

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

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THE HONOURABLE MR.JUSTICE DR. KAUSER EDAPPAGATH

WEDNESDAY, THE 10TH DAY OF MARCH 2021 / 19TH PHALGUNA, 1942

OP (FC).No.157 OF 2020

AGAINST THE ORDER IN IA NO.611/2019 IN OP 92/2018 DATED 23-01-2020 OF FAMILY COURT,KOZHIKODE

PETITIONER/RESPONDENT/RESPONDENT:

DEVIKA M. ,
AGED 34 YEARS
D/O.LOHITHAKSHAN, MAMIYIL HOUSE, ODUMBRA ROAD,
KUNNATHUPALAM, OLAVAANNA P.O. ,
KOZHIKODE DISTRICT - 673 019.

BY ADVS.
SRI.ADITHYA RAJEEV
SRI.ADITHYA RAJEEV

RESPONDENTS/PETITIONER/ORIGINAL PETITIONER:

SHIBIN PRAKASH,
S/O.BRAHMA PRAKASH, AGED 39 YEARS,
PRAKASH BHAVAN, KARUVISSERY P.O. , KOZHIKODE
DISTRICT - 673 010.

R1 BY ADV. SRI.SHARAN SHAHIER

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 03-03-2021, THE COURT ON 10-03-2021 DELIVERED THE FOLLOWING:

J U D G M E N T

Dated this the 10th day of March, 2021

Dr.Kauser Edappagath, J.

This Original Petition is filed by the wife in a marital dispute challenging an order passed by the Family Court allowing the application filed by the husband to constitute a medical board and to direct the wife to appear before it to assess her mental condition.

2. The husband is the respondent in this original petition. The petitioner and the respondent got married on 19/1/2014. The husband initiated proceedings for divorce before the Court below u/s 13(1)(iii) of the Hindu Marriage Act on the ground of mental disorder. The husband took up a contention that the mental condition of the wife was not normal as she was suffering from obsessive compulsive disorder as well as borderline personality disorder. The husband filed a petition before the Court below as IA No.611/2019 (Ext.P3) to direct the wife to undergo medical examination for borderline personality disorder before a medical

board to be constituted for the said purpose. The wife filed objection statement opposing the same. After hearing both sides, the Court below allowed the petition as per Ext. P5 order and directed the wife to appear before the medical board to be constituted at the Medical College Hospital, Kozhikode to assess her mental condition. The wife challenges Ext.P5 order in this Original Petition.

3. We have heard the learned counsel for the petitioner Sri.T.R.Harikumar and the learned counsel for the respondent Sri.Sharan Shahier.

4. The learned counsel for the petitioner submitted that the power of a Family Court to order a person to undergo medical test ought to be exercised only where the applicant establishes a strong *prima facie* case. The counsel further submitted that, in the absence of any finding that the respondent has established a *prima facie* case, the Family Court erred in allowing Ext.P3 petition preferred by the respondent. The counsel also submitted that subjecting the petitioner to undergo medical examination, without assigning any reason for issuing such a direction, is in contravention of the Right to Life of the petitioner guaranteed

under Article 21 of the Constitution of India. Per contra, the learned counsel for the respondent submitted that in order to establish the case set up by the husband that the wife is suffering from obsessive compulsive disorder and borderline personality disorder, it is absolutely necessary that the wife is examined by a medical board to assess her mental condition and that the respondent has established a strong *prima facie* case.

5. We have anxiously considered the rival contentions. The issue arises in a proceedings for divorce initiated by the husband alleging mental disorder on the part of the wife. It is settled that the Court has power to direct the parties to the litigation to undergo a medical test. The Supreme Court of India in ***Sharda v. Dharmpal*** [(2003) 4 SCC 493] has held that even though the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country under Article 21 of the Constitution of India, a matrimonial Court has the power to order a person to undergo a medical test and such a direction need not be in violation of any right to personal liberty. It was further held that while exercising the power to order a medical test to be undergone by a person, the Court should exercise

restraint and there must be strong *prima facie* case and sufficient material before the Court to pass such an order. The said decision has been followed recently by the Division Bench of this Court in ***Rajmohan L v. Sindhu P.B.*** [2020 (5) KHC 447]. It was held that the Court is always empowered to order medical examination, provided that the facts and circumstances arising in the case warrants such an examination.

6. As stated already, the petition for divorce was filed by the husband invoking S.13(1)(iii) of Hindu Marriage Act (for short 'HMA') alleging that the wife is suffering from mental disorder.

S.13(iii) reads as follows:

“13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

*(i)-(ii)****

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

-:6:-

(a) the expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or"

The wife's alleged mental order is an issue to be decided in the case. In order to get a decree for divorce u/s 13(1)(iii) of HMA, the petitioner must establish that unsoundness of mind of the respondent is incurable or his/her mental disorder is of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with his/her spouse. The burden of proof of the existence of requisite degree of mental disorder is on the spouse making the claim on that state of fact. Medical evidence for arriving at such a finding would, no doubt, be of considerable assistance to the Court. Where the Court is satisfied that a real ground exists to direct a party in the case before it to undergo medical examination, if the circumstances of the case warrant such a direction, the Family Court has the power to direct a party

to appear before a medical board to undergo medical examination and the question of such action being violative of Art.21 of the Constitution of India would not arise. The Court having regard to Art.21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

7. In the Original Petition, the husband has given necessary pleadings regarding the alleged mental disorder of the wife. Few documents have been produced by the husband along with the original petition to substantiate the contention that the wife was treated by the psychiatrist for the alleged illness. Those documents were perused by the Court below before passing Ext.P5 order. The fact that the wife's alleged mental disorder is an issue to be decided in the case itself constitutes a *prima facie* case. The opinion of the medical board regarding the mental condition of the wife may be of utmost importance for granting or rejecting a prayer for a decree of divorce u/s 13(1)(iii) of HMA. The said opinion is relevant u/s 45 of the Evidence Act. When a party to a litigation alleges existence of certain facts, the Court can draw no inference of its existence unless it is proved through

the manner in which the Evidence Act is envisaged. Therefore, the Court shall not preclude a party from adducing evidence which may be relevant in accordance with the Evidence Act to prove his case. For all these reasons, we hold that the Court below was justified in allowing Ext.P3. This Court cannot invoke the jurisdiction under Art.227 of the Constitution of India unless the findings are highly erroneous or capricious.

Hence, we find no reason to interfere with Ext.P5 order and accordingly the original petition is dismissed.

Sd/-

A .MUHAMED MUSTAQUE

JUDGE

Sd/-

Dr .KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 A TRUE COPY OF ORIGINAL PETITION FILED AS O.P.NO.92/2018 DATED 16/01/2018 BEFORE THE FAMILY COURT, KOZHIKODE.
- EXHIBIT P2 A TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE RESPONDENT DATED 19/05/2018 IN O.P.NO.92/2018 BEFORE THE FAMILY COURT, KOZHIKODE.
- EXHIBIT P3 A TRUE COPY OF THE AFFIDAVIT ALONG WITH THE PETITION IN I.A.NO.611 OF 2019 IN O.P.92 OF 2018 BEFORE THE FAMILY COURT, KOZHIKODE DATED 04/05/2019.
- EXHIBIT P4 A TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER IN I.A.NO.611 OF 2019 IN O.P.92 OF 2018 BEFORE THE FAMILY COURT, KOZHIKODE DATED 29/06/2019.
- EXHIBIT P5 A TRUE COPY OF THE ORDER DATED 23/01/2019 IN I.A.NO.611 OF 2019 IN O.P.92 OF 2018 BEFORE THE FAMILY COURT, KOZHIKODE.