

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

WRIT PETITION NO.1363 OF 2020

Nandita Samir Bharadwaj	..Petitioner
Vs.	
Samir Vidyasagar Bharadwaj	..Respondent

.....

Mr. Mohan Bir Singh a/w. Pooja Jalan i/b. MBS & Co., Advocate for the Petitioner.

Mr. R. T. Lalwani a/w. J. K. Shah i/b. R. J. Law, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 11th FEBRUARY, 2020

P.C.

. The challenge in this petition is to the order dated 7/11/2019 (below Exhibit 51), passed by the Family Court, Mumbai in Petition No.A-1873/2015. By the impugned order, application (Exhibit 51) filed by the petitioner for amendment of the petition has been dismissed.

2. The parties are husband and wife. Their marriage was solemnized on 5/5/1992 and they are blessed with two daughters. It appears that the marriage has run into rough weather and the petitioner has filed the above petition before the Family Court against the respondent / husband for dissolution of marriage on the ground of cruelty.

3. It appears that in para 42 of the petition there is a reference to Flat No.201, Aashna, 8 St. Martin Road, Bandra (W), Mumbai - 400 050 which according to the petitioner is exclusively belonging to her. The petitioner claims that the said flat was purchased by her prior to the marriage and the name of the respondent was added as a purchaser for the sake of convenience. It is contended that the petitioner has "single handedly been paying all the outgoings and other charges" relating to the said flat and the respondent has no right, title or interest in the same.

4. In order to appreciate the rival contentions, as raised in this petition, it is necessary to reproduce para 42 and the prayer clause 50 in the petition which read thus-

Para 42 -

“As stated hereinabove, flat at 201 Aashna, 8 St. Martin Road, Bandra (West), Mumbai – 400 050, i.e. the matrimonial home has been purchased by the Petitioner, prior to her marriage with the Respondent, whose name was only added in the Agreements for the sake of convenience, and he has no right over the same. The Petitioner has single handedly been paying all the outgoings and other charges related to the same to her detriment, as the Respondent has never contributed a single rupee towards the maintenance of the said matrimonial home. The Petitioner further submits, due to the various acts of mental and physical cruelty meted out by the Respondent it has become impossible for the

Petitioner and her daughters to continue to reside under the same roof with the Respondent, and the fact that he continues to reside in the matrimonial home at the expense of the Petitioner only adds to their agony. As the Respondent has also recently become physically violent with one of the daughters, it is imperative that he be restrained from entering the matrimonial home, as the Petitioner and her daughters lives are at risk. The Respondent's mother is staying all alone in a 2BHK flat at Pali Hill and he should therefore be directed by the Hon'ble Court to move out of the matrimonial home and go and reside at his mother's place without claiming any right title or interest in said matrimonial home."

Prayer clause 50 :

- (a) For a Decree for Divorce against the Respondent on the grounds of mental and physical cruelty;*
- (b) For an order directing the Respondent to move out of the matrimonial home and hand over vacant and peaceful possession of the same to the petitioner;*
- (c) For alimony / maintenance of Rs.1 Lakh per month;*
- (d) For Rs.50 Lakhs each for the two daughters for their wedding expenses ;*
- (e) Pending the hearing and final disposal of the petition, the Respondent be ordered to move out of the matrimonial home and hand over vacant and peaceful possession of the same without claiming any right title or interest therein ;*

- (f) Pending the hearing and final disposal of the petition, the Respondent be ordered to pay Rs.1 Lakh per month by way of alimony / maintenance ;*
- (g) For interim orders and ad interim reliefs in terms of prayers (e) and (f) above ; and*
- (h) For such further and other reliefs as this Hon'ble Court deems fit and proper.*

5. It appears that a specific issue about the petitioner's right, title and interest in the said flat, was framed by the Family Court which on the application of the respondent has been deleted by the Family Court on 6/3/2019.

6. It is after this that the petitioner filed an application (Exhibit 51) for amendment of the petition and the only amendment sought is by addition of prayer clause (b-1) as under-

(b-1) That this Hon'ble Court be pleased to hold and declare that the petitioner is the owner of the matrimonial home being 201, Aashna, 8, Martin Road, Bandra (West), Mumbai – 400 050 and that the Respondent has no right, title or interest therein.

