M.P. No.109 of 2026

IN THE HIGH COURT OF MADHYA PRADESH
A T J A B A L P U R

BEFORE

HON'BLE SHRI JUSTICE VIVEK JAIN

ON THE 21st OF JANUARY, 2026

MISC. PETITION No. 109 of 2026

BHUPENDRA KUSHWAHA
Versus
SMT. PRIYANSHI KUSHWAHA

Appearance:

Mr. Mohd. Aadil Usmani – Advocate for petitioner.

ORDER

The present petition has been filed by the petitioner/husband being aggrieved by the order dated 05.12.2025 passed by the Family Court, whereby the Family Court has rejected the application filed by the petitioner/husband for medical examination of the respondent/wife.

2. A divorce petition has been filed by the present petitioner against the respondent on the ground of cruelty and in the said divorce petition it has been pleaded by the petitioner/husband that the respondent/wife has refused to enter into physical relationship with

the petitioner/husband and that is also alleged to be one of the factors of cruelty upon the petitioner/husband.

3. In written statement, the allegations were denied by the respondent/wife and the respondent/wife also pleaded that she was being harassed on account of dowry demand and also that she was being subjected to physical and mental cruelty and was also subjected to acts of sodomy by the petitioner/husband. She also denied the allegation that she is mentally infirm and ill.

4. An application was filed by the petitioner before the Family Court that there has been no physical relationship between the petitioner and the respondent at any point of time and counter allegations have been made by the respondent-wife upon the petitioner/husband that he committed sodomy on the respondent/wife and, therefore, she be subjected to medical examination to ascertain whether she has ever entered into sexual relationship with anybody and whether she has been subjected to sodomy/anal intercourse, at any point of time.

5. The said application has been rejected by the Family Court on the ground that the divorce petition is on the ground of cruelty and the

medical examination being called cannot be ordered looking to the pleadings.

6. The counsel for the petitioner has vehemently relied on the judgement of the Hon'ble Supreme Court in the case of ***Sharda vs. Dharmpal, (2003) 4 SCC 493*** and submitted that it has been categorically held by the Hon'ble Supreme Court in the aforesaid case that in matrimonial matters, right to privacy cannot be claimed by the other party, if medical examination is sought on such matters which are grounds of divorce. Therefore, it is vehemently argued that the order of the Family Court runs contrary to the law settled by the Hon'ble Supreme Court and medical examination ought to have been ordered by the Family Court.

7. Heard.

8. Upon considering the aforesaid submissions and on perusal of the record, it is seen that the petitioner is seeking medical examination to the extent that whether the respondent/wife has ever had sexual relations with anybody or whether she has been subjected to anal intercourse.

9. The petitioner has filed the divorce petition on the ground that

the respondent/wife refused to enter into sexual relationship and that amounted to cruelty whereas the wife has raised defence that she was in fact even subjected to sodomy by the petitioner/husband.

10. The parties entering into sexual relationship or not, is not a ground of divorce and the fact may be relevant only for the limited purpose in the present case that whether the wife has committed cruelty upon the husband by refusing to enter into sexual relationship. Otherwise, it is neither a ground for declaring the marriage as void nor voidable under Sections 11 and 12 of the Hindu Marriage Act, 1955, nor a ground of divorce under Section 13. Impotence has not been alleged on the other party so that it would have necessitated medical examination of the other party.

11. The Hon'ble Supreme Court in the case of **Sharda (supra)** has held that in matrimonial matters where divorce is sought on a particular ground, which can only be established by medical examination, then without medical examination, it is difficult for the Court to arrive at any conclusion. The Hon'ble Supreme Court in the case of **Sharda (supra)** held as under:-

> ***"76.*** *The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by a spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the court has to reconcile these competing interests by balancing the interests involved."*

12. In the present case, as already discussed above, the wife refusing sexual relationship in itself is not a ground of divorce nor it is a ground to declare the marriage as void or voidable. It is being alleged as part of cruelty being inflicted by the respondent/wife on the husband.

13. So far as the allegation of sodomy is concerned, if sodomy has been committed much prior to medical examination, then sodomy

cannot be ascertained in medical examination being conducted many years after the alleged act of sodomy/anal intercourse and it would amount to nothing but invasion of privacy of the person and her humiliation.

