

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

WRIT PETITION NO.8312 OF 2015

Mr.Dakshraj Chamathu S.Shetty	...Petitioner
Vs.	
Mrs.Chandravati w/o.Dakshraj Shetty	...Respondent

Mr.Sushil Upadhyay i/b. Mr.A.M. Saraogi for Petitioner.
Mr.S.N. Kadam for Respondent No.2.
Mr.A.R. Metkari, AGP for the State.

Coram : G.S.KULKARNI, J

Date : 7th FEBRUARY 2018

P.C.

Rule returnable forthwith.

2. By consent of the parties, heard finally.

3. The challenge in this petition is to the order dated 15th April 2015 passed by the 3rd Family Court at Bombay, whereby the application of the petitioner under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the petition inter-alia to incorporate the ground of desertion under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 (for short “the Act”) has been rejected.

4. The petitioner-husband initially filed petition No.A-1830 of 2012 seeking a decree of divorce on the ground of cruelty under Section 13(1) (ia) of the Act. However, though the prayers in the petition were made on the ground of cruelty, in paragraph nos.15, 17 and 19 of the petition the petitioner has made averments of the respondent-wife leaving the matrimonial house which according to learned Counsel for the petitioner sufficient to raise a ground under section 13(1)(i-b) of desertion. The averments read thus:-

“15. The Petitioners states that when the respondent left his house, the Respondent never tried to contact petitioner. The Petitioners states that as all efforts made by him and through relatives failed, he stopped his efforts as there was no positive reply from the Respondent or his family members. The Petitioner found out that the Respondent and his family's sole aim was only interested in the Petitioners wealth. And therefore the Petitioner suffered extreme mental agony. The Petitioner states that the Respondent after deserting the petitioner never bothered to contact the Petitioner; and totally failed to reply to Petitioner's efforts. The Respondent and his family even threatened petitioner of ruining his career, after he sent the first Divorce notice.

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17. Petitioner and Respondent state that both are residing under one shelter/roof, there is no cohabitation or any matrimonial, physical relation between both of them since marriage as husband and wife.

18. Petitioner state that they have been living separately since August 2010 the relationship between them having become strained and their nature, temperament and disposition becoming incompatible. They are not in a position to live together as husband and wife. They have been living separately since months. As they are unable to live together petitioner has thus decided and conceded to take divorce by mutual consent and get their marriage dissolved amicably.

19. The petitioner states that he is staying separately since

August 2010 i.e. more than one & half years and the respondent deserted him and there is no any conjugal relations and even no communication and no efforts from Respondent hence marriage is irretrievably broken down and no need to continue such unnecessary bindings as Respondent has no value of it.”

5. The petitioner had filed a petition seeking divorce on 4th August 2012. Thereafter the application for amendment came to be filed in September 2014 seeking to incorporate the ground of desertion under Section 13(1)(i-b) of the Act. The application was resisted by the respondent-wife denying the contents of the application and inter-alia contended that it is a false and malafide story which is sought to be made out by incorporating such an amendment.

6. The Family Court by the impugned order has rejected the application inter-alia observing that the amendment application cannot be allowed as it is made after trial has commenced and there was an obligation on the parties to show that the parties could not have raised such ground despite due diligence before commencement of the trial. It is observed that the petitioner has filed affidavit of evidence on 11th December 2013. Issues were framed on 29th July 2013 and the application in question was made thereafter on 27th September 2014 which was almost after about 1 year and 9 months of filing of said affidavit and two years of framing of issues and thus, second application, which was filed after commencement of trial, was rejected.

7. Learned Counsel for the petitioner in assailing the impugned order would submit that the impugned order on the face of record is illegal. It is

submitted that there were sufficient grounds which was made out in the petition itself to urge a ground of divorce on desertion by the respondent-wife and it had inadvertently remained to be taken. My attention is drawn to the averments which are made in the application and more particularly paragraph 4 in which the petitioner states that due to lack of knowledge and improper advice he could not add the ground of desertion while filing the present petition although sufficient foundation was laid in the paragraphs 15 to 19 of the petition in that regard. It is submitted that it was necessary to add such a ground taking into consideration the facts and circumstances of the case as pleaded by the petitioner in the petition. It is thus urged that the impugned order be set aside and the petitioner be permitted to urge the said ground as made out in the application.

