

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

33 WRIT PETITION NO. 4622 OF 2020

Supriya Amar Patil,
Age. 28 years, Occ. House wife,
R/o. Flat No. 211, Grishma Apartment,
Uttara Nagari, MIDC Chikalthana, Aurangabad. ...Petitioner.

Versus

Amar Ramrao Patil,
Age. 29 years, Occ. Service,
R/o. State Bank of India, Dhule Branch,
Ishkrupa Building, Opposite Zilla Parishad,
Dhule, Maharashtra. ...Respondent.

Advocate for Appellant : Mr. Thorat h/f. Mr. G.B. Kadlag.
Advocate for Respondent : Mr. S.V. Choudhari.

CORAM : MANGESH S. PATIL, J.

DATE : 23.10.2020

Judgment :

Heard. Rule. The Rule is made returnable forthwith. With the consent of the parties the matter is heard finally at the stage of admission.

2. The petitioner is the wife of the respondent. The parties are before the Family Court in a proceeding filed by the respondent seeking declaration as to the nullity of the marriage on the ground of she being incapable of consummation and unable to conceive and in the alternative seeking divorce on the ground of cruelty.

3. The petitioner is aggrieved by rejection of her application Exhibit 120 by the impugned order whereby her request for calling a witness has been turned down.

4. The learned Advocate Mr. Thorat holding for Advocate Mr. Kadlag for petitioner submits that the dispute is as to if the petitioner is capable to conceive. A copy of Short Case Record purportedly issued by Government Medical College, Aurangabad, was produced on the record about her medical examination on 30.07.2016 by the doctors of the Medical College and Hospital. With the hope that it would be duly proved by calling the resident Dr. Javeria Tanzeer Shaikh whose name appears in this Short Case Record she was sought to be examined as witness. Since petitioner was not allowed to examine her she had to approach this Court in Writ Petition No. 9493/2019. This Court by the order dated 30.07.2019 permitted her to examine Dr. Shaikh. Unfortunately for the petitioner when Dr. Shaikh stepped into the witness box she refused to prove the contents of this Case Record. Left with no alternative the application Exhibit 120 was filed seeking to call Dr. Varsha Deshmukh as a witness to prove the contents of this case record. He would submit that name of the Dr. Varsha Deshmukh appears in this record as a Unit Head and also reads that the investigation was ordered by her. Therefore,

sufficient opportunity ought to have been extended to the petitioner to examine Dr. Varsha Deshmukh. Instead, by the impugned order the learned Judge of the Family Court has rejected the application. The impugned order be quashed and set aside and she may be permitted to examine the witness.

5. The learned Advocate Mr. Choudhari for respondent referring to the affidavit-in-reply of the respondent strongly opposes the petition. He submits that since inception the petitioner is protracting the trial. Even while allowing the earlier Writ Petition, this Court had accepted a commitment from the petitioner that Dr. Shaikh would be her last witness and still, in spite of having examined Dr. Shaikh the present application was filed which was nothing but a dilatory tactic.

6. Learned Advocate Mr. Choudhari, submits that there is no propriety in calling of Dr. Varsha Deshmukh as a witness. The Family Court itself had taken initiative and had directed medical examination of the petitioner by the doctors of the same Medical College and Hospital. Pursuant there to the petitioner was physically examined by Dr. Sonali Deshmukh and her colleague doctors and a detailed report was submitted before the Family Court (Exhibit 16). Even these doctors subsequently have been examined as witnesses. There is no reason now to go back and examine Dr. Varsha Deshmukh to prove

this Short Case Record which is of earlier time i.e. of the year 2016. He, therefore, submits that the Writ Petition may be dismissed.

7. I have carefully gone through the papers. Obviously, the nature of the dispute makes it important to ascertain if really there is substance in the allegations being levelled by the respondent about the petitioner being incapable of performing sex and incapable of conceiving a child. According to the petitioner she had undergone medical examination at the Government Medical College, Aurangabad in the year 2016 and has produced a copy of the Short Case Record dated 30.07.2016. It specifically reads that one Dr. Varsha Deshmukh was the Unit Head and the USG abdomen and pelvis was ordered by her.

8. Name of resident doctor Javeria Tanzeer Shaikh appears on this Case Record and obviously attempt was made to call her as a witness. Since the request was turned down by the Family Court, the petitioner had to approach this Court. This Court in Writ Petition 9293/2019 by the order dated 30.07.2019 had allowed the petitioner to examine Dr. Shaikh.

9. Unfortunately for the petitioner Dr. Shaikh seems to have denied any role in preparation of this Short Case Record. Obviously the contents of this

record could not be proved through Dr. Shaikh.

10. Faced with the situation the petitioner now seems to have made the application for calling Dr. Varsha Deshmukh as a witness. Needless to state that since Dr. Varsha Deshmukh was the Head of the Unit and had ordered the investigation, she possibly would be the best person to prove the contents of this report.

11. True it is that when the petitioner was before this Court last time apparently there was a commitment from her that Dr. Shaikh would be the last witness on her behalf. But then when Dr. Shaikh was unable to prove the contents of this Case Record, one cannot refuse to call the witness by taking a hyper technical and pedantic view. This is what has been done by the learned Judge of the Family Court. The doors of justice cannot be closed abruptly without extending sufficient opportunity. As is mentioned above, had Dr. Shaikh proved the contents of Short Case Record there would not have been any necessity to call Dr. Varsha Deshmukh. It is because Dr. Shaikh was unable to prove the contents that the application Exhibit 120 seems to have been moved.

12. The submission of the learned Advocate Mr. Choudhari that there is no

propriety in examining Dr. Varsha Deshmukh when the petitioner had herself approached the doctor and got herself examined in the year 2016, when independently as per the direction of the Family Court the petitioner has undergone a medical examination in the year 2018, in my considered view clearly ignores the fact that it is not the matter as to what would be the worth of the contents of this Short Case Record which can be considered at this juncture. When the petitioner feels that the contents would if proved come to her rescue, one cannot refuse her opportunity to examine Dr. Varsha Deshmukh. The submission of the learned Advocate Mr. Choudhari, therefore, cannot be accepted. The learned Family Court Judge, has clearly erred in rejecting the application Exhibit 120. The order is clearly arbitrary of capricious.

13. The Writ Petition is allowed. The impugned order is quashed and set aside. The learned Judge of the Family Court shall now call Dr. Varsha Deshmukh as a witness and allow the petitioner to examine.

14. Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)