

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

WRIT PETITION NO. 5037 OF 2017

Ms.Manisha Nitin Urankar @	]	
Kavita Devdatta Rukadikar an adult	]	
Indian Inhabitant, presently residing	]	
near K.C.C. Office, E.P. School Compound	]	
Nagala Park, Kolhapur 416 004	]	Petitioner.

V/s.

Mr.Nitin Deodatta Urunkar, an adult Indian	]	
Inhabitant, presently residing at "Ashirwad"	]	
204 K Patankar Colony, Near Doshi Nursing	]	
Home, Opp. Tourist Hotel, Kolhapur	]	Respondent.

- Mr.Sandesh Shukla a/w. Santosh Sawant for the Petitioner.
- Mr.Chetan G. Patil for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATED : 9th OCTOBER, 2017.

ORAL JUDGMENT :-

1] Rule. Rule made returnable forthwith.

2] Heard learned counsel for both the parties finally at the stage of admission itself.

3] This petition is directed against the order dated

15/02/2017 passed by the Principal Judge, Family Court, Kolhapur in P.A. No.110 of 2015 thereby rejecting the Petitioner's application for amendment in written statement, filed under Order 6 Rule 17 of Civil Procedure Code (C.P.C.).

4] This petition for divorce is filed by the Respondent-husband against the Petitioner on the ground of cruelty, desertion and non consummation of marriage. As per the case of the Petitioner-wife after the filing of the said petition her husband repeatedly gave her assurance that the petition was filed only at the behest of his elder sister and he will ensure that divorce will not be granted. Accordingly, initially he did not pursue the petition. Therefore, it was dismissed for default. Thereafter, he even did not file Restoration Application in time. Then though he filed Application for Restoration, he again assured her that it was done at the instance of his sister. It is the contention of the Petitioner that all along she was given the hope by the Respondent and his parents that she will be accepted again in the house of the Respondent. Meetings were also held to that effect but ultimately it was of no use.

5] When the hearing of the petition commenced, she realised that the Respondent was misguiding her. At the time of his

cross-examination she noticed that husband was making certain false statements and therefore she wanted to cross-examine him on that aspect. Her cross-examination was however restrained on certain aspects on the ground that there was no pleading to that effect in the written statement. Hence she was constrained to file the application for amendment in the written statement to bring on record the fact that the marriage was actually consumed and therefore, the ground of non consummation of marriage is not true and correct.

6] This application was resisted by the Respondent contending *inter-alia* that application was filed at a very belated stage i.e. after the trial has commenced. The ground or the reason which is offered by the Petitioner for the said delay is not at all just or true and on the face of it also, it cannot be accepted. Much reliance was placed on the Proviso to Order 6 Rule 17 of C.P.C. to submit that as per the said Proviso, 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 the trial, Application for amendment cannot be allowed after the trial has commenced. In this case, it was urged that the trial has commenced. The

Respondent is already under cross-examination and therefore as no ground is made out to show that there was due diligence on the part of the Petitioner, the application needs to be dismissed.

7] Learned trial Court, after hearing both the parties, was pleased to accept the submission of the Respondent and it was held that as this amendment was sought after about 11 years from the date of filing the petition for divorce and no plausible explanation was offered by the Petitioner as to why such amendment was not sought at the earlier stage, the trial Court rejected the said application.

8] In this Writ Petition, as the entire emphasis of learned counsel for Respondent is on the Proviso to the Order 6 Rule 17 of C.P.C. for ready reference it is reproduced as follows;

“Amendment of Pleadings.- The Court may at any stage at the proceedings allow either party to alter or amend his pleadings 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.”

9] The law is well settled that the applications for amendment in the pleadings are required to be allowed liberally and so far as amendments in written statement are concerned the approach of the Court needs to be more liberal *vis-a-vis* the amendment in the plaint. It is also equally well settled that such amendments which are necessary for the purpose of determining the real question and controversy between the parties, they are necessarily to be allowed by the Court.

10] Learned counsel for the Petitioner has also in this respect relied upon two decisions of the Apex Court; one that of *Andhra Bank vs. ABN Amro Bank N.V. and Others*, (2007) 6 SCC 167, wherein it was held that, “It is well settled that delay is no ground for refusal of prayer for amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of real controversy between the parties to the suit”.

11] In second decision in the case of *B.K. Narayana Pillai vs.*

Parameswaran Pillai and Another, (2000) 1 SCC 712, it is held that, “The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. Otherwise all amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken.”

12] In this decision also, it was held that the delay in filing the petition for amendment of the pleadings, if any, should be compensated properly by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

13] Thus the legal position so far as the amendment of

pleadings is concerned, till the Amendment was brought on the statute book itself, by inserting the Proviso to Order 6 Rule 17 of C.P.C. is that all the amendments should be allowed liberally, if they are necessary to decide the real controversy between the parties and as regards the amendment in written statement, the approach of the Court can be more liberal.

