IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6276 of 2022

Ariz Kohli .. Applicant
Indian Inhabitant of Mumbai,
Occupation Business, Age 48 years
36, Sunita Building, Cuffe Parade,
Mumbai 400005.

Versus

Tehzeeb Kohli .. Respondent
Indian Inhabitant of Mumbai
Occupation Business, Age 45 years,
37, Sunita Building, Cuffe Parade,
Mumbai 400005.

...

Mr.Malcolm Siganporia i/b Jayesh Bhosale for the petitioner.

Mr.Rafique Dada, Sr. Counsel with Ms.Taubon F. Irani, Mr.Zubair, Mr.Sachi Lodha and Ms.Disha Shetty for the respondent.

CORAM: BHARATI DANGRE, J.

DATED : 7th JULY, 2022

JUDGMENT:-

1 The petition is filed by the petitioner, who is the original respondent in Petition No.A-1109/2018 filed before the Family Court No.5 at Bandra, Mumbai, being aggrieved by an

order of the Family Court dated 16th April 2022 passed on an Interim Application No.102 of 2022 in the said petition as by the impugned order, the application filed by the respondent (petitioner wife) under Order 6 Rule 17 of the Code of Civil Procedure, seeking amendment in the petition has been allowed.

2 Heard learned senior counsel Mr.Rafique Dada with Ms.Taubon Irani for the respondent.

Since the parties expressed consensus to hear the Writ Petition finally. Rule. Rule returnable forthwith. By consent, taken up for hearing forthwith.

The bare minimum facts necessary for determination of the sustainability or otherwise of the impugned order can be narrated thus :-

The petitioner and the respondent herein were married on 20/1/2002, as per Muslim Rites and Rituals and on 1/8/2004, a son was born out of the wedlock. On account of the differences, the wife filed Petition No.A-1109/2018 before the Family Court No.5 at Bandra, inter alia, seeking restitution of conjugal rights as well as other reliefs. the petition came to be filed on 14/3/2018. The petition running into 119 pages, refer to the marital discord between the couple and also contain serious allegations about the respondent carrying a love affair with a lady and it is alleged that though she kept quiet, she was tormented by the husband and his violent nature petrified her. The allegations

in the petition are to the effect that the errant behaviour on account of his extra marital affair, caused tremendous agony to her and the petitioner also narrate the irresponsible behaviour of her husband towards the children. It is also alleged that he did not give monthly expenses to her and was in a habit of throwing tantrums whenever a demand to that effect was made. It is specifically pleaded that the respondent throughout his ongoing extra-marital relationship, mentally harassed and tortured her and mistreated her by expressing his anger, aggression, cold behaviour and ruthless attitude. It is also pleaded that he insulted and humiliated the petitioner wife with his bitter words, causing mental, emotional and financial torture and abuse. In paragraph no.25 of the petition, the following averment is made :-

> "257. The petitioner states that she is left with no option but to file this petition in this Hon'ble Court and address her grievances. The petitioner further state that she has endured grave hardship, heartbreak, humiliation during the course of her matrimonial relationship with the respondent especially since his affair with Neha Kotak and hence has no alternative than to seek redressal from this Hon'ble Court to salvage her marriage.
>
> 258. The petitioner says and submits that she is entitled to mandatory Order and injunction from this Hon'ble Court directing the respondent to restrain from disposing his personal assets as enumerated herein above."

In the said proceedings, a decree for restitution for conjugal rights was sought, apart from the claim of an amount of Rs.Three lakhs by way of monthly maintenance being staked for herself and her minor son. The other reliefs included the responsibility being cast upon the husband, to bear the educational expenses of the child. A direction was also sought against the respondent husband to transfer his 50% share in a flat and restrain him from disposing off alienating, creating any third party rights in respect of his property.

In response to the petition, the husband filed his written statement on 29/11/2018.

3 Another application was filed by the petitioner wife on 11/1/2018, seeking interim maintenance and the husband responded to the same by filing his reply on 14/1/2018. On 25/4/2019, the application seeking interim maintenance was disposed off and against which a Writ Petition is instituted before this Court which is pending for adjudication.

4 After the period of two years from filing of the petition which is described above, an Interim Application came to be filed by the petitioner wife under Order 6 Rule 17 of the CPC, seeking amendment in Petition No.A-1109/2018 and the application was numbered on I.A. No.102/2022. By the said application, the petitioner sought insertion of certain pleadings in

the petition in terms of the schedule and also sought amendment in the prayer clause.

