

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.2037 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 & 401 of the Code of Criminal Procedure, 1973, ('the Code', for short) is filed by the petitioner/ A1 assailing the order dated, 05.07.2017, of the learned I Additional Metropolitan Sessions Judge for trial of communal offence cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad, passed in CrI.R.P.no.237 of 2016.

2. I have heard the submissions of *Sri Mohd. Abdul Lateef*, learned counsel appearing for the petitioner/ A1, and of the learned Public Prosecutor appearing for the respondent, State of Telangana. I have perused the material record.

3. To begin with it is to be noted that the case in Crime No.340 of 2016 of was registered by the Women Police Station, DD, Hyderabad, against the petitioner/ A1 and others, on 27.05.2016, for the offences punishable under Sections 498-A, 406 and 506 IPC and Sections 4 and 6 of Dowry Prohibition Act. During the course of investigation into the said crime, the State/ complainant filed CrI.M.P.No.5545 of 2016 requesting to send the petitioner/ A1 to medical check up and direct him to undergo potency test. The said petition was resisted by the A1/ petitioner herein. The learned Additional Chief Metropolitan Magistrate dismissed the said petition of the complainant *inter alia* holding that the potency test has no nexus to the subject matter of the crime and such a test is not necessary and that any direction to the petitioner to undergo such a test

is neither necessary to prove or disprove the case of the prosecution and that the prosecution case has to be proved by oral and documentary evidence. As already noted, the learned Additional Metropolitan Sessions Judge allowed the Criminal Revision Petition filed by the State/ complainant and directed the petitioner/ A1 to undergo medical check up and potency test at Osmania General Hospital, Hyderabad. Hence, the petitioner/ A1 is before this Court.

4. The averments in the petition of the State/ complainant in support of the above said request, in brief, are as follows: 'On a report lodged by Shaik Raziya, wife of the petitioner/ A1, the aforestated crime was registered against the petitioner/ A1 and his family members. She stated in her report to the police that her husband is impotent and that their marriage was not consummated. During the course of investigation, the petitioner, her parents and other witnesses were examined and their statements were recorded. Necessary documentary evidence was also collected. During the course of investigation also, she affirmed that her husband is impotent and that their marriage was not consummated. Hence, it has become necessary to make a request to the Court to issue orders directing the petitioner/ A1 to go to Osmania General Hospital, Hyderabad, and undergo medical check up/potency test to find out whether or not he is fit for marital life. Subjecting the petitioner/ A1 to the said test and knowing the result of the said test is essential to proceed further with the investigation into the crime.'

5. The petitioner/ A1 filed a detailed counter denying various allegations leveled by his wife/the 1st informant against him and his

family members. In the counter, it is *inter alia* alleged on the relevant aspect as follows: 'The petitioner/ A1 and his wife lived together and had sexual relationship and conjugal society after the marriage. Their marital life was very happy for more than three years. The 1st informant did not beget children. The marriage was consummated on the 2nd day of the marriage. On the 3rd day, the *de facto* complainant left the matrimonial house. On 04.03.2013, they celebrated Valima function. Her elder brother, Shaik Abdul Fareed, is a non resident Indian. He is a green card holder of Australia. He is sending huge amounts regularly to his father, Shaik Abdul Haq, and he is managing the Women Police Station, CCS and its staff. They are under the control of the father-in-law the petitioner/ A1. This petitioner/ A1 and his family members were granted anticipatory bail. One Magistrate is also controlling the Investigating Officer and his staff. On account of the false complaint lodged by the wife of the petitioner/ A1 and the high handed action of the police, the petitioner and his family members, who are highly qualified and having good social status, are suffering a lot. The allegation in the petition about the investigation allegedly conducted as stated in the petition of the complainant is false. The first informant, that is, the wife of this petitioner/ A1, unnecessarily blamed this petitioner/ A1 by stating that he is impotent. The wife of this petitioner/ A1 enjoyed marital life for more than three years. She and her family members are liable for prosecution under Section 500 IPC. The Investigating Officer has no power to seek a direction for medical check-up or potency test of this petitioner/ A1. It is for this petitioner/

A1 either to submit or not before the medical officer for any medical check up or potency test. Hence, the petition may be dismissed.'

6. Learned counsel for the petitioner/ A1 while reiterating his case, which is stated supra, in detail, would further submit as follows: 'As observed by the learned Magistrate, the crime was registered for the offences punishable under Sections 498-A, 406 and 506 IPC and Sections 4 and 6 of Dowry Prohibition Act. For proving the ingredients of the said offences, it is for the wife of the petitioner/ A1 to adduce necessary oral and documentary evidence. The issue whether the petitioner/ A1 is potent or impotent is irrelevant and does not fall for consideration in the matter. After leading happy marital life for more than three years, the wife of the petitioner/ A1 is unnecessarily blaming him by stating that he is impotent. Merely because a false allegation is made by the wife, the husband cannot be directed to undergo medical check up or potency test. The order of the Court below causes lot of mental agony. The petition is got filed by the wife only to harass her husband/ petitioner/ A1 and to defame him. The Court below ought not to have interfered with the well reasoned order of the learned Magistrate. As per the settled legal position, a party to a matrimonial proceeding or a criminal proceeding like the present one, cannot be compelled to undergo any medical check-up or medical test without his or her consent and willingness. The complainant/ State is not entitled to request the Court and the Court is also not empowered to pass an order compelling the petitioner/ A1 to undergo potency test. It is for the petitioner/ A1 to give or not to give consent for undergoing such test. Since this petitioner's wife's brother is an NRI and is sending huge amounts to his father, the

