A.F.R.

Reserved

Neutral Citation No. - 2024:AHC:149103-DB

In Chamber

Case :- FIRST APPEAL No. - 495 of 2024

Appellant :- Smt Hasina Bano
Respondent :- Mohammad Ehsan
Counsel for Appellant :- Bhriguram Ji,Shashi Shekhar Maurya
Counsel for Respondent :- Nilesh Kumar Dubey

Hon'ble Vivek Kumar Birla,J.
Hon'ble Syed Qamar Hasan Rizvi,J.

(Per: Hon'ble Syed Qamar Hasan Rizvi,J.)

On the application for condonation of delay

As per the report submitted by the Registry, the present appeal under Section 19 of the Family Court Act, 1984 is barred by limitation as the same has been preferred by the appellant beyond 148 days of the prescribed limitation period. The cause of delay as explained by the appellant in the present application for condonation of delay duly supported by an affidavit is found satisfactory. The learned counsel appearing on behalf of the respondent has no objection against the aforesaid condonation of delay. Accordingly, delay in filing this appeal is condoned.

The present application for condonation of delay having application No. 01 of 2024 is **allowed**.

On the Memo of Appeal

1. Heard Sri Bhriguram Ji Pandey along with Sri Shashi Shekhar Maurya, learned counsels for the appellant and Sri Nilesh Kumar Dubey, learned counsel appearing for the respondent.

2. The present appeal under section 19 of the Family Court Act, 1984 has been filed, *inter alia*, praying for setting aside the impugned judgment and order dated 10.10.2023 and also the decree dated 19.10.2023 passed by the Additional Principal Judge, Family Court, Jhansi in Declaration Case No. 687/2021 whereby the 'Suit for declaration of the matrimonial status' of the parties has been dismissed. It has also been prayed that this Court may, in exercise of its appellate jurisdiction allow the said Suit, by declaring the matrimonial status of the parties as 'divorced' by way of *mubara'at*, as recognised under the Muslim Personal Law.

3. Facts of the case that are culled out from the material available on record is that the marriage between the appellant and the respondent was solemnised on 18.12.1984 in accordance with the recognised rites and customs of the *Hanafi Muslim* school of thought. The appellant in support of her stand filed a copy of the '*nikahnama'* as Annexure No. 1 along with the stay application duly supported by an affidavit.

4. There is no dispute of the fact that out of their wedlock, a child was born in the year 1991 but due to some matrimonial dispute the parties preferred staying separately, giving rise to litigation. From the pleadings, it transpires that a case under section 125 Cr.P.C. was filed by the appellant which was registered as Case No. 194/1990 and a case under Section 127 Cr.P.C. was also registered as Case No. 43/1994. Further, a criminal case under Sections 498A, 323, 504, 506 I.P.C. was also filed in the Court of Chief Judicial Magistrate, Jhansi which was registered as Case No. 2454 of 1997 (Haseena Bano *versus* Ehsan). However, after a lapse of time, a settlement took place between the parties, out of Court and the aforesaid litigation came to an end. It is the admitted case of the parties to the present appeal that they are living separately since 16.07.1990 and on the intervention and persuasion of some respected persons of the society, the parties resorted to put an end

to their marital tie and finally on 15.11.1999, they decided to accord divorce on the basis of mutual consent and dissolved their marriage by way of *mubara'at* as per the established principles under the Muslim Personal Law. Thereafter, on 07.03.2000 the appellant and the respondent reduced the aforesaid divorce in writing by means of a jointly signed notarised document titled as *"Talaqnama Tehreer"*.

5. The parties to this appeal jointly filed a Suit being Declaration Case No.687 of 2021 before the competent Family Court at Jhansi, seeking declaration of their matrimonial status. However, the said Suit was dismissed by the learned Additional Principal Judge, Family Court, Jhansi, vide order dated 10.10.2023, on the ground of default of non-filing of the said '*Talaqnama'* in-original by the plaintiffs along with the list of documents submitted in the Suit proceeding and also on the ground of delay in filing the Suit that having being instituted after a lapse of about 20 years from the date of its commencement of the dissolution of marriage.