7. The respondent filed his reply and has opposed the application. It is contended that the issue regarding the ownership of the said flat has already been deleted on the basis of an application (Exhibit 39) filed by the respondent and only to overreach the said order the present application is filed. It is contended that the trial has already commenced, in as much as the issues are framed and the

petitioner has filed her affidavit in lieu of chief examination and therefore in the absence of petitioner showing due diligence the amendment could not be allowed to be carried out in view of proviso to Order VI Rule 17 of CPC. It was also contended that amendment if allowed would introduce relief which is barred by limitation and would thus seriously prejudice the respondent. It is submitted that the ground that "through inadvertence" the prayer was not included is too casual to be accepted and allowed.

8. The Family Court by the impugned order has dismissed the application mainly on the ground that it is filed after the commencement of the trial and without compliance with the requirement of showing due diligence under the proviso to Order VI Rule 17 of CPC. Secondly, the Family Court has found that the proposed amendment would change the nature of the petition in as much as the petition is registered as "category A petition" while the relief regarding declaration comes in "category B petition" as per the Rules framed under the Family Court Act.

9. I have heard the learned counsel for the parties. Perused record.

10. The learned counsel for the petitioner has submitted that the contention about the ownership and title to the said flat have already been raised in the plaint. Learned counsel in this regard has pointed out para 42 of the petition as above. It is therefore submitted that no new case is tried to be introduced or made out. It is submitted that the trial cannot be said to have commenced merely on framing of issues

and/or filing of the affidavit in lieu of chief examination, unless and until the party actually enters into the witness box and deposes before the Court. It is submitted that even the relief of declaration can be sought in a petition which is registered in "A Category". In the submission of learned counsel the procedural rules about the registration of the petition cannot override the powers of the Court to allow the amendment if it is otherwise found to be necessary. On behalf of the petitioner reliance is placed on the decision of the Supreme Court in the case of -

- 1) Abdul Rehman and Anr. Vs. Mohd. Ruldu and Ors. (2012) 11 Supreme Court Cases 341**
- 2) Rajesh Kumar Aggarwal and Ors. Vs. K. K. Modi and Ors. (2006) 4 Supreme Court Cases 385.**
- 3) Mahila Ramkali Devi and Ors. Vs. Nandram (dead) through Legal Representatives and Ors. (2015) 13 Supreme Court Cases 132 and the decision of the Calcutta High Court in the case of Basudeb Das Vs. Malati P. Soni AIR 2019 Calcutta 131.**

11. The learned counsel for the respondent on the contrary, has strenuously urged that the application for amendment is misconceived and has rightly been dismissed. It is submitted that the said flat has been purchased jointly in the name of the petitioner and the respondent on 22/11/2010 i.e. much prior to the filing of the petition in the year 2015.

12. It is submitted that the trial has commenced when the issues were framed and the affidavit in lieu of chief examination has been filed and therefore the proviso to Order VI Rule 17 is attracted. It is submitted that the petitioner has failed to show that in spite of due diligence the amendment could not have been brought prior to the commencement of the trial. It is submitted that the issue regarding ownership and title of the said flat was deleted on the application filed by the respondent on 6/3/2019 and it is thereafter that the present application for amendment is filed to overreach that order. It is submitted that the proposed amendment is clearly barred by limitation as the sale deed is of the year 2010 and the claim of exclusive title is being raised now by virtue of the amendment. It is also submitted that the claim which is sought to be introduced by virtue of the proposed amendment would be barred under the provisions of the The Prohibition of Benami Property Transactions Act, 1988 ('1988 Act' for short). Learned counsel pointed out that the petitioner is at liberty to file separate petition, if so advised, for such declaration and it is not necessary to be incorporated in the present petition.