The Amendment Application proceed on the basis that at the time of filing of the petition, the petitioner believed that her marriage could be salvaged. However, during the course of the proceedings, the conduct and attitude of the respondent had given her a realization that it is a futile attempt to pursue restitution, as it is evidently clear to the petitioner that the respondent had chosen his paramour over her and their son, and since the petition filed by her has not reached trial stage, she sought amendment to the petition.

5 The Schedule of the Amendment, when carefully perused, is nothing but continuation of the narration of the conduct of the respondent/husband, along with his paramour so as to humiliate the petitioner and several other instances have been cited. The application also sought deletion of a prayer and prayer clause (a) and it's substitution by a prayer for dissolution of marriage plus insertion of prayer g(i) and g(ii). The proposed amended prayer sought for the following :-

> TO DELETE AND REPLACE PRAYER CLAUSE (a) WITH THE FOLLOWING
>
> "(a) This Hon'ble Court may be pleased to dissolve the marriage solemnized on 20th January 2002 U/s. 2(ii), (iv), & (vii a & d) OF THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

TO ADD PRAYER CLAUSE g(i) and g(ii)

(gi) That this Hon'ble Court be pleased to declare the Petitioner the sole owner of the flat situated at 37, Sunita Apartments, 7th floor, Cuffe Parade, Mumbai and this Hon'ble Court be pleased to direct the Respondent to vacate the said flat.

(gii) This Hon'ble Court be pleased to restrain the respondent from entering the matrimonial home of the petitioner.

6 The present petitioner, the husband opposed the amendment application on the ground that the amendment sought would fundamentally change the nature and character of the pending case. Written arguments were also filed opposing the said application.

The Family Court, while passing the impugned order, granted the application for amendment and directed the amendment to be carried out within a stipulated period. It is informed that, pursuant to the impugned order, amendment is already carried out.

7 The impugned order passed below Exhibit-97 determine the issue, whether the proposed amendment is necessary in determining the real question in controversy between the petitioner and the respondent, and whether the application is filed before the commencement of the trial. Both the issues have been answered in the affirmative and it was held that the petitioner's application was maintainable.

In granting the said application, the Family Court placed reliance upon a decision of the Division Bench of this

Court in case of *Uttara Praveen Thool Vs. Praveen s/o Bhanudas Thool, 2014 (2) Mh.L.J. 321*, where, in a petition filed by the petitioner seeking restitution of conjugal rights, amendment was granted by allowing addition of prayer for grant of divorce, by obtaining leave of the Court. The Division bench has held that concept like changing the nature of suit etc. which is applicable to normal proceedings may be inherently foreign to and not applicable in matrimonial matters, where primacy is restoration of normal marital ties, and if not possible, to grant other appropriate relief. In view of the above, it was held that the principle laid down in *M/s.Revajeetu Builders and Developers vs Narayanaswamy and Sons and ors, (2009) 10 SCC 84,* which propound the law on amendment of pleadings in routine civil matters, was held to be inappropriate.

8 The Family Court recorded that the petition is filed by the petitioner in the year 2018 and after two years, the application for amendment is filed and since the matter has not reached the trial stage, in order to prevent multiplicity, and to avoid further delay, the application deserve to be allowed. Cost of Rs.5,000/- was imposed on the petitioner for causing delay in filing the application.

It is this decision of the Family Court which is assailed by the petitioner.

9 The learned counsel for the petitioner would submit that the Family Court has failed to advert to the scheme of the Family Court's Act, 1984 and has completely ignored Section 10 of the said Act, which prescribe the procedure to be followed generally, while conducting the proceedings before a Family Court and he would submit that for all purposes, the provisions of the Code are applicable and a Family Court is deemed to be a Civil Court and therefore, the parameters which are usually to be applied in the civil proceedings would be equally applicable with the same force to the proceedings before the Family Court. The learned counsel would submit that by the proposed amendment, the nature of the proceedings has been completely altered and he would submit that the amendment is malafide and since it do not confirm to the parameters laid down in Revajeetu Builders (supra) which are specifically culled out in the matter of grant or refusal of amendment when an application is preferred under Order 6 Rule 17 of the CPC. He would submit that ultimately, the Court must test the bonafide of the application and shall not refuse bonafide, legitimate, honest and necessary amendment, but it shall not permit malafide, worthless and/or dishonest amendments, and the basic test which must govern grant or refusal of amendment is whether such amendment is necessary for determination of the real question in controversy or for proper and effective adjudication of the case. He would further submit that the Division Bench in case of Uttara Thool (supra) has failed

to consider the scheme of the Family Court's Act and the procedure to be followed, particularly as set out in Section 10 therein, and therefore, the decision of the Division Bench is to be passed, per incuriam.