6. We have heard the learned Counsels for the parties and perused the record.

7. It is submitted by the learned counsel for the appellant that since 16.07.1990, the appellant has been living separately. The divorce between the parties, by way of mutual consent (*mubara'at*) on 07.03.2000 is undisputed as the same has never been challenged before any court of law. But the authorities at different forum, unnecessarily demands a formal declaration of the said dissolved matrimonial status (divorce) issued from the competent court of law. Having no other option but to approach the court of law for redressal of the said grievance, appellant and the respondent jointly filed a Suit being Declaration Case No. 687 of 2021 before the competent Family Court at Jhansi seeking declaration of the aforesaid duly dissolved marriage. However, the said Suit has been illegally dismissed by the learned

Additional Principal Judge, Family Court, Jhansi, vide order dated 10.10.2023.

8. The contention of learned counsel for the appellant is that the learned Court below, although, has neither disbelieved the solemnisation of the marriage between the parties that took place on 18.12.1984 nor their separation since 16.07.1990. The dissolution of marriage by way of *mubara'at* (divorce by mutual consent) on 15.11.1999 which was reduced in writing in the form of '*Talaqnama Tehreer'* on 07.03.2000 is not in dispute*;* but the learned court below dismissed the said Suit in the most mechanical manner, vide impugned judgement and order dated 10.10.2023 on the unwarranted/technical grounds of non-availability of the '*Talaqnama'* in-original on record and the Suit in question having been instituted after a lapse of about 20 years from the date of commencement of the dissolution of marriage.

9. It has also been asserted on behalf of the appellant that the learned Court below did not appreciate the statements of the witnesses who were examined before the Court on 22.11.2021, evidence as placed by the appellant and the factual matrix of the case, in as much as, the fact that the Suit has been jointly filed by the parties seeking declaration of their matrimonial status as 'divorced' where the same is not at all disputed. The next submission advanced by the learned counsel appearing on behalf of the appellant is that since the factum of divorce is not disputed in the instant case and under the Muslim Law, there is no legal mandate of a written divorce (*mubara'at)* the *Talaqnama* dated 07.03.2000 in the instant case, is at the best a memorial, further the same is not a disputed document, as such, under the facts of the case there is no requirement of Talaqnama in-original as per Section 54 of the Indian Evidence Act, 1872, but the learned Court below has dismissed the said Suit without taking into consideration the settled legal position of law. Further, the provisions of the Indian Limitation Act are not attracted in the instant

case and the learned court below has misconstrued the law on the subject.

10. The aforesaid facts as narrated on behalf of the appellant-plaintiff have not been disputed by the learned counsel for the respondent.

11. For better appreciation of the case, it would be apt to go through the law on the subject matter i.e. divorce by way of *mubara'at* as provided under the Muslim Personal law.

12. Under the Mohammadan Law, divorce by mutual consent is called *mubara'at*; and it may take place as an out-of-court divorce. The word *mubara'at* is in a linguistic form indicates mutual and joint or common initiative of the parties. The Muslim Personal Law (Shariat) Application Act, 1937 refers to this form of divorce where the parties to a Muslim marriage, may by their joint initiative and mutual consent decide to put an end to the marital tie, either unconditionally or subject to conditions mutually agreed upon. Both the parties, so agreeing to a divorce by mutual consent should be major and sane and both should be acting by their own free will. There is no condition that the marriage should have lasted for a particular duration. The *ijab* (proposal) for *mubara'at* may emanates from either party; and the other party's *qubul* (acceptance) of the same will make the transaction complete. It is pertinent to mention here that *mubara'at* may be effected orally or by writing and with or without a *qazi*'s intervention. No reason for separation need be mentioned in the oral or written agreement entered into, between the parties, for the said purpose. A *mubara'at* agreement cannot incorporate any such condition that affects the right of any person than the parties to marriage. For convenience the relevant provision of The Muslim Personal Law (Shariat) Application Act, 1937 is quoted below:

> ***2. Application of Personal Law to Muslims.***—*Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate*

succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

13. The Hon'ble Supreme Court of India while dealing with the issue of rights of Muslim women regarding the dissolution of marriage, in the case of ***Shayara Bano*** versus ***Union of India,*** reported in **(2017) 9 SCC 1,** has been pleased to elaborate the provisions of the Section 2 (*ix*) of The Dissolution of Muslim Marriages Act, 1939 (Act VIII of 1939) which provides that a woman married under the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on the ground which is recognised as valid for the dissolution of marriages under Muslim Law.

