

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 138 OF 2018**

Yogesh Thakur	...	Petitioner
Versus		
Tejal Y. Thakur	...	Respondent

Smt. A. Agni, Senior Advocate with Ms. Elma Estibeiro
Advocate for the Petitioner.

Shri J.P. Mulgaonkar, Advocate for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 18th JULY 2018

PRONOUNCED ON: 8th AUGUST 2018

ORDER:

The challenge in this petition, is to the order dated 11.01.2018, passed by the learned Senior Civil Judge at Panaji, in Matrimonial Petition No. 5/2012/B. By the impugned order, an application Exhibit-D/74, filed by the petitioner, for amendment of the petition, has been dismissed.

2. The petitioner and the respondent were married in Goa, somewhere in October 2010 and the marriage is registered in the office of the Civil Registrar at Tiswadi, Goa. The second signature was made somewhere on 24.11.2010 and the Civil Registrar has issued a certificate of marriage bearing no. 123, certifying the registration of marriage. Unfortunately,

the marriage ran into rough weather, shortly after its solemnization. According to the petitioner, the marriage was not consummated on the first night on account of the frigidity of the respondent. According to the petitioner, the respondent was a believer in the sect of “Brahmakumaris” and was against of allowing any physical relations being kept. As a result, there were no physical relationships between the petitioner and the respondent and the respondent was unable to fulfill any marital obligations. It is in these circumstances that the petitioner filed Matrimonial Petition No. 5/2012/B, for annulment of marriage, which is pending before the learned Senior Civil Judge at Panaji. It is the case made out in the petition that the petitioner hails from a respected family of the State of Goa, although, in para 2 of the matrimonial petition, it is claimed that the mother of the petitioner was from a village in Maharashtra, as well as the father of the petitioner was born at Mhapan village in Maharashtra on 23.10.1940. Incidentally, the father of the petitioner has expired on 10.06.2017.

3. The respondent resisted the petition and has raised a counterclaim for return of her gold ornaments and other articles, given in marriage and is also seeking maintenance of Rs.30,000/- per month.

4. The petitioner examined himself on 17.06.2017 and was under cross examination on behalf of the respondent.

5. On 12.09.2017, the petitioner filed an application (Exhibit-D/74), for amendment of the plaint, in the following terms:

“To be added in paragraph 1a

1a. The plaintiff states that though his family is based in Goa, his ancestors are not of Goan origin. The plaintiff states that his family originally hails from Mhapan Village in the State of Maharashtra. The father of the petitioner was born at Mhapan on 23.10.1940. The plaintiff states that he is therefore governed by the provisions of the Hindu Marriage Act and as such is filing the present suit for annulment of his marriage with the defendant under Section 12 1a and c of the Hindu Marriage Act.

To be added in paragraph 68a

The petitioner is therefore entitled to a judgment and decree annulling his marriage with the defendant under Section 12 1a and c of the Hindu Marriage Act.

To be added in prayer clause a. after the word defendant

under Section 12 1a and c of the Hindu Marriage Act.”

6. It was contended on behalf of the petitioner that although, his family is based in Goa, his ancestors are not goans and his family hails from Mhapan village of Maharashtra and therefore, he is governed by Hindu Marriage Act. The petitioner, therefore, sought amendment of the plaint, *inter alia*, seeking the decree of annulment of marriage under Section 12(1)(a) and (c) of the Hindu Marriage Act.

7. The respondent opposed the application. It was contended that the marriage was solemnized under the Family Laws, applicable to the State of Goa and both the parties are governed by the Family Laws and Law of Divorce. It was contended that the Law of Communion of Assets is applicable and the parties were aware that they are governed under the marriage and succession laws applicable in Goa. It was contended that the petition does not contain averments that the marriage was performed or the parties are governed by the Hindu Marriage Act. It is contended that the application is by way of an after thought.

8. The learned Trial Court, by the impugned order, has dismissed the application. Feeling aggrieved, the petitioner is before this Court.

9. I have heard Smt. Agni, the learned Senior Counsel for the petitioner and Shri Mulgaonkar, the learned Counsel for the respondent and perused record.

10. It is submitted by Smt. Agni, the learned Senior Counsel for the petitioner that the amendment is clarificatory in nature and does not affect the nature of the suit or the cause of action, on the basis of which, the petition for annulment of marriage is filed. Insofar as the proviso to Order VI, Rule 7 of CPC is concerned (inasmuch as the trial in the matrimonial petition has commenced), it is submitted that the Court can look into the aspect of prejudice and the Court can allow the amendment, notwithstanding the proviso being applicable. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and sons and Others, (2009) 10 SCC 84**, in order to submit that the proviso is not an absolute bar, to grant amendment after commencement of trial. Reliance is then placed on the decision of this Court dated 20.03.2013 in Chamber Summons No. 867/2012 in Suit No. 603/2005 (**Rohit A. Kapadia Vs. Perviz J. Modi**), in which, this Court, placing reliance on the decision of the Supreme Court in the case of **Ajendraprasadji N. Pandey Vs. Swami Keshavprakash,**

(2006) 12 SCC 1, has held that the proviso is directory and not mandatory in nature and calls for substantial and not rigid compliance.

