

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

B E F O R E :

The Hon'ble Justice SAHIDULLAH MUNSHI

C.O. No.3309 of 2018

With
C.O. No. 3310 of 2018

SRI

...

Petitioner
- Versus-

SMT.

... Opposite Party

Mr. Dipanjan Datta,
Mr. Sayan Datta,
Mrs. Rituparna Saha

... For the petitioner

Mr. Ankit Agarwala,
Ms. Alotriya Mukherjee

... For the opposite party

Heard on : 03.04.2019 & 16.06.2019.

Judgment on : June 21, 2019.

Sahidullah Munshi, J.:-

Both these Revisional Applications in C.O. No. 3309 of 2018 and C.O. No. 3310 of 2018 are taken up together for hearing inasmuch as identical question of law and facts are involved therein.

Heard both the learned counsels for the parties and the materials disclosed in both the Revisional Applications.

Both the Revisional Applications arise out of impugned orders passed in MAT Suit No. 736 of 2008 filed by the wife opposite party.

C.O. No. 3309 of 2018 arises out of order No. 119 dated 19th July, 2018 passed by the learned Additional District & Sessions Judge Chandernagore, Hooghly in MAT Suit No. 736 of 2008 at the instance of the husband. The suit was filed by the wife seeking annulment of marriage by a decree of nullity under Section 25 (i) and alternatively for divorce under Section 27 (1) (d) of the Special Marriage Act, 1954. However, initially the suit was based on cruelty but subsequently by way of amendment the wife also incorporated the ground of nullity under Section 25 (i) of the said Act. From the pleading it appears that the wife claimed that the marriage was void inasmuch as the same was not consummated. In the above background after the amendment was allowed the wife filed an application before the Court below praying potency test of the husband. Such prayer of the wife was allowed by the order impugned. Since the wife opposite party also pleaded in the suit that the marriage was not

consummated because of the impotency of the husband and that the same was a void marriage, the husband also filed an application seeking virginity test of the wife. By the order impugned the husband's application seeking virginity test has been rejected by the learned Court below. While rejecting the application the learned trial Court relied on a passage of a renowned author that "Virginity test is not a reliable indicator of a female having actually engaged in sexual intercourse because the tearing of the hymen may have been the result of an involuntarily sexual act" and held that it does not appear to the Court to be a sound proposition of law. Therefore, in my view also the contention raised by the husband that since the wife made an allegation that the marriage was not consummated she should be subjected to virginity test cannot be accepted, particularly, when it is undisputed that the marriage took place on 30th November, 2006. Therefore, I do not find any illegality and/or material irregularity in the impugned order. I do not also find any jurisdictional error on the part of the learned trial Court in rejecting petitioner's application for virginity test.

Therefore, the Order dated 19th July, 2018 is upheld consequently C.O. No. 3309 stands disallowed and rejected.

C.O. No. 3310 of 2018 is against order no. 105 dated 2nd February, 2017 whereby the learned Court below rejected the husband's application for extending the date to enable him to appear before the Medical Board for the purpose of his potency test.

Record reveals that on a previous occasion the petitioner was directed to appear before the board for the said test, accordingly he appeared before the Medical Board as constituted by the Superintendent Immambara Sadar Hospital, Hooghly, which is apparent from order no. 98 dated 22nd August, 2016 when the petitioner appeared before the Medical Board, it unanimously held that the party be referred to FSM Department, Calcutta Medical College for proper opinion. Accordingly, the Superintendant of the Calcutta Medical College was requested to constitute a Medical Board comprising Medical Officers with specialization to conduct medical examination of the respondent husband named Sandip Kumar Dasgupta for determination on the specified items. It is not disputed the petitioner appeared before the said Board but on 14th September, 2016 last when he was supposed to appear before the said Medical Board could not appear. The petitioner on 2nd February, 2017, filed an application in the Court below seeking leave to appear before the Board on a subsequent date. Such application has been rejected by the learned Court below on contest. The learned Court below held that the petitioner is reluctant and, therefore, he did not appear before the constituted Medical Board. Indisputably, the petitioner in his application filed on 2nd February, 2017 mentioned on oath that on 14th September, 2016 he was not in Kolkata and for such reason he could not appear before the Board but while rejecting such prayer the learned Court below has not supplied any reason as to why the fact that he was not in Kolkata was to be disbelieved, when it is on record that the petitioner appeared before the Board as recorded in order no. 98 dated 22nd August, 2016 indicated hereinabove.

In my view, the learned Court below is at all not justified to comment that the petitioner was reluctant to attend the Medical Board. Therefore, although, there has been delay and such delay might have caused prejudice to the opposite party wife but the learned Court below is not justified in rejecting the prayer for extension of time when it is apparent that the result of the test might be considered crucial, and even the result can decide the fate of parties to the suit. Allowing such application would be to enure to the benefit of the opposite party wife also. The delay caused, as submitted by the learned Advocate for the opposite party wife, that it is a great loss for her, is appreciated but at the same time that cannot be the only ground for not allowing the petitioner's prayer to present himself before the Medical Board. Accordingly, I am unable to sustain the impugned order which I hereby set aside.

Consequently, the Revisional Application stands allowed.

As a last chance the petitioner is allowed to present him before the Medical Board on the next date to be fixed by such board. Superintendent, Calcutta Medical College is directed to allow the petitioner on a subsequent date subject to the convenience of the members of the Board but the Superintendent, Calcutta Medical College shall see that the next date is fixed within two month from the date of communication of this order. The petitioner is directed to communicate this order to the Superintendent, Calcutta Medical College together with a copy of order no. 98 dated 22nd August, 2016 passed by the Additional District Judge, Chandernagore, Hooghly, in MAT Suit No. 736 of 2008 forthwith.

Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned advocates for the respective parties upon compliance of all usual formalities.

(Sahidullah Munshi, J.)