For ready reference, the relevant paragraph of the said judgment is quoted hereinafter:

> ***145.*** *A close examination of Section 2, extracted above, leaves no room for any doubt, that custom and usage, as it existed amongst Muslims, were sought to be expressly done away with, to the extent the same were contrary to Muslim Personal Law. Section 2 also mandated, that Muslim Personal Law (Shariat) would be exclusively adopted as "… the rule of decision…" in matters of intestate succession, specIal property of females, including all questions pertaining to "… personal property inherited or obtained under contract or gift or any other provision of "Personal Law", marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, gifts, trusts and trust properties, and wakfs…". Section 3 added to the above list, "… adoption, wills and legacies…", subject to the declaration expressed in Section 3.*

……

……

291. *If the Muslim Personal Law (Shariat) Application Act, 1937, had incorporated the manner in which questions regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or matters such as marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (as in Section 2 thereof), had to be dealt with, as per Muslim Personal Law—"Shariat" according to the petitioners, it would be quite a different matter. All the same, the Shariat Act did not describe how the above questions and subjects had to be dealt with. And, therefore, for settlement of disputes amongst Muslims, it would need to be first determined what the Muslim Personal Law, with reference to the disputation, was. Whatever it was, would in terms of Section 2 of the 1937 Act, constitute "the rule of decision".*

14. It is worth mentioning that 'The Dissolution of Muslim Marriages Act, 1939 was enacted to give Muslim women the right to divorce on certain conditions, besides the Muslim Personal Law (Shiariat) Application Act, 1937 was legislated so that specific personal law be made applicable to the Muslims, in certain matters, eliminating the customary usages of localised nature.

15. The Dissolution of Muslim Marriages Act, 1939 assimilates principles of Muslim Personal Law in codified form. It would not be out of place to say that the *Holy Quran* has provided ample safeguards to women who are commanded to be dealt with fairly on 'equitable terms', when a dispute of some sort arises between husband and wife. It is notable that prior to the coming into force of 'The Dissolution of Muslim Marriages Act, 1939'; Muslim woman had a right to file a Suit before a *qazi* or a judge, having authority and sanction from the State or governing agency in the area.

16. It is pertinent to flag at this stage that the Family Court, in exercise of its jurisdiction as per Explanation (b) of S.7 of the Family Courts Act, 1984, is duly competent to endorse an extra-judicial divorce and declare matrimonial status of a person. Therefore, in the case of *mubara'at*, the Family Court is competent to declare 'divorce', on being satisfied that both the parties, so agreeing to dissolve their marital-tie by mutual consent are major and sane are acting by their own free will. The declaration of the matrimonial status of the parties by the Family Court as contemplated under Section 7 of the Family Courts Act, 1984, is a judicial endorsement of even the extra-judicial divorce.

17. The extra-judicial divorce by way of *mubara'at* is complete, the moment spouses enter into a lawful mutual agreement to put an end to their matrimonial tie. In the case of *mubara'at*, if the Court is prima-facie satisfied that the parties have duly entered into a *mubara'at* agreement, it shall endorse the same and declare the status of the parties as divorced by passing an order to that effect as provided under Section 7 of the Family Courts Act, 1984. Needless to observe that it is always open to the parties to challenge the validity of the aforesaid divorce in accordance with law before the competent forum and in the event where the divorce itself is held legally unsustainable by competent authority the declaration endorsing the extra-judicial divorce made under Section 7 of the Family Courts Act, 1984 shall abide the said decision.

18. The said issue has been dealt with in detail by the High Court of Kerala at Ernakulam in the case of ***Asbi .K.N*** versus ***Hashim M.U.*** reported in **2021 SCC OnLine Ker 3945**. For ready reference, paragraphs 4 and 5 of the said judgment is reproduced hereinbelow:

> **"4.** *The Division Bench of this Court in X v. Y (2021 (2) KHC 709) has held that the Family Court in exercise of the jurisdiction under Explanation (d) of S.7 of the Act is*

competent to endorse an extrajudicial divorce to declare the marital status of a person. It was made clear in the said judgment that in the matter of unilateral dissolution of marriage invoking khula and talaq, the scope of enquiry before the Family Court is limited and in such proceedings, the Court shall record the khula or talaq to declare the marital status of the parties after due notice to other party. In the matter of mubaraat, the Family Court shall declare the marital status without further enquiry on being satisfied that the dissolution was effected on mutual consent. It was observed that such matter shall be disposed treating it as uncontested matter without any delay by passing a formal order declaring the marital status. It was further held that if any person wants to contest the effectiveness of khula or talaq, it is open for such person to contest the same in appropriate manner known under the law.

