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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 25.07.2023

+ **CM(M) 1024/2022 & CM APPL. 42245/2022**

SHEENA

..... Petitioner

Through: Mr.Sunil Mittal, Sr. Advocate
with Ms.Seema Seth,
Ms.Shreya Maggu, Advs.

versus

CHIRAG NATH

..... Respondent

Through: Dr.Aman Hingorani,
Mr.Himanshu Yadav, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. The present petition has been filed by the petitioner, who is also the petitioner in HMA No. 5862223/2016 titled ***Sheena v. Chirag Nath*** (hereinafter referred to as the 'said petition'), pending before the learned Principal Judge, Family Court, Central District, Tis Hazari Courts, Delhi (hereinafter referred to as the 'Family Court'), challenging the order dated 02.07.2022 (hereinafter referred to as the 'Impugned Order') passed by the learned Family Court in said petition, allowing the application filed by the respondent herein under Order VI Rule 17 of the Code of Civil Procedure (in short 'CPC') seeking amendment of his written statement, subject to payment of costs of Rs.25,000/-.
2. The learned senior counsel for the petitioner submits that in the



12(1)(A) and Section 13(1)(i)(a) of the Hindu Marriage Act, 1955 against the respondent on 07.08.2014. The respondent filed his written statement to the said petition on 06.09.2016. Thereafter, the petitioner tendered her examination-in-chief and was cross-examined from 15.01.2018 to 09.03.2018. The petitioner also produced her father as PW-2, whose evidence was recorded on 29.11.2019. It was only on 01.12.2020 that the respondent herein filed an application seeking an amendment to his written statement, thereby now seeking to raise a fresh allegation that the petitioner herein was having an extra-marital affair with a gentleman mentioned in the application even prior to their marital discord taking place, that is, in 2014. The respondent further alleged that he became aware of the said affair only on 10.01.2020 when he, coincidentally, met the said gentleman at Mumbai Airport.

3. Drawing reference to the averments made in the said application filed by the respondent herein under VI Rule 17 of the CPC, the learned senior counsel for the petitioner submits that the said assertions do not show any due diligence on the part of the respondent and, therefore, the amendment should not have been allowed by the learned Family Court.
4. He submits that in the present case, the evidence of the petitioner already stands concluded. Allowing the amendment at such a belated stage would, therefore, put the clock back and cause further delay in the adjudication of the said petition. He submits that the learned Family Court has not considered the issue of due diligence at all in its Impugned Order.

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Placing reliance on the judgment of the Supreme Court in **Pandit**



Malhari Mahale v. Monika Pandit Mahale & Ors. (2020) 11 SCC 549, he submits that in the absence of consideration of the issue of due diligence, the Impugned Order deserves to be set aside by this Court.

6. He further submits that the averments that have been made in the application are *mala fide* and only intended to delay the adjudication of the said petition.
7. On the other hand, the learned counsel for the respondent submits that no case for interference with the Impugned Order, in the exercise of powers of this Court under Article 227 of the Constitution of India, has been made out by the petitioner herein. Placing reliance on the judgment of the Supreme Court in ***Raj Kumar Bhatia v. Subhash Chander Bhatia***, (2018) 2 SCC 87, he submits that the Court in the exercise of its powers under Article 227 of the Constitution of India does not act as an Appellate Court or Tribunal and it is not open for the Court to review or re-assess the evidence upon which the Family Court has passed the Impugned Order; the power of this Court is confined only to see whether a subordinate Court or Tribunal has proceeded within the parameters of its jurisdiction. He submits that in the present case, the learned Family Court has acted well within its jurisdiction and, therefore, the Impugned Order does not deserve any interference of this Court.
8. On merits, he submits that the respondent, in his application, has clearly brought out the facts that led to the filing of the amendment application. He has stated that he came to gain the knowledge of the affair of the petitioner herein only pursuant to a

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chance meeting with the said gentleman at the Mumbai Airport



on 10.01.2020. The facts subsequent thereto, as have also been enumerated in the said application, gave rise to this belief in the respondent. The respondent, therefore, cannot be found guilty of having delayed the moving of the application in question.

