



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

908 CRIMINAL WRIT PETITION NO. 1985 OF 2024

**SAURABH SHIVHAR YELURKAR AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

....

Mr. L. H. Kawale, Advocate for the Petitioners
Mr. C. V. Bhadane, APP for the Respondent/State

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CORAM : Y. G. KHOBRAGADE, J.

DATE : 11.12.2024

PER COURT :-

1. Heard Mr. Kawale, learned Counsel for the Petitioners and the learned APP for the Respondent/State.

2. By the present Petition, the Petitioners who are facing the trial in R.C.C. No. 253 of 2018, for the offences punishable under Sections 498-A, 504, 506 of the Indian Penal Code, 1860 prayed to quash and set aside the order dated 26.03.2024 passed below Exh. 46 in R.C.C. No. 253 of 2024, passed by the learned J.M.F.C., Latur and order dated 27.09.2024 passed by the learned Revisional Court in Criminal Revision Application No. 43 of 2024.

3. The facts leading to filing of present Petition are that the Respondent No. 2/wife lodged an FIR on 16.11.2014 with Gangakhed Police Station alleging that on 14.02.2013, her marriage was solemnized with the present Petitioner No. 1 (accused No. 1) as per the Hindu customs and rites. After marriage, she was subjected to cruelty and harassment due to non fulfillment of demand of dowry. Further, she was compelled to fetch water from the water tank after removal of domestic servant, due to which she suffered spinal cord problem, hence she has to undergo a surgery. So also, she was criminally intimidated and intentionally insulted at the hands of the accused persons. On the basis of said allegations, Crime No. 291 of 2014 was came to be registered with Gangakhed Police Station.

4. After due investigation, a charge-sheet came to be filed against all the accused persons/present Petitioners. During the course of trial, the Petitioner No.1 / husband who is a medical practitioner, filed an application Exh.146 and prayed for referring the informant / wife for medical examination as per the judgment and order dated 26.10.2023 passed by the co ordinate bench of this Court in Second Appeal No. 851 of 2018. However, on 26.03.2024, the learned trial Court passed an order and rejected said application on the ground that, the prosecution was lodged on the basis of police report for the

offences punishable under Sections 498-A, 504, 506 read with 34 of I.P.C. Therefore, the burden lies upon the prosecution to prove the case beyond all the reasonable doubt and if the prosecution failed to do so, the accused may get the benefit of doubt. Further, the evidence of the prosecution is not closed. Hence, the application for referring the complainant / wife for medical examination is not maintainable.

5. Being aggrieved by the said order, the Petitioners/accused invoked the jurisdiction under Section 397 of Cr.P.C. and challenged the interlocutory order before the learned Revisional Court. On 27.09.2024, the learned Sessions Court passed the impugned order holding that the judgment and order dated 01.10.2018 passed by this Court in Second Appeal No. 851 of 2018 deals with the issue regards to Hindu Marriage petition, but the present Petitioners/accused are facing trial for the offences punishable under Sections 498-A, 504, 506 read with 34 of I.P.C. Therefore, to prove the charges, it is not necessary to refer the complainant / wife for medical examination.

6. The learned Counsel for the Petitioners canvassed in vehemence that while deciding the issue in Marriage Petition under Section 13(ia) (ib) of the Hindu Marriage Act, desertion and cruelty

required to be considered as per the evidence available on record and this Court granted divorce in Second Appeal, by observing that the learned trial Court could have refer the complainant / wife for examination when there is specific allegations about physical ability for consumption of marriage. Therefore, the accused has filed an application for referring the informant victim for medical examination, however he submits that both the Courts below wrongly rejected the said application.

7. Per contra, the learned APP canvassed that the order dated 26.03.2024 passed below Exh.146 in R.C.C. No.253 of 2018 is an interlocutory order. It has not attained the finality, because there is no adjudication of rights of the parties. Therefore, the revision under Section 397 Cr.P.C., is not maintainable. However, the Petitioners approached before the Sessions Court under Section 397 of Cr.P.C. So also, on 27.09.2024, the learned Sessions Court passed the impugned order and affirmed the order passed by the learned trial Court refusing to refer the informant for medical examination. Therefore, no bona fide and substantial grounds have been set out to interfere with the findings of both the Courts below, hence prayed for dismissal of the Petition.