5. *The unilateral extrajudicial divorce under Muslim Personal law is complete when either of the spouse pronounce/declare talaq, talaq-e-tafweez or khula, as the case may be, in accordance with Muslim Personal Law. So also extrajudicial divorce by mubaarat mode is complete as and when both spouses enter into mutual agreement. The seal of the Court is not necessary to the validity of any of these modes of extra judicial divorce. The endorsement of extrajudicial divorce and consequential declaration of the status of the parties by the Family Court invoking S.7(d) of the Act is contemplated only to have a public record of the extrajudicial divorce. Hence, detailed enquiry is neither essential nor desirable in a proceeding initiated by either of the parties to endorse an extrajudicial divorce and to declare the marital status. The Family Court has to simply ascertain whether a valid pronouncement/declaration of talaq or khula was made and it was preceded by effective attempt of conciliation. In the case of khula, it has to be further ascertained whether there was an offer by the wife to return the "dower". It could be ascertained by perusal of the recitals in talaq nama/khula nama or its communication (if it is in writing) or by recording the statement of the parties. No further enquiry as in the case of an adversarial litigation like chief examination and cross-examination of the parties are not*

at all contemplated in such a proceedings. If the Court is prima facie satisfied that there was valid pronouncement of talaq/khula/talaq-e-tafweez, it shall endorse the same and declare the status of the parties. In the case of mubaarat, if the Court is prima facie satisfied that mubaarat agreement has been executed and signed by both parties, it shall endorse the same and declare the status of the parties. The Court shall pass formal order declaring the marital status without any delay. If any of the parties want to challenge the extrajudicial divorce by talaq, khula, mubaarat or talaq-e-tafweez mode, he/she is free to challenge the same in accordance with law in appropriate forum. The declaration granted by the Family Court u/s 7(d) endorsing the extrajudicial divorce shall be subject to the final outcome of such proceedings, if any. We consider it desirable to formulate the following guidelines to be followed by the Family Court in a petition filed u/s 7(d) of the Act to endorse an extrajudicial divorce under Muslim Personal Law and to declare the marital status of the parties to the marriage.

(i) On receipt of the petition, the Family Court shall issue notice to the respondent.

(ii) After service of summons or appearance of the respondent, as the case may be, the Family Court shall formally record the statement of both parties. The parties shall also be directed to produce talaq nama/khula nama (if pronouncement / declaration is in writing) / mubaarat agreement.

(iii) The Family Court shall thereafter on perusal of the recitals in talaq nama/khula nama/ communication of talaq, khula or talaq-e-tafweez (if available) and the statement of the parties, ascertain whether there was valid pronouncement of talaq/khula/talaq-e-tafweez. In the case of mubaarat, the Family Court shall ascertain whether the parties have executed and signed mubaarat agreement.

(iv) On prima facie satisfaction that there was valid pronouncement of talaq, khula, talaq-e-tafweez, as the case may be, or valid execution of mubaarat agreement, the Family Court shall proceed to pass order endorsing the extrajudicial

divorce and declaring the status of the parties without any further enquiry.

(v) The enquiry to be conducted by the Family Court shall be summary in nature treating it as an uncontested matter.

(vi) The Family Court shall dispose of the petition within one month of the appearance of the respondent. The period can be extended for valid reasons.

(vii) If any of the parties is unable to appear at the Court personally, the Family Court shall conduct enquiry using video conferencing facility."