14. So far as the medical examination to ascertain whether the wife has ever entered into sexual relationship or not, is concerned, it is nothing but seeking virginity test of the wife in different words. The recent judicial trend is heavily against conducting virginity test of a woman and even otherwise it is medically well settled that even after sexual intercourse hymen may remain intact in some rare cases, and on other hand, hymen may be damaged even without sexual intercourse upon any other physical activity and, therefore, presence or absence of hymen, would not be a determinative factor to infer that whether there has been sexual intercourse with the respondent ever or not.

15. Recently, the Hon'ble Supreme Court in the case of **State of Jharkhand vs. Shailendra Kumar Rai**, reported in **(2022) 14 SCC 299,** has heavily deprecated the practice of conducting virginity test. The Hon'ble Supreme Court, in the aforesaid case, has considered the

guidelines of the Ministry of Health and Family Welfare. The said guidelines contain the irrelevancy of application of two-finger test. It has been contained in the said guidelines that status of hymen is irrelevant because hymen can be torn due to several reasons such as cycling, riding or masturbation among other things and even an intact hymen does not rule out sexual activity nor a torn hymen proves previous sexual activity.

16. Looking to the aforesaid medical guidelines issued by the Ministry of Health and Family Welfare, which have been considered by the Hon'ble Supreme Court in the aforesaid judgement and ultimately the Hon'ble Supreme Court deprecated the practice of conducting two-finger test or virginity test, therefore, the prayer being made in the present petition would be nothing but invasion on privacy of the respondent, which otherwise also is not a direct ground to seek divorce, and not essential to adjudicate on the issues arising in the present case.

17. Recently, the Delhi High Court in the case of ***SR. Sephy vs. CBI and others, (2023) SCC OnLine Delhi 717*** has considered the entire

legal aspects of medical examination to conduct virginity test in detail. The Delhi High Court has held under:-

> *"(e) **Virginity test: victim v. accused***
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> ***76.*** *There cannot be two sets of views regarding the test of virginity being in violation of fundamental right of a victim of sexual assault and a woman under investigation. It is not the issue of a person being a victim or an accused but the vital issue is such a test being in violation of fundamental right if conducted on a female, whether a victim or an accused.*
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> ***77.*** *To hold that conducting virginity test on a woman who is victim of sexual assault and on a woman who may be an accused of an offence will be on different footing or that the earlier will be unconstitutional and the later constitutional, will be a perverse finding and against the intent of the Constitution of India and Article 21.*
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> ***78.*** *In light of the same, it can also be observed and reiterated that there is no procedure, under any law for the time being, which provides for "virginity test" of a female accused. Virginity testing is a form of inhuman treatment and the same violates the principle of human dignity. The test, being violative of right to dignity of an individual, cannot be resorted to by the State and the same shall be in teeth of the scheme of Indian Constitution and the right to life enshrined under Article 21.*
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> ***79.*** *This Court has to be guided by values and constitutional principles essential to establish rule of law in a democratic society that lays stress on respect for inherent dignity of all citizens. The respect for human dignity cannot be questioned and it has been recognised as human right by the Supreme Court as part of fundamental right under Article 21. In this regard, Supreme Court's decisions make it clear that notion of dignity may not be so worded in the fundamental constitutional right under Article 21, but it has been held to be part of it and also has been held to be of immense value.*
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> ***80.*** *Most shockingly, in the present case the virginity test was used to determine the truth of the accusation of murder against the petitioner. Undoubtedly, the test in itself is extremely traumatic for a victim of sexual assault as well as upon any other women in custody*

and is bound to have devastating effect on the psychological as well as physical health of the person.

81. *Strangely, though the word "virginity" may not have a definite scientific and medical definition, it has become a mark of purity of a woman. The intrusive testing procedure, as been held in several judgments of the Supreme Court, does not have a medical standing. Despite being inaccurate and their being definite studies that in some women hymen may not tear during vaginal intercourse, while in others they may tear even without vaginal sexual intercourse due to sports and other activities and some women may not even have one, such test has been conducted.*

82. *Further, without an iota of doubt, the same rests on gender bias and society's view and obsession with the false concept of virginity being equated with purity of a woman. Needless to say, it also amounts to controlling women's body, their sexual behaviour and the view that a woman with the hymen is pure and innocent. The Supreme Court, in the most recent case of State of Jharkhand v. Shailendra Kumar Rai [State of Jharkhand v. Shailendra Kumar Rai, 2022 SCC OnLine SC 1494] , has gone to the extent of holding that in case such tests are conducted on victims of sexual assault, it will amount to misconduct and thus, has tried to do away with this misogynistic practice.*

