

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

% **Date of decision: 28th September, 2018**

+ **CM(M) 1076/2017 & CM No.35175/2017 (for stay)**

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..... Petitioner

Through: Mr. Abhay Kumar, Mr. Pankaj
Jaiswal, Mr. Vineet Kumar Singh &
Mr. Himanshu Pal Singh, Advs.

Versus

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..... Respondent

Through: Mr. Praveen Kumar Singh & Mr.
Rajeev Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order dated [24th January, 2017 in H.M.A. No.562/2014 of the Court of Principal Judge Family Court (East)] of dismissal of an application under Section 12 of the Family Courts Act, 1984 seeking medical test of the respondent wife, filed by the petitioner husband in a proceeding filed by the respondent wife under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for dissolution of her marriage with the petitioner husband.

2. The petition came up first before this Court on 25th September, 2017 when notice thereof was ordered to be issued and though no stay of proceedings before the Family Court sought was granted but the record of the Family Court was requisitioned in this Court effectively staying the proceedings in the Family Court. Vide order dated 21st December, 2017, the parties were referred to the Mediation Cell of this Court. Mediation failed.

3. The counsels were heard on 7th August, 2018 when the counsel for the petitioner husband stated that medical test of the respondent wife was being sought since according to the petitioner husband the respondent wife is 'a eunuch and not a female'. It was on that day enquired from the counsel for the petitioner husband that if such was the claim of the petitioner husband, why was the petitioner husband resisting the proceedings filed by the respondent wife for dissolution of marriage by a decree of divorce. The counsel for the petitioner husband stated that the petitioner husband did not want a divorce because it was a fit case for declaring the marriage void under Section 5 of the Act. However, on enquiry whether any proceeding under Section 5 of the Act had been taken, the answer was in the negative. Per contra, the counsel for the respondent wife, on that date stated that the petitioner husband had earlier applied for restitution of conjugal rights, though subsequently withdrew the same. Observing in the order dated 7th August, 2018, that the conduct of the petitioner husband was inexplicable as he could not on the one hand make allegations of the nature made by him against the respondent wife and on the other hand, by contesting the petition for dissolution of marriage, show a desire to continue with the marriage, the personal presence of the parties before this Court today was directed and the Family Court record requisitioned in this Court ordered to be sent back and the Family Court directed to proceed with the matter.

4. Today, at the outset, the counsels indicated that the parties will take steps for, quashing of First Information Reports (FIRs), criminal complaints and for withdrawal of several other proceedings filed against each other and apply to the Court for dissolution of marriage by mutual

consent. However, after the same had been recorded, the counsel for the respondent wife states that the respondent wife also wants compensation and alimony from the petitioner husband. The same is not agreeable to the petitioner husband.

5. No possibility of any amicable settlement at this stage between the parties appears. The counsels have been heard on merits.

6. The parties were married on 24th June, 2012.

7. The petitioner husband, in or about March, 2013, applied under Section 9 of the Hindu Marriage Act to the Principal Judge Family Court, Muzaffarpur, pleading (i) that on the first night after marriage, the respondent wife refused to make any sexual relation and did not even allow the petitioner husband to touch her body stating that she has chosen to be a *sanyasin* because she had no private parts for making any sexual relation and had agreed to marriage under pressure from her family members; (ii) that the respondent wife stayed in the house of the petitioner husband only for 4-5 days and thereafter left with her brother; (iii) that the respondent wife subsequently said that she will have passion for the petitioner husband only if he transfers all his properties in her name; and, (iv) “ that three months is left to be mature in filing divorce petition but in the meantime the petitioner husband has decided to take an attempt for restoration of marriage and if opposite party corporate to make relation of husband-wife by intervention of Court”.

8. The respondent wife, in or about October, 2013, filed the petition for dissolution of marriage, from order wherein this petition arises, *inter alia* pleading (i) that though the parties lived together as husband and wife but

the marriage was not consummated as the respondent wife subsequently realized that the family of the petitioner husband had married the petitioner husband to the respondent wife for the purpose of taking revenge from the father of the respondent wife as the father of the respondent wife, while working as a Medical Officer, had prepared the MLC in two criminal cases against the uncle of the petitioner husband who in the said cases had also spent 6 to 7 months in judicial custody; (ii) it was also realized that the family of the petitioner husband had misrepresented facts about their family and about the employment of the petitioner husband; (iii) as part of the said revenge, various acts of cruelty were inflicted by the petitioner husband and his family members on the respondent wife; and, (iv) besides the dowry extracted at the time of marriage, subsequent demands of dowry were also made on the respondent wife and her family members.

9. As aforesaid, the petitioner husband contested the aforesaid proceedings and applied for medical examination of the respondent wife, pleading (i) that the petitioner husband, in the preliminary objection in the written statement to the petition filed by the respondent wife for dissolution of marriage, had pleaded that the respondent wife on the first night of marriage had informed the petitioner husband that she had no private parts for making any cognizable relationship; (ii) therefore the divorce petition was liable to be dismissed because there was no valid marriage under Section 5(ii)(b) read with Section 12(1)(b) of the Hindu Marriage Act as the respondent wife was incapable of procreation; (iii) that the petitioner husband had also pleaded that the respondent wife is “home barren” / eunuch; (iv) that the petitioner husband, in other proceedings *inter se* parties also, had raised the said plea and the reply thereto by the respondent

wife before every fora was evasive; and, (v) that the Family Court was the appropriate forum for sending the respondent wife for medical test before the Medical Board, to verify whether she is barren eunuch, or not.

