Revamma Vs. Shanthappa

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Court : Karnataka

Decided On : Jul-20-1971

Reported in : AIR1972Kant157; AIR1972Mys157

Judge : H.B. Datar, J.

Acts : Hindu Marriage Act, 1955 - Sections 12; Code of Civil Procedure (CPC), 1908 - Sections 151; Evidence Act; Indian Lunacy Act

Appeal No. : Civil Revn. Petn. No. 239 of 1971

Appellant : Revamma

Respondent : Shanthappa

Advocate for Def. : C.V. Subba Rao, Adv.

Advocate for Pet/Ap. : M.R. Janardhana, Adv.

Disposition : Revision allowed

Judgement :
ORDER

H.B. Datar, J.

1. Respondent has filed M. C. No. 18 of 1969 in the court of the District Judge, Bangalore under the Hindu Marriage Act. An application I. A. No. IV was filed

alleging that the petitioner in this revision application is impotent and therefore a direction should be issued to the petitioner to subject herself to medical examination by the Lady Doctor of either St. Martha's Hospital. Bangalore or any other premier Hospitals in Bangalore for the purpose of ascertaining whether she is impotent and physically unfit for conjugal relationship. In support of the application affidavit has been filed ind it is alleged therein that the only material issue that arises for consideration is, whether the petitioner in this revision application is impotent and unfit for conjugal relationship and whether, as alleged by the respondent in this revision application, it is physiological factor and should be found out by the medical examination and the result of such medical examination would clinch the issue. Objections were filed to this application, contending that she had subjected herself once at the instance of the respondent and it was certified that she is a normal woman fit for conjugal relationship as wife. It was also submitted that even otherwise, it is not open to the court to order such medical examination, as the burden of proving the issue is upon the husband.

2. The learned District Judge considered that application and has stated as follows:--

'The only material piece of evidence to enable the court to come to a conclusion on this point, is the medical evidence hence I deem it proper to allow I. A. No. IV and direct the respondent to submit herself to the necessary medical examination by a lady doctor from the Bowring Hospital and Lady Curzon Hospital Bangalore.' It is this order that is challenged in this revision application.

3. The short question is as to whether it is open to the court to compel a person to undergo medical examination. The learned Advocate for the respondent submitted that this was an application filed under Section 151 of the Code of Civil Procedure and to meet the ends of justice, it was necessary to have the petitioner medically examined by a competent authority. The learned Advocate placed reliance upon the judgment of the High Court of Calcutta in Birendra Kumar Biswas v. Hemalata Biswas, AIR 1921 Cal 459 at p. 464. it has been stated by Mookerjee, A. C. J.. as follows:--

'In these circumstances, we must hold that there has not been that full investigation of the case which the gravity of the result to the parties concerned required. The appeal must consequently be allowed and the case remanded for retrial. The allegation of fraud will be investigated and the question whether the condition of the respondent makes the rule of impotency as explained above applicable will be carefully reconsidered. We may add that it is necessary that there should be a proper medical examination of the person of the respondent. Reference may on this point be made to the following passage from the judgment of Lord Stowcll in Briggs v. Morgan, (1820-3 Phill 325): 'It has been said that the means resorted to for proof on these occasions are offensive to natural modesty, but nature has provided no other means, and we must be under the necessity of saving that all relief shall be denied or of applying the moans within our power. The Court must not sacrifice justice to notions of delicacy of its own.' (See also Norton v. Seton. (1819) 3 Phill 147; Pollard v. Wybourn. (1828) 1 Hag Ecc 725; Aleson v. Aleson. (1728) 2 Lcc Ecc 576: Sparrow v. Hyrrison (1841) 3 Curt 16 affirmed in Harrison v. Harrison. (1842) 4 Moo PC 96. Where a party refuses to attend for medical inspection, the court may properly draw an unfavourable inference. This was laid down in the case of a female respondent in B. v. B., (1901 P 39) and was applied again in the case of a female respondent in W. v. S., (1905 P 231). The courts naturally exercise a wide discretion in ordering physical examination and always do so. subject to such conditions as will afford protection from violence to natural delicacy and sensibility. We understand that the respondent does not object to a proper medical examination.'

