HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Civil Misc. Appeal No. 1319/2025

Ayasha Chouhan W/o Shri Waseem Khan, Aged About 24 Years, D/o Shri Amjad Ali , Residing Of Pali, At Present Merta City,tehsil Merta, District Nagaur.

----Appellant

Versus

Waseem Khan S/o Shri Mohd Yusuf, Resident Of 79, Goshiwada, Tehsil And District Pali.

----Respondent

For Appellant(s) : Mr. Vishal Sharma
For Respondent(s) : Mr. Ravindra Kumar Purohit

HON'BLE MR. JUSTICE ARUN MONGA
HON'BLE MR. JUSTICE YOGENDRA KUMAR PUROHIT

Judgment

REPORTABLE

07/01/2026

Per : Arun Monga, J.

1. Appeal herein is directed against a judgment dated 03.04.2025 (Annexure-3) rendered by learned Family Court, Merta. Vide impugned judgment the learned Family Judge in exercise of jurisdiction under Section 7 of the Family Courts Act, 1984, dismissed the Civil Suit filed by appellant wife seeking declaration that her marriage stands dissolved under Section 2 of Dissolution of Muslim Marriages Act, 1939.

2. At the outset, to invoke the old adage in converse, instant case is one where *"miya biwi raazi, nahi maan rahaa qazi"*. It transpires that both parties were/are unequivocally agreeable to dissolution of marriage and had consciously tendered their consent

before the learned Trial Judge. Yet, the marriage was not dissolved. The learned Family Court evidently was persuaded with the principle that considerations of public interest must prevail over private consent. What appears to have also weighed with the learned Judge is that consent of parties, by itself, cannot sanctify an illegality.

3. No doubt, the legal position admits of no ambiguity i.e. even where parties are ad idem, the Court is duty-bound to subject the arrangement to the touchstone of legality. Mere consensus between litigating parties cannot clothe an otherwise impermissible act with legitimacy, nor can it denude the Court of its statutory jurisdiction to examine the matter independently. More of it later.

4. Brief facts of the case first. Parties to the marriage are Muslims by religion. Their marriage was solemnized in accordance with Muslim Sharia and customs on 27.02.2022 at Merta City. No child is born out of the wedlock.

4.1. After the marriage, serious disputes arose between the parties due to persistent differences in temperament and ideology, resulting in strained relations. According to the plaintiff-wife / appellant, the conduct of the defendant-husband / respondent caused such mental distress that it became impossible for the parties to continue living together as husband and wife.

4.2 During the subsistence of the marriage, the defendant pronounced talaq upon the plaintiff in accordance with Muslim law —first on 08.06.2024, second on 08.07.2024, and finally on 08.08.2024, each pronouncement being made during separate Tuhar periods (distinct menstrual cycles). The plaintiff accepted

the said pronouncements. Consequently, the marital relationship between the parties stood dissolved with effect from 08.08.2024, in accordance with Muslim Shariat and customs.

4.3 Subsequently, both the parties admit that they also executed a written divorce agreement by mutual consent on 20.08.2024, duly stamped on non-judicial stamp paper of Rs. 500/-, affirming the dissolution of marriage. As per the said settlement, the plaintiff received a lump-sum amount towards her lifelong maintenance from the defendant. Both parties acknowledged that there remains no possibility of reconciliation or resumption of marital life in the future.

4.4 On these grounds, the plaintiff/wife sought a decree of divorce under Section 2(viii)(a) of the Dissolution of Muslim Marriages Act, 1939. She also filed an affidavit in support of her claim.

4.5 The defendant-husband filed a written statement admitting the factum of marriage, the dates of the talaq pronounced during three separate Tuhar periods, and also the execution of the mutual divorce agreement. While denying the allegations of cruelty and harassment, the defendant stated that due to irreconcilable differences and misunderstandings, the parties are not residing together as husband and wife. The defendant also further expressed his no objection to the grant of a decree of divorce dissolving the marriage in question.

