.f. 1-7-2002. It had a provision permitting amendment in the first part which said that the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (*sic* Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain ¹⁵ limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their

court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.

45. On 13-3-2006, Shri K.P. Swami, Respondent 1 offered in the witness box for cross-examination, however, he was not cross-examined and the application of Appellant 1 for 15 days' adjournment was rejected. Hence, the  17 right to cross-examination was closed and the matter was adjourned to 16-3-2006.

57. It is submitted that the date of settlement of issues is the date of commencement of trial. (*Kailash v. Nanhku*⁴) Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter-affidavit which proves lack of due diligence on the part of Defendants 1 and 2 (the appellants)."

3. While in paragraph 33, the provision Order VI Rule 17 CPC have been quoted, the Apex court in the remaining paragraphs laid stress on the fact that the proviso to Order VI Rule 17 curtails absolute discretion to allow amendment. Stress has also been laid that the Court must satisfy itself that in spite of due diligence the amendment could not have been sought earlier. There is no quarrel to this proposition.
4. It is submitted that counter claim for restitution of conjugal rights has been filed and that allegations are also made that respondent is residing in adulterous relationship.

5. Counsel for the petitioner has also drawn attention of this court to **Bachhaj Nahar Vs. Nilima Mandal & Anr.** 2008 (15) SCALE, 158 and more particularly paragraphs 60, to canvass his argument that in civil suit only such a relief can be granted which form part of the pleadings and not that any Court can on examination of facts grant any relief as it thinks fit.
6. Counsel for the respondent at the very outset submits that the petition under section 13 (1)(i)(a) of the Hindu Marriage Act, admittedly did not contain the mandatory provision of Rule 8 of the Hindu Marriage Act, 1955 Rules (Delhi High Court), however, he submits that the relevant paragraph was missed out inadvertently, due to typographical omission. In the application it has also been stated that the omissions were not deliberate and also that the same would not affect or change the nature of petition in any manner and would not cause prejudice to either of the parties. He further submits that even otherwise, no useful purpose would be achieved and it would be to the benefit of none in case the amendments were not allowed and the petition would have been dismissed, as the respondent is not prevented by any law from filing another petition, however, the same would only waste the precious time of the Court, besides that the parties would face to further harassment and delay. He also submits that petitioner has made all efforts to delay the trial

to the extent that while the issues were framed on 12.05.2008 various opportunities were availed by the petitioner to cross-examine the respondent herein. He further submits that petitioner did not take a specific objection in the written statement and it is only for the first time in an application under Order VI Rule 17 CPC that a specific objection was taken that the petition is not in conformity with the Hindu Marriage Act, 1955 Rules (Delhi High Court), which led to filing of the application for amendment. He also submits that the application for amendment was filed within days of filing of the application under Order VII Rule 11 CPC, which would show that respondent was neither callous nor it would show any inaction on her part.

7. I have heard counsel for the parties and perused the application which has been filed. It may be noticed that by the application, applicant has sought necessary amendments in the main petition. Undoubtedly, there is no specific prayer that the amendment may also be allowed in the affidavit to the amended petition. The supreme Court in the case of **Ajendraprasadji N. Pandey (Supra)**, while noticing the amendment in the Order VI Rule 17 CPC, has observed that the object of this proviso was to prevent frivolous applications which were being filed to delay the trial. Further it was observed that Order VI Rule 17 CPC was amended due

to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by the parties interested in delaying the trial. That to shorten the litigation and speed up disposal of the suits, the amendment was made by amending Act, 1999. The Apex Court in various judgments including in the case of **Kailash Vs. Nanhku** 4 (2005) 4 SCC 480, held that all the rules and procedures are handmaids of justice and the language employed by the draftsmen of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. What is to be seen in the facts of this case is whether the respondent herein (petitioner before the trial court) has made this application with a view to delay the trial or whether the application has been made seeking amendment which is formal in nature. Having regard to the fact that a petition for divorce has been filed on the grounds of cruelty and the same is being hotly contested, sure enough could not have been presented in collusion with the respondent, keeping in view the fact that the allegations and counter allegations which have been made including a counter claim which has been raised by the petitioner herein that the respondent is in adulterous relationship with another person. The petitioner has also not spared the present proceedings and has also placed a photograph on record, to show the situation which

exists between the parties. While certainly, the respondent could have elaborated that the amendment could not have been made earlier in spite of due diligence, the application certainly mentions that the act was not deliberate and on account of inadvertent /human/ typographical omission. It cannot be said that the respondent would have in any way benefited from not including the formal amendment in the petition or in the affidavit, much less can it be said that this delay in making the application was with an intention to delay the matter.

8. I find no infirmity in the order of the trial court and also find no force in the submission made by counsel for the petitioner that since a specific averments was not made in the petition that the amendment be permitted in the affidavit as well, as on filing of an amended petition, obviously the same would have been supported by an affidavit, which would swear the contents to be true and correct.
9. Having heard counsel for the parties and taking into consideration the facts of this case, I find no infirmity in the impugned order and accordingly, the petition is dismissed.
10. At this stage, counsel for the petitioner submits that in view of the orders passed, he will not press the application filed under Order VII Rule 11 of CPC, however, he prays that time for filing the written statement, may be extended. Counsel for the respondent fairly agrees to the same. Let the written

statement be filed within three weeks.

11. In view of above, petition stands disposed of.

September 10, 2010
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G.S. SISTANI, J.