police concerned were in their hands and they harassed the petitioner/ A1 and his family members by resorting to illegal acts. The wife of the petitioner herself mentioned in her report that they lived happily for about two months after the marriage. The said averment shows that the couple lead happy marital life. It is also an admitted fact that the couple lived in Bangalore for about 1 ½ years. The petitioner/ A1 worked as Software Engineer in Mercedes Benz Company. There is no point in directing the petitioner to undergo potency test after he pronounced divorce and the same was accepted by his wife, the informant. Hence, the revision may be allowed and the order passed by the Court below may be set aside and the order passed by the learned Magistrate may be restored.'

7. Per contra, the learned Additional Public Prosecutor representing the State of Telangana supported the orders of the Court below and submitted as follows: 'In view of the assertion in the first information by the wife and also her affirmation during the course of investigation that her husband is impotent and that there is no consummation of marriage, it is necessary to direct the petitioner/ A1 to undergo potency test. The learned Additional Metropolitan Sessions Judge having considered the facts correctly and the legal position in proper perspective granted the request of the complainant. The said order of the Court below, which is justified in the facts and circumstances of the case, does not warrant interference. Even if this Court comes to the conclusion that the petitioner/ A1 cannot be compelled to undergo the test, that does not prevent the Court from ordering the petitioner/ A1 to undergo the test. In spite of the orders of this Court, if the petitioner/ A1 does not undergo

the potency test by obeying the orders of this Court, then, necessary inference would be drawn by the Court concerned at the appropriate time. Therefore, there are no impediments for a Court ordering a party to undergo the DNA test or potency test, or any other test, and it is for the party concerned to either obey the orders of the Court or face the consequences that flow from the refusal to undergo the test as ordered by the Court. Hence, the revision may be dismissed.

8. I have bestowed my attention to the facts of the case and contentions of the parties. Since, the facts, pleadings and submissions are stated supra, in detail, there is no need to dilate the same. The wife submits that the husband is impotent and the marriage is not consummated. The husband submits that they lived happily as man and wife and that they had conjugal society and that the marriage was consummated. If the parties go to trial, they simply assert their respective versions on Oath against Oath. Therefore, to bring on record superior evidence the State/ Complainant requests the Court to direct the Petitioner/ A1 to undergo medical check-up and potency test as the report that may be furnished by a competent Doctor/ medical officer of the Government Hospital after subjecting the petitioner/ A1 to the necessary tests would be helpful to the Court concerned in arriving at a just decision in the matter. Since medical science would be able to determine as to whether a person is potent or not, it is always just and fair to secure the opinion of an expert medical officer by directing the person concerned to undergo the necessary medical tests, as such a course would provide one more assured piece of evidence that may be useful in arriving at a just decision in the matter.

Hence, it is just and necessary to direct the petitioner/ A1 to undergo medical examination and potency test at Osmania General Hospital, Hyderabad. If the opinion of the Doctor that may be furnished after conducting the necessary tests is to be considered along with the other evidence that may ultimately be brought on record, the whole of such evidence may eventually help the Court concerned in ascertaining as to which of the two rival version is true and such a course, if permitted, will perhaps leave no room for any doubt.

9. Coming to the contention of the petitioner/ A1 that he cannot be compelled to undergo any such tests as being sought for the complainant/ State and that it is for him to decide whether or not to undergo any tests, it is to be noted that the mere fact that the choice to undergo the test or not lies with the petitioner/ A1, the same does not *ipso facto* entail the dismissal of the petition of the complainant. Nevertheless, the petitioner/ A1 can be directed to undergo the necessary tests as directed in the orders of the Court below by giving him the liberty to comply with the said order or disregard the same at his own peril.

10. On the above analysis, this Court finds that the Court below is justified in passing the impugned order and that there is no merit in the contentions of the petitioner/ A1 and that the revision case, which is lacking merit, is liable for dismissal.

11. Accordingly the Criminal Revision Case is dismissed confirming the order of the Court below subject to the caveat that the petitioner/ A1 is given liberty to comply with the order of the Court below or disregard

the order requiring him to undergo medical check-up and potency test. In case he accepts the direction issued by the Court below, the report furnished by the expert medical officer shall form part of the record and shall be given its due weight at the appropriate stage, however, subject to proof. However, in case he declines to comply with the direction issued by the Court below in its orders, which are confirmed by this Court, the allegation would be determined by the Court below by drawing an adverse inference or a presumption of the nature contemplated under section 114 of the Evidence Act especially in terms of illustration (h) thereof. However, in case the petitioner/ A1 is willing to undergo the medical check-up and potency test as ordered by the Court below, the learned Magistrate shall give necessary further directions to all concerned in accord with law and procedure.

Pending miscellaneous petitions pending, if any, in this revision case shall stand closed.

03rd August, 2017

M. SEETHARAMA MURTI, J

Note:-

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