19. Now, having dealt with the legal aspect of *mubara'at* under the Muslim Personal Law, it would be apt to deal with the findings as recorded by the learned Additional Principal Judge, Family Court, Jhansi, vide the impugned judgment and order dated 10.10.2023, regarding the delay in filing the Suit for declaration of the dissolution of marriage. From a bare perusal of The Family Courts Act, 1984, it is abundantly clear that no period of limitation is prescribed for a Suit or proceeding for declaration of matrimonial status of the parties as provided under the Explanation appended to Section 7 of the Family Courts Act, 1984. For convenience, Section 7 of the Family Courts Act, 1984 is quoted below:

"7. **Jurisdiction.** – (1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purpose of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation -- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

20. Looking into the factual matrix of the case, this Court is of the view that when the dissolution of marriage between the parties by way of *mubara'at* to put an end to their marital tie, by mutually agreeing on their own free will is not in dispute; the appellant and the respondent were duly examined by the learned Trial Court on 22.11.2021 as Witnesses (PW-1 & PW-2) wherein they admitted the dissolution of their marriage as well as the execution of a jointly signed notarised *"Talaqnama Tehreer"* dated 07.03.2000, the finding recorded by the

learned Additional Principal Judge, Family Court, Jhansi to the effect that the said '*Talaqnama'* in-original has not been filed by the appellant-plaintiff along with the list of documents, is totally unwarranted, and not sustainable in the light of Section 58 of the Indian Evidence Act, 1872, which provides as under:

> "**58. Facts admitted need not be proved**- No fact need not be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

21. Here it is also relevant to mention that the '*Talaqnama Tehreer'* dated 07.03.2000 in-original has been filed by the appellant as additional evidence before this Court through an application dated 27.05.2023, which has been allowed vide order dated 29.05.2024, as the same has not been disputed by the respondent.

22. Now, coming to the other finding returned by the learned Additional Principal Judge, Family Court Jhansi, leading to the dismissal of the Suit that the Suit in question is barred by limitation as the same was instituted after a lapse of about 20 years from the date of commencement of the dissolution of marriage is concerned, it would be apposite to quote the relevant portion of the impugned judgement and order dated 10.10.2023, which are reproduced as under:

> ''3. याचीगण ने अपना अपना शपथ पत्र प्रस्तुत कर कथन किया कि मध्य तलाक हो चुकी है। यह वादिया सं0 1 को 1,10,035/. रू. प्राप्त हो चुके है अब उनके मध्य किसी प्रकार का लेन देन शेष नहीं है।
>
> 4. याचीगण के बयान अंकित किए गए एवं उन्हें सुना गया।
>
> 5. घोषणात्मक वाद तथा याचीगण के द्वारा शपथपत्र व मौखिक साक्ष्य पर किये गये कथन के अवलोकन से यह विदित होता है कि याचीगण का विवाह मुस्लिम

रीति रिवाज के अनुसार दिनांक 18.12.1984 को सम्पन्न हुआ था। याचीगण दिनांक 16.07.1990 से अलग अलग रह रहे है। याचीगण के मध्य अब कोई लेन देन बकाया नहीं है। जिरह में भी पी.डब्लू–1, पी.डब्ल्यू.–2 ने कहा है कि याचीगण के मध्य दिनांक 07.03.2000 को मुस्लिम रीति रिवाज के अनुसार तलाक हो गयी जिसके संबंध में याचीगण ने तलाक नामा तहरीर की छायाप्रति प्रस्तुत की है जो न सूची से दाखिल है और न ही प्रमाणित हैं। तलाक नामें की छाया प्रति इस स्तर पर ग्राहय नही है। याचीगण के अनुसार उभयपक्ष का दिनांक 7.3.2000 को तलाक हो चुका है। तथा उसी दिन तहरीर नामा बनवा लिया गया। उक्त उद्घोषणात्मक वाद दिनांक 24.08.2021 को तलाक होने की तिथि से लगभग 20 वर्ष बाद संस्थित किया गया है जो परिसीमा अधिनियम 1963 से बाधित है। अतः उक्त वाद परिसीमा विधि से बाधित व अभिप्रमाणित साक्ष्य न होने के कारण स्वीकार किए जाने योग्य नहीं है।

<u>आदेश</u>

याचीगण द्वारा प्रस्तुत घोषणात्मक वाद निरस्त किया जाता है। पत्रावली नियमानुसार दाखिल दफ्तर हो।"

23. The aforesaid finding regarding the delay in seeking the relief of declaration, leading to the dismissal of Suit is unsustainable in view of the fact that the Suit was instituted on the joint initiative of the appellant and the respondent, wherein it is the admitted case of the appellant as well as the respondent that they are living separately since 16.07.1990 and there survives no conjugal relationship between them. They decided to dissolve their marriage on 15.11.1999, with their mutual consent, by way of *mubara'at* as per the Muslim Personal Law. Thereafter, on 07.03.2000, the appellant and the respondent executed a jointly signed notarised document as *"Talaqnama Tehreer"*.