9. Placing reliance on the judgments of this Court in *National Small Industries Corpn. Ltd. v. Gaajra International*, 2009 SCC OnLine Del 135; *BDR Developers Pvt. Ltd. v. Narsingh Shah & Ors.*, 2021 SCC OnLine Del 3889; and *Sunita Rekhi & Ors. v. Y.D.Puri and Ors.*, 2015 SCC OnLine Del 13841; and of the Supreme Court in *Usha Balashaheb Swami & Ors. v. Kiran Appaso Swami & Ors.*, (2007) 5 SCC 602, he submits that while considering an application seeking an amendment to the written statement, the Court has to be liberal and even addition of a new ground of defence or substituting or altering the defence or taking inconsistent pleas in the written statement would not be objectionable. He submits that the Court cannot go into the merits of the averments sought to be added by way of the amendment application.
10. On the issue of delay, he further submits that the petitioner, after the passing of the Impugned Order, has herself delayed the further adjudication of the divorce petition, with the amended written statement having been filed on 04.08.2022.
11. I have considered the submissions made by the learned counsels for the parties.
12. Order VI Rule 17 of the CPC, and specifically the proviso thereto, reads as under:



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.”

13. A reading of the above provision would show that while the Court may ‘***at any stage of the proceedings***’ allow the other party to alter or amend the pleadings, as may be necessary for the purpose of determining the real question in controversy between the parties, however, such power is circumscribed by the proviso which provides that no such application shall be allowed ‘***after the trial has commenced***’ and ‘***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 the trial***’.
14. The Supreme Court in ***Ajendraprasadji N. Pandey and Another v. Swami Keshavprakeshdasji N. and Others***, (2006) 12 SCC 1, has held as under:

“36. Ultimately, to strike a balance the legislature applied its mind and reintroduced Rule 17 by Act 22 of 2002 w.e.f. 1-7-2002. It had a provision permitting amendment in the first part which said that the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before



the commencement of the trial. It is this proviso which falls for consideration.

37. Reliance was placed on the judgment of this Court in Salem Bar Assn. case [(2005) 6 SCC 344] . In this case, this Court dealt with Order 6 Rule 17 at para 26. Y.K. Sabharwal, C.J. speaking for the Bench observed as under: (SCC pp. 365-66)

“26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.”

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42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested



in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief.”

15. In ***Smt. Kailash Sharma v. Jagdish Lal Sharma & Ors.***, 2010 SCC OnLine Del 4225, while interpreting the amendment to Order VI Rule 17 of the CPC, the Supreme Court has held that:

“9. Before the proviso came to be added to Order VI Rule 17 of CPC, it was not uncommon for the unscrupulous litigants, who, for one reason or the other, were not interest in expeditious disposal of the case, to prolong the trial by seeking unnecessary and sometimes mala fide and frivolous amendments, in order to delay the progress of the trial. This mischief was sought to be remedied by the legislature by putting an embargo on the power of the Court to allow amendments, once the trial has begun. That precisely was the objective behind adding the aforesaid proviso to the statute book. The legislative intent, therefore, needs to be given a meaningful effect and, therefore, unless the amendment sought by a party squarely falls in the four corners of the legal provision, the Courts need to discourage such amendments. The legislative intent cannot be frustrated by the Courts by giving so liberal an interpretation the amendment even where they



find that the amendment now sought by the party could, on exercise of due diligence, have been conveniently sought before the trial began.”

16. Therefore, once the trial has commenced, the party who seeks to amend its pleadings has an added obligation to show to the Court that, in spite of due diligence, such party could not have raised the matter sought to be brought on record by way of the amendment, before the commencement of trial.
17. In the present case, the trial commenced on 15.01.2018. The amendment application has been filed on 01.12.2020.
18. As far as the due diligence of the respondent is concerned, the application states as under:

“3. The amendment of the Respondent's written statement is essential as the Petitioner has inter alia sought dissolution of marriage by a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 and has also sought annulment of marriage under Section 12(1)(a) of the Hindu Marriage Act, 1955 and subsequently facts have emerged which show that the Petitioner has been involved with Mr. Debarshi Mazumder in an extra marital relationship which, to the best of the information of the Respondent, still subsists. Therefore, the Petitioner cannot take benefit of her own wrongdoings.