13. On behalf of the respondent reliance is placed on the following decisions namely.

- 1) **Mahadeo Maruti Bhanje Vs. Balaji Shivaji Pathade & Anr. 2012 SCC Online Bom 1283.**
- 2) **Pandit Malhari Mahale Vs. Monika Pandit Mahale and Ors. in Civil Appeal No.189/2020 Supreme Court, decided on 10/1/2020.**
- 3) **State of A. P. and Ors. Vs. Pioneer Builders, A.P. (2006) 12 Supreme Court Cases 119.**

- 4) Ashok Daga Patil Vs. Daga Yadav Patil and Ors. 2003(1) Mh.L.J. 686.
- 5) Radhika Devi Vs. Bajrangi Singh and Ors. (1996) 7 Supreme Court Cases 486.
- 6) Vidyabai and Ors. Vs. Padmalatha and Anr. (2009) 2 Supreme Court Cases 409.
- 7) Chhabubai Haribhau Badakh Vs. S. H. Khatod and Sons and Anr. 2009 (6) Mh.L.J. 760.
- 8) J. Samuel and Ors Vs. Gattu Mahesh and Ors. (2012) 2 Supreme Court Cases 300.

14. I have carefully considered the rival circumstances and the submissions made.

15. The petition filed by the petitioner before the Family Court is for dissolution of marriage on the ground of cruelty. Presently we are only concerned with the issue of amendment as regards Flat No.201, Aashna, 8 St. Martin Road, Bandra (W), Mumbai - 400 050 which the petitioner claims to be exclusively belonging to her. The only question is whether the amendment by introduction of prayer clause (b-1) as above, can be allowed at this stage.

16. The law relating to the amendment of pleadings is fairly well settled. It is now well settled that the Court has to allow all such amendments which are necessary to decide the real controversy in the matter. It is true that where the amendment is brought after the commencement of the trial, there is an additional requirement which the party should establish. The party seeking amendment in such a case

has to demonstrate that, in spite of due diligence the matter could not have been raised prior to the commencement of the trial.

17. A perusal of para 42 as reproduced above would show that in fact the issue about the right, title and interest over the said flat has already been raised by the petitioner in the petition. The prayer clause 15(e) would further indicate that the interim relief was sought directing the respondent to move out of the matrimonial home and to hand over the vacant and peaceful possession of the same without claiming any right title or interest therein. It is a matter of record that the Family Court by an order dated 13/12/2016 "below Exh.7" has directed the respondent to remove himself from the matrimonial house which order has been confirmed by this Court in Writ Petition No.169/2017 on 11/1/2017 and further by the Hon'ble Supreme Court in Civil Appeal No.6450/2017 on 9/5/2017. Learned counsel for the respondent has pointed out that the order passed by this Court below Exh.7 although directs the respondent to remove himself out of the matrimonial house, the said order nowhere states that this is without the respondent claiming any right, title or interest in the said flat. In my considered view, all these aspects are besides the point. This is because at this stage we are only concerned as to whether the substantive pleadings on the basis of which the prayer clause (b-1) is sought to be introduced have already been raised in the petition or not. In my considered view the answer has to be in the affirmative.

18. Learned counsel for the respondent in all fairness did not dispute that in an appropriate case, the Family Court can consider such declaration. In other words the existence of the jurisdiction in the

Family Court to consider such a prayer is not disputed. The amendment is opposed on the ground of

- (i) Non compliance with the proviso to Order VI Rule 17 of the CPC,
- (ii) The proposed amendment being barred by limitation, thereby causing prejudice to the respondent, if allowed and
- (iii) The proposed amendment being hit by the provisions of the 1988 Act.

19. In so far as the first ground relating to the proviso to Order VI Rule 17 is concerned, I find that the pleadings about the petitioner claiming that she is exclusively owner of the said flat have already been raised in the petition and therefore by virtue of the proposed amendment no new case or new relief is sought to be introduced. It is necessary to reproduce Order VI Rule 17 of the CPC in order to appreciate the scope and ambit of the proviso which reads thus-

Order VI Rule 17 – Amendment of pleadings – The Court may at any stage of 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. (Emphasis supplied)

20. The Hon'ble Supreme Court in the case of **Abdul Rehman and Anr.** (supra) has inter alia held that, making explicit what was already implicit in plaint would not change the nature of the suit and all such amendments which are necessary for purpose of determining the real questions in controversy between the parties, should be allowed if it does not change the basic nature of the suit.

