
(1971) 08 BOM CK 0007

In the Bombay High Court

Case No : Criminal Reference No. 37 of 1971

Sulabai Jagannath Vharkate

APPELLANT

Vs

Jagannath Sonaji Vharkate

RESPONDENT

Date of Decision : 05-08-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 21
Evidence Act, 1872 — Section 114, 14
Hindu Marriage Act, 1955 — Section 13

Citation : (1972) 74 BOMLR 295 : (1972) MhLj 553

Hon'ble Judges : Malvankar, J

Bench : Single Bench

Judgement

Malvankar, J.—This is a reference by the learned Sessions Judge. Bhir, in Criminal Revision Application No. 54 of 1970 before him. It arises this way. The petitioner before the learned Sessions Judge had, obtained an order for maintenance u/s 488, Criminal Procedure Code against her husband. When the husband remained in arrears amounting to Rs. 690, she applied for executing the order for the recovery of the amount of arrears. In that application, her husband alleged in his reply that the petitioner had committed acts of adultery and had given birth also to a child. When the application of the petitioner came up for hearing before the learned Magistrate, the petitioner and her advocate remained absent, and. the learned Magistrate passed the following order:

In view of the orders passed on Exs. 7 and 8, the applicant is directed to remain present before L.M.O., Bhir, on 22.12.1970 on payment of Rs. 10/- towards her T.A. and D.A. L.M.O. be informed accordingly.

Being aggrieved by this order, the petitioner went in revision to the Sessions Court. The learned Sessions Judge allowed the revision application recommending to this Court that the order passed by the learned Magistrate should be set aside. According to the learned Sessions Judge, compelling the

petitioner to submit to medical examination in order to find out whether she has committed any act of adultery is testimonial compulsion, and secondly, he has referred to some passage from Modi's Medical Jurisprudence, where the learned author has observed that the Court has no power to compel any Woman to submit the private parts of her person to the examination of a medical practitioner, male or female. Now, it is needless to say that there is no question of testimonial compulsion in this case for the simple reason that the petitioner is not an accused person. She had obtained an order for maintenance u/s 488, Criminal Procedure Code and she Went to the Court for putting that order in execution when her husband remained in arrears.

2. It appears that the learned Magistrate by passing the order has compelled the petitioner to remain present before the Medical Officer and, submit to medical examination. Now, it is no doubt true that in order to find out whether the petitioner has committed any act of adultery after the order for maintenance was passed in her favour, her medical examination would be one of the pieces of evidence. But the learned Magistrate, while passing this order, has not taken into account the willingness or otherwise on the part of the petitioner. Surely, if the petitioner is willing to submit herself to medical examination and gives her consent, there need be no objection to such examination being made by a Medical Officer. Unfortunately, however, the learned Magistrate it appears, without ascertaining whether the petitioner is willing or not and without obtaining her consent, has passed this order which compels her to submit herself to medical examination. Such an order, I think, in the absence of any valid law providing for it, contravenes the fundamental right guaranteed by Article 21 of the Constitution of India.

3. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The word "liberty" is a comprehensive term and it would include not merely freedom to move about unrestricted, but it would also include liberty of conduct, choice and action as the law gives and. protects. It is true that the Constitution does not define the word, but it seems to me that it is not confined to mere freedom from bodily restraint. "Liberty" contemplated under this Article extends to the full range of conduct which the individual is free to pursue. Obviously, therefore, the right conferred by this Article cannot be subjected to physical coercion in any manner that does not admit of legal justification. That being the position, the learned Magistrate, while passing the order compelling the petitioner to submit herself to medical examination, subjected her to physical coercion that does not admit of legal justification. Article 21 clearly provides that except according to procedure established by law, no person shall be deprived of personal liberty. I have not been pointed out any provision either in Criminal Procedure Code, 1898, or Indian Evidence Act, 1872, or in any other law, which justifies such compulsion which obviously puts restraint on the personal liberty of the petitioner. The expression "procedure established by law" used in this Article means that no person can be deprived of his personal liberty, unless there is law