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5. It is submitted that as the above stated fact is not a part of the pleadings, it is imperative that the present application is allowed as the petitioner and Mr. Debarshi Mazumder has been and are in extra-marital relationship. This ground could not be raised by the Respondent before the commencement of the trial as he has now become aware of the same only recently and therefore the present amendment is based on a subsequent event and the Respondent is raising an additional defense”



19. Clearly, the above does not satisfy the test of due diligence.
20. The amendment in the written statement which is sought to be carried out in the written statement is as under:

“4. The Respondent, in his written statement filed, wishes to add the proposed amendment before 'Without prejudice to what is stated hereinabove, the Para wise reply to the petition is hereunder: -' at page 1 of the written statement. The proposed amendment is as under: -

a. One Mr. Debarshi Mazumder was known, to the Respondent, to be the Petitioner's office colleague. The Petitioner had introduced the Respondent to Mr. Debarshi Mazumder while the Petitioner and Mr. Debarshi Mazumder were working at Mahindra Logistics.

b. The Respondent became aware that the flight bookings of Indigo Airlines PNR DYBKGK which were booked by the Petitioner were modified by one Mr. Debarsha.. This was the cause for the Respondent to believe that Mr. Debarshi Mazumder and the Petitioner are involved beyond the level of being mere office colleagues as the Petitioner entrusted him to modify the tickets that the Petitioner had discreetly booked prior to the Petitioner's surreptitious departure with Master Akshat Nath from Mumbai on or about 04.07.2014.

c. Thereafter, on 10.01.2020, the Respondent coincidentally met Mr. Debarshi Mazumder at Mumbai Airport where the Respondent informed Mr. Debarshi Mazumder that he was traveling to Chandigarh. The Respondent then requested Mr. Debarshi Mazumder to share his contact details and whereabouts as they had met after a long time. Mr. Debarshi Mazumder then informed the Respondent that he too was at Chandigarh on or around 23.12.2019 at Hotel Lalit while returning from a holiday in Simla and that now he has shifted to Gurugram and his mobile number is 9967259456 and 9967146177 and his e-mail address is finddm@yahoo.co.in and that presently he was travelling to Delhi. Surprisingly Mr. Debarshi Mazumder inquired



about the divorce proceedings between the Petitioner and the Respondent and despite the Petitioner and Mr. Debarshi Mazumder not being together in employment since 2014, Mr. Debarshi Mazumder appeared to be completely aware of the divorce proceedings and as the Respondent was suspicious about Mr. Debarshi Mazumder's interest in the proceedings, the Respondent made a note of the PNR No. LGD4RK of Mr. Debarshi Mazumder's which was written on his Spice Jet Boarding Pass that was kept out. This discussion by Mr. Debarshi Mazumder about divorce proceedings and disclosure of him being at Chandigarh on 23.12.2019 at Hotel Lalit while on holiday made the Respondent more credibly believe that the Petitioner and Mr. Debarshi Mazumder were and are involved with each other in an extra-marital affair for reasons stated below.

d. Prior to the above, the Respondent had sent an e-mail to the Petitioner on 21.12.2019 that he would call at 07:30 PM on 22.12.2019 to speak to his child, Master Akshat. The Respondent then received a message from the Petitioner on WhatsApp on 22.12.2019 stating that master Akshat is going for a night show of a movie on 22.12.2019 and the Respondent can call on 23.12.2019 around 06:30 PM as Petitioner will be back from her exams. The Respondent was previously informed by the Petitioner that she is studying Law from Punjab University.

e. After Mr. Debarshi Mazumder had informed the Respondent that he was at Lalit Hotel, Chandigarh on 23.12.2019 while on a holiday, the Respondent found out that the Law exams of 1st, 3rd and 5th Semester at Punjab University had concluded on 21.12.2019 and therefore the Petitioner's message to Respondent that she had an exam on 23.12.2019 was false.

f. On basis of all that is stated in the foregoing paragraphs to the best of the information and belief of the Respondent, the Petitioner and Mr. Debarshi Mazumder stayed together on the night of 23.12.2019 at the Lalit Hotel, Rajiv Gandhi IT Park, DLF



Commercial Complex, Chandigarh 160101.

g. Further, on 16.07.2020, the Petitioner telephoned the Respondent from 8146825486, a number which the Petitioner had not disclosed and the Respondent has reasons to believe that the Petitioner uses this mobile number to communicate with Mr. Debarshi Mazumder. The Petitioner's numbers known to the Respondent are 9820111730 and 9855126113.

h. The Respondent has credible reasons to believe that Petitioner has clandestinely and discreetly been in extra-marital relationship with Mr. Debarshi Mazumder and they have traveled and stayed together at numerous occasions since Petitioner's surreptitious departure from Mumbai since July 2014."

