IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SHEEL NAGU

&

HON'BLE SHRI JUSTICE VINAY SARAF

ON THE 3rd OF JANUARY, 2024

FIRST APPEAL No. 896 of 2014

BETWEEN:-

SUDEEPTO SAHA

.....APPELLANT

(PETITIONER IN PERSON)

AND

MOUMITA SAHA

.....RESPONDENTS

(NONE)

This appeal coming on for orders this day, ***Justice Vinay Saraf*** *passed the following:*

JUDGMENT

The appellant, husband has preferred the present appeal under Section 28 of the Hindu Marriage Act, 1955 (herein after referred to as Act, 1955), challenging the judgment and decree dated 3.11.2014 passed by the XIVth Additional District Judge, Bhopal in R.C.S. No.11/20214 whereby the petition filed by the appellant for grant of decree of divorce was dismissed.

2. The notices of the present appeal were issued to the respondent by various modes and ultimately, the notices of the present appeal was ordered to

be published in two newspapers having wide circulation in the area where the respondent resides, one in vernacular language and other in English Language vide order dated 7.7.2023 and the notices were published in newspaper, *The Eco Of India, Kolkat*a on July 14, 2023 and in newspaper- *Arthik Lipie* (Bengali), Kolkata on July 14, 2023. Despite the publication of notices in two newspapers, no one appeared on behalf of the respondents on 11.9.2023, 3.10.2023, 10.10.2023, 31.10.2023, 2.1.2024 and on 3.1.2024 and consequently the matter is heard today finally in the absence of respondent.

3. The appellant filed an application under Section 13 of the Hindu Marriage Act for grant of decree of divorce in the court of XIVth Additional Sessions Judge, Bhopal on 25.3.2014 stating that marriage was solemnized on 12.7.2006 at Village Dasaghra P.S. Dhaniya Khali District Hoogli, West Bengal as per Hindu Rights and Rituals. According to the appellant, after marriage the respondent denied cohabitation with the appellant and there was no consunmation due to the denial of the respondent. It is alleged in the petition that the respondent disclosed to the appellant that her parents and relatives forced her to marry with appellant whereas she was having love affair with her boyfriend namely, *Pintu Das* and she requested appellant to hand over her custody to said *Pintu Das*. Thereafter, they came to Bhopal at their matrimonial house but there also she denied cohabitation and ultimately the appellant left Bhopal for USA on 28.7.2006 and during this period, the marriage was not consummated.

4. According to the appellant, the respondent threatened him through e-mail that she will cut her vein and commit suicide. The respondent left the matrimonial home in the month of September, 2006 and thereafter never returned.

5. The appellant further stated in the petition that the respondent lodged a false complaint before the National Commission for Women against the parents of the appellant and lodged FIR at P.S. Dhaniya Khali District Hoogli which was registered as Crime No.17/2013 on 18.2.2013 against the appellant and his parents under Section 498-A/406 of the IPC wherein the respondent alleged that at the time of her marriage, her father gave cash of Rs.3,00,000/- with gold and silver ornaments, costly sarees, utensils etc. to the appellant and his parents to fulfill their demand of dowry and even after marriage when she was living at Bhopal further Rs.75,000/- cash was given by her father to parents of appellant but she was subjected to harassment, physically and mentally tortured by her husband, father-in-law and mother-in-law and they tried to strangulate her with the help of *saree* and when they failed in the same, on 29.9.2006, they put *kerosene* oil over her and tried to lit fire but somehow she managed to escape with the help of local neighbors and reached her parental home.

6. It is further stated in the petition that due to the false report lodged by the respondent, parents of the appellant remained in custody for almost 23 days and in this way respondent has treated the appellant and his parents with cruelty and deserted the appellant without any reason. It was also stated in the petition that the respondent lodged a report at P.S. Shahpura, Bhopal also. Thereafter in the settlement the respondent received Rs.10,00,000/- from the father of the appellant and signed the petition for divorce by mutual consent but later on denied to submit the same before the competent court and in the aforesaid facts and circumtances, the appellant prayed for grant of decree of divorce by preferring the application under Section 13 of the Act, 1955

before the trial court.

7. The trial court issued summons of the petition to the respondent through registered post but the respondent remained absent therefore, the trial court proceeded *ex parte* against the respondent by order dated 20.8.2014 and after recording the statement of the appellant and his father passed the impugned judgment and decree on 3.11.2014 whereby the application preferred by the appellant was dismissed on the ground that appellant failed to prove any of the grounds available in the Act, 1955 for grant of decree of divorce.

