

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8983 OF 2018

Gayatri Aniket Kadam ..Petitioner
vs.
Aniket Amrut Kadam ..Respondent

WRIT PETITION ST. NO. 33942 OF 2018

Aniket Amrut Kadam ..Petitioner
vs.
Gayatri Aniket Kadam ..Respondent

....

Shri Kuldeep Nikam for petitioner in WP/8983/18 and for respondent in WPst/33942/18.

Shri S.S. Patwardhan a/w. Shri P.J. Thorat for petitioner in Wpst/33942/18 and for respondent in WP no. 8983/18.

....

CORAM : M.S.KARNIK, J.

DATE : 9th SEPTEMBER, 2019

P.C. :

Heard learned counsel for the parties.

2. As common issues arise, the Petitions are disposed of by common order. The parties are referred to as the husband and wife.

3. Writ Petition No. 8983 of 2018 is filed by the wife. The wife filed a Petition for divorce under Section 13 (1) (ia) of Hindu Marriage Act. In the Petition the allegation is made regarding impotency of the husband. The wife seeks nullity of the marriage. The order below Exhibit 69 directing the husband to undergo medical test meant for determining the impotency in Government Hospital, USA and submit the report on or before the next date is under challenge.

4. Writ Petition St. No. 33942 of 2018 is filed by the husband challenging the order passed below Exhibit 1 directing the husband to remain present before the trial Court on 20/11/2018 so that he could be referred to the Civil Surgeon, Sangli.

5. The wife filed the application below Exhibit 69 for a direction to the husband to undergo the medical test to determine impotency by Civil Surgeon, Sangli. The husband filed a reply stating that he would not refuse to undergo the medical test. However, as he is residing in USA, citing the reason

of financial loss and even career loss, a request is made to permit him to undergo the medical test in the Government Hospital in USA.

6. The trial Court allowed the application with a direction to the husband to undergo the medical test meant for determining the impotency in Government Hospital, USA and submit the report on or before next date. The wife challenged this order passed below Exhibit 69 by filing Writ Petition No. 8983 of 2018.

7. When the matter came up for admission on 29th August, 2018, this Court was of the opinion that as the husband did not comply with the order dated 18th February, 2017 passed by the trial Court for depositing the arrears, it was made clear that if the husband does not comply with the order dated 18th February, 2017 before the next date of hearing, even if he produces the report from Government Hospital, USA on the next date of hearing before the trial Court, the Court will consider directing him to undergo medical test before Civil Surgeon,

Sangli. Thereafter, notice came to be issued to the husband to appear before this Court. It is therefore seen that the order dated 29th August 2018 was passed even before issuance of notice to the husband.

8. The husband thereafter consulted his lawyer and as per instructions of his lawyer, the husband deposited arrears as directed by this Court. There is no dispute that the arrears have been deposited. However, the arrears were not deposited within the time granted by this Court vide order of 29/8/2018.

9. As the arrears are not deposited within the time granted by this Court, in terms of the order dated 29/8/2018, the trial Court directed the husband to remain present before the trial Court so that he can be referred to Government Hospital, Sangli.

10. In my opinion, the order passed by the trial Court on 17th October, 2018 below Exhibit 81 and Pursis at Exhibit 86 deserves to be set aside. No doubt the husband did not

immediately comply with the order dated 29th August, 2018 passed by this Court to deposit the arrears within the time stipulated. It is however not in dispute that the husband has in fact deposited all the arrears sometime later.

11. Learned counsel for the husband states that as he is residing in USA, it is only after seeking legal advise that the arrears were deposited which resulted in delay in depositing the arrears. I find substance in the contention of learned counsel for the husband that merely because the arrears of maintenance are not deposited within time granted by this Court, the husband cannot be subjected to undergo medical test before Government Hospital, Sangli. This Court by its order had directed the trial Court to consider directing the husband to undergo medical test before Civil Surgeon, Sangli in case the arrears are not deposited. It is true that the arrears are not deposited even on a date when the trial Court passed the order on 17th October, 2018. The arrears are however deposited only after filing of this Petition upon legal advise as is the contention of learned

Counsel for the husband. In this view of the matter as there has been delay in compliance with the order passed by this Court, I am inclined to impose costs on the husband for non compliance of the order passed within the time granted. This Court while issuing notice had only directed the trial Court to consider referring the husband to Civil Surgeon, Sangli if arrears are not deposited. I find substance in the argument of learned Counsel for husband that at the stage of issuance of notice on the Writ Petition itself as this Court directed to deposit arrears, the husband would be justified in seeking condonation of the default as he has now complied with the order.

12. For the delay in depositing the arrears in terms of the order passed by this Court, the husband to pay a sum of Rs.50,000/- (Rupees Fifty Thousand only) as costs to the wife. The cost to be paid within a period of 4 weeks from today.

13. Writ Petition St. No. 33942 of 2018 is allowed subject to payment of cost of Rs.50,000/- (Rupees Fifty Thousand only) to wife within a period of 4 weeks from today.

14. In so far as Writ Petition No.8983 of 2018 is concerned, the trial in the facts had directed the husband to undergo the medical test meant for determining the impotency in Government Hospital, USA. The husband is residing at USA and the trial Court took into consideration the purpose of the wife in making the application is to bring the medical evidence regarding the impotency of the husband on record. The trial Court took a view that the place where such test is to be conducted could not be of much consequence. The husband is residing in USA and as contended by the husband it will affect his career if he is made to come to India, apart from causing financial loss which was taken into consideration by the trial Court.

15. In this view of the matter if the trial Court and for the reasons recorded has directed the husband to undergo medical test meant for determining the impotency in Government Hospital, USA, I see no reason to interfere with the order passed by the trial Court. I am now informed that the

report has been placed on record below Exhibit 90.

16. Though I am not interfering with the order passed by the trial Court below Exhibit 69, however, all objections to the report including its evidentiary value are kept open to be decided by the trial Court at the appropriate stage.

17. In case the trial Court is not satisfied with the report for any cogent reason, the trial Court is always at liberty to pass further appropriate orders in the interest of justice upon an application made by the wife.

18. As the amount of maintenance is already deposited in terms of the order passed by the trial Court and this Court, the wife is permitted to withdraw the same. Subject to above observations wife's Writ Petition No. 8983 of 2018 is dismissed.

19. The Petitions are disposed of.

(M.S.KARNIK, J.)