

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10095 OF 2016

Mrs.Hetal Jignesh Parekh

.. Petitioner

vs.

Mr.Jignesh Vinod Parekh

.. Respondent

Mr.Mandar Limaye for the petitioner

Mr.R.T.Lalwani i/b Mr.Prakash Mahadik for the respondent

CORAM : K. K. TATED, J.
DATE : AUGUST 29, 2016

PC.:

1 Not on board. At the request of Advocate for the petitioner, matter is taken on board for urgent orders.

2 Heard the learned counsel for the parties.

3 The learned Counsel Mr.R.T.Lalwani submits that he received instruction to appear on behalf of respondent. He undertakes to file his Vakalatnama within one week from today.

4 By this Petition under Article 227 of Constitution of India, the petitioner wife challenges the order dated 28.7.2016 passed by Judge, Family Court No.3, Mumbai below Exhibit-69 in Petition A-2993 of 2011 directing petitioner to undergo physical and psychological

medical examination to be conducted by Medical Board, Government Hospital (Sir J.J.Hospital), Mumbai. Operative part of the said order reads thus:

“: **ORDER** :

The application is allowed as under:

- 1) The respondent is directed to undergo physical and psychological medical examination to be conducted by Medical Board, Government Hospital (Sir J.J.Hospital), Mumbai.
- 2) Both parties are directed to appear before the Medical Board on 02.08.2016 for taking appointment for medical examination and to inform said date to this Court.
- 3) On the appointment day, both parties should remain present before the Medical Board for examination of respondent.
- 4) The Concerned Authority is directed to conduct physical and psychological examination of the respondent and to report as to whether she is impotent as alleged and to submit the report at the earliest.
- 5) Petitioner to pay the necessary charges of medical examination.
- 6) Petitioner to carry copy of this order for giving it to the Medical Board so as to expedite the examination and receipt of the report.”

5 The learned Counsel for the petitioner submits that the impugned order is required to be set aside on three grounds:

- “a) Application filed by respondent husband is at belated stage.
- b) Family Court has no right to pass order a roving enquiry.
- c) Petitioner wife already examined by Dr.Kusum Zaveri and certificate is on record.”

6 It is to be noted that in the present proceeding, petitioner wife in her cross-examination on 11.4.2016 specifically made a statement that

she is ready to undergo any kind of physical examination. Paragraph 27 of the said cross-examination reads thus:

“27. It is true that in the month of April 2011 I had been to my parents house. It is not true that at that time I stayed at my parents house for three weeks. Witness volunteers that I stayed there for 10 to 12 days for my examination. It is not true that apart from said visit, I had been to my parents house on 2-3 occasions and stayed there. It is not true that I stayed for 3 ½ in all with the petitioner.

(On the request of the parties and their lawyers, proceeding in camera is ordered)

It is true that while cohabiting with the petitioner I used to attend college. Witness volunteers that I used to attend the college once in all 10 days. My college timings were 6.00 p.m. to 9.00 p.m. During my cohabitation with the petitioner we had uncountable sexual intercourse. I am ready to undergo any kind of physical examination.”

7 Thereafter respondent husband filed application on 27.7.2016 with following prayer:

“(a) That this Hon'ble Court may be pleased to pass an order directing the Respondent to undergo required medical examination at Nair Hospital or any other government hospital; and direct the Head of Department of Gynecology and Head of Department of Psychiatry to carry out physical and psychological medical examination of the Respondent and administer required tests and thereupon give their report as to whether the Respondent has had sexual intercourse and whether she is physically and mentally capable of having sexual intercourse; and such report may be sent to this Hon'ble Court confidentially in a sealed envelope.”

8 This itself shows that, from the date of statement made by the petitioner in her cross-examination, respondent husband immediately

filed application within three months. That cannot be termed as a belated stage. In any case in the present proceeding, respondent filed application for divorce for non consummation of marriage. Considering these facts, I do not find any substance in the petitioner's objection that application filed by respondent husband was at belated stage.

9 The second objection raised by the petitioner is Family Court has no right to pass order a roving enquiry in matrimony case. In support of this contention, he relies on the Apex Court Judgment in the matter of *Sharda vs. Dharmpal, (2003) 4 SCC 493*. He relies on paragraph 78 which reads thus:

“78. It is, however, axiomatic that a Court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a Court is not expected. The Court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.”

10 The learned Counsel for the petitioner submits that in the present proceeding, the examination in chief as well as cross-examination of both the parties is over. Now the matter is kept for argument. At this stage, the respondent husband filed application for physical and psychological medical examination. He submits that court below failed to consider the fact that certificate issued by Dr.Kusum Zaveri, Obstetrician & Gynaecologist was already on record. In spite of that Family Court has passed this order. Hence, said order is required to be

set aside.

11 It is to be noted that to prove the non consummation of marriage medical examination is required and for that purpose the learned counsel for the respondent husband relies on the same judgment reported in the case of *Sharda vs. Dharmpal* (Supra). He relies on paragraph 81 which reads thus:

“81. To sum up, our conclusions are

“1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution

3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.”

12 It is clear from paragraph 81 of the said judgment that matrimonial court has power to order a person to undergo a medical test and same thing is done by Trial Court in the present proceeding. Hence, objection raised by the learned counsel for the petitioner about holding roving is not maintainable in the facts and circumstances of the present case.

13 The third objection is that Petitioner wife already examined by Dr.Kusum Zaveri and certificate is on record. Therefore there is no

question of asking the petitioner to undergo medical examination before the Government Hospital. It is to be noted that medical certificate issued by Dr.Kusum Zaveri which reads thus:

“This is to certify that Mrs.Hetal Parekh was seen by me on 10th March, 2011. She had swelling & pain in vagina. On examination she was found have bartholin abscess on rt. Side. She was treated with antibiotics & subsequent examination 16th March, 2011 the abscess resolved & speculum examination showed lot of discharge with absent hymen.”

14 Bare reading of the said certificate shows that said Doctor has examined petitioner and that cannot be treated as a Certificate after examining the petitioner.

15 Considering these facts, I do not find any substance in the present Writ Petition and same stands rejected.

JUDGE