5. On the basis of the pleadings of the parties, the following issues were framed by the Trial Court on 12.02.2025:

> *"1. Did the defendant, being the husband of the plaintiff, treat her with cruelty and torture?*
>
> *2. Has the defendant duly divorced the plaintiff?*
>
> *3. Relief?"*

6. Evidence was adduced and after hearing the final arguments, the Trial Court vide order impugned dated 03.04.2025, decided the issues No. 1 and 2 against plaintiff / appellant and consequently dismissed her application under Section 2 of Dissolution of Muslim Marriages Act, 1939. Hence, the present appeal.

7. Learned counsel for the appellant submits that the impugned judgment and order dated 03.04.2025 passed by the learned Trial Court is wholly contrary to the facts on record and settled principles of law, and is therefore liable to be quashed and set aside.

7.1 Learned counsel contends that the learned Trial Court has rendered the impugned judgment in a casual and mechanical manner, without proper appreciation of the pleadings and evidence available on record. The suit has been dismissed on hyper-technical grounds, thereby unjustly depriving the appellant of a lawful decree of divorce, which has resulted in grave miscarriage of justice.

7.2 Learned counsel further submits that the learned Trial Court has committed a serious illegality while deciding Issue No. 1, by holding that the appellant failed to establish cruelty or harassment on the ground that detailed particulars were not furnished. Such a finding is unsustainable in law, inasmuch as the appellant had duly

filed the plaint and deposed on oath in support of her pleadings, and her testimony remained unchallenged, as the respondent neither cross-examined her nor led any rebuttal evidence. In the absence of cross-examination or denial, the appellant's testimony ought to have been accepted as admitted, and no further corroboration was required. The impugned finding, therefore, suffers from patent illegality and warrants interference by this Hon'ble Court.

7.3 Learned counsel further contends that the learned court below has also committed a grave error in deciding Issue No. 2, which relates to dissolution of marriage in accordance with Muslim law and customs. It is undisputed and admitted by both parties that the respondent pronounced talaq on three separate occasions in three successive Tuhars, which was accepted by the appellant. However, the learned Trial Court erroneously rejected the claim of divorce solely on the ground that the pronouncement was not made in the presence of two adult male witnesses.

7.4 It is submitted that such a requirement is not applicable under Sunni Muslim Law, which governs the parties herein. Under Sunni law, a talaq, whether oral or written, does not mandatorily require witnesses for its validity. The requirement of pronouncement in the presence of witnesses is applicable under Shia law, wherein talaq must be strictly pronounced in Arabic and in the presence of at least two adult male witnesses.

7.5 Learned counsel submits that though there is no codified statute governing the field, the present case squarely falls under Talaq-ul-Hasan, a recognized form of divorce under Muslim law. In

the Hasan form, the husband pronounces talaq during three successive periods of tuhr, and upon the third pronouncement, the divorce becomes irrevocable. Even assuming, without admitting, the view taken by the learned Trial Court to be correct, the requirement of witnesses could arise only in cases where the pronouncement of talaq is disputed. In the present case, there is no denial by the appellant, who has consistently admitted and accepted the pronouncement of talaq in three successive Tuhars. Therefore, rejection of the prayer for divorce on the ground of absence of independent witnesses is legally untenable.

7.6 Learned counsel finally submits that the learned court below has failed to appreciate that the present case is one where both parties have voluntarily and unequivocally consented to dissolution of marriage. Denial of a decree of divorce in such circumstances amounts to compelling the parties to continue a marital relationship in name alone, despite complete breakdown and separation. Such an approach is overly technical, unreasonable, and contrary to the ends of justice. Hence, the impugned judgment and order deserve to be quashed and set aside.

8. Per contra, in fact rather per idem, learned counsel for respondent husband though denies the allegations of cruelty and torture, but urges that marriage between the parties be dissolved and has no objection if the appeal is allowed.

