

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

WRIT PETITION STAMP NO.2505 OF 2017

Lynette Fernandes : Petitioner
versus
Jude Fernandes and anr. : Respondents.

Mr. Sanjay Bhatia for the Petitioner.
Mr. S D Rayrikar, AGP for the Respondent No.2.

CORAM : R. M. SAVANT, J.
DATE : 07th February 2017

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 02/01/2017 passed by the learned Judge of the Family Court No.7, Mumbai by which order the application for amendment filed by the Petitioner came to be rejected.

2 The Petitioner herein has filed Marriage Petition No.A-808 of 2010 for judicial separation in the year 2010. It seems that thereafter the Petitioner had sought various amendments in the Marriage Petition as well as in the prayer clauses, as a result of which the Petitioner has claimed judicial separation, permanent injunction and a decree of dissolution of marriage. The trial in the Marriage Petition has progressed inasmuch as the Petitioner has completed her evidence and the cross examination of the Respondent is going on. The Petitioner has filed the instant Application Exhibit 81 seeking to

amend the Marriage Petition so as to incorporate the pleadings in respect of the alleged payment/contribution made by her towards the purchase of matrimonial home in which according to her, she has 2/3rd undivided share. The Petitioner also wants to incorporate pleadings about Goa property which according to her has been disposed of by the Respondent, and also wants to incorporate the pleadings in respect of movable and immovable properties situated at various locations in Mumbai. She also wants to incorporate the pleadings as regards alleged damage caused by the Respondent to most of the consumer items purchased by her. She also wants to incorporate the pleadings as regards the proceedings filed before the Metropolitan Tribunal of the Archdiocese of Bombay. The Petitioner also seeks to incorporate various prayers regarding, declaration, permanent alimony, share in the properties, interest and permanent injunction etc. based on the said pleadings.

3 The said application filed by the Petitioner was opposed to on behalf of the Respondent on the ground that the Petitioner has already amended the Marriage Petition and that second amendment is sought merely to improve her case on the basis of the cross examination of the Respondent. It was the case of the Respondent in the said reply that the facts which are sought to be incorporated by the pleadings now sought by way of amendment were already known to the Petitioner and therefore the Respondent sought the dismissal of the application.

4 The learned Judge of the Family Court No.7 Mumbai considered the said application and has by the impugned order dated 02/01/2017 rejected the same. The said application has been rejected inter alia on the ground that the facts which the Petitioner now seeks to incorporate were very well known to the Petitioner before the commencement of the trial. The learned Judge was of the view that in so far as the proceeding before the Metropolitan Tribunal is concerned, it was always open for the Petitioner to withdraw the said proceeding when she had filed the instant proceeding for judicial separation i.e. divorce. The declaration sought by the Petitioner on the basis of the certificate issued by the Metropolitan Tribunal was considered by the learned Judge of the Family Court and he was of the view that the annulment of marriage and dissolution of marriage are two different things. The learned Judge was of the view that if it is the case of the Petitioner that the marriage has been annulled there is no need to seek decree of dissolution of marriage. The learned Judge has also considered the judgment of a learned Single Judge of this Court in **Mudra Salt and Chemical Industries vs Collector, Thane.** reported in **2001(3) Mh.LJ 151** which judgment according to the learned Judge of the Family Court would have no application. As indicated above by the impugned order dated 02/01/2017 the learned Judge of the Family Court No.7, Mumbai has dismissed the application (Exhibit 81) filed by the Petitioner.

5 The learned counsel for the Petitioner Shri Bhatia would contend that the facts sought to be brought on record by way of amendment were the facts relating to events which are subsequent to the filing of the Marriage Petition. The learned counsel for the Petitioner would seek to fortify the said submission by contending that after the order was passed by the learned Metropolitan Magistrate on 26/09/2016 as also after the Respondent started harassing the Petitioner, that the cause for moving the amendment application arose. It was also the submission of the learned counsel for the Petitioner that the certificate of annulment was also received by the Petitioner during the same time as when the Respondent was under cross examination. The learned counsel sought to place reliance on the judgment in *Mudra Salt and Chemical Industries vs Collector, Thane and others* reported in *2001(3) Mh.L.J.151* and , in *Hari Shankar Singhania & ors. v/s Dr. Gaur Hari Singhania & ors.* reported in *2003(1) ALL MR 548* in support of his contention that the application (Exhibit 81) for amendment of the Marriage Petition be allowed.

6 Having considered the submissions of the learned counsel for the Petitioner Shri Bhatia, in my view, there is no merit in the above Petition. As recorded in the impugned order, the instant application has been moved on 30/09/2006 when the Respondent was under cross examination which had started earlier. The fact that the Petitioner has completed her evidence cannot be disputed. In so far as the pleadings sought to be incorporated by way of

amendment are concerned, the learned Judge of the Family Court was right in holding that the said facts were very well known to the Petitioner prior to commencement of the trial. In so far as the amendment application is concerned, the tests laid down for being permitted to amend the pleadings after the trial has commenced cannot be said to be satisfied in the instant case.

7 In so far as the certificate of annulment of marriage is concerned, though it is well settled that at the time of consideration of the application for amendment of pleading, the merits of the case sought to be incorporated by way of amendment, need not be gone into. However, in so far as the present case is concerned, having regard to the fact that the Petitioner is claiming dissolution of marriage, the declaration sought by the Petitioner of annulment of marriage would therefore be contrary to the relief sought which is of dissolution of marriage. Hence on a prima facie view, the learned Judge of the Family Court can be said to have come to a conclusion that the annulment of marriage and dissolution of marriage are two different things and they have therefore no causal connection with each other. In so far as the judgment in *Mudra Salt'* case and *Hari Singhania's* case (supra) are concerned, they would not further the case of the Petitioner having regard to the facts and circumstances of the present case wherein the proceedings are at a stage where the evidence of the Respondent has substantially progressed and is on the verge of completion in the near future. Having regard to the said stage of the

proceedings, the onus of the Petitioner was all the more, to prove that the facts which are sought to be incorporated were not within the knowledge of the Petitioner and came to her knowledge only during the time when the cross examination of the Respondent was going on. From the facts sought to be pleaded, the test laid down cannot be said to be satisfied by the Petitioner as the said facts can be said to be well within the knowledge of the Petitioner even prior to commencement of trial. Hence no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]