83. *This Court, therefore, holds that this test is sexist and is in violation of human right to dignity even of a female accused if she is subjected to such a test while being in custody. The long-term and short-term negative effects of such a test have been reported in many reports.*

84. *It will be difficult for this Court to hold being guided by the constitutional principles of fundamental rights that a person in custody of the authorities surrenders right to bodily integrity and submits to bodily intrusion for the prosecution to find evidence through its body. The feeling of being demeaned by such treatment in custody by bodily invasion through conducting a virginity test also brings forth the undesirable and abhorrable notion of differentiation on the basis of gender and stereotypes.*

85. *The concept of custodial dignity i.e. ensuring dignity of an individual while in custody, whether police or judicial, has been discussed at length in Sunil Batra (2) v. Delhi Admn. [Sunil Batra (2) v. Delhi Admn., (1980) 3 SCC 488 : 1980 SCC (Cri) 777] , which dealt with the torture of persons while in judicial custody. The*

Supreme Court has also held in several judgments regarding violence in police custody. The present case draws the attention of the court to take note of the important issue of dignity of a female in police custody. This Court holds that the concept of custodial dignity of a female will include her right to live with dignity even while in police custody. Conducting a virginity test on the pretext of reaching truth regarding allegations against her will amount to infringement and violation of her right enshrined in Article 21 and explained in the judgment of D.K. Basu v. State of W.B. [D.K. Basu v. State of W.B., (1997) 1 SCC 416 : 1997 SCC (Cri) 92].

86. *This Court is not impressed with the argument of the law enforcement agency that the virginity test was necessary to uphold the laws since this argument itself flouts basic principles that a person's dignity even in custody has to be upheld. The conducting of virginity test not only amounts to interference of the investigating agency with the bodily integrity but also psychological integrity of a woman which will have serious and profound effects on the mental health of a woman.*

87. *Some fundamental rights cannot be suspended or infringed or abridged even when a person is in custody and right to dignity is one such fundamental right which falls within the ambit of Article 21.*

88. *This Court, however, makes it clear that right of dignity in custody does not refer to the ordinary stresses and anxieties that a person may feel as a result of being in custody and under interrogation but the right for constitutional protection even while being in custody i.e. right to dignity. However, this should not mean to be taken to be a shield for the detainee from legitimate interrogation by police as per procedure established by law.*

89. *While our country has made positive and definite strides by way of several judgments of Supreme Court in this regard as far as victims of sexual assault are concerned, this Court holds that on the same analogy as laid down in the judgment of Lillu v. State of Haryana [Lillu v. State of Haryana, (2013) 14 SCC 643 : (2014) 4 SCC (Cri) 311] and State of Jharkhand v. Shailendra Kumar Rai [State of Jharkhand v. Shailendra Kumar Rai, 2022 SCC OnLine SC 1494] , conducting such tests on a female accused in custody will also amount to violation of her right to dignity and, therefore, in violation of Article 21 of the Constitution of India. Needless to say, rights of an accused in custody are also to be safeguarded even if some rights have to yield to the safety of the State.*

> ***90.*** *Under the constitutional system, the court stands guard against any such practice which may cause unexplainable suffering of human dignity. A higher duty is cast on a constitutional court and its solemn responsibility to ensure that the fundamental rights granted by the Constitution of India remain living law at all times and act as constitutional shield for the benefit of every Indian citizen.*
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> ***D. Conclusion and directions***
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> ***91.*** *In view of the aforesaid discussion, this petition is disposed of with the observations and directions as stated in the succeeding paragraphs.*
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> ***92.*** *Prayer (a): The virginity test conducted on a female detainee, accused under investigation, or in custody, whether judicial or police, is declared unconstitutional and in violation of Article 21 of the Constitution which includes right to dignity."*

18. In view of the aforesaid, this Court does not find any substance in the plea made by the petitioner/husband to subject the respondent/wife to medical examination as the said examination would be nothing but a virginity test which would be an invasion of privacy of the individual and is not relevant for the purpose of divorce as refusal to enter into sexual intercourse in itself is not a ground of divorce and the petitioner can adduce other evidence to prove disinclination of the wife to enter into sexual relations, as alleged in the divorce petition and virginity test or "two-finger test" of the wife would neither be relevant nor be conclusive for the purposes of the

divorce petition. It would be nothing but invasion of privacy.

19. Consequently, the petition fails and is **dismissed**.

(VIVEK JAIN)
JUDGE

psm