which provides for the deprivation of such liberty. Their Lordships of the Supreme Court in *A.K. Gopalan Vs. The State of Madras*, have observed that in Article 21 the word "law" has been used, in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice; and "procedure established by law" means procedure established by law made by the State, that is to say, the Union Parliament or the Legislatures of the States. The word may also include subordinate legislation not enacted by the Legislature, but promulgated by the delegated, authority in exercise of its statutory powers. Vide *Bashira v. The State of U.P.* (1968) Criminal Appeal No. 25 of 1968. No such law has been pointed out to me in justification of the order passed by the learned Magistrate. That being the position, I am of the opinion that the order passed by the learned Magistrate contravenes the fundamental right guaranteed by Article 21 of our Constitution.

4. In this connection, I may refer to *Sreeramamurthi v. Lakshmikantham* A.I.R. [1955] And 207, where the Andhra High Court, in similar circumstances arising in a civil dispute, has held that in the absence of any statutory provision compelling the medical examination of a party and restricting the enjoyment of personal liberty of that person, it is not right to rely upon the general or inherent powers of the Court u/s 151, Civil Procedure Code, to achieve that purpose. In that case, a Civil Revision Petition was filed against the order of the Subordinate Judge of Eluru, dismissing an application filed by the petitioner to direct the medical examination of respondent No. 1, as to whether she had become enceinte and given birth to a child at any time. The suit was filed by the plaintiff-respondent No. 1 for partition and recovery of a one-third, share of the suit properties, on the ground that her husband died, divided from his brothers, the petitioner and respondent No. 2 therein. Alternatively, she had prayed that if the partition was found to be not true, she was entitled to a one-third share in the non-agricultural properties and for maintenance. It was contended by the petitioner that the plaintiff had given birth to a child subsequent to her husband's death and being unchaste, she was not entitled, to recover any maintenance. Issue was raised in regard to the chastity of respondent No. 1. Application, therefore, was filed to find out, by medical examination, whether respondent No. 1 gave birth to a child at any time. The lower Court held that respondent No. 1 could not be compelled to undergo medical examination. The advocate for the petitioner contended that u/s 14, Evidence Act, facts showing the existence of any state of body was a relevant fact and that he was entitled to lead evidence to show that the respondent was enceinte after her husband's death. The respondent's advocate did not challenge the position that evidence might be let in to prove that fact. The only question which was argued was whether there was any power in Court to compel an unwilling party to be medically examined, and the Andhra High Court held that the respondent could not be compelled to undergo medical examination. In support of this view, the Andhra High Court referred to Article 21 of our Constitution and also to a passage from *A.K. Gopalan v. The State* cited above. The passage runs thus (p. 254):

...The right to the safety of one's life and limbs and to the enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birthrights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things....An individual can be deprived of his life or personal liberty only by action of the State, either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law....There must be a substantive law, under which the State is empowered to deprive a man of his life and personal liberty and such law must be a valid law which the legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down.

This view was also followed by Gujarat High Court in *Bipinchandra Shantilal Bhatt Vs. Madhuriben Bhatt*, . The petitioner in that case was the husband of the opponent. The marriage of the parties had taken place in 1945 at Ahmedabad. After the marriage the petitioner and the opponent lived and cohabited together as husband and wife. The opponent's allegation was that after her marriage the petitioner at times behaved like an insane person. The conduct of the petitioner from which the opponent had come to such a conclusion was from instances of his breaking window-panes, of his attempt to break doors, quarrels etc. According to her, his sense of discrimination between good and evil, right and wrong became less and less as time went on and ultimately vanished. In 1940 she went for her delivery to Bombay to her father's place and at that time she was informed that the petitioner had run away and was not to be found. Subsequently, after he was found, his name and address had to be tattooed, on his hand so that if he again went away he would be restored to the house. She also alleged that he was treated by one Dr. Vahiya, a psychiatrist at Bombay, who gave him electric shocks as and by way of treatment for his malady. Her allegation was that for the last eleven years before the petition, the petitioner had been insane and this insanity had been increasing from day to day. On this allegation, the opponent had filed a petition for dissolution of marriage u/s 13(1) (iii) of the Hindu Marriage Act, on the ground that the petitioner was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. A Written-statement was filed by the husband-petitioner, which was verified not by the petitioner himself but by the mother of the petitioner. The allegation that he behaved in an insane manner was denied and it was also denied that he had run away. It was, however, admitted that the petitioner was treated in Bombay by Dr. Vahiya. However, it was alleged that full treatment could not be given because the opponent, his wife, never looked after him during his medical treatment. It was also denied, by the husband that the madness was incurable. While the petition under the Hindu Marriage Act was pending in the trial Court, the opponent-wife filed an application to the trial Court for an order for compulsory medical examination of the petitioner. It was stated in the application that to establish the incurable