8. Having regard to the submissions canvassed on behalf of both the sides, I have gone through the Petition paper-book, including the judgment and order dated 26.10.2023 passed by the learned Single Judge of this Court in Second Appeal No. 851 of 2018, which was referred in an application Exh. 146 by the present Petitioners/accused persons. It is not in dispute that on 13.02.2013, the marriage between the Respondent No. 2 and Petitioner No.1 was solemnized as per the Hindu customs and rites. However, due to matrimonial differences, the present Petitioner No. 1 / husband had filed Hindu Marriage Petition bearing No. 25 of 2016 under Section 13(ia) (ib) of the Hindu Marriage Act, which was decided by the learned trial Court. The said judgment and decree was assailed in Regular Civil Appeal No. 40 of 2017. However, the learned appellate Court affirmed the said judgment and decree. Being aggrieved by the concurrent findings of both the Courts, the present Petitioner No.1 had filed Second Appeal No.851 of 2018 before this Court. On 26.10.2023, the learned Single Judge of this Court, passed the judgment and order and observed thus in Para No. 15:-

“15. So far as the cruelty is concerned this Court finds that it has clearly come on record that there is no physical contact between husband and wife. Denying physical relations by wife also amounts to cruelty. The wife in this case could not bring on

record anything contrary to the allegations of the husband on this point. It is further seen that there was a specific prayer to send the wife for examination, but the said was not accepted. The husband was required to file writ petition in this Court. However, before decision of the said petition, marriage petition came to be decided. When a case was made out to send the wife for physical examination, it was necessary for the Court to send the wife for medical examination. Filing of several cases against husband without substance also amounts to cruelty.”

9. Needless to say that in a proceeding for the offences punishable under Sections 498-A, 504, 506 of I.P.C., the Petitioner No.1/husband filed Exh. 146 and prayed for referring the informant /the present Respondent No. 2 for medical examination in pursuance of observations made by the learned Single Judge of this Court as observed above in Second Appeal to prove that he has not raised cruelty against Respondent No. 2, but the Respondent No. 2 was refusing to have physical relationship with him and made criminal complaint against him.

10. On 26.03.2024, the learned J.M.F.C. passed an order below Exh. 146 holding that this Court has passed a judgment and order in respect of question involved in the Hindu Marriage Petition filed by the present Petitioner No. 1/accused Dr. Saurabh against Respondent No. 2/informant Mayuri, praying for decree of divorce. However, to prove the cruelty alleged by the prosecution, the burden

lies upon the prosecution to prove the said cruelty and if the prosecution failed to discharge the burden, the prosecution required to face the consequences.

11. No doubt, the present Petitioners carried the order dated 26.03.2024 passed below Exh.146 in Criminal Revision No. 43 of 2024.

12. It is well settled principle of law that if under the interlocutory order, the rights of the parties are being determined, then the remedy under Section 397 of Cr.P.C., is available. However, in case in hand, merely rejection of the application of the present Petitioners seeking to refer Respondent No. 2/informant for medical examination, right of the parties were not finally adjudicated. Therefore, to my mind, the said order is itself is not revisionable. However, the learned revisional Court entertained the revision and passed the impugned order dated 27.09.2024.

13. The learned revisional court observed in Para No. 15 and held that the revision is not maintainable as against the said order. The learned revisional Court further held that the observations made by this Court in the judgment dated 26.08.2023 passed in Second

Appeal No. 851 of 2018 are in respect of the petition under the Hindu Marriage Act, in which divorce was sought on the ground of cruelty at the hands of Respondent No. 2/informant and same allegations about incapability of maintaining physical relations was raised. Under these circumstances the learned Single Judge of this Court has held that in such circumstances, the Respondent No. 2/wife could have been send for medical examination.

14. However, in the case in hand, the petitioners are charge-sheeted for the offences punishable under Sections 498-A, 504, 506 read with Section 34 of I.P.C., on the ground that the informant was subjected to cruelty/harassment due to non fulfillment of demand of dowry as well as she was criminally intimated and she was insulted. Therefore, to prove the allegations made in the F.I.R. burden lies upon the prosecution to prove the said charges against the present Petitioners/accused persons beyond reasonable doubt. Since the case of the prosecution does not based on the allegations made by the present Petitioner No.1 regarding incapability of informant/Respondent No.2 to establish physical relations with the Petitioner No.1 / husband. Not only this, but in judgment and order dated 26.10.2023, passed by this Court in Second Appeal No.851 of

2018, this Court has not permitted the Petitioners to examine the Respondent No. 2 informant through the medical examination by the medical practitioner. Therefore, I do not find that the impugned orders are illegal and bad in law and hence no perversity is found in said orders. Therefore, no case is made out even for issuance of the notices. The Writ Petition is therefore dismissed.

[Y. G. KHOBRADE, J.]

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