

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7867 OF 2011

Sanjeev Sudamrao Abnave	..	Petitioner
VS.		
Rupali Sanjeev Abnave	..	Respondent

Mr. A. Sarwate for Petitioner.
Mr. K. A. Chottani for Respondent.

CORAM : M. S. SONAK, J.
DATE: 18 DECEMBER 2015

P.C. :-

1] The challenge in this petition is to the order dated 7 June 2011 made by the Family Court at Pune allowing the respondent's application seeking leave to amend petition no. 91 of 2010.

2] The respondent has instituted the aforesaid petition seeking divorce, *inter alia* on the grounds of desertion and cruelty. By the application at Exhibit 34, the respondent applied for leave to amend, by way of introducing certain averments to the effect that the petitioner has avoided having physical relationship with the respondent without any justifiable reasons. By the impugned order dated 7 June 2011 the Family Court has granted leave. Hence, this petition by the petitioner - husband.

3] Mr. Sarwate, the learned counsel for the petitioner has submitted that the very application seeking leave was mala fide. He submits that in this very petition, the petitioner had applied for a counter claim seeking restitution of conjugal rights. Therein, the petitioner had taken out an application (Exhibit '13') seeking a restraint upon the respondent and her family members from prohibiting the petitioner from entering into the matrimonial home. The Family Court, decided this application in favour of the petitioner by recording a finding that there is no substance in the contention of the respondent - wife that the petitioner had deserted her. Mr. Sarwate submits that an application seeking leave to amend was filed for an oblique purpose of attempting to overcome the effect of such finding in the order made by the Family Court.

4] Mr. Sarwate further submitted that the respondent, in the petition as originally filed, has nowhere alleged that the petitioner has avoided maintaining the physical relations with her for any unjustifiable reasons. This significant omission, according to Mr. Sarwate constitutes an admission. He submits that by permitting amendment, the respondent has been permitted to set up an entirely new case seeking to displace completely the admissions made by her by way of such significant omissions. This, Mr. Sarwate submits, is impermissible in view of the decision of the

Apex Court in the case of *M/s. Modi Spinning and Weaving Mills Co. Ltd. & Anr. vs. M/s. Ladha Ram and Co.*¹

5] Mr. Sarwate finally submitted that the proposed amendment, seeking to introduce an entirely new and distinct cause of action from the one set out in the original petition. The cause of action is based upon certain events, which are alleged to have taken place prior to the institution of the main petition. He submits that grant of leave to amend, in such circumstances is clearly impermissible in view of the decision of the Hon'ble Apex Court in the case of *Alkapuri Co-operative Housing Society Ltd. vs. Jayantibhai Naginbhai (deceased) through L.Rs.*²

6] Mr. Chottani, the learned counsel appearing for the respondent has countered the submissions of Mr. Sarwate. He submits that in the petition as originally filed, grounds of desertion and cruelty have already been raised. By the proposed amendment, the ground of cruelty is sought to be elaborated. The amendment was applied for at the stage when the trial was yet to commence. There were no admissions in the pleadings made earlier and therefore, there arises no question of displacement of such admissions. Mr. Chottani has submitted that there is neither any

1 AIR 1977 SC 680(1)

2 AIR 2009 SC 1948

jurisdictional error in the making of the impugned order, nor the same vitiates by perversity.

7] Having heard the learned counsel for the parties and perused the record, in my judgment, no case is made out to interfere with the impugned order. There is no question of malafides involved in the making of the application seeking leave to amend. The so-called finding in the order made by the Family Court upon Exhibit '13', is only a *prima facie* finding. In fact, in order to establish that such *prima facie* finding need not be confirmed, the respondent was justified in seeking amendment to the pleadings, so that the respondent is able to lead better evidence upon this aspect. In such circumstances, it cannot be said that there are any malafides involved in seeking leave to amend.

8] This is also not a case where the proposed amendment seeks to displace any admissions on record. The original petition was on the grounds of cruelty and desertion. The proposed amendment merely seeks to elaborate the aspect of cruelty and desertion. Such an amendment is always permissible and the same was rightly allowed by the trial Court. The decision in the case of *Modi Spinning and Weaving Mills Co. Ltd.* (supra) has no application to the facts and circumstances of the present case. In

the said decision, the attempt was to withdraw specific admissions and to set up an entirely new and different case. This is not a situation in the present case.

9] This is also not a case of some new cause of action as such has been alleged. This is a case where the grounds for divorce i.e. desertion and cruelty are sought to be elaborated upon. The application seeking leave to amend has set out better particulars in the matters of such pleadings. Therefore, even the decision in the case of *Alkapuri CHSL* (supra) is not attracted to the present case.

10] There is neither any jurisdictional error nor perversity in the making of the impugned order. Therefore, there is no reason to interfere with the impugned order.

11] The Family Court is directed to dispose of the pending petition as expeditiously as possible and in any case within a period of one year from the date of production of authenticated copy of this order.

12] The parties to appear before the Family Court on 19 December 2015, which is even otherwise the date already fixed by the Family Court.

13] This petition is dismissed. Interim order, if any, stands vacated.

14] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

Chandka