

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 447 OF 2015**

Mrs. Brigida De Souza,
alias Brigida Miranda,
C/o Mrs. Filomena Miranda,
Dr. Dada Vaidya Road,
Shambahvi Apartments,
Ground floor,
Panaji – Goa.

..... Petitioner

V e r s u s

Mr. Juino De Souza,
C/o Mrs. Mary De Souza,
Khilchi Terrace,
Near Grant Road Emporium,
Grant Road (E),
Mumbai – 7.

..... Respondent

Mr. J. A. Lobo, Advocate for the Petitioner.

Mr. V. Menezes with Ms. V. Shetye, Advocates for the Respondent.

CORAM: C. V. BHADANG, J.
DATE: 11TH SEPTEMBER, 2015.

ORAL ORDER:

By this petition, the petitioner is challenging the order dated 17/3/2015 (below Exhibit 30) passed by learned Senior Civil Judge, Panaji by which the application for amendment of plaint, filed by the petitioner has been rejected in M. P. No.47/2000.

2. The brief facts necessary for the disposal of the petition may be

stated thus:

The parties are husband and wife. The petitioner has filed MP.47/2000/A for divorce, custody of children, separation of properties and permanent injunction against the respondent. The marriage between the parties was registered with the Civil Registrar of Ilhas at Panaji in the year 1994 having been solemnized on 5/1/1994. According to the petitioner, the parties resided at Grand Road, Mumbai at the ancestral flat of the respondent, which is close to the office of the respondent, who is in pharmaceutical business. The divorce in particular is claimed on the ground of ill treatment. The petitioner has also alleged that the respondent was consuming excessive alcohol and under the influence thereof was behaving violently with the petitioner and her children. The allegations of ill treatment include physical and mental ill treatment, as also threats of physical assault. The said petition has been filed by the petitioner on 24/11/2000.

3. It is a matter of record that the petition was dismissed on 14/12/2004 against which the petitioner had preferred First Appeal No. 271/2006 before this Court. That appeal was allowed on 23/10/2013 thereby remanding the suit to the Trial Court for decision in accordance with law.

4. After the matter was sent back, the petitioner filed an application (Exhibit 30) on 2/4/2014 for amendment of the petition.

According to the petitioner after the year 2004, there are several subsequent developments which are relevant for deciding the controversy. The petitioner claims that this includes an attempt of the petitioner to reconcile with the respondent “at the behest of the Court” and she conceiving a third child in the month of March 2001. It was contended that the respondent had left the petitioner “high and dry at the home” without giving any money, as earlier the respondent used to give an amount of Rs.10,000/- per month for her personable use. It would not be necessary to set out all the contentions in the application for amendment, suffice it to mention that the material ground was that the amendment is necessitated on account of subsequent developments. The said subsequent developments which are relevant according to the petitioner are set out in paras IV (1) to (28). In para VI (a) to (g), the petitioner also sought liberty to amend the prayer clause.

5. The respondent filed a reply (Exhibit 33) opposing the same. It was contended that the amendments sought are barred by law of limitation. It was contended that the trial has commenced in the suit and after the issues were framed the recording of evidence had begun. The petitioner has filed her Affidavit-in-Evidence and her part cross examination is recorded. It was contended that thus under the proviso to Rule 17 of Order 6 of C.P.C., the amendment would be impermissible. It was also contended that by the proposed amendment, the petitioner seeks to introduce a totally new and

inconsistent case based on a new cause of action which will cause serious prejudice to the respondents. It was contended that the petitioner was previously allowed to amend the plaint and this is the second attempt for amending the plaint. The proposed amendment if allowed, would take away the vested rights of the defendant acquired by lapse of time. The proposed amendment has the effect of maligning and defaming the defendant's mother who expired, some time in the year 2006. In short, it was contended that the amendment apart from being belated, is also not necessary and relevant for deciding the real controversy in dispute.