It is necessary to note that in that case the respondent--wife did not object to a proper medical examination and the court, therefore, took the view that there has not been full investigation of the case which the gravity of the result to the parties concerned required and therefore by placing reliance upon the observations made in certain English Decisions, the appeal was allowed and the case was remanded for recording evidence. The learned Advocate for the respondent also brought to my notice the observations made in Mulla's Hindu Law Thirteenth Edition at page 678, which is as under:

'Cases of malformation or structural defects causing disability often arise for consideration under the head of practical impossibility. Either spouse is at liberty to ask for relief under this clause as soon as it is discovered that the other party is incapable of sexual intercourse from any malformation or structural defect or otherwise. Ordinarily and also as a matter of prudence the court will insist on proof of this by medical evidence. It may be questioned whether the court can order physical examination in any case under the present head; but where a husband or wife refuses to submit to such examination the court may properly draw an unfavourable inference. The court, however, is not bound to draw such inference.'

For this observation made by the learned Author, reference is made to two decisions. One is the .judgment of the High Court of Calcutta to which I have made reference earlier and the second is the judgment of the High Court of Gujarat in Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt, : AIR1963 Guj250 . In that case, a question similar to the one which is arising in this case, arose for consideration and after considering the judgment of the Calcutta High Court in AIR 1921 Cal 459, it was observed that the principles laid down therein cannot be applied. In paragraph 9 of the judgment, this is what Mody. J., observed:

'Miss Shah the fell back upon a Division Bench Judgment of the Calcutta High Court in. AIR 1921 Cal 459 Apart from the fact that this judgment is a judgment long before the Constitution, this case does not specifically consider or lay down that it would be open to a party under a court's order to have the other side compulsorily medically examined. What the learnedJudges were there considering was a case of syphilis. They observed that the courts exercise wide discretion in ordering physical examination and always, do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. It is very relevant to observe that in that case the party concerned did not object to a proper medical examination. It appears that the case followed on a concession. That apart their Lordships relied on certain English cases which are cases concerning themselves with an allegation or impotency or incapacity. These English cases can have no application in this country to a case arising Under the Hindu Marriage Act, because under the Matrimonial Causes Rules in England specific provision has been made for examination by medical inspectors. There is no such provision in

our country regarding the appointment of medical inspectors so that the Calcutta case cannot either be of any assistance to Miss Shah. In my judgment, the order passed by the learned Judge Was in excess of jurisdiction and is liable to be set aside.'

4. 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. As stated by the High Court of Guiarat.

'There is no provision under the Hindu Marriage Act or the Rules framed thereunder, or in the Code of Civil Procedure or in the Indian Evidence Act or any other law which would show any power in the court to compel any party to undergo medical examination.''

A medical examination for ascertaining whether a person is insane or important are all cases in which unless by the law of the land a person can be compelled to undergo medical examination, an order directing a person to undergo medical examination would be clearly illegal and without jurisdiction. In P. Sreeramamurthy v. P. Lakshmikantham. : AIR 1955 AP207 , when an order was passed directing medical examination, it was held that there must be some statutory provision under which it would be open to the court to compel medical examination of a party, thus restricting the enjoyment of personal liberty of the person. It was also held that in a case like this it was not right to rely upon the general or inherent powers of the court under Section 151 of the Civil Procedure Code. It may be pointed out that even medical examination is specifically provided as under the terms of the Indian Lunacy Act. In the absence of any provision, it is not competent toany party to compel the other party to undergo medical examination.

5. In the case of Ranganathan Chettiar v. Chinna Lakshmi Achi : AIR1955 Mad546 , it has been held that it is not open to the court under Section 151 of the Code of Civil Procedure to order a medical examination of a party against the consent of such party. To pass such an order is tantamount to treating a human being as a material object, which no court should do under its inherent power. It is, thus, clear that it is not open to the court to invoke Section 151 of the Code of Civil Procedure

to order a medical examination against his consent. In that view, the order directing the medical examination of the petitioner is one which has been passed by the learned Judge in excess of his jurisdiction and the same is liable to be set aside.

6. In the result, this revision application is allowed, the order passed by the learned trial Judge is set aside and the application I. A. No. IV is dismissed.

In the circumstances, the parties will bear their own costs.