insanity of the petitioner as required by law, it was necessary to have a medical examination of the petitioner. The trial Judge, therefore, granted the application holding that the Court had inherent jurisdiction even in absence of a specific provision in the CPC to direct a medical examination of the petitioner by a doctor. Accordingly, the Judge ordered that the petitioner be subjected to examination by the Civil Surgeon or a Doctor named by him to determine the unsoundness of mind of the petitioner and whether the unsoundness of mind Was curable or not. The husband, therefore, went in revision. The Gujarat High Court held 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. There is no provision under the Hindu Marriage Act or the rules framed thereunder, or in the CPC or the Indian Evidence Act or any other law which would show any power in the Court to compel any party to undergo medical examination. The High Court further held that medical examination for ascertaining the presence or the extent of insanity, even if it be by mere questioning, is as much interference with personal liberty as a real physical interference such as the drawing of blood or the personal examination of the body as in other oases. I respectfully agree with the view to the extent relevant here expressed by the learned. Judges of the Andhra and Gujarat High Courts.

5. I am, therefore, of the opinion that the order passed by the learned Magistrate cannot be maintained and must be set aside.

6. The question then arises whether in such a case where a person refuses to be subjected to medical examination by adopting obdurate attitude, an adverse inference can be drawn u/s 114 of the Indian Evidence Act. Section 114 of the Indian Evidence Act provides for the presumption by the Court regarding existence of facts. Illustration (g) to that section is to the effect that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. If, therefore, in a case it is shown that a person wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved can be raised against him or her. This section, amongst other things, therefore, enables the Court to draw an adverse inference against a party who refuses to produce a document in his possession. Similarly, it enables the Court to draw a presumption against a person who can make evidence available to the Court but obstructs the availability of such evidence. If, therefore, a person in a case refuses to submit to a medical examination where the whole case depends on the state of his or her mind and body, I think that it would be open to the Court to draw an adverse inference or presumption against such a person. Such a person would be on a par with a party who wrongfully withholds evidence in his possession. In *RM. PM. Ranganathan Chettiar Vs. Chinna Lakshmi Achi*, , it was held, that it was not open to a Court to invoke Section 151 of the CPC for ordering a medical examination of a party against the consent of such party. The High Court

observed that the Court might draw any adverse inference against a party who refuses to examine himself or herself. In *Bipinchandra v. Madhuriben*, cited above, the Gujarat High Court has also held that the fact that a party with ulterior motives adopts an obdurate and relentless attitude, cannot and does not render the Court helpless to counteract it. Where a party refuses to submit to a medical examination in a case where the whole case depends on the state of his mind and body, it will be open to the Court to draw an adverse inference or presumption against the recalcitrant party. Of course, the adverse inference that may be drawn by any Court is from the circumstances in each case and having regard to the refusal to let the best evidence being brought before the Court. In the present case if the circumstances permit, the learned Magistrate would be justified to draw an unfavourable inference against the petitioner.

7. The result, therefore, is that the order passed by the learned Judicial Magistrate, First Class, Gevrai, must be set aside as recommended by the learned Sessions Judge. Reference, therefore, is accepted for the reasons stated above, and. the rule is made absolute.