10. The respondent wife contested the aforesaid application contending that the application was irrelevant for the controversy to be determined in the divorce sought on the ground of cruelty. It was further stated, (i) that the allegations made by the petitioner husband were false; (ii) that in another proceeding between the parties, the respondent wife had produced Certificate dated 18th April, 2013 of B.M. Hospital, Vishnupur, Begusarai to the effect that she was normal; (iii) that no challenge was made by the petitioner husband to the said Medical Certificate which was deemed to be admitted; and, (iv) on the basis of the said Medical Certificate, the complaint under Section 420, 406, 120B of Indian Penal Code, 1860 (IPC) made by the petitioner husband against the respondent wife and her family members was dismissed.

11. The counsel for the petitioner husband today states that he had wrongly stated on 7th August, 2018 that no proceedings under Section 5 of the Hindu Marriage Act had been taken and has handed over in the Court a copy of the petition under Section 12(1)(a) of the Hindu Marriage Act filed by the petitioner husband before the Family Court Karkardooma, on the ground of the respondent wife being home barren. Reliance is also placed on *Sharda Vs. Dharmpal* (2003) 4 SCC 493.

12. Per contra, the counsel for the respondent wife has handed over (i) a copy of the Medical Certificate dated 18th April, 2013 of B.M. Hospital, Vishnupur, Begusarai; and, (ii) a copy of the order dated 13th January, 2014

in Cri. Rev. No.174/2013 titled ***Dr. Raghwendra Prasad & Anr. Vs. The State of Bihar & Ors.*** setting aside the order dated 14th May, 2013 of the Chief Judicial Magistrate issuing summons to Dr. Raghwendra Prasad father of the respondent wife and to the respondent wife to face trial for the offences under Sections 406, 420 & 120B of the IPC as they had cheated the petitioner husband by hiding the fact that the respondent wife “has no womanish character” and directing the Chief Judicial Magistrate to re-enquire into the matter and pass fresh orders in consonance with law.

13. I have enquired from the counsel for the respondent wife, whether the respondent wife, to put an end to the controversy, is willing to undergo medical examination.

14. The counsel for the respondent wife replies that the respondent wife is “not agreeable at this stage”.

15. Supreme Court, in ***Sharda*** supra relied upon by the counsel for the petitioner husband, has summarized its conclusions as under:-

“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.”

16. Having considered the controversy, I am of the opinion that there is no merit in this petition and the application of the petitioner husband for medical examination of the respondent wife has been rightly dismissed. My reasons are:-

- A. That the question sought to be determined by medical examination is not relevant to the controversy for adjudication in the proceedings filed by the respondent wife for dissolution of marriage with the petitioner husband on the ground of cruelty. The question sought to be determined by medical examination, as has transpired, is for adjudication in at least two other proceedings i.e. in the petition filed by the petitioner husband in the Family Court Karkardooma under Section 12(1)(a) and in the complaint filed by the petitioner husband in Muzaffarpur of offences under Sections 406, 420 & 120B of the IPC allegedly committed by the respondent wife and her father. Interim orders, particularly of investigation, are to be passed in aid of the adjudication of the controversy before the Court and not for the purposes of use in other proceedings *inter se parties*.
- B. The order, as sought in this proceeding, can prejudicially affect the respondent wife in other proceedings in which the said question is for adjudication.

- C. The question of the petitioner husband having a strong *prima facie* case in his favour or there being sufficient material before this Court, being one of the tests laid down by the Supreme Court in ***Sharda*** supra, does not arise when the question sought to be determined by medical test, is not in controversy in the proceedings in which the application for medical test/medical examination has been filed.
- D. What emerges is that not only the parties but their respective families are also engaged in a bitter, acrimonious litigation at several fronts. In such factual scenario, the possibility of the petitioner husband vindictively wanting the respondent wife to be subjected to a medical examination at Delhi, when the respondent wife is informed to be residing at Begusarai, Bihar, cannot be ruled out.
- E. The petitioner husband has no basis, as per his own showing, for making averments of the respondent wife “being a eunuch” or “being home barren” or “being a *Hijra*”. The only basis is that the respondent wife told the petitioner husband so. The respondent wife however denies having informed the petitioner husband so.

17. I may however state that the Medical Certificate dated 18th April, 2013 is pursuant to examination on a complaint by the respondent wife of dysmenorrhea commonly known as menstrual cramps and of examination of vagina uterus which are reported to be ‘normal’. However, the order

dated 13th January, 2014 aforesaid of the Additional Sessions Judge, Muzaffarpur does not record any categorical finding in that respect.

18. The petition is thus misconceived and dismissed for the aforesaid reasons; for delaying the proceedings before the Family Court by nearly two years, the petitioner husband is also burdened with costs of Rs.25,000/- payable to the respondent wife on the next date of hearing before the Family Court as a condition for further participation in the proceedings before the Family Court.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 28, 2018

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