10 The learned Senior Counsel Mr.Dada would not dispute the factual scenario but submit that considering the futility of the relief which was initially sought by the petitioner wife by filing a petition for restitution of conjugal rights, on passage of time, she moved an application seeking dissolution of marriage. He would submit that it is uncommon for an Indian woman to make every attempt to save her marriage and therefore, initially she sought restitution of conjugal rights but thereafter realizing that it would not serve any purpose, and it is not possible for her to reside with the petitioner, she sought dissolution of marriage on the grounds that are permissible under the Muslim Marriage Act. He would submit that endeavour of every Court should be to avoid multiplicity of litigation and he would submit that the matrimonial matters which are delicate and sensitive, must be dealt with a liberal hand, with a primacy being accorded to restoration of normal marital ties, and if not, permitting dissolution of the marriage in a dignified way. Mr.Dada would also lay emphasis on the observations of the Division Bench in case of *Uttara Thool* (supra). He would submit that the long pendency before the Family Court would add to the detriment of the petitioner, who was standing in the

queue, awaiting the turn of her petition filed in the year 2018 and now, if a fresh petition is to be filed, seeking dissolution of marriage, her wait for justice would be further delayed.

11 The factual background in which the question arises for determination, being not in dispute, the crux of the matter is whether the Family Court was justified in allowing the application for amendment, de hors the parameters laid down in Order 6 Rule 17 and specifically, as culled out by the Apex Court in Revajeetu Builders (supra).

12 The decision of the Division bench in case of Uttara Thool(supra) is delivered in the peculiar facts where the marriage between the parties was solemnized, and a son was born out of the wedlock, but after the birth of the child, the wife did not return to her matrimonial home for no justifiable reason. The husband, therefore, instituted HMP under Section 9 of the Hindu Marriage Act, seeking restitution of conjugal rights and during the pendency of the proceedings, amended his pleadings and in the alternate, sought a decree for divorce on the ground of mental cruelty on the basis of desertion by the wife.

The parties went to trial and the Family Court allowed the petition filed by the husband and passed a decree of divorce on the ground of cruelty.

Pertinent to note that during the pendency of the proceedings before the Family Court, seeking restitution of

conjugal rights, the respondent husband made an application to amend the petition by deleting the prayer for restitution and substituting the same by the prayer for grant of divorce. The Family Court disposed off the application by directing the respondent to file another application seeking divorce as an alternate relief. On appreciating the evidence brought on record, in the backdrop of the pleadings, the marriage between the parties was dissolved by a decree of divorce on the ground of cruelty.

13 While arguing the appeal, on behalf of the wife, it was argued that though initially the petition was filed under Section 9, no issue in that regard was framed while deciding the proceedings. It was urged that by seeking restitution, the respondent had condoned all earlier incidents and hence on that count, decree for divorce could not have been passed. It was sought to be argued that the two reliefs sought in the petition were mutually destructive as the two prayers were opposed to each other. On behalf of the husband, it was argued that in absence of any justifiable cause assigned by the wife for living separately from her husband, he was compelled to seek divorce on the ground of cruelty. Merely because no issue was framed, as regards restitution of conjugal rights would not have effect of vitiating the impugned judgment, as there was irretrievable breakdown of marriage and both the parties had separated for almost 20 years. In the wake of the aforesaid background, the Division Bench after referring to various authoritative

pronouncements, has observed as under.

> "12 Similarly, we find that the appellant's objection to amendment and to insertion of an additional prayer seeking the relief of decree of insertion of an divorce on account of cruelty is also unsustainable. A civil suit to certain extent, is bound by the procedural laws and in province of amendment, by Order 2 Rule 2, Order 6 Rule 17 of CPC and the Limitation Act, 1963. The Hindu Marriage Act, 1955 does not prescribe any outer period to prove the desertion or cruelty, if the cause continues. The said Act only prohibits filing of premature proceedings and after expiry of said bar-period, the cause in most of the matrimonial disputes may be continuous accruing till the normal ties are not restored. Section 21 only makes CPC applicable as far as possible and not otherwise.

