

THE HONOURABLE SRI JUSTICE P.S.NARAYANA

C.R.P. No.385 of 2006

24-07-2006

Padala Kaniki Reddy

Padala Sridevi

Counsel for the Petitioner: Sri A. Veera Swamy

Counsel for the Respondent: Sri Kunareddy Anji Reddy.

:ORDER:

Heard Sri A. Veera Swamy, the learned counsel representing the revision petitioner and Sri Kunareddy Anji Reddy, the learned counsel representing the respondent.

2. This revision petition is filed as against an order dated 23-09-2005 made in I.A.No.944 of 2005 in O.P.No.104 of 2001 on the file of the Senior Civil Judge, Tanuku. The revision petitioner is the husband of the respondent.

3. This is a matrimonial dispute. For the purpose of convenience, the parties herein after would be referred to as wife and husband only.

4. The wife filed O.P.No.104 of 2001 on the file of the Senior Civil Judge, Tanuku praying for dissolution of marriage on the grounds of husband being of unsound mind and sexually impotent and also made several elaborate allegations. The husband, who is the respondent in the main O.P. denied those allegations. A specific stand was taken in para 13 of the counter that she had some trouble in connection with her uterus even before the marriage and in the said context, she cannot conceive and beget children and she was treated in England and finally various attempts to use the sperm of respondent proved futile in view of the condition of her uterus. It is needless to say that as already referred to supra, the O.P. was filed by the wife for dissolution of marriage on the grounds of insanity, impotency and also cruelty. The allegations made in the O.P. and the counter allegations need not be dealt with at length at this interlocutory stage.

5. In the said O.P., the husband filed I.A.No.944 of 2005 to direct the wife to undergo medical examination by a qualified lady Gynecologist of Government Institutional Hospital so as to substantiate the fact whether she enjoyed the conjugal life and she is capable of begetting children considering the condition of her virginity. The parties had led the matrimonial life for more than a decade. It is stated that during the cross-examination, the wife admitted that she was willing to undergo medical examination. The specific stand taken by the husband in I.A.No.944 of 2005 is that she was unable to conceive due to the condition of her uterus and the doctor in England also opined the same after examining her. The same was resisted by the wife by making the counter allegations and assert that she is sexually potent, whereas, the husband is impotent. She had taken a specific stand that she cannot be directed to undergo such test since it would amount to violation of the right to privacy and personal liberty. Moreover, the virginity test cannot constitute the sole basis to prove consummation of marriage. Hence, she prayed for dismissal of the application. The learned Judge recorded certain reasons at paras 6,7 and 8 and ultimately dismissed the said application. Aggrieved by the same, the present Civil Revision Petition is preferred.

6. Both the counsel narrated several factual details, addressed the historical background of this litigation and also certain other civil litigations said to be pending between the parties.

7. The wife filed O.P.No.104 of 2001 on the file of the Senior Civil Judge, Tanuku praying for dissolution of marriage on the grounds already specified supra. The husband is contesting the same. It is pertinent to note that the wife is making serious allegations of insanity, impotency and also cruelty as against the husband. The husband is denying those allegations and further, he is taking a specific stand from the earliest point of time that the wife is unable to conceive in view of the defective uterus. In relation to the grounds either impotency or insanity, the wife had not taken any appropriate steps praying for medical examination of the husband. This Court is not concerned with the said question in the present context. It is true that the wife approached the Court praying for dissolution of marriage on certain grounds and if the wife is unable to establish the same, she may not be entitled to any relief at all. That may not be the end of the matter. While appreciating a matrimonial dispute, the stand taken by the husband in the counter also may have to be taken into consideration. At the earliest point of time, the husband had taken a specific stand that because of the defective uterus, the wife is unable to conceive. Further, the specific stand taken by the wife on the ground of impotency is a baseless allegation and the defect lies with the wife only. Apart from the other allegations, the main question in controversy between the parties revolves around, the question whether the wife is able to conceive or not, whether the ground of defective uterus raised by the husband in his counter and also in the affidavit filed in support of the application is true or not, these aspects cannot be decided by mere adduction of oral evidence by the parties. It is needless to say that one party would assert a particular fact and the other party would deny the same. In the light of this background, the husband appears to have moved this application praying for a direction to the wife to undergo medical examination by a qualified lady Gynecologist in Government Institutional Hospital to substantiate whether she had enjoyed conjugal life and whether she is capable of begetting children or not and in relation to the condition of her virginity.