8. In the present appeal, the appellant appeared in person and vehemently argued that the learned trial court has committed error in law and facts in not granting the decree of divorce despite the evidence available on record that since 2006, the appellant and respondent are living separately and the marriage was not consummated for a single day. According to the appellant, learned trial court ought to have granted the decree of divorce on the ground of cruelty as the appellant has produced the documentary evidence on record to establish the allegation of lodging the false report against the appellant and his parents by the respondent. The appellant further argued that order sheets were available on record to demonstrate that parents of appellant remained in custody for 23 days due to false report lodged by the respondent, however, upon query regarding the result of the criminal case, the appellant accepted that the criminal case is still pending. When the criminal case is pending and has not culminated in acquittal of the appellant and his parents, it cannot be accepted that appellant and his parents arrested on the basis of the false report. Learned trial court has not committed any error in holding that as the criminal case is still pending, no decree of divorce can be granted on the ground that by lodging false report, the respondent has committed cruelty with appellant and his parents.

9. According to the appellant himself, after the marriage he reached Bhopal on 23.7.2006 and thereafter left Bhopal on 28.7.2006 to USA, therefore, the allegation of desertion of appellant by respondent/wife has no legs. The same cannot be accepted because wife was left at matrimonial home by the appellant and appellant had not made any arrangement for taking her to USA.

10. According to the report lodged by the respondent, she was subjected to cruelty by appellant and his parents and they tried to kill her, therefore, she left matrimonial home and in the aforesaid circumstances, it cannot be accepted that the respondent/wife has deserted the appellant/husband without any reason and the findings of the learned trial court in respect of the ground of desertion is based on due appreciation of evidence and do not require any interference by this Court.

11. It is alleged by the appellant in the petition as well as in the memo of appeal that the wife was having boyfriend and she was forced to marry with the appellant by her parents and relatives and she requested the appellant to hand over her custody to her boyfriend. Though the said allegation of the appellant could not be proved by adducing any cogent evidence but the same cannot be a ground for decree of divorce under Section 13 of the Act, 1955. It is not the case of the appellant that the respondent/wife had made physical relation with any other person than her husband and therefore, by simply levelling allegation that the respondent/wife was having boyfriend, no decree of divorce can be granted. The learned trial court has not committed any error in declining to grant decree upon the said allegation.

12. It is further alleged by the appellant that when the respondent lodged a report at Police Station- Dhaniya Khali District-Hoogli, both the parties

entered into a compromise and in the settlement on 13.7.2013 all the articles of *stridhan*/jewellery, gold & silver items were handed over to the respondent/wife and they entered into the settlement for payment of permanent alimony of Rs.10,00,000/ in lieu of the dissolution of marriage. Rs.1 lac was paid in cash on 13.7.2013 itself and thereafter Rs.1 lac cash and Rs.4-4 lacs through cheques were paid to respondent/wife on 21.7.2023 and she signed the petition for divorce under Section 13-B of the 1955 Act for submitting it before the District Judge, Chinsurah, Hoogli but the same was not filed and as the appellant has already paid the settlement amount, the appellant is entitled for decree of divorce.

13. Before the learned trial court, no evidence was produced to establish the payment of cheques of Rs.4-4 lacs, however, before this Court without filing any application for considering the documents as additional evidence, the copy of the pass book has been placed on record which shows that the cheques of Rs.4-4 lacs were cleared.

14. On the basis of the settlement, the decree of divorce can be passed only in a situation when both the parties are present before the Court and they confirm the settlement and jointly pray for grant of decree of divorce by mutual consent. In the present case, though the appellant has submitted that he entered into a settlement with the respondent and paid the settlement amount in full but neither any petition under Section 13 (B) of the Act 1955 was filed nor the respondent was present before the Court to confirm the factum of settlement, therefore, learned trial court has not committed any error in refusing to grant decree of divorce on the ground of settlement.

15. The appellant has further argued that the appellant and respondent are living separately since 2006, they were not having any physical

relationship, there is no hope of cohabitation in future, the allegations levelled by the respondent against the appellant and his parents were reckless, defamatory and false and in view of the facts and circumstances of the present case, it is evident that the marriage has been broken down irretrievably and it is just and proper to grant the decree of divorce. The decree of divorce can be granted on any of the ground enumerated in Section 13 of the Act, 1955. Section 13 does not provide any ground for grant of decree of divorce in a situation of irretrievable break down of marriage, therefore, no decree of divorce can be granted by accepting the arguments of the appellant that the marriage has been broken down irretrievably.