14 The aforesaid observations are relied upon by the Family Court in passing the impugned order by granting the relief, by recording that seeking deletion of the relief of restitution of conjugal rights and substituting the same by a prayer for divorce, did not alter the nature of proceedings.

With due respect to the Division Bench which decided Uttara Thool (supra), I must mention that the Division Bench has failed to make reference to the scheme of the Family Court's Act, 1984. Under the said enactment, the Family Courts have established with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and the Family Court shall exercise jurisdiction as set out in Section 7 over the suits and proceedings enumerated there under. Section 9 of the Family Court Act, cast a duty on the said Court

to make efforts of settlement, where it is possible to do so, consistent with the nature and circumstances of the case, and to assist and persuade the authorities in arriving at a settlement, in respect of the subject matter of the Suit or proceedings. Section 10 of the Family Court adumbrate the procedure to be followed while trying the proceedings falling within its jurisdiction. Section 10 reads thus :-

> *"10. Procedure generally -*
>
> *(1) subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court. -(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.*
>
> *(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.*
>
> *(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure*

with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the order"

15 Another important section in the said Family Court Act is, section 18(1), which prescribe procedure for execution of decrees and orders. Section 20 of the said Act contain a provision which give an overriding effect to the provisions of the Act, notwithstanding anything inconsistent therewith contain in any law for the time being in force, or in any instrument having effect by virtue of any law other than the said Act.

16 Reading of the various provisions of the Act of 1984, thus make it clear that the Family Court is a Civil Court and possess all powers of such Court. Sub-section (1) of Section 10 specifically make the applicability of the provisions of Code of Civil Procedure and of any other law for the time being in force, and prescribe that it shall apply to the suits and proceedings, other than the one which are provided for. The said provision however, shall not preclude the Family Court from laying down its own procedure, since its primary object is to arrive at a settlement in respect of the subject matter of the Suit or proceedings, or arrive at the truth of the facts alleged by one party and denied by the other.

17 A single Judge of this Court (Justice S.B. Shukre) in *Prakash Balkrishna Naidu Vs. Sou.Shashank Prakash Naidu (AO No.43/2017 dated 15/12/2017)* was confronted with the

maintainability of appeal filed under Order 43 Rule 1-A read with Section 104 of Code of Civil Procedure. The said decision was upheld by the Hon'ble Supreme Court,

The objection raised was to the effect, that the appropriate remedy for the appellant would be to proceed u/s.19 of the Family Court's Act, and he is not entitled to avail the remedy available under Order 43 Rule 1(a), which is a remedy of Appeal against the order passed under Order 7 Rule 10 of the CPC.

18 While determining which remedy is available to the appellant, the learned Single Judge laid his emphasis upon Section 10 of the Family Court's Act and observed as under :-

> "5. It is clear from a reading of this Section that the provisions of Civil Procedure Code are expressly made applicable to the Family Courts and that in order to remove any doubt which anybody may perhaps entertain about the nomenclature of the Court, which is of "Family Court", the legislature has expressed itself to clear it off in so many words that "Family Court shall be deemed to be a civil court". This Section on a careful look at it, would show that it is capable of being divided in two parts. First part relates to the applicability of the provisions of the Civil Procedure Code to a Family Court which has the effect of clothing a Family Court with all those powers a civil court would have under the Civil Procedure Code. Second part contains a declaration of legislative intent. The legislature intends that this Court, by fiction of law, be deemed to be a Civil Court. A combined reading of these two parts would clearly show that a Family Court has got all those powers of a civil court which it has under the Provisions of Civil Procedure Code and for all purposes, it is considered to be a Civil Court.

> Therefore, I find that a Family Court, by virtue of the provisions of Section 10 of the Family Courts Act, would have to be considered as equal to a civil court, no less and no more.
>
> 6. Now, what is left for this Court is to find out if the order passed by the Family Court invoking its power under Order 7 Rule 10 would be amenable to a remedy of appeal available to an aggrieved party under the provisions of the Civil Procedure Code or not. This remedy of appeal can be found to be expressly provided under Order 43 Rule 1(a) of the Civil Procedure Code and thus, I find that this appeal is tenable.

