

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 10900 OF 2016

Anil Gopal Bhatia

...Petitioner

Versus

Smt. Kashish Anil Bhatia

@ Neelam Rattankumar Balchandani

..Respondent.

....

Mr.H.H. Nagi i/b. H.H. Nagi & Asso. for the Petitioner.

Mr.Raju M. Yamgar, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 17th APRIL, 2017

P.C.

1. Heard Mr.H.H. Nagi, learned counsel for the petitioner and Mr.Raju Yamgar, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 6.8.2016 passed by the learned Judge, Family Court, Thane below Exhibit-33 in Petition A-302/2011. By that order, the learned trial Judge rejected the application made by the petitioner-husband under Order VI Rule 17 of C.P.C. for amending the Petition so as to include the ground of desertion

as contemplated by Section 13(1)(i-b) of the Hindu Marriage Act, 1955 (for short, 'Act').

3. Mr. Nagi submitted that the petitioner has instituted the Petition for divorce under Section 13(1)(i-a) of the Act on 1.10.2011. He submitted that the petition is presented on the ground of cruelty. The petitioner also contended that the respondent has deserted him. At the time of instituting the Petition, the period of desertion was not of two years and, therefore, the petitioner did not seek divorce on that ground. During pendency of this Petition, the period of two years is over and, therefore, he filed application for amending the Petition. By the impugned order, the learned trial Judge rejected the application on the ground that the amendment relates to the date of filing of the Petition. If the petitioner is allowed to amend the petition and incorporate the ground of desertion, it will be contrary to Section 13(1)(i-b) of the Act.

4. Mr. Nagi relied upon the decision of Apex Court in ***Sampath Kumar v Ayyakannu and another, (2002) 7 SCC 559*** and in particular paragraph-7 thereof, wherein Apex Court has observed thus :

7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was open to the plaintiff to file a fresh suit and that is one of the reason which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.
5. He submitted that if the petitioner can institute separate proceedings seeking divorce on the ground of desertion in order to avoid multiplicity of the proceedings, the learned trial Judge should have allowed the application.
6. On the other hand, Mr. Yamgar supported the impugned order.
7. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Section 13(1)(i-b) of the Act reads thus:
- “13. Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) XXXXXXXXX

(ia) XXXXXXXXX

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;"

A perusal of the above extracted provision clearly shows that petition can be presented either by husband or wife on the ground that the respondent **has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.** Even if the amendment is allowed, it will relate back to the date of filing of the petition i.e. 1.10.2011. In terms of Section 13(1) (ib), the petitioner has to make out a case that the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. [emphasis supplied]

8. A perusal of the application and in particular paragraph-3 onwards shows that the petitioner has alleged that during pendency of the petition, the period of two years of desertion is completed. In view thereof, I do not find that the

learned trial Judge has committed any error in rejecting the application for amendment. It will be open for the petitioner, if so advised, to institute separate proceedings on the ground of desertion. It is made clear that I have not examined the merits of the ground of desertion. All contentions of the respondent are kept open.

9. Mr. Nagi relied upon the decision of Apex Court in ***Sampath Kumar*** (supra) and in particular paragraph-7 thereof. There is no dispute with the proposition laid down therein. The question is whether the amendment application can be allowed in view of Section 13(1)(i-b) of the Act. In view thereof, the decision relied upon by Mr. Nagi does not advance the case of the petitioner. Hence, Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)