6. The learned Trial Court noticed the observations of this Court in para 13 of the judgment dated 23/10/2013 in First Appeal No.271/2006 wherein while restoring the suit, this Court had observed that the Trial Court will have to decide the matter on the basis of the pleadings of the parties and ascertain whether the applicant is entitled for the reliefs, “whilst also noting the subsequent events”. It was found that these subsequent events were the ones which were brought on record by virtue of the earlier amendment to the plaint namely, the birth of the third child to the parties. The learned Trial Court thus refused to accept the submission on behalf of the petitioner that by virtue of para 13, the petitioner was permitted to file an application for amendment and to bring some irrelevant and extraneous material on record. The Trial Court also accepted the contention based on the proviso to Order 6

Rule 17 of C.P.C. The learned Trial Court also noticed that the petition was of the year 2000 and was required to be disposed off on priority basis. In the face of such a finding the application came to be rejected. Feeling aggrieved, the petitioner is before this Court.

7. I have heard Mr. Lobo, the learned counsel for the petitioner and Mr. Menezes, the learned counsel for the respondent.

8. It is submitted by Mr. Lobo the learned counsel appearing for the petitioner that under Order 6, Rule 17 of C.P.C. the Court can allow an amendment at any stage of the proceedings, provided it is necessary for deciding the real controversy in dispute. It is submitted that the proviso to Rule 17 of Order 6 of C.P.C cannot be an absolute bar in such a case. It is submitted that this Court while restoring the petition had observed that the Trial Court shall decide the suit after taking into consideration the subsequent events. It is submitted that the amendment only aimed at bringing the subsequent events on record which are relevant and germane for deciding the real controversy in dispute. The learned counsel has placed reliance on the decision of this Court in **Ambreen Akhoun Vs. Aditya Aurn Paudwal and Ors., reported in LAWs (BOM)-2015-8-8**, in order to submit that the relief as is available to the petitioner under sections 18 to 22 of the Protection of Women from Domestic Violence Act, 2005 (The Act, for short) can also be

claimed in any other legal proceedings before the Civil Court, Family Court or a Criminal Court. This contention was in the context of the fact that by virtue of the proposed amendment, the petitioner is also incorporating pleadings as to the failure of the respondent to pay maintenance and is seeking appropriate reliefs by amendment of the prayer clause. He, therefore submits that the petition needs to be allowed.

9. On the contrary it is submitted by Mr. Menezes, the learned counsel appearing for the respondent that the main petition, is of the year 2000 and has dragged on for more than 15 years. It is submitted that the nature and character of the proposed amendment as set out in para IV (1) to (28) would clearly show that extensive amendments are sought to be made thereby incorporating allegations which are either inconsistent or which are not necessary for deciding the controversy or they are such which would change the nature of the petition itself. He, therefore submitted that the petition be dismissed.

10. I have given my anxious consideration to the rival circumstances and the submissions made. With the the assistance of the learned counsel for the parties, I have perused the impugned order as also the judgment of this Court in First Appeal No. 271 of 2006. I have also perused the application for amendment and the reply filed thereto. In view of the rival submissions the

question which would arise for determination is as to whether the amendment needs to be allowed and as to whether the impugned order needs interference in exercise of the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India.

11. There cannot be any manner of dispute with the proposition that under Order 6 Rule 17 of C.P.C. the Court has ample discretion to allow the amendment of the pleadings at any stage of the proceeding. It is now well settled that all such amendments which are necessary for the purpose of determining the real questions in controversy between the parties have to be allowed. The question whether the particular amendment would be such as would be necessary for deciding the real question in controversy would be a question of fact to be decided in the facts and circumstances of each case. The general power as conferred under Rule 17, Order 6 of C.P.C is subject to the rider as mentioned in the proviso thereto. It can thus be seen that no application for amendment shall be allowed by the Court, after the Trial has commenced, unless and until the Court comes to the conclusion that inspite of due diligence the party would not have raised the matter before the commencement of the trial. It is true that normally the Court would be liberal in allowing amendments which are based on developments subsequent to the filing of the petition and or the written statement, as the case may be. This is because in such a case the party cannot be expected to include the pleadings

which are themselves in the form of subsequent developments when the petition or the written statement is filed. However, this liberal approach would again be subject to the main requirement that the amendment is necessary for deciding the real question in controversy and secondly the party seeking amendment has acted with due diligence. There are other considerations which arise namely, where the amendment is such as would change the nature of the suit or petition itself and thereby cause prejudice or change the vested right of the adversary which are relevant, while deciding whether the amendment needs to be allowed. Let us now examine the facts in the present case in the context of the principles which by now are too well settled to be restated.