8. In *G. VENKATANARAYANA v. KURUPATI LAXMI DEVI*¹, the learned Judge of this Court, Justice Rama Rao, observed at para 6 as hereunder; "The human body is the most ancient apparatus and defied probe and vulnerability to diagnosis and treatment of ailments for long time. The human intellect generated by the human body unraveled the mysteries and complications in the human body and the process of experimentation for several years, dissection of anatomy scientific analysis and modern scientific approach contributed to discovery of diverse methods of diagnosis of deficiencies and ailments and treatment of the same. There is a gradual change over from oral diagnosis and treatment to discovery of deficiencies precisely by scientific data and effective and expeditious treatment by prescription of medicines and surgery. The transplantation of heart and other parts of the body, scanning the body to detect deficiencies and malfunctioning, invasive diagnosis and treatment yielded dividends of minimizing wear and tear of the body and thereby improving the longevity and quality of life though the avoidance of final exit is not in sight. The close affinity between law and medicine is demonstrated by medical jurisprudence. The physician as an expert witness has become a common and welcome feature in Courts ranging from opinions on nature and degree of injuries to the proximate cause of death in criminal cases, assessment of insanity and several other situations. When there is a dispute between the wife and husband about the potency of either of them their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence. In the present atmosphere of looking forward to progeny of artificial insemination, scientific probe by virginity tests and the knowledge of pre-delivery sex the depreciation of the importance of determination of potency by medical test does not bear the impress of realistic approach".

In *BIRENDRA KUMAR v. HEMALATA BISWAS*² it was held that in a suit by the husband to declare the marriage void under the Indian Divorce Act on the ground of impotency and also another ground of consent obtaining by fraud it was also alleged that the wife was suffering from incurable syphilis. After reference to the evidence it was concluded that full investigation of the case was not done and the case was remanded for trial. While giving directions for investigation of fraud and consideration of impotency, the Division Bench added that it is necessary that there should be a proper medical examination of the person of the respondent. In *GEORGE SWAMIDOSS JOSEPH v. SUNDARI EDWARD*³, the learned Judge Justice Ramaswamy, of the Madras High Court observed as hereunder; "While the confessions or admissions of either party are

admissible to prove his or her impotency, they are not generally regarded sufficient unless corroborated. That a Court having jurisdiction to pronounce decree of nullity on the ground of impotency has power also to direct a proper medical and surgical examination of the person of the parties whenever this is necessary, is well settled in England.

The learned Judge also observed that in this country it may be held that by necessary implication the Court is armed with all the usual powers which in England are deemed requisite to ascertain the fact of incapacity and without which it would be impossible for any Court to exercise such a jurisdiction in ordering the examination, and do so subject to such conditions as will afford protection from injuries to natural delicacy and sensibilities".

In RANGANATHAN CHETTIAR v. LAKSHMI ACHI⁴ it was held that "there is no statutory provision for compelling a party to be examined by a doctor and apart from cases of lunacy there is no provision enabling the medical examination. It was further held that the Court may draw an adverse inference against the party who refused to be examined by himself or herself". In BIPINCHANDRA v. MADHURIBEN⁵ it was observed that a compulsion to undergo medical examination is certainly an interference with the personal liberty of a citizen and such personal liberty could only be interfered with under the provisions of any penal enactment or in the exercise of any other coercive process vested in the Court under the law. In REVAMMA v. SANTHAPPA⁶) while dealing with an application for issuance of a direction to the wife to be examined by the doctor in relation to impotency, it was held by the learned Judge Justice Datar as hereunder; "In a case where a party alleges that a person is impotent or suffering from other such incurable disease, it is for the person making such an allegation to prove the same. A party cannot be compelled to undergo medical examination".

In SREERAMAMURTHY v. LAKSHMIKANTHAM⁷ where a suit was filed by the plaintiff for partition and recovery of 1/3rd share on the ground that her husband died, divided from his brothers with some alternative reliefs and further, it was contended that the plaintiff gave birth to a child subsequent to her husband's death and being unchaste is not entitled to recover any maintenance and on the application filed for medical examination whether the first respondent gave birth to a child at any time, the Court of first instance held that she cannot be compelled to undergo medical examination and in that context, Umamaheswaram, J held that it is impossible to ascertain after a lapse of four years whether the respondent was enceinte and had given birth to a child and it was further observed that Section 151 of the Code of Civil Procedure cannot be invoked in the circumstances and the personal liberty is infringed by compulsion of medical examination.

