

[2024] 4 S.C.R. 72 : 2024 INSC 274

Deep Mukerjee
v.
Sreyashi Banerjee

(Civil Appeal No(s). 4722-4723 of 2024)

05 April 2024

[Vikram Nath and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

Matter pertains to subjecting the husband to undergo potentiality test.

Headnotes

Matrimonial laws – Matrimonial disputes – Medical tests – Potentiality test for husband – Divorce petition by the wife on the ground that the marriage between the parties was not consummated because of the husband’s impotency – Application by husband for subjecting the husband to undergo potentiality test and referring the wife for fertility test and psychological/mental health test for both the parties – Allowed by the trial court, however set aside by the High Court – Correctness:

Held: When the husband is willing to undergo potentiality test, the High Court should have upheld the order of the trial court to that extent – Order passed by the trial court directing the husband to take the medical test to determine his potentiality upheld – Impugned order passed by the High Court modified to that extent – Hindu Marriage Act, 1955 – Evidence Act, 1872. [Para 9]

Case Law Cited

Sharda v. Dharmpal [\[2003\] 3 SCR 106](#) : (2003) 4 SCC 493 – referred to.

List of Acts

Hindu Marriage Act, 1955; Evidence Act, 1872; Code of Civil Procedure, 1908.

List of Keywords

Divorce petition; Non-consummation of marriage; Impotency; Medical tests; Potential test; Fertility test; Psychological/mental health test.

* Author

Deep Mukerjee v. Sreyashi Banerjee**Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.4722-4723 of 2024

From the Judgment and Order dated 28.11.2023 of the High Court of Judicature at Madras in CRPPD No. 2844 and 2848 of 2023

Appearances for Parties

B Rangunath, Mrs. N C Kavitha, Vijay Kumar, Advs. for the Appellant.

K. S. Mahadevan, Ms. Swati Bansal, Rangarajan .R, Aravind Gopinathan, Rajesh Kumar, Advs. for the Respondent.

Judgment / Order of the Supreme Court**Judgment**

Prashant Kumar Mishra, J.

Leave granted.

2. Challenge in these appeals is to the common order dated 28.11.2023 passed by the High Court in Civil Revision Petition Nos. 2844 and 2848 of 2023 allowing the revisions while setting aside the order dated 27.06.2023 passed by the Trial Court in I.A. Nos. 8 & 9 of 2023 preferred by the appellant/husband in O.P. No. 2866 of 2021.
3. The parties were married on 23.07.2013 at Chennai and thereafter they agreed to move to the United Kingdom where they stayed together happily for a period of 7½ years. After they returned, they stayed together in a residential property belonging to the respondent/wife's father. However, upon disputes being cropped, they have separated in April, 2021 and since then, it is alleged by the appellant/husband that the respondent/wife neither joined his company nor responded to any communication and/or messages of the appellant/husband.
4. The appellant/husband preferred application under Section 9 of the Hindu Marriage Act, 1955¹ before the Additional Principal Family Court at Chennai, seeking restitution of conjugal rights being OP No. 2441 of 2021 whereas the respondent/wife subsequently preferred

1 'Act,1955'

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OP No. 2866 of 2021 for grant of decree of divorce under Section 13(1) (ia) of the Act, 1955 on the ground that the marriage between the parties has not consummated because of the appellant/husband's impotency.

5. In the above factual background, the appellant/husband moved I.A. Nos. 8 & 9 of 2023 under Section 45 of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure, 1908² for subjecting the appellant/husband to undergo potentiality test and at the same time referring the respondent/wife for fertility test and psychological/mental health test for both the parties. Vide order dated 27.06.2023, the Trial Court allowed the above interim applications on the condition that a competent medical board shall be constituted by the Dean, Rajiv Gandhi Government General Hospital, Chennai to conduct the subject tests for both the parties as prayed for in the interim applications and the report of the medical board be sent to the Court through the advocate Commissioner in a sealed cover. Both the parties were directed not to reveal the result of the tests to any third party and maintain complete secrecy.
6. The Trial Court's order dated 27.06.2023 was challenged by the respondent/wife before the High Court by way of two separate revisions which have been allowed by the High Court under the impugned order.
7. In the course of arguments in this Court, learned counsel for the appellant/husband submitted that when the appellant/husband is willing to undergo potentiality test, there is no reason why the High Court should set aside the entire order. The learned counsel for the appellant would refer to the decision of this Court in the case of "[*Sharda vs. Dharmpal*](#)" (2003) 4 SCC 493. Per contra, the learned counsel for the respondent/wife would submit that when the respondent/wife is not willing to undergo any test be it fertility test or mental health check-up, she cannot be compelled to undergo such tests.
8. While allowing the revision petitions preferred by the respondent/wife the High Court has not assigned any cogent reason as to why the appellant/husband cannot be sent for potentiality test. Instead of

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dwelling on the contentions of the parties qua the merits of the interim applications decided by the Trial Court, the High Court focused on the conduct of the parties which was not at all germane for deciding the issue as to the validity of the order passed by the Trial court.

9. Considering the fact situation of the present case, we are satisfied that when the appellant/husband is willing to undergo potentiality test, the High Court should have upheld the order of the Trial Court to that extent. Accordingly, we allow the present appeals in part maintaining the order passed by the Trial Court dated 27.06.2023 insofar as it directs the appellant/husband to take the medical test to determine his potentiality. Let the test be conducted in the manner indicated by the Trial Court within a period of four weeks from today and the report be submitted within two weeks thereafter. Impugned order passed by the High Court stands modified to the above extent only.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals partly allowed.