14] Now in view of this Amendment in Order 6 Rule 17 of C.P.C. on account of insertion of the Proviso, the things have changed a bit as the Proviso provides that once the trial commences, 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, no application for amendment shall be allowed. The Apex Court was, in the case of *Vidyabai and Others vs. Padmalatha and Another*, (2009) 2 SCC 409, while considering the effect of this Proviso, pleased to observe that, "this proviso is couched in a mandatory form and as a result the Court's jurisdiction to allow such an application for amendment is taken away, unless the conditions precedent therefore are satisfied and the said conditions are that the Court must come to the conclusion that in spite of due diligence, the parties could not have raised the matter before commencement of

the trial”.

15] Learned counsel for the Respondent has also relied upon the decision of this Court in case of *K.T. Kubal and Company vs. Mujibur Rehman Haji Israr Alam Siddiqui*, (2015) 3 Mh.L.J. 892, wherein also, while considering the effect of this proviso, it was held that, “if the application for amendment is filed after the commencement of the trial, there would be one more jurisdictional fact to be established which is exercise of due diligence. The applicant must establish that despite due diligence he could not have raised the matter before the commencement of trial. This could be the first jurisdictional fact for such application. Unless the jurisdictional fact is established, Court cannot move to the second jurisdictional fact of the necessity for the purpose of determining the real controversies between the parties”.

16] According to learned counsel for the Respondent, therefore, this jurisdictional fact, as to whether despite due diligence the Petitioner could not have raised this matter before the commencement of the trial, needs to be established first and foremost before entering into the question, whether such amendment is necessary or not.

17] Now as regards this aspect, in the application itself, the Petitioner has stated that though the Respondent had filed petition for nullity of marriage against her, after filing of the said petition, he has repeatedly given her assurance and confidence that the same is filed at the behest of his elder sister and he will ensure that divorce will not be granted. Hence she remained assured. This ground which is given by the Petitioner in the application appears to be probable and true because it is a matter of record that this petition was not pursued by the Respondent and, as a result, it came to be dismissed for default on 17/07/2007. Thereafter, he had not filed the application for restoration for about two years. Only in the year 2009 he filed the application for Restoration with application for condonation of delay which was also not pursued diligently and ultimately after 6 years it came to be allowed by order dated 10/04/2015. The very fact that the said petition for divorce came to be dismissed for default, probabalises the ground put up by the Petitioner that the Respondent himself was not keen to pursue this petition for divorce and it was merely filed at the instance or at the behest of his sister. After restoration of this petition, she has filed this application for amendment in written statement on 08/12/2016

after the cross-examination of the Respondent started and she was restrained from putting certain questions to the Respondent as there was no pleading to that effect.

18] Therefore, it can not be said that the Petitioner has not acted with due diligence. The words “due diligence” are not prescribing any rigid formula and cannot be circumscribed in any iron jacket formula. They take the colour of the particular facts and circumstances of each case.

19] In the instant case, one has to give regard to the fact that the Petitioner remained assured on account of the hope given by the Respondent and only at the time of cross-examination, when her counsel was not allowed to cross examine the Respondent on the particular aspects, it must have been realized by her that these facts were necessary to be pleaded and then she has filed this application for amendment.

20] It is always desirable that when the parties are coming before the Court, especially in matrimonial proceedings and that too on the serious ground like non- consummation of marriage, cruelty and desertion, both the parties must be given an opportunity to

bring all the facts before the Court, which ultimately assist the Court in arriving at the just decision of the case. Therefore, the law also allows the parties to the matrimonial litigation even to bring on record subsequent events. The approach of the Court needs and has to be different in matrimonial proceedings as the results therein are have far reaching impact not only on the lives of the parties thereto but also on the lives of their children and on the society as such. For that purpose approach of the Court has to liberal while considering the application for amendment.

21] Here the Petitioner wife has given the reason as to why inspite of due diligence she could not have raised this matter in her written statement. There may be more substance in the submission advanced at bar by learned counsel for the Petitioner that as these matters which she wants to bring on record by way of amendment, pertain to the intimate details of their life about consummation or non-consummation of their marriage, she exercised her due diligence not to bring those details on record in her written statement in the light of the assurance or confidence given to her by the Respondent-husband that this petition for divorce was not to be perused.

22] Therefore, having regard to these facts on record, I find that this application for amendment of written statement should have been allowed by the trial Court. As to the prejudice likely to be caused to the Respondent, the same can be compensated always in terms of money. However, having regard to the fact that the application for interim maintenance filed by the Petitioner is rejected and she is already incurring the litigation expenses, it is not proper to impose further the costs on her.

23] As a result, the Writ Petition is allowed with no order as to costs. The impugned order passed by the trial Court is quashed and set-aside.

24] The Application for amendment in the written statement filed by the Petitioner before the trial Court is allowed.

25] The Petitioner shall carryout the proposed amendment within three weeks from the date of this order.

26] The trial Court shall decide the petition pending before it as expeditiously as possible, provided both parties and their learned counsel extend their cooperation.

27] Writ Petition is disposed off in above terms.

28] Rule is made absolute in above terms.

(DR. SHALINI PHANSALKAR-JOSHI, J.)