9. In P.A.ANBU ANANDAN v. D. SIVAKUMARI⁸ while dealing with a case of restitution of conjugal rights under Section 9 of the Hindu Marriage Act and rejection of an application for medical examination of wife prayed for by the husband for finding out whether she remained virgin or not, it was held that the rejection of application was held to be proper in the light of an Article 21 of the Constitution of India. In ARUN KUMAR v. SUDHANSU BALA⁹ the Special Bench of the Orissa High Court held that when there are accusations and counter accusations of impotency, some corroborative evidence would be essential and in such cases, medical evidence would be valuable. In GOUTAM KUNDU v. STATE OF WEST BENGAL¹⁰ the Apex Court, while dealing with a case of legitimacy of a third born during the marriage held that no one can be compelled to give sample of blood for analysis. In M. VENKATACHALAPATHY v. SAROJA ALIAS THANGAMMAL¹¹ Justice V. Ratnam held that it is settled law that a person cannot be directed to be examined medically against her wish. In KRISHNAMURTHI AYYAR v. GOVINDASWAMI PILLAI¹² Justice M. Natesan held that even in an election petition there is no warrant in the procedure now obtaining in the Civil Courts under the Code for an order for compulsory medical examination of a party against the wish of the party.

10. In SHANTI DEVI v. RAM NATH¹³, Justice Prem Chand Pandit held that when wife's petition for dissolution of marriage on the ground of husband's unsoundness of mind and the husband refusing to submit to medical examination, the question whether adverse inference if can be drawn, had been considered.

11. In *Smt NINGAMMA v. CHIKKAIAH*¹⁴ Justice Hari Nath Tilhari observed that to compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamount to interference with his fundamental right of life or liberty particularly even where there is no provision either in the Code of Civil Procedure or the Evidence Act or any other law which may be said to authorize the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity will amount to nothing but interference with the right of personal liberty.

12. In three Judge Bench of the Apex Court in *SHARDA v. DHARMPAL*¹⁵ Justice S.B.Sinha speaking for the Court while summing up observed at para 81 as hereunder;

"To sum up, our conclusions are:

1. A matrimonial Court has the power to order a person to undergo medical test.
2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw an adverse inference against him".

13. The Apex Court, in fact, had made an elaborate survey of all the facets in the light of the decisions governing the question both in England and in this country. In the light of the decision of the Apex Court referred to supra, now the question is whether in the facts and circumstances of the case the relief prayed for by the husband to be granted or to be negated. The facts already had been narrated supra. In the light of the specific stand taken by the husband inasmuch as the adduction of oral evidence may not be of much help to establish the stand taken by the husband, it would be just and proper to direct the wife to submit to the medical examination for the purposes prayed for in the application. As already referred to supra, it is true that the wife had prayed the Court by filing O.P. for dissolution of marriage on certain grounds. However, for reasons best known, the wife had not chosen to file any application of this nature, but the husband had chosen to do so. Hence, taking the over all facts and circumstances and in the light of the peculiar facts, the wife is directed to undergo medical examination as prayed for in the application. The learned Judge dismissed the application on unsustainable grounds. Hence, the impugned order is hereby set aside.

14. Accordingly, the Civil Revision Petition is hereby allowed and the impugned order is set aside. Since it is a matrimonial dispute and inasmuch as the wife is complaining that only with a view to delay the divorce proceedings, the husband is filing such applications, the learned Judge to make an endeavour to dispose of the main O.P. itself at the earliest point of time. Inasmuch as this Civil Revision Petition arises out of an interlocutory order in a matrimonial dispute, this Court directs the parties to bear their own costs.

?1 AIR 1985 ANDHRA PRADESH 1

2 AIR 1921 CALCUTTA 459

3 (1954) 67 MADRAS LW 676

4 AIR 1955 NADRAS 546 (547)

5 AIR 1963 GUJARAT 250

6 AIR 1972 MYSORE 157=1972(1) My LJ 136

7 AIR 1955 ANDHRA 207

8 AIR 1999 MADRAS 232

9 AIR 1962 ORISSA 65

10 AIR 1993 SC 2295=1993(3) SCC 418

11 AIR 1981 MADRAS 349=1981(1) MLJ 440

12 AIR 1966 MADRAS 443=1966(2) MLJ 383

13 AIR 1972 PUNJAB & HARYANA 270

14 AIR 2000 KARNATAKA 50

15 (2003) 4 SUPREME COURT CASES 493