11. The learned Senior Counsel for the petitioner was at pains to point out that the fact that the father of the petitioner was from Mhapan village and the birth of the father of the petitioner in the year 1940 has already been pleaded and thus, the proposed amendment does not change the nature of the claim or seeks to introduce a new claim, so as to cause prejudice to the respondent. It is submitted that the proposed amendment is necessary for deciding the real controversy in the matter and as such, ought to have been allowed.

12. The learned Senior Counsel, however, did not dispute that the provisions of the Hindu Marriage Act, are not extended to the State of Goa. Reliance however is placed on the decision of this Court in the case of **Monica Variato Vs. Thomas Variato, 2000(2) Goa L.T. 149**, in order to submit that the claim for annulment of the marriage under the Hindu Marriage Act can be decided by the Court of civil jurisdiction, in the State of Goa, entertaining matrimonial matters.

13. On the contrary, Shri Mulgaonkar, the learned Counsel for the respondent has supported the impugned order. It is submitted that the proposed amendment is neither bonafide nor is shown to be necessary for deciding the real controversy in the matter, as has been rightly held by the learned Trial Court. It is submitted that the application for amendment is casual and lacks, material particulars and the averment that the proposed amendment is necessary for deciding the real controversy in dispute. The learned Counsel was at pains to point out that the application is silent on the requirement to be satisfied under the proviso to Order VI, Rule 17 of CPC. It is submitted that the petitioner has not averred, much less, shown that inspite of due diligence, he was prevented from bringing the amendment, prior to the commencement of trial. It is submitted that on his own saying, the petitioner belongs to the family which hails from Goa. It is submitted that both the parties and their families are domiciled in Goa and the marriage is performed in accordance with laws, as applicable to the State and is registered at the office of the Civil Registrar at Tiswadi, Goa.

14. It is submitted by the learned Counsel for the respondent that the decision in the case of **Monica Variato**

(supra) as well as **Rohit A. Kapadia** (supra) are distinguishable on facts. Insofar as the case of **Monica Variato** (supra) is concerned, it is contended that the appellant-wife was a German national, while the respondent-husband was a resident of Mumbai and the marriage was performed in Mumbai in accordance with Special Marriage Act. It is submitted that the Division Bench of this Court found that although, the marriage was governed by Special Marriage Act (which Act has not been extended to Goa), insofar as the Forum is concerned, it would be the Civil Court, exercising jurisdiction in divorce matters in the State of Goa. It is thus submitted that the judgment cannot assist the case of the petitioner. Insofar as the case of **Rohit A. Kapadia** (supra) is concerned, it is contended that the claim in that case was for amendment of the written statement, which in a normal course is considered in more liberal manner than amendment to a plaint or petition, as in the present case. It is submitted that amendment cannot be said to be of clarificatory in nature.

15. I have given my anxious consideration to the rival circumstances and the submissions made and I do not find that any case for interference is made out. The law relating to the consideration of an application for amendment of pleadings is

too well settled to be restated. The first requirement which a party should establish, while seeking the amendment, is that the proposed amendment, is necessary for deciding the real controversy in the matter. After the introduction of proviso to Order VI, Rule 17 of CPC, there is a second requirement, inasmuch as where, the amendment is sought, after the commencement of trial, the party has to show that inspite of due diligence, the party could not have “raised the matter”, before the commencement of trial.

16. Coming to the present case, a bare perusal of the application for amendment would show that neither of these two aspects were even averred in the application, much less established. The learned Counsel for the respondent, in my view, is right in contending that the application for amendment, is filed in a casual manner. Even in the present petition, as originally filed, there were no circumstances claimed, which prevented the petitioner from filing the application for amendment, prior to the commencement of the trial. The present petition came to be amended on 16.02.2018, by incorporating para 9A, in which, an attempt is made to show due diligence and to explain the circumstances in which the application was required to be filed. It is contended that from

the line of cross examination of PW-1, the petitioner sensed that “perhaps the respondent is angling for half share in the estate”, especially as the father of the petitioner had died on 10.06.2017. It is contended that it is at this stage, that the petitioner had told his Advocate that he was not a goan and his family hailed from Mhapan village in Maharashtra and as such, he would be governed by Hindu Law and not Goan Law of Marriage. It is not possible to accept the explanation, which is introduced by way of an amendment to the present petition. However, considering the fact that the Supreme Court in the case of **Ajendraprasadji N. Pandey** (supra) has held that the proviso is directory and not mandatory in nature and calls for substantial and not rigid compliance, I do not propose to harp much on the compliance with proviso to Order VI, Rule 17 of CPC. As noticed earlier, the first requirement which a party should show and the Court must be satisfied with, is that the proposed amendment is necessary for deciding the real controversy in the matter. Let us see whether, the said condition can be said to be satisfied in the present case.