9. In the aforesaid backdrop, we have heard learned counsels for the respective parties and perused the case file.

10. It is borne out that while deciding issue No. 1 against the appellant / wife, learned Family Court observed that any specific

instances/particulars of cruelty by the respondent husband had not been brought on record and that the appellant's sole testimony generally alleging cruelty by the respondent was not sufficient to prove the factum of cruelty so as to justify the grant of decree of divorce on that ground. On perusal of the pleadings and the testimony of the appellant, we are of the opinion that there is nothing wrong or perverse in the view as taken by the learned Family Court.

11. The learned Family Court decided issue No. 2 against the appellant observing that neither the defendant nor the plaintiff had clearly stated/admitted in their respective pleadings that the pronouncements of talaq thrice by the respondent/husband took place during the three successive tuhrs in the presence of two witnesses. For this, it relied upon the judgments of two different High Courts in ***Banu Vs Koutubuddin Sulemanji Vimanwala***[1] and ***Dilshada Massod Vs Ghulam Mustaffa***[2] expressing the same view that in the absence of two witnesses, the talaq so pronounced is not a valid one. Placing reliance thereof, the learned Family Court thus decided the issue no.2 against the appellant.

12. Speaking of issue no.2, at the outset, on perusal the aforesaid two High Court judgments, relied upon by the Family Court, we find substance in the contention of the learned counsel for appellant that the same were rendered in cases where the parties to marriage were governed by Shia School of Muslim law. That is not so in present case. It follows, therefore, that the judgments *ibid* are not applicable to the parties herein.

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1 1994 SCC OnLine BOM 481

2 1985 SCC OnLine J&K 22

13. Even otherwise, it seems that the obvious purpose for requiring the pronouncement of talaq in the presence and hearing of two witnesses is to ensure that at the relevant time the person concerned was in a fit state of mind and had actually, voluntarily and consciously made the pronouncement of talaq.

14. In our opinion, the above test seems to have be met in present case. The appellant and the respondent both categorically pleaded and unambiguously stated before the Court that during the subsistence of the marriage, the defendant pronounced talaq upon the plaintiff in accordance with Muslim law—first on 08.06.2024, second on 08.07.2024, and finally on 08.08.2024, each pronouncement being made during separate Tuhar periods (distinct menstrual cycles). The plaintiff accepted the said pronouncements. Consequently, the marital relationship between the parties stood dissolved with effect from 08.08.2024, in accordance with Muslim Shariat and customs. This being the ultimate fact situation, we are of the view that the learned Family Court erred in holding that the appellant had failed to prove that the defendant had duly divorced her and thus erroneously decided issue No. 2 against the appellant. We, therefore, reverse this finding and decide issue No. 2 in favour of the appellant.

15. The case can also be examined from yet another, and equally decisive, perspective. What was placed before the Family Court was not a mere consensual arrangement *simpliciter* between the parties, but a properly instituted suit seeking a judicial declaration of their matrimonial status, founded upon a *Mubarat* agreement entered into between them. However, that part of the lis was

given a complete short shrift by the family court. Mubarat could not have been treated as falling outside the adjudicatory domain of the Family Court.

15.1. The matter, therefore, squarely demanded adjudication within the statutory framework of Section 7 of the Family Courts Act, 1984, which unequivocally vests the Family Court with jurisdiction to entertain and decide suits and proceedings arising out of matrimonial relationships. Section 7, *ibid*, expressly encompasses, *inter alia*, suits or proceedings between parties to a marriage seeking a decree of nullity of marriage i.e. whether by declaring the marriage to be null and void or by annulling the same or restitution of conjugal rights, judicial separation, or dissolution of marriage. The provision empowers the Family Court to entertain and adjudicate suits or proceedings seeking a declaration as to the validity of a marriage or the matrimonial status of any person. The family court committed a material irregularity in not going into that aspect of the matter.

16. Let us now delve into the validity of agreement mutually executed between the parties i.e. Mubarat, which has been duly pleaded also. Parties herein are ad-idem that they had also executed a written divorce agreement by mutual consent on 20.08.2024, duly stamped on non-judicial stamp paper of Rs. 500/-, affirming the dissolution of marriage. As per the said settlement, the appellant had received the full amount of mehr, maintenance for the period of iddat and a lump-sum amount towards her lifelong maintenance from the defendant. The respondent had also returned the appellant’s entire stridhan.