16. Lastly, the appellant raised the issue of denial of cohabitation by the respondent without any reason and submitted that since the date of marriage i.e. 12.7.2006 till he left India, he tried to consummate the marriage but every time the respondent denied cohabitation without any reason and due to denial of the respondent-wife, the marriage could not be consummated. The appellant submitted that after the marriage when they were in West Bengal, the wife denied physical intimacy on the ground that when she will reach to her matrimonial home, they will start their life as husband and wife, however, after reaching Bhopal, the respondent- wife did not permit appellant-husband to make any physical relation and lastly when both of them visited Delhi from where the appellant departed for USA, the wife yet again refused to consummate the marriage with the appellant and according to the appellant, the appellant had to leave India for higher education without consummation of marriage due to continuous denial of the respondent-wife and thus the same caused mental cruelty to the appellant.

17. The non consummation of marriage and denial of physical intimacy amounts to mental cruelty. This allegation of the appellant-husband remained unrebutted as the respondent-wife did not appear before the trial court and did not file any reply to the petition filed by the appellant. The appellant narrated the factum of mental cruelty on account of non consummation of marriage in his affidavit of chief-examination filed under Order 18 Rule 4 of the CPC and the same could not be controverted in the absence of the respondent. The fact which was pleaded and stated in chief-examination in the absence of any rebuttal can be accepted as proved. Meaning thereby, the allegation of mental cruelty levelled by the appellant-husband on account of denial by the respondent-wife for physical intimacy was proved and the learned trial court ought to have considered the same at the time of passing the impugned judgment.

18. The Supreme Court in ***Samer Ghosh Vs. Jaya Ghosh*** *reported in* ***(2007) 4 SCC 511*** narrated several illustrations enumerated from instances for human behavior which may be relevant in dealing with the cases of mental cruelty. Some illustrations were given in paragraph 101, as was said to be not exhaustive. Illustration No.XII is reproduced below:

> *"(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty."*

19. We understand that unilateral refusal to have sexual intercourse for considerable period without any physical incapacity or valid reason can amount to mental cruelty. In the present matter, it is specifically alleged by the appellant in the petition and stated in the affidavit that the respondent denied consummation of marriage from the date of marriage till he left India and the

marriage was never consummated, due to unilateral decision of the respondent to refuse sexual intercourse for considerable period without having any valid reason. In the absence of any contrary version or any rebuttal on the part of the respondent, the statement of the appellant cannot be discarded and has to be accepted as it is.

20. We are clear in our minds that the pleading of facts regarding the non consummation and denial of physical intimacy by the respondent were there in the petition and the respondent had notice of the petitioner's case but the respondent had chosen to remain absent. The Apex Court in the case of ***Sukhendu Das Vs. Rita Mukherjee reported in (2017) 9 SCC 632*** has held that non appearance of the respondent-wife in the case filed by the appellant/husband for divorce itself amount to cruelty. The relevant paragraph of the said judgment is as under:

> *"7. The respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of notice, the respondent did not show any interest to appear in this Court also. This conduct of the respondent by itself would indicate that she is not interested in living with the appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty."*

21. In view of the aforesaid, we are unable to accept the findings of the trial court on the issue of absence of consummation of marriage or physical intimacy. The trial court has wrongly held that failure on the part of the wife to consummate the marriage cannot be a ground for divorce whereas in the matter of ***Sumer Ghosh (supra),*** the Apex Court has accepted the said act of wife as mental cruelty. There can never be any straight jacket formula or fixed

parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking the relevant factors in consideration. The appellant solemnized the marriage. It was already decided that he will leave India in a short period. During this period, the appellant was hopeful to consummate the marriage but the same was denied by the respondent and certainly the said act of the respondent amounts to mental cruelty. The ground of divorce enumerated in Clause (i-a) under Section 13 (1) is made out. The appellant is entitled for the decree of divorce.

22. The impugned judgment is set aside. We hold ground under Clause (i-a) under Section 13 (1) of the Act proved by the appellant/husband. The marriage solemnized on 12.7.2006 is hereby dissolved by the decree of divorce. Accordingly, the appeal is **allowed**. There shall be no order as to costs.

23. Office is directed to draw up the decree. Record of the trial court be sent back along with the copy of judgment and decree.

(SHEEL NAGU)
JUDGE

(VINAY SARAF)
JUDGE

P/-