IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Samapti Chatterjee

And

The Hon'ble Justice Manojit Mandal

F.AT. 217 of 2017

Sk. Maniruddin

v.

Soma Banerjee

For the Appellant : Mr. Prabal Mukherjee
Mr. Rajat Dutta

For the Respondent : Mr. Indranath Mukherjee
Ms. Sajani Roy Chowdhury

Heard on : 02.01.2020

Judgment on : 13.01.2020

Manojit Mandal J.

This appeal is directed against the judgment and decree passed by the learned Additional District Judge, 1st Court, Hooghly in

Matrimonial Suit No. 391 of 2013 by which the learned trial Court dismissed the matrimonial suit which was filed by the respondent/wife against the appellant/husband praying for dissolution of marriage under Section 27 of the Special Marriage Act (hereinafter referred to as the "said Act") and also dismissed the counter-claim with direction to live separately from each other by way of judicial separation.

2. Admittedly, the parties were married according to Special Marriage Act on 05.01.1998 registered before the Marriage Registrar, Chinsurah, Hooghly. The respondent/wife prayed for divorce on the ground of cruelty and desertion. The case of the respondent/wife is that she is a Hindu by religion, while the appellant/husband is a Muslim male and they got acquainted through their common friend and gradually became affectionate to each other. It was the further case of the respondent/wife that their common friend Anjana Pal made a proposal to the appellant/husband to marry the respondent/wife and the appellant/husband agreed to the proposal. Although she was not ready to marry but she was told to get the marriage registered. Subsequently, marriage of the parties was solemnized before the Marriage Registrar, Hooghly, on 05.01.1998 according to the provisions of the said Act. Subsequently, she filed a title suit being T.S. No. 74 of 1998 in the Court of learned Civil Judge (Junior Division), 1st Court, Hooghly praying for a declaration that she was a bachelor and the certificate of marriage was not acted upon. However, the said suit was dismissed being non-maintainable and against the judgment of the learned Civil Judge (Junior

Division), 1st Court, Hooghly, an appeal was preferred before the Court of the learned Additional District Judge, Hooghly but the appeal was also dismissed on 26.09.2005. Thereafter, MAT Suit No. 76 of 2006 was filed by her for annulment of marriage and although in that suit, a decree was passed in favour of her, but in appeal, this Court set aside the judgment and decree of the trial Court. It was the further case of the respondent/wife that since 1998, she was residing in her father's house while the appellant/husband was living in his house and the appellant/husband had never shown any interest to bring her to his house. It was also contended that although the appellant/husband earned Rs. 50,000/-(Rupees Fifty Thousand) only per month but he never sent any money for her maintenance. It was also contended that the appellant/husband married her by suppressing material facts and he even threatened her personally as well as through his men. It was further contended that both the parties were living separately for more than fourteen (14) years and the marital tie has irretrievably broken down and, therefore, a decree of divorce may be passed in her favour. The application for dissolution of marriage was filed in the Court of learned District Judge, Hooghly at Chinsurah on 17.04.2013.

3. The suit was contested by the appellant/husband by filing a written statement contending, inter alia, that in 1993, the parties got acquainted with each other at Vidyasagar Mela held at Birshingha Village of Midnapur District. Gradually, they developed love for each other and they used to travel together at various places and their family members also visited

each other's house. At one point of time, the father of the respondent/wife restricted movement of her and at that time the respondent/wife would put pressure upon him for registration of marriage and thereafter their marriage was registered. It was further contended that the marriage was pre-planned and known to all the friends of the parties. The appellant/husband denied all allegations of torture and neglect and contended that due to ill advice of others, respondent/wife filed the suits with false and fictitious claims for which they failed to lead peaceful conjugal life. The appellant/husband by way of counter-claim prayed for restitution of conjugal rights. In reply to the counter claim, the respondent/wife contended that prayer was made by appellant/husband only to show his good gesture but he had no intention to live with her.

4. At the trial, both sides led evidence and the learned Trial Court in the impugned judgment rather found that allegation of desertion and cruelty by the appellant/husband was not sustained. The learned Trial Court also observed that the prayer for restitution of conjugal rights has not been made by the appellant/husband with bona fide intention. The learned Trial Court dismissed the suit as well as the counter-claim with direction to live separately from each other by way of judicial separation.