17. The petitioner is seeking annulment of marriage on the ground that the marriage was not consummated on account of frigidity of the respondent and her inability to perform the

matrimonial obligations. In the counterclaim, the respondent has claimed three reliefs (i) for return of her gold ornaments as listed in para 59 of the counterclaim (ii) for return of all the articles as set out in para 60 of the counterclaim and (iii) for maintenance in the sum of Rs.30,000/- per month. It can thus be seen that the question of the respondent claiming half share in the property is not involved in the petition. The only question is whether, the marriage is liable to be dissolved, on the ground as claimed and incidentally, whether, the respondent is entitled to reliefs as claimed in her counterclaim. In my considered view, the amendment sought is not necessary for deciding the real controversy in the matter. It is not disputed that the physical/mental capacity of a spouse to discharge the matrimonial obligations, leading to non-consummation of marriage is a ground available, both, under the Hindu Marriage Act and the Family Laws, applicable to the State of Goa. Thus, looking to the limited controversy involved, the amendment would not be necessary for deciding the real controversy in the matter. Thus, the very first requirement falls through.

18. In the case of **Monica Variato** (supra), the appellant-wife was a German national, at the time of marriage

and continued to be so. The respondent although hailed from Goa, was residing at Mumbai. The marriage was performed on 04.10.1975, under the Special Marriage Act at Mumbai. The parties presented a petition for divorce by mutual consent, before the Matrimonial Court at Goa, under Section 36 of the Law of Divorce, as applicable in the State of Goa. On 13.10.1988, an order granting provisional divorce for a period of one year in terms of Article 39 of the Law of Divorce was passed. On 30.05.1990, the appellant filed an application claiming that one year had lapsed after the grant of provisional divorce and the appellant maintained the decision of seeking divorce, as the marriage had irretrievably broken down. The respondent appeared and claimed that the initial application for divorce, by mutual consent, was signed by him when he was fully drunk and was not in his proper senses. It was contended that even otherwise, he was withdrawing his consent. The learned Trial Court dismissed the application holding that the marriage was not transcribed before the Civil Registrar's Office and thus, there was no marriage between the parties, as solemnized under the law of the land. The Trial Court held that the proper course for the parties was to apply for divorce under the Special Marriage Act, before the competent Court. The matter was carried in first appeal before this Court. The

learned Single Judge of this Court concurred with the finding of the Trial Court, holding that the petition, as framed and filed, under Chapter III of the Law of Divorce, was not maintainable, inasmuch as, the parties were married under the Special Marriage Act. This was challenged in a Letters Patent Appeal. The Division Bench of this Court held that, even if the Special Marriage Act applied, the Forum for filing petition would be the competent Court of civil jurisdiction in Goa, having territorial jurisdiction and jurisdiction as to subject matter. This Court upheld the order on the ground that the consent of either of the spouses has to continue from the time of filing of the application till the final order is passed and the respondent having withdrawn the consent, after the grant of the provisional divorce, the application was rightly dismissed. It can thus be seen that the case entirely turned on its own facts.

In the present case, it is not even claimed that the parties were married in accordance with the Hindu Marriage Act.

19. The Supreme Court in the case of **Revajeetu Builders and Developers** (supra) has laid down the following principles, governing the grant or rejection of an application for amendment (see para 67 of the judgment):

- (1) *Whether the amendment sought is imperative for proper and effective adjudication of the case ?*
- (2) *Whether the application for amendment is bona fide or mala fide ?*
- (3) *The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
- (4) *Refusing amendment would in fact lead to injustice or lead to multiple litigation;*
- (5) *Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and*
- (6) *As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.*

20. The proposed amendment, in my humble view, cannot be said to be imperative for proper and effective adjudication of the case. At this stage, it is necessary to note that neither of the parties could be allowed to enlarge the scope of the petition before the Trial Court and should restrict the same to the issue of annulment of marriage, as claimed on behalf of the petitioner and the claim made by the respondent in the counterclaim for return of certain articles and gold ornaments.

21. Although, the merits of the proposed amendment cannot be gone into at the stage where, the question is whether, the amendment is to be allowed, the Hon'ble Supreme Court in the case of **Revajeetu Builders and Developers** (supra) has held that the question whether, the amendment is bonafide or malafide, is one of the relevant factors. In the present case, the reason given for moving the application for amendment is that from the line of cross examination of PW-1, the petitioner apprehends that the respondent-wife may be angling for half share, inasmuch as, a wife married as per the local law, under the regime of Communion of Assets, is entitled to half share in the property. This appears to be a reason for the petitioner to seek amendment that he originally belongs to Maharashtra and his family originally hails from Mhapan village in the State of Maharashtra and therefore, he is governed by Hindu Marriage Act. The amendment sought, for the reason as set out, in my considered view, cannot be said to be bonafide. I would hasten to add that it is neither appropriate nor necessary to go into the question whether, indeed, the family of the petitioner hails from Maharashtra as that is not the scope and ambit of the petition for annulment of marriage, filed by the petitioner. However, suffice it to mention that it is not even the case made out in the petition nor the proposed amendment that

the parties were married in accordance with the Hindu Marriage Act and quite to the contrary the marriage was performed in Goa and has been registered in the office of the Civil Registrar after the second signature was made somewhere on 24.11.2010. I have carefully gone through the impugned order and I do not see any reason to interfere with the same in the exercise of supervisory jurisdiction of this Court. The petition is accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

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