

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

CRIMINAL APPLICATION NO.104 OF 2021

Rajesh S/o Dhanraj Chawale,
Age : 31 years, Occu: Service,
R/o Ramji Chawale, Plot No.33, Naik Nagar,
Manewada Ring Road, Bhagwan Nagar
Dist. Nagpur State – Maharashtra

... **Applicant**

VERSUS

The State of Maharashtra
through Police Inspector,
Bhagyanagar Police Station,
Taluka and District Nanded

... **Respondent**

...

Advocate for Petitioner : Mr. Prashant M. Nagargoje
APP for Respondent/State: Mr. P.G. Borade

...

CORAM : MANGESH S. PATIL, J.

DATE : 01.02.2021

ORAL JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned APP waives service of notice for respondent State. With the consent of both the sides, the matter is heard finally at the stage of admission.

2. This is an Application under Section 482 of the Code of Criminal Procedure. The applicant is accused No.1 in the FIR lodged by his wife on the basis of which Crime No.389/2020 has been registered under Sections 498-A, 323, 504 and 506 read with Section 34 of the Indian Penal Code against him and his relations.

3. It appears that during the course of investigation, the Investigating Officer submitted an application to the Additional Chief

Judicial Magistrate requesting to issue direction to the applicant to undergo medical examination to ascertain his potency. By the impugned order the learned Magistrate accepted the request and permitted the Investigating Officer to resort to his medical examination.

4. The learned advocate for the applicant would submit that considering the fact that it is a crime which is under investigation based on an FIR lodged by the applicant's wife, the question of his potency or otherwise is absolutely irrelevant. The whole basis of the allegation in the FIR is that he never allowed the wife to consummate the marriage. The learned advocate would further submit that the fact of his being capable of performing sexual intercourse is absolutely irrelevant. In spite of he being capable of doing so if he refuses to indulge in it, it would still amount to cruelty within the meaning of Section 498-A of the Indian Penal Code. It is not a civil dispute to resort to such an investigation. The learned Magistrate without referring to any specific decision has vaguely observed that he was passing the order relying upon catena of decisions. The learned advocate would therefore submit that the impugned order is grossly erroneous and not sustainable in law.

5. The learned APP submits that no error is committed by the Magistrate in conceding to the request of the Investigating Officer. It is the prerogative of the Investigating Officer to undertake investigation in the manner as per his own judgment. It cannot be regulated by this Court. No harm is likely to be caused to the applicant even if he is subjected to such

medical examination and the Application be rejected.

6. I have carefully gone through the impugned order and considered the rival submissions. True it is that it is the prerogative of the Investigating Officer to undertake the investigation in a manner he decides to do it.

7. However, in the matter in hand, the basic allegation in the FIR filed by the wife of the applicant against him to attribute him with cruelty is that he never allowed her to consummate the marriage and was always reluctant to indulge in sexual relation. If her version is to be believed, the question whether the applicant is physically fit to perform sex becomes absolutely irrelevant. In spite of being sexually capable if he has refused to allow her to consummate the marriage that would still constitute cruelty. Therefore his being physically fit to perform sex or otherwise is completely redundant to make out the allegations of cruelty.

8. If such is the state of affairs, one cannot comprehend as to why the learned Magistrate conceded to the request. The impugned order is grossly erroneous and impeaches the right to privacy of the applicant.

9. The Application is allowed. The impugned order is quashed and set aside. The Rule is made absolute.

(MANGESH S. PATIL, J.)

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