17. At this stage, Section 2 of the Dissolution of Muslim Marriages Act, 1939 may be seen which is reproduced herein below :-

> *"**2. Grounds for decree for dissolution of marriage.** —*
> *A woman married under Muslim law shall be entitle to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: —*
> *(i) that the whereabouts of the husband have not been known for a period of four years;*
> *(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;*
> *(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;*
> *(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;*
> *(v) that the husband was impotent at the time of the marriage and continues to be so;*
> *(vi) that the husband has been insane for a period of two years or is suffering from a virulent venereal disease;*
> *(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :*
> *Provided that the marriage has not been consummated;*
> *(viii) that the husband treats her with cruelty, that is to say, —*
> *(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or*
> *(b) associates with women of evil repute or leads an infamous life, or*
> *(c) attempts to force her to lead an immoral life, or*
> *(d) disposes of her property of prevents her exercising her legal rights over it, or*
> *(e) obstructs her in the observance of her religious profession or practice, or*
> *(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;*
> *(ix) on any other ground which is recognised as valid for the dissolution of marriages under muslim law :*
> *Provided that —*
> *(a) no decree shall be passed on ground (iii) until the sentence has become final;*
> *(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and*
> *(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."*

18. The Act, *ibid*, is a beneficial legislation intended to relieve Muslim women from oppressive or dead marriages and prevent forced continuance of broken matrimonial ties. Clause 2(ix) thereof permits dissolution where the marriage on any other ground which is recognised as valid for the dissolution of marriages under muslim law.

19. The facts in hand overwhelmingly satisfy the threshold envisaged under Section 2(ix) *ibid*. Under Muslim law, the conditions for a valid khula or mubaarat divorce primarily involve mutual consent, free will, and the existence of a clear agreement or declaration, with the process often requiring the involvement of a Qazi or a court to endorse and declare the divorce. Both forms are recognized modes of dissolution, but they differ in initiation and procedural requirements. Such a divorce is valid provided the parties act voluntarily, and the court's role is to verify the validity of the agreement or declaration, often through a summary process, without detailed enquiry. Khula is initiated by the wife seeking divorce, usually by proposing the dissolution and offering to relinquish her claim to dower or other rights. Mubaarat is a mutual agreement between husband and wife to dissolve the marriage with both parties consenting without the need for the wife to relinquish her rights.

20. In this context we may gainfully quote the view of a Division Bench of Karnataka High Court in ***Shabnam Parveen Ahmad and Mohammed Saliya Shaikh***[3], which in turn was expressed

[3] 2024 SCC OnLine Kar 39, Misc. First Appeal No.4711 of 2022

relying on Apex court in Shayara Bano's case, observing as under :-

> *"The Apex Court in Shayara Bano's case (supra), has considered the concept of Divorce in Muslim Personal Law and its relationship to the Dissolution of Muslim Marriages under the enactments of 1937 and 1939. Referring extensively to the Surahs of the Quran and the authoritative text on personal law, the Apex Court held that Mubarat is a form of Divorce by consent of both the parties which is well recognized in Muslim Personal Law. The High Court of Kerala while considering the similar writ petition in "X" v. "Y" in Mat. Appeal No. 89/2020 held that Mubarat is a form of Divorce by mutual consent which is recognized by Muslim Personal Law (Shariat) and when the marriage between two persons, who are governed by the Shariat Law is dissolved by Mubarat agreement, the Family Courts are duty bound to accept the agreement of the parties and to declare the dissolution of the marriage as agreed between the parties. The Division Bench of this Court in Asif Iqbal's case (supra), has also followed the said Judgment and has held that Mubarat literally means obtained release from each other and is a form of Divorce, which is recognized by the Muslim Personal Law."*

