

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

WRIT PETITION NO.128 OF 2020

Karunakar Shetty ..Petitioner
Vs.
Shanta Chandappa Alva ..Respondent

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Ms. Taubon F. Irani a/w. Ms. Sachi Lodha i/b. Disha Shetty, Advocate
for Petitioner.

Ms. Kshama R. Bhandari, Advocate for Respondent No.1.

**CORAM : C.V. BHADANG, J.
DATE : 25th FEBRUARY, 2020**

P.C.

. The challenge in this petition is to the order dated 16/11/2019 (below Exh.37) passed by the Family Court at Mumbai in Petition No.B-79/2017. By the impugned order the Family Court has refused to grant an application for amendment of the petition filed by the petitioner.

2. Admittedly, the marriage between the parties has been dissolved by a decree of divorce, which is subject matter of challenge at the instance of the wife, before the learned District Judge, Udupi, Karnataka.

3. The aforesaid petition is filed by the petitioner for a declaration that the petitioner is an exclusive owner of the flat which is the subject matter of dispute and that the name of the respondent wife was included only for purpose of convenience.

4. Admittedly, the petitioner has entered into the witness box and presently he is under cross examination on behalf of the respondent. It is at this stage, that the petitioner filed application (Exhibit 37) for amendment of the petition. The only amendment sought is for inclusion of the following prayer clause.

“(e) In the alternative, this Hon’ble Court be pleased to auction the said suit premises and to divide the proceeds in equal shares between the parties.”

5. The learned Family Court has refused to grant the amendment only on the ground that the trial has commenced and therefore, the requirements of the proviso to Order VI Rule 17 of CPC are not satisfied.

6. I have heard learned counsel for the parties and have gone through the impugned order.

7. It transpired during the course of arguments that the parties had **proposed** Consent Terms somewhere in December 2018 agreeing to auction the said flat and to share the proceeds. It is also a matter of record that the Consent Terms did not materialise. Be that as it may, the record also indicates that the petitioner had filed an application for auction of the said flat which application was rejected by the Family Court.

8. Learned counsel for the petitioner submitted that by virtue of the proposed amendment only a prayer clause is sought to be added and the proposed amendment neither introduces any new case nor changes the cause of action.

9. The learned counsel for the respondent points out that previously the petitioner had filed similar petitions in the year 2014 and 2015 and this is the third petition filed for similar reliefs. It is submitted that the petitioner had not complied with the proviso to Order VI Rule 17 and therefore the application is rightly rejected.

10. I have considered the circumstances and the submissions made.

11. The first consideration before the Court while considering an application for amendment is that the amendment is necessary for deciding real controversy in the matter. There is an additional requirement, which is imposed by the proviso to Order VI Rule 17, where the amendment is brought after commencement of the trial. The party seeking such amendment has to demonstrate that inspite of due diligence the party could not have “raised the matter” prior to the commencement of the trial. Thus, the principal question is whether by the proposed amendment the petitioner is trying to raise any matter which is not already raised. All that the petitioner wants to include is an alternate prayer for auction of the flat and to **divide** the proceeds equally, in the event the **petitioner** does not succeed in establishing his exclusive ownership. In my considered view, by the proposed amendment the petitioner has not raised any matter which is not already raised and therefore the proviso to Order VI Rule 17 of CPC may not come in the way. It is necessary to emphasise that in an appropriate case the Court can always mould the relief. The alternate prayer sought to be introduced, will only help the Court to mould such relief, if found necessary. In that view of the matter, the proposed amendment would be necessary in deciding the real

controversy between the parties. Thus, in my considered view, the proposed amendment can be allowed.

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

ORDER

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exh.37) is hereby allowed as prayed. The necessary amendment to be carried out within two weeks from today.
- (iv) Needless to mention that the respondent can carry out consequential amendment and / or file additional reply to the amended petition, if any, within two weeks thereafter.
- (v) The petition is disposed of in the aforesaid terms, with no order as to costs.

C.V. BHADANG, J.