5. Being dissatisfied, the appellant/husband has come with the present appeal.

6. Mr. Prabal Mukherjee, the learned Senior Advocate appearing on behalf of the appellant/husband vehemently contended before us that the learned trial Court has committed wrong and erred in law in passing the

decree of judicial separation. He further urged that the learned Trial Court passed the decree of judicial separation though the ingredients of judicial separation as mentioned in Section 23(1)(a) of the Act has not been proved. He further urged that decree of judicial separation was passed by the learned trial Court without considering the provision as mentioned in Section 34(a) of the Act. In support of his argument, he has relied upon the decision of ***Hirachand Srinivas Managaonkar v. Sunanda*** reported in ***2001 (4) SCC 125.***

7. Mr. Indranath Mukherjee, learned Advocate appearing on behalf of the respondent/wife has, on the other hand, opposed the aforesaid contention of Mr. Prabal Mukherjee, and submitted that the learned Trial Court in the facts of the present case rightly disbelieved the case of the appellant/husband. He further submitted that the learned trial Court has rightly passed the decree of judicial separation. In support of his argument, he has relied upon the decisions reported in ***(2015) 4 WBLR (Cal) 293 and AIR 2007 SC 1426*** Mr. Mukherjee, therefore, prayed for dismissal of the appeal.

8. Upon taking into consideration the submission of the learned Advocates of both sides and on perusal of the materials on record, we find that admittedly, the parties were married on January 5, 1998, according to the said Act before the Marriage Registrar at Chinsurah, Hooghly. Admittedly, the petitioner/husband married the respondent/wife out of their pre-existing love affairs. Admittedly, the appellant/husband is a Mohammadan by religion before and after marriage and the

respondent/wife is a Hindu by religion before and after marriage. Admittedly, the respondent/wife filed a title suit being Title Suit No. 74 of 1998 in the Court of the learned Civil Judge (Junior Division), 1st Court, Hooghly, praying for declaration that the petitioner was a bachelor and the certificate of marriage was not at all acted upon and the said suit was dismissed. Admittedly, against the judgment of the learned Civil Judge (Junior Division), 1st Court, Hooghly, an appeal was preferred before the Court of the learned District Judge, Hooghly and the said appeal was dismissed on 26.09.2005. Admittedly, on 14.01.2009, the respondent/wife filed Matrimonial Suit No. 76 of 2006 before the learned District Judge, Chinsurah, Hooghly, praying for annulment of marriage under Section 24 of the Special Marriage Act, 1954, and the said matrimonial suit was decreed in favour of the respondent/wife. But in appeal, this Court set aside the judgment and decree of the learned Trial Court. Admittedly, the parties to the suit are living separately at their respective residential addresses as mentioned in the cause title of the plaint. Now, the points are to be decided in this appeal are:-

1. Whether the learned trial Judge was justified in decreeing the suit for judicial separation?

2. Whether the respondent/wife has any justified ground to live separately at her father's house at Chatterjee Lane, P.O.-Buroahibtola, P.S.-Chinsurah, Dist.-Hooghly.

9. As to the prayer for a decree for divorce under Section 27 of the Act on the ground of cruelty, the evidence of the respondent/wife as PW 1

including her cross-examination reveals that she was insulted and assaulted many times by the appellant/husband and that appellant/husband threatened her in her father's house and that some times, some unknown persons and the appellant/husband also over telephone used abusive languages to her and her parents and that when she was a college student, she was assaulted by the appellant/husband and at that time the marriage was registered. The respondent/wife has nowhere in that plaint as well as in her evidence stated about the particular date or place of such assault and insult upon her by the appellant/husband. The evidence of PW 1 is not clear as to whether such incidents of assault or insult took place prior to the marriage or after that. Exhibit-1 and Exhibit-2 are the G.D. Entries which disclose that the appellant/husband teased and taunted the respondent/wife. The Exhibit-1 proves that the G.D. Entry was lodged over the incident of Title Suit No. 74 of 1998. There is also no evidence on record about the abusive words which were allegedly used by the appellant/husband. There is nothing on record to suggest that the appellant/husband abused and insulted the respondent/wife so as to cause tremendous mental pain to the petitioner/wife. There is also no corroborative evidence on record for such allegations. PW 2 is the father of the respondent/wife and he did not speak anything about any incident of physical torture during his examination. The allegation, whatsoever, made by the respondent/wife, does not, however, appear to be convincing at all. Therefore, on consideration of the evidence of PW 1 and PW 2 it may be concluded that the conduct of the appellant/husband does not amount to mental cruelty.

In the result, we are of the view that no question of cruelty, be it physical or mental, arises in the facts of the present case. Therefore, the learned Trial Judge was justified in holding that there is no material to suggest that the appellant/husband treated the respondent/wife with mental and physical cruelty.

10. As regards the desertion, the evidence of PW 1 including her cross-examination reveals that the respondent/wife filed several cases to get rid of matrimonial bond and that the respondent/wife married the appellant/husband out of the pre-existing love affairs but since her family members did not accept such relationship, she tried to get rid of the matrimonial bond by filing different cases on different grounds. On consideration of the above evidence, we are of the view that respondent/wife has failed to prove that the appellant/husband deserted the respondent/wife without any just cause. Therefore, we are of the view that the learned trial Judge has rightly hold that the respondent/wife failed to establish that the appellant/husband treated her with cruelty or willfully deserted her.