21. Reference may also be had to a judgments rendered by Kerala High Court in ***Asbi K.N. v. Hashim M.U.***[4]***, Nazeer @ Oyoor Nazeer VS Shemeema***[5] and the Supreme Court in ***Shabnam Parveen Ahmad and Mohammed Saliya Shaikh*** *(supra)* and ***Anjum Nayyar Vs Yavar Ehsan***[6] which too affirm that these modes are valid and can be endorsed by the Family Court after verifying the genuineness and voluntariness of the agreement or declaration. The Kerala High Court in ***Asbi K.N. v. Hashim*** *(supra)* ***M.U. Nazeer @ Oyoor Nazeer VS Shemeema***, *ibid* held that the Family Court is competent to endorse extra-judicial divorces such as khula and mubaarat after verifying their validity through a summary process, primarily ensuring voluntariness and proper documentation. The Supreme Court in ***Shabnam Parveen Ahmad and Mohammed Saliya Shaikh***

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4 2021 SCC OnLine Ker 3945
5 2016 SCC OnLine Ker 41294
6 2024 SCC OnLine Del 7768

(supra) ***Anjum Nayyar VS Yavar Ehsan*** (supra) reaffirmed that a Mubaarat agreement, entered into voluntarily by both parties, is a valid mode of divorce under Muslim law, and the Family Court can declare the marital status as dissolved based on such an agreement.

22. Mubaarat is thus a mutual divorce where both spouses agree to dissolve the marriage. The conditions include that both parties must be major and acting voluntarily. The agreement must be genuine and free from coercion. The parties may execute a Mubaarat agreement, which is a private document recording their mutual consent. The Court's role is to endorse the agreement and declare the marital status as dissolved, often after a summary verification of the agreement and statements. The process is considered complete when the spouses enter into a lawful mutual agreement, and the court's endorsement records this fact.

23. Our views expressed herein above are also fortified by what has been enunciated by the Apex Court in ***Zohara Khatoon Vs. Mohd. Ibrahim***[7] wherein opining on the different modes of divorce under Mahomedan Law as well as rights of Muslim women to seek divorce, it is held as under:-

> *"21. In these circumstances we are therefore, satisfied that the interpretation put by the High Court on the second limb of clause (b) is not correct. This seems to be borne out from the provisions of Mahomedan law itself. It would appear that under the Mahomedan law there are three distinct modes in which a muslim marriage can be dissolved and the relationship of the husband and the wife terminated so as to result in an irrevocable divorce.*
> *(1) Where the husband unilaterally gives a divorce according to any of the forms approved by the Mahomedan law, viz, Talaq ahsan which consists of a single pronouncement of divorce during tuhar (Period between menstruations) followed by abstinence from sexual intercourse for the period of iddat; or Talak hasan which consists of three pronouncement made during the successive tuhrs, no*

[7] 1981 (2) SCC 509

intercourse taking place between three tuhrs; and lastly Talak-ul-bidaat or talalk-i- badai which consists of three pronouncements made during a single tuhr either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying 'I divorce thee irrevocably' or 'I divorce thee, I divorce thee, I divorce thee'. The third form referred to above is however not recognised by the Shiah law. In the instant case, we are concerned with the appellant who appears to be a Sunni and governed by the Hanafi law (vide Mulla's Principles of Mahomedan Law, Sec. 311, p. 297). A divorce or talaq may be given orally or in writing and it becomes irrevocable if the period of iddat is observed though it is not necessary that the woman divorced should come to know of the fact that she has been divorced by her husband.

(2) By an agreement between the husband and the wife whereby a wife obtains divorce by relinquishing either her entire or part of the dower. This mode of divorce is called 'khula' or Mubarat. This form of divorce is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where, however, both parties agree and desire a separation resulting in a divorce, it is called mubarat. The gist of these mode is that it comes into existence with the consent of both the parties particularly the husband because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to be the husband. In such a case the wife can repudiate herself in the exercise of the power and the divorce would be deemed to have been pronounced by the husband. This mode of divorce is called 'Tawfeez' (vide Mulla's Mohmedan Law, Sec. 314. p. 300.

(3) By obtaining a decree from a civil court for dissolution of marriage u/s