8. On the other hand, learned Counsel for the respondent in opposing this petition has supported the impugned order. He submits that it is a clear case where the petitioner had moved such an application after the commencement of the trial. He submits that after filing of this petition, the proceedings before the Family Court are almost at the stage of conclusion in as much as the parties have recorded their evidence and have cross-examined each other and now that case is to be posted for final hearing. He submits that the circumstances demand such an application ought not to be allowed at this stage of proceedings. In support of his submissions, learned Counsel for the respondent placed reliance on the decision of Supreme Court in case of **Vidyabai & Ors. Vs. Padmalatha & Anr.**¹ to contend that unless the test of due diligence is satisfied, such amendment ought not to be allowed.

¹ 2009 SC 1433

9. A perusal of the marriage petition as filed by the petitioner clearly indicates that there are averments which are made in the petition which show that the respondent-wife had left the matrimonial house. These circumstances find place in the averments which are made in paragraph nos.15 to 19 as noted above, which brings about a foundation to the case of desertion being urged on behalf of the petitioner and accordingly incorporate a prayer for decree of divorce on the ground of desertion. It thus, cannot be said that having already led some foundation in the main petition, the petitioner should be precluded from urging the ground of desertion and incorporate a prayer for a decree on this ground.

10. Further it is also quite clear that the application for amendment was not filed at a very belated stage as urged by the respondent. The petition for divorce was filed on 4th August 2012. The amendment application was filed sometime in September 2014. The same had remained pending and was ultimately decided by an order dated 15th April 2015. Thus, the respondent was not oblivious of the fact that this petition was moved by petitioner being aggrieved by the impugned order dated 15th April 2015, on 31st July 2015. In the meantime, on this background, the Family Court had proceeded with the matter, the parties have led their evidence and were cross-examined cannot be the sole reason to deny the amendment as sought to be made on behalf of the petitioner, considering the interest of justice. What is more striking as seen from the impugned order is that the learned Judge has completely overlooked the averments made in the petition and has taken a narrow and technical view of the matter and

applying the normal rigorous provisions of order 6 Rule 17 although not justified, proceeded to dismiss the amendment application.

11. Even provisions of Rule 6 Order 17 in that regard taken into consideration, would certainly permit a necessary amendment in the interest of justice to be granted by the Court to enable the Court to decide the real controversy between the parties. Further it cannot be said that the rigours of due diligence would be strictly applicable in the present facts as the petitioner had sufficient foundation in the petition by making averments in paragraphs 15 to 19 in petition to make out a case on the ground of desertion. As stated by the petitioner in paragraph 4 of the amendment application, due to lack of knowledge and improper advice to incorporate the prayer, the prayer had remained to be made. In any case it cannot be forgotten that the proceedings are before the Family Court and thus, certain allowance in the application of hard technical rules is required to be made. Considering the above circumstances, in my opinion, denying such amendment will surely cause injustice to the petitioner. Accordingly, the amendment application is required to be allowed.

12. The decision in case of **Vidyabai & Ors. Vs. Padmalatha & Anr.** (supra) as relied on behalf of the petitioner would also not assist the respondent. The principle of law as laid down in the said decision cannot be disputed. However, in the facts and circumstances of the case and as noted above, the cause of justice surely demanded that the application is allowed as at the very threshold, the petitioner has taken grounds to incorporate such averments in the petition which would support the amendment.

13. In the circumstances, the petition is required to be allowed. It is allowed in terms of the prayer clause (a). The petitioner is permitted to carry out necessary amendment in the petition within a period of two weeks from today. The Family Court shall consider the matter on merits after the amendments are incorporated and in accordance with law.

14. All contentions of the parties on the merits of the main dispute are expressly kept open.

15. The petition is allowed in the above terms.

(G.S.KULKARNI, J)