24. The Explanation appended to the Section 7 of The Family Courts Act, 1984 bestows jurisdiction upon the concerned Family Court to entertain the suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of person concerned. The Family court Act, 1984 does not prescribe any period of Limitation in respect of the suit or proceeding for declaration of the matrimonial status of the parties. Further, Section 29(3) of the Limitation Act, 1963 very categorically stipulates that 'save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in

this Act shall apply to any suit or other proceeding under any such law'. For ready reference Section 29 of the Limitation Act, 1963 is quoted below:

> **"29- Savings**.-(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.
>
> (3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.
>
> (4) Sections 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882(5of 1882(, may for the time being extend."

25. The present case being a claim for declaration of matrimonial status of the parties as 'divorced' is undisputed, it is a well settled law that where the legal status of the parties is a continuing course of event, a continuing and recurring cause of action accrues each day. As has been addressed in the preceding paragraphs the declaration of the matrimonial status of the parties by the Family Court as contemplated under Section 7 of the Family Courts Act, 1984, is a judicial endorsement of the extra-judicial divorce. In the case of *mubara'at*, if the Court is prima-facie satisfied that the parties with their free will have duly entered a *mubara'at* agreement, it shall endorse the same and declare the divorced

status of the parties by passing an appropriate order to that effect. Such a proceeding is not akin to the adversarial litigation. The claim for the declaration of the parties' marital-status, strikes at the very core of society and if such an undisputed declaratory claim is elongated and haunted by the technical ground of delay, the aim, object and the very spirit of the said welfare legislation shall be adversely sacrificed. It is settled principle of law that when substantial justice and technical consideration are pitted against each other, the substantial justice shall prevail over the technical consideration. However, it goes without saying that the courts are not to take a liberal approach in condonation of delay in the absence of sufficient cause. In any case, it would be unnecessary to delve into this debate any further in the light of the categorical provision as stipulated under Section 29(3) of the Limitation Act, 1963 that deals with the extent of applicability of Limitation Act to any suit or proceeding under any law with respect to marriage and divorce. Accordingly, in view of the deliberations made herein above it is apparent that in view of the express restriction as contemplated under the said Section 29(3) no provision of The Limitation Act, 1963 shall come in the way to put any bar in respect of the suit or proceeding for declaration of matrimonial status as provided under Section 7 of the Family Courts Act, 1984.

26. It would be appropriate at this stage to note that the Hon'ble Supreme Court in the case of **Ajaib Singh** versus **The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Others**, reported in **(1999) 6 SCC 82**, has been pleased to observe that,

> *"11… It is not the function of the court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature…"*

The High Court of Bombay (Nagpur Bench) in the case of ***Skh. Hafiz Skh. Habib*** versus ***State of Maharashtra***, reported in **2009 (1) AIR Bom R 345**, has held as under:

> *"**26.** If the law intends not to prescribe limitation, it means so, and this omission will have to be respected as conscious omission and there are no grounds coming forward permitting to fill in the alleged omission taking shelter of Article 137 of the Limitation Act. The law of Limitation has no application to the right of a Muslim Woman filing an application u/s. 3(1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, it being a right of recurring nature, and bar of limitation is not laid down.*
>
> ***27.** In these premises, this Court holds that the Law of Limitation has no application to the right of a Muslim woman filing an application under Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, it being a right of recurring nature, and bar of limitation is not laid down."*

27. Having come to the conclusion that The Family Courts Act, 1984 does not prescribe any specific limitation for filing a suit or proceeding for declaration as to the matrimonial status of any person, it would be apt to consider whether the length of delay as noticed by the learned Court below, in filing the Suit in question could be a valid ground for rejection of the same.