21. The learned senior counsel for the petitioner, drawing reference to the cross-examination of the petitioner recorded by the learned Family Court on 08.03.2018, submits that the petitioner had been extensively cross-examined by the respondent herein on basis of the air-tickets that now form the basis of the application filed by the respondent under Order VI Rule 17 of the CPC. He submits that even the email from Indigo Airlines, giving the history of the air-tickets, was available with the respondent since early February 2018, as is evident from the emails itself. The respondent has also asserted that he met the other gentleman on 10.01.2020. Apart from the fact, that this is only a false excuse generated to file the application under Order VI Rule 17 of the CPC, the application was filed only on 01.12.2020, that is, almost eleven months thereafter. I find merit in these objections. It is apparent from the reading of the application, the respondent is seeking to add allegations which relate to the period prior to 2014



knowledge of the respondent, as is evident from the cross-examination of the petitioner to which attention of this Court has been drawn by the learned senior counsel for the petitioner. Apart from the vague allegations of having met with the gentleman in question at Mumbai Airport on 10.01.2020, which is alleged to have raised certain suspicion in the mind of the respondent, there is nothing on record to show any subsequent fact which would justify the delay of eleven months even thereafter. Even otherwise, the amendment appears to be a means to delay the trial of the divorce petition filed by the petitioner herein, and appears to be *mala fide*.

22. The learned Family Court in the Impugned Order has been influenced by the fact that an amendment can be allowed at '*any stage of the proceedings*', however, at the same time, ignoring the mandate of the proviso to Rule 17 of Order VI of the CPC. The finding of the learned Family Court on the said aspect is reproduced hereinbelow:

"12. After considering the submission of Ld. Counsels for parties and also after going through the amendment being sought by the respondent/husband, I am of the opinion that the law permits the amendment to be allowed at any stage though preferably not after the commencement of trial but it is also the requirement of law that both the parties should be given opportunity to prove their case on merits and on technical grounds the parties should not be stopped from prosecuting their case or defending their case. Hence, I am of the opinion that in view of my observation made above, the application u/o 6 Rule 17 CPC should be allowed. However, as the application has been moved at a belated stage the application is allowed subject to cost of 25000/-. Respondent is directed to file an



amended written statement within 15 days from the date of this order.”

23. The learned Family Court has not adverted to the issue of due diligence of the respondent at all in the Impugned Order, thereby committing a jurisdictional error.
24. In ***Pandit Malhari Mahale*** (supra), the Supreme Court has observed as under:

“7. In the present case, the Civil Judge has not returned any finding that the Court is satisfied that in spite of due diligence, the party could not to have raised the matter before the commencement of trial. In Vidyabai & Ors. v. Padalatha & Anr. (2009) 2 SCC 409, this Court observed in para 19 as under:

“19. It is primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court’s jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

8. There being no finding by the Court that the Court is satisfied in spite of due diligence, the party could not introduce amendment before commencement of the trial, the order of the trial Judge is unsustainable. The High Court has not adverted to the above aspect of the matter. In view of aforesaid, we allow the appeal and set aside the order of the High Court as well as of the Civil Judge, the amendment application stands dismissed.”

25. The above judgment of the Supreme Court would squarely apply to the facts of the present case as well. Though, there is no doubt

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that a Court should be more liberal in allowing an amendment to the pleadings, especially the written statement, at the same time, the legislative intent of preventing delays in the adjudication of the proceedings by way of adding proviso to Order VI Rule 17 of the CPC cannot be ignored or negated.

26. In view of the above, I find that the learned Family Court has erred in allowing the amendment application filed by the respondent under Order VI Rule 17 of the CPC. The Impugned Order is accordingly set aside.
27. The petition is allowed. The pending application also stands disposed of.
28. The parties shall bear their own costs.

NAVIN CHAWLA, J

JULY 25, 2023
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