

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

WRIT PETITION NO. 9812 OF 2021

Shantanu s/o Ashok Raut
Age :39 years, Occu. Service,
R/o Khamgaon, Tq. Khamgaon
Dist.Buldhana
At present : Burhanpur
Dist.Burhanpur (M.P.)

.. PETITIONER

VERSUS

Sau. Kanchan w/o Shantanu Raut
Age 31 years, Occ-Household,
R/o Dr.Devidas Rajaram Bhagwat
Trimurti Nagar, Near Parvati Mangal Karyalaya
Parbhani, Tq. & Dist.Parbhani.

..RESPONDENT

.....
Shri Pravin N. Kalani, Advocate for the petitioners
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**CORAM : MANGESH S. PATIL, J.
DATE : 03/09/2021**

PC. :-

Heard the learned advocate for the petitioner

2] The petitioner is the husband of the respondent and has filed a divorce proceeding under Section 13(1)(i)(a) of the Hindu Marriage Act. After his testimony was over he submitted an application (Exh.46) requesting the Court to direct the Dean of the Government Medical College and Hospital,

Aurangabad to undertake his medical examination so as to ascertain if he is medically fit to have sexual intercourse. A questionnaire is given soliciting an expert opinion. By the impugned order the learned Judge has rejected the application. Hence this Writ Petition.

3] The learned advocate for the petitioner submits that the respondent wife has been coming with a defence that petitioner is incapable of performing sex. In order to disprove her such stand, the application was filed. He would submit that considering the peculiar nature of the dispute, the ratio laid in the case of Sharda Versus Dharmpal; 2003 AIR(SC) 3450 and particularly in paragraph no.80 would be relevant.

4] True it is that the respondent wife has been coming with a specific stand about inability of the petitioner to perform sex. Keeping aside the question as to the burden of proof to establish this fact, the petitioner if at all he intends to meet these allegations, is free to get himself medically examined and lead the evidence of the doctor.

5] The point here, as has been rightly noted by the learned Judge, is as to why he needs an assistance of the Court to undertake that exercise. As can be

seen from the papers, already he has undergone some medical examination in a superspeciality hospital at Khamgaon. If that be so, one cannot comprehend as to why he is finding it difficult to call the doctor from that hospital as his witness and establish the fact of his being physically fit.

6] The learned Civil Judge has clearly considered all the aforementioned facts and circumstances and has rejected the application. The order, in my considered view, by no stretch of imagination can be said to be either perverse, arbitrary or capricious.

7] The observations of the Supreme Court in the case of Sharda (supra) in paragraph no.80 read thus :

“80. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia...etc.. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may be in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which

divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase “personal liberty” this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has to reconcile these competing interests by balancing the interests involved.”

8] The above observation can be followed as a guideline in an appropriate case. The petitioner is not entitled to seek any benefit from the observations of the Supreme Court in the case of Sharda (supra). It would cover a situation where a spouse is complaining of impotency of the other spouse and wishes the latter to undertake medical examination. Here he himself wants to undertake that exercise which he is not entitled to in the facts and circumstances.

9] There is no merit in the Petition. The Writ Petition is dismissed in limine.

[MANGESH S. PATIL, J.]