28. On the question as to whether in the absence of an expressly prescribed limitation under the Statute, can a suit or proceeding be entertained, irrespective of any passage of time? The Hon'ble Supreme Court dealing with such a situation has held that in the absence of a prescribed statutory limitation, approaching the court, is to be done within 'reasonable time'. There is a catena of judgments where the Hon'ble Supreme Court has been pleased to hold that where the concerned Statute does not prescribe the limitation, the rights conferred

therein must be exercised within a 'reasonable time'. The issue of no express limitation being provided under the statute has captured the attention of the Hon'ble Apex Court in the case of **State of Punjab and others** versus **Bhatinda District Cooperative Milk Producers Union**, reported in **(2007) 11 SCC 363**, wherein the Hon'ble Apex Court has been pleased to observe as under:

> *"**18**. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors."*

29. For the purpose of determination of time period to be the 'reasonable period' the Hon'ble Apex Court has provided the yard stick, in the case of **M/S North Eastern Chemicals Industries (P) Ltd. and another** versus **M/S Ashok Paper Mill (Assam) Ltd. and another**, reported in **AIR 2024 Supreme Court 436**, wherein the Hon'ble Supreme Court has been pleased to hold that in the absence of a particular period of time being prescribed under the statute, the same would be governed by the principle of 'reasonable time', for which, by virtue of its very nature, no straitjacket formula can be laid down and it is to be determined as per case and circumstances of each case. The parameter for determining the 'reasonable time' in a particular case has been laid down by the Hon'ble Supreme Court in the following manner:

> *"In light of above discussion, it is clear that when a Court is seized of a situation where no limitation stands provided either by specific applicability of the Limitation Act or the special statute governing the dispute, the Court must undertake a holistic assessment of the facts and circumstances of the case to examine the possibility of delay causing prejudice to a party. When no limitation stands prescribed it would be inappropriate for a Court to supplant the legislature's wisdom by its own and provide a limitation,*

> *more so in accordance with what it believes to be the appropriate period. A court should, in such a situation consider in the facts and circumstances of the case at hand, the conduct of the parties, the nature of the proceeding, the length of delay, the possibility of prejudice being caused, and the scheme of the statute in question. It may be underscored here that when a party to a dispute raises a plea of delay despite no specific period being prescribed in the statute, such a party also bears the burden of demonstrating how the delay in itself would cause the party additional prejudice or loss as opposed to, the claim subject matter of dispute, being raised at an earlier point in time."* (emphasis supplied by us)

30. In the present case, having regard to the factual matrix of the case, as taken note of above, the parties to the suit cannot be said to have transgressed the boundaries of reasonable time in approaching the learned Family Court having jurisdiction by jointly filing the suit for declaration as to their matrimonial status, for the obvious reason that the parties by way of *mubara'at* put an end to their marital-tie by mutually agreeing on their own free will, all the more the factum of divorce in the instant case is not in dispute giving rise to the cause of action being of recurring nature. Thus, the prayer sought for by the parties by jointly filing the Suit for declaration of their matrimonial status as divorced ought to have been granted by the learned Family Court. The finding recorded by the learned Additional Principal Judge, Family Court, Jhansi that Suit in question is barred by limitation having being instituted after a lapse of about 20 years from the date of commencement of the dissolution of marital-tie, is unsustainable in the eyes of law, in the teeth of the categorical provision as stipulated under Section 29(3) of the Limitation Act, 1963 and also not being in consonance with the parameters laid down by the Hon'ble Supreme Court of India, as narrated in the preceding paragraphs, regarding the assessment of the reasonableness of the length of delay, if any. Accordingly, the order of dismissal of the Suit dated 10.10.2023 based

upon the unwarranted findings recorded in the impugned judgment is liable to be set-aside.

Order

1. The appeal is **allowed**. The impugned judgment and order dated 10.10.2023 and the decree dated 19.10.2023 passed by the Additional Principal Judge, Family Court, Jhansi in Declaration Case No.687 of 2021, are hereby set-aside. The Suit for declaration of the matrimonial status is decreed. Accordingly, the matrimonial status of the parties is hereby declared as 'divorced'.

2. However, the parties to bear respective cost.

3. Since this appeal has been decided with the mutual consent of the parties, hence no useful purpose would be served to retain the original *'Talaqnama Tehreer'* dated 07.03.2000 on record. Accordingly, the Registry is directed to return the same in-original to the appellant after retaining a photocopy of the same on record, in accordance with the Rules.

4. The Registry is further directed to return the lower court record to the court concerned.

Order Date :- 12.9.2024
Abhishek Gupta