The Division Bench in case of Ujwala Thool (supra) did not make any reference to the statutory provision in form of Section 10, in the Family Courts Act, the said decision, which fail to consider the statutory provision would thus fall within the spectrum of *per incuriam* and may not amount to a binding precedent. In *State of Uttar Pradesh vs. Synthetics and Chemicals Ltd, 1991(4) SCC 139,* the doctrine has been evolved as under :-

> *"English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority"*

In *Hyder Consulting (UK) Ltd vs. Governor, State of Orissa, Through Chief Engineer, 2015(2) SCC 189,* the doctrine is phrased in the following words:

> *"A decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the Court of record. As regards*

the judgment of this Court rendered per incuriam, it cannot be said that this Court has "declared the law" on a given subject matter, if the relevant law was not duly considered by this Court in its decision".

19 The decision in Uttara Thool which fail to consider the procedure to be adopted by the Family Court in terms of Section 10 of the Family Court Act, which is trying the petition, is not a binding precedent. Conduct of suits and proceedings before the Family Court are governed by provisions of Family Court Act and the Rules framed thereunder and the Family Court is deemed to be a Civil Court in the wake of sub-section (1) of Section 10. True it is, that a slightly liberal approach may be permissible, since the heading of Section 10 read as "procedure generally" but by assimilating the intention of the legislature, underlying the said provision, the provisions of the Code of Civil Procedure is made applicable to the suits and the proceedings before the family court.

Once it is held that the Civil Procedure Code shall govern the proceedings before the Family Court, an application filed under Order 6 Rule 17 seeking amendment must be governed by the factors/principles to be kept in mind by a civil court while granting or refusing the amendment.

The Courts have very wide discretion in the matter of amendment of pleadings, but it is expected that the power must be exercised judiciously and with great care. While deciding the

applications for amendment, the Court must not refuse bonafide, legitimate, honest and necessary amendment and should not permit malafide, worthless and/or dishonest amendments.

The Honble Apex Court in case of Revajeetu have culled out the principles in the following words :

> WHETHER AMENDMENT IS NECESSARY TO DECIDE REAL CONTROVERSY:
>
> The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.
>
> NO PREJUDICE OR INJUSTICE TO OTHER PARTY:
>
> The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to 22 (1981) 3 SCC 652 other side. Ordinarily, if other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The Courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

The factors which have been considered to be relevant and guiding principles while considering the applications for amendment, being set out as under :-

> "On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(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.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

20 The application filed by the petitioner wife ought to have been tested in the Family Court, in the aforesaid framework, contemplated by Family Court Act.

When the petition filed by the respondent/wife seeking restitution for conjugal rights and other ancillary reliefs is perused, it is apparent that it reflect the troublesome relationship between the two. Despite this, the relief of restitution for conjugal rights is sought for. The existing troublesome relationship is carried further by the amendment and the relief of restitution of conjugal rights is sought to be substituted by the

one for dissolution of marriage. True it is, that the proceedings are at pre-trial stage but the conspectus of the petition has completely undergone a change. The amendment , by no stretch of imagination, can be said to be imperative for proper and effective adjudication of the existing petition, seeking restitution of conjugal rights and no prejudice is caused to the petitioner if the amendment is disallowed, as it is always open for the petitioner to institute a fresh petition for dissolution of marriage, since the marriage is sought to be dissolved on the grounds available in section 2(ii)(iv) (viii) a & d of the Dissolution of Muslim Marriage Act, 1939.

Since the dissolution of marriage is sought on these specific grounds, which contemplate a period of limitation i.e. where the husband has neglected or failed to provide maintenance of wife for a period of two years or he has failed to perform, without reasonable cause, his marital obligations for a period of three years, it is permissible for the petitioner to seek dissolution of marriage by establishing the neglect from the period prescribed under different clauses. Merely because it would result in multiplicity of litigation, can be no ground to grant amendment, praying a diagonally opposite relief, in the main proceedings, as the Court must be cautious while allowing the application for amendment and shall discourage worthless and/or dishonest amendments.

The basic test to govern the courts discretion should be whether the amendment is necessary for determination of the real question in controversy. The relief sought by way of amendment is exclusive and completely extrinsic and alien to the one which was sought, in the backdrop of the pleading set out in the petition filed by the wife. Further prayer clause g(i) and g(ii) which are sought to be inserted are the prayers which are completely irreconcilable to the original petition and reliefs sought therein.

21 The learned Judge of the Family Court has miserably failed to consider the true conspectus of the provision permitting grant of amendment under Order 6 Rule 17 of the Code and hence, the impugned order cannot be sustained. By setting aside the said order, the writ petition is made absolute in terms of prayer clause (b).

(SMT. BHARATI DANGRE, J.)

Tilak