11. The evidence of the appellant/husband (DW 1) including his cross-examination reveals that he did not get any opportunity to live together with the respondent/wife for a single day and their marriage was solemnized on January 5, 1998, and since then they have been living separately. In Paragraph number 16 of the written statement, the appellant/husband has clearly and categorically stated that there was no joint living as husband and wife in between them and the respondent/wife

is responsible for not living together as husband and wife and non-access in between them at the instance of the respondent/wife in spite of the fact that he wanted to live with the respondent/wife as husband and wife as married couple. From the above evidence of DW 1 and from the written statement, it is proved that after marriage, the parties to the suit did not reside together as husband and wife. Record goes to show to that though the parties were living separately since after marriage but the prayer for restitution of conjugal rights has been made by the appellant/husband only on 09.7.2013. Record also goes to show that the appellant/husband also did not make any prayer for restitution of conjugal rights by way of counter- claim in the previous suits filed by the respondent/wife. He also did not file any separate suit for restitution of conjugal rights and the said prayer has been made only on 09.7.2013 when the appellant/husband filed written statement in the present suit. From the above discussion, it is crystal clear that the intention of the appellant/husband was not *bona fide* to lead conjugal life with the respondent/wife. Therefore, we are of the view, that the learned Trial Court has rightly dismissed the counter-claim filed by the appellant/husband.

12. Under these facts and circumstances of the case, we are of the view, that a decree for divorce for dissolution of the marriage was thus not a legal recourse open for the respondent/wife and there was no valid ground for the same at present.

13. In order to dissolve the controversy and the stalemate, in reality, so as not to prolong the litigation and to do a complete justice in the case, the facts that have now emerged may be recapitulated as follows:-

(i) The marriage between the parties was duly solemnized under the provisions of the Special Marriage Act, 1954;

(ii) The appellant/husband did not get any opportunity to live together for a single day with the respondent/wife;

(iii) Both the parties to the suit are living separately since after marriage and;

(iv) The appellant/husband was willing to honour the marriage and live with the respondent/wife as husband and wife but the respondent/wife is not willing to live with the appellant/husband as husband and wife.

14. The state of facts as noticed above, in our considered opinion would must certainly suggest to go for a suitable relief like a decree for judicial separation so as to enable the parties to develop a mutual understanding with confidence and to exercise their free will in the matter.

15. The learned Advocate appearing for the appellant/husband submitted that the learned trial Court passed the decree of judicial separation though the ingredients of judicial separation as mentioned in Section 23 of the Act has not been proved. We fail to accept such

submission of the learned Advocate appearing for the appellant/husband as because the Trial Court has enough power to pass a decree for judicial separation under Section 27A of the Act if it is just and proper with regard to the circumstances of the case in a proceedings under this Act pertaining to dissolution of marriage by decree of divorce while the trial Court thinks that attempt should be made to save the marriage from breaking and the spouses may be given the opportunity to rethink and reconcile.

16. Learned Advocate appearing for the appellant/husband further submitted that Section 34(a) of the Act has not been considered in passing impugned judgment and order and, so, the impugned judgment should be set aside. We fail to accept such contention made by the learned Advocate appearing for the appellant/husband as because Section 34(a) of the Act will not apply in the present case as no decree for dissolution of marriage by way of divorce has been passed.

17. The decision of ***Hirachand Srinivas Managaonkar (Supra)*** is of no assistance to the appellant/husband as because in that case the Hon'ble Apex Court observed that the petition for divorce was rightly dismissed and the provision of Section 23 of the Hindu Marriage Act was discussed in relation to a petition for divorce and in the present case the learned Trial Court has passed the order of judicial separation under Section 27A of the Act and not a decree of divorce.

18. In that view of the matter, we are of the view that learned Trial Judge was justified in dismissing the suit and the counterclaim and in passing the decree for judicial separation under Section 27A of the Act. Therefore,

the appeal is without any merit and it should be dismissed affirming the judgment and decree passed by the learned Trial Judge.

19. Accordingly, the appeal is dismissed. The judgment and decree dated 18th January, 2017, passed by learned Additional District Judge, 1st Court, Hooghly, in Matrimonial Suit No. 391 of 2013 is hereby affirmed.

20. In the result, the order of stay granted earlier stands vacated. Respondent/wife is at liberty to proceed with the case pending before the learned lower Court below.

21. Considering the circumstances, there will be no order as to costs.

22. Let a copy of this judgment along with Lower Court record be sent down to the Trial Court for information.

I agree.

(Samapti Chatterjee, J.) **(Manojit Mandal, J.)**