21. The question whether such pleadings are already explicitly made or are implicit would depend on the facts and circumstances of the each case. In my considered view the reading of the petition before the Family Court as a whole, would make it clear that such pleadings were already made in the petition and no new matter is sought to be raised as such, by virtue of the proposed amendment. A useful reference in this regard can be made to the decision of this Court in the case of **Rohit A. Kapadia and Anr. Vs. Perviz J. Modi 2013(4) Mh.L.J. 940**. Thus, in my considered view, it is not necessary to dwell into the issue as to whether the trial had commenced, in as much as, what the proviso prohibits is raising of a matter which is not already raised. In such circumstances, I do not propose to go to the individual cases on the point of commencement of the trial, which are cited.

22. In so far as the ground of limitation is concerned, the Court at the stage of considering whether the amendment is to be allowed or not, would not go into the merits of the amendment which has necessarily to be gone into at the stage of trial. Learned counsel for the respondent strenuously urged that this will be subject to at least two exceptions in the present case. First is that the proposed amendment is *exfacie* barred by limitation. In the submission of learned counsel for

the respondent if the question about limitation does not involve the examination of disputed facts and the amendment is found to be *exfacie* barred by limitation, said aspect can be considered even at the stage of consideration of the application and such amendment could not be allowed. Secondly, it is contended that the proposed amendment is also *exfacie* barred by the provisions of 1988 Act.

23. In my considered view, none of these contentions can be accepted in the facts and circumstances of the present case. This is because I have already found that there is no new case which is sought to be introduced by virtue of the introduction of prayer (b-1). Therefore, if at all the claim as to the exclusive right title and interest in the said flat is already there in the plaint, it is for the respondent to contest the same and the proposed amendment would not make any change.

24. Coming to the issue of 1988 Act, Section 2(9) of the Act which defines the benami transaction reads thus -

2(9) Benami transaction means -

(A) a transaction or an arrangement -

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person ; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by-

(i)

(ii)

(iii) *any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual ;*

(iv)

Prima facie it can thus be seen that the section excludes the property between spouses. I would hasten to add that this Court has not expressed any final opinion in the matter as the party would be going for trial even on the said issue before the Family Court, if raised.

25. Coming to the order passed by the Family Court, it cannot be accepted that because the petition involving declaratory relief are categorized as 'B' category, the amendment could not be allowed. Such procedural rules about classification / registration of the petition, cannot override the powers of the Court, to grant the amendment, if otherwise a case for such grant of amendment is made out. It would be preposterous to hold that because the amendment would entail the registration of the petition in a different category the amendment could not be allowed. The basic principles on which the grant or refusal of the amendment is based is whether the proposed amendment is necessary for deciding the real controversy in the matter.

26. The learned counsel for the respondent has in all fairness submitted that nothing prevents the petitioner from filing a separate petition claiming the relief which is now sought to be introduced by

virtue of the proposed amendment. It is necessary to note that one of the objects of allowing the amendment is to prevent multiplicity of proceedings and if that be so certainly the amendment needs to be allowed in order to avoid such multiplicity. It is also not possible to accept that the proposed amendment has the effect of changing the cause of action as substantive pleadings on which the proposed amendment of the prayer clause is based are already there in the petition.

27. In the result, the following order is passed.

ORDER

1. The petition is allowed.
2. The impugned order is hereby set aside. The application (Exh.51) for amendment is allowed.
3. The amendment shall be carried out within a period of two weeks.
4. Needless to mention that the respondent shall be entitled to carry out consequential amendment and / or to file additional Written Statement, if so advised, within a period of three weeks after the amendment is carried out.
5. In the circumstances, there shall be no order as to costs.

6. At the request of learned counsel for the respondent, the effect of this order is stayed for a period of three weeks. The period mentioned in clauses (3) and (4) above shall commence after the period of three weeks for which the effect of the present order is stayed.

C.V. BHADANG, J.