

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 13584 OF 2018**

Madhura Ashish Desai	 Petitioner.
V/s	
Mr. Ashish Sharad Desai	 Respondent.

Mr. Ashutosh M. Kulkarni for the Petitioner.
Mr. S.S. Ambekar i/b Shriya Gune for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: FEBRUARY 24, 2021

P.C.:-

1] Petitioner/Wife filed HMP No.166 of 2010 under Section 12 of the Hindu Marriage Act wherein Trial Court passed a decree of nullity of marriage on 2/9/2013. Feeling aggrieved, Respondent/husband preferred Regular Civil Appeal No. 360 of 2013 questioning the aforesaid judgment and decree. In the said appeal, application-Exhibit-19 came to be moved by the Respondent/husband, praying therein directions to Civil Surgeon to get the Respondent examined through expert doctor and submit a report regarding erectile response and normal sexual capacity. The said application came to be resisted by the Petitioner. However, learned lower appellate court allowed the

same vide order impugned dated 17/10/2018. As such, this Petition.

2] The learned Counsel for the Petitioner/wife would urge that provisions of Order 41 Rule 27 ought not to have been invoked by the Respondent at the stage of hearing of the appeal, particularly when such attempt was already made by the Respondent during pendency of the suit. According to him, facts which are sought to be brought on record by Respondent/husband were well within his knowledge and he could have brought the same before the Court at the relevant time. That being so, order impugned is not sustainable as the same is beyond the scope of Order 41 Rule 21 of CPC.

3] While countering the aforesaid submissions, learned Counsel for the Respondent/husband would urge that the Court, after having satisfied itself about requirement under Rule 27 of Order 41, has passed the order impugned. According to him, no prejudice would be caused to the Petitioner in case if additional evidence as is sought to be produced is permitted. The learned Counsel then would urge that the Petitioner will get chance of cross examining the witness including the Respondent.

4] I have considered the rival submissions in the light of provisions of Order 41 Rule 27 of the CPC, which deals with production of additional evidence at appellate stage. Provisions of Order 41 Rule 27 can be invoked for production of additional evidence, may be oral or documentary, in case if court below has refused to admit evidence which ought to have been admitted and against whose judgment and decree appeal is preferred. The party is also permitted to produce additional evidence, provided he establishes that in spite of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, produce the same during trial. In case if appellate court requires such document to be produced or any witness to be examined to enable it to pronounce the judgment, the production of additional evidence is permitted.

5] As far as decree of nullity of marriage is concerned, same is based on the ground of impotency of the Respondent/husband. The Trial Court while appreciating the evidence on record has taken note of the marriage performed on 12/12/2009 and has appreciated the evidence of the Petitioner and her father so as to consider her case of

annulment of marriage on the ground of impotency. Respondent/husband has examined Dr. Avinash Badne at Exhibit-67. However, Court below observed that from the evidence of the said witness of the Respondent, it cannot be inferred that the Respondent was potent and as such the Court has drawn adverse inference against the Respondent. However, the said witness has failed to produce medical certificate issued in favour of the Respondent and secondary evidence which is placed on record was not accepted. In that view of the matter, it appears that the Respondent was prompted to move application-Exhibit-19 which is allowed by the impugned order.

6] If we consider nature of evidence which is sought to be brought on record, fact remains that want of medical certificate is relied upon by the court below in passing decree of annulment of marriage. It has to be noted that the said findings would cast a stigma on the Respondent throughout his life. So as to establish that he is sexually competent to consummate the marriage, it appears that he has invoked provisions of Order 41 Rule 27 by moving the application. Pursuant to the order impugned, I am informed that the Respondent has already undergone medical examination in the Civil Hospital, Sangli so as to

determine his potency and the report is already produced on record of the appellate court.

7] Respondent/Plaintiff who intends to produce additional evidence has tried to prove the fact of his sexual competency by examining witness and as such has shown his due diligence at the time of trial. However, the doctor who was examined has failed to produce the certificate of medical fitness of the Respondent and as such the requirements under Order 27 Rule 1(aa) are prima facie satisfied.

8] In that view of the matter, I am of the opinion that the Court below was justified in invoking provisions of Order 41 Rule 27 of CPC particularly having regard to the facts of the present case. In any case, prejudice is not likely to be caused to the Petitioner, particularly when the Petitioner will get appropriate opportunity of cross examining the witness.

9] In the result, no case for interference is made out. Petition as such fails and same stands dismissed.

10] At this stage, learned Counsel for the Petitioner submits that the order passed by this Court be stayed for a period of four weeks. Considering the facts and circumstances of the case, stay as prayed is granted. Proceedings before the Trial Court not to be continued for a period of four weeks from today.

(NITIN W. SAMBRE, J.)