12. I would first deal with the submission based on the observations of this Court in First Appeal No. 271/2006. A perusal of the judgment would show that the respondent had filed an application in the petition on 3/7/2004, praying inter alia for dismissal of the suit on the ground that the parties were living together. This was after the petitioner amended the petition saying that she had made all attempts for reconciliation and had started residing with the respondent. The petitioner brought on record the fact of birth of their third child. The Trial Court, allowing the application filed on 3/7/2004, dismissed the petition. This Court while remanding the order held thus in para 13:

Taking note of the ratio laid down by the Apex Court, the learned Judge would have to decide the matter on the basis of the pleadings of the parties and ascertain whether the appellant is entitled for the reliefs, whilst also noting the subsequent events. It is also pertinent to note that the appellant desires to proceed with the petition claiming that the cause of action still survives and tried to explain the circumstances in which the consequent events have taken place. In such circumstances, the learned Judge was not justified to dismiss the matrimonial petition filed by the Appellant.

13. It can thus be seen that the observations about the trial Court noting the subsequent developments had to be read in the context of the subsequent development which was already brought on record, namely, the birth of the third child. Those observations would appear to be in the context of the submission that, in view of birth of the third child, after filing of the petition, the cause of action would not survive. The petitioner wanted to contend that, inspite of the said subsequent development, the cause of action would survive. A perusal of the judgment does not show that any submission was advanced on behalf of the petitioner that the petitioner intends to seek further amendment. Thus, the observations cannot read to mean that this Court had granted liberty to the petitioner to seek further amendment. Even

assuming that any such liberty is granted, it would always be open to the Trial Court to decide such application on its own merits. The observations of this Court indicating requirement to note the subsequent developments cannot be pressed into service to say that events which may not be relevant for deciding the controversy in dispute can be allowed to be placed on record. Thus in my considered view, the reliance placed on the observations of this Court, in the Judgment dated 23/10/2013 in First Appeal No.271 of 2006 is of no avail to the petitioner.

14. A perusal of the proposed amendments in para IV (1) to (28) would show that extensive amendments are sought to be introduced, which are broadly in the nature of some allegations as to ill treatment, the financial condition of the respondent (the list of bonds held by the respondent are listed in para 17) and some acts of threats allegedly held out by the respondent. There are some allegations made in para 23 about the respondent allegedly narrating, how his friend a police officer, got gangsters killed in an encounter. I have carefully gone through the proposed amendments and I do not find that any exception can be taken to the findings recorded by the learned Trial Court that they may not be relevant for deciding the controversy in dispute. The petitioner has to establish her case as set out in the petition (as amended on the earlier occasion), including the allegations of cruelty.

15. The decision in case of Ambreen Akhoon (supra) also cannot come to the aid of the petitioner. There cannot be any dispute that the reliefs available to the petitioners under sections 18 to 22 of the D.V. Act can be claimed in any other legal proceedings. The case of Ambreen Akhoon does not involve any claim for amendment, as such. In my considered view the proposed amendment would certainly change and/or enlarge the scope of the petition. On a careful consideration of the impugned order, I do not find that the same requires interference in the exercise of the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India as it cannot be said that the impugned order has the effect of causing any manifest injustice, (see **Radhey Shyam and Another Vs. Chhabi Nath and others, reported in (2009) 5 S.C.C 616**). It is needless to mention that the rejection of the amendment would not dis-entitle the petitioner from taking recourse to any other remedy if so advised, as may be available to her in law in substantive separate proceeding seeking the relief of maintenance and/or in respect of the property. Subject to this, there is no reason to interfere with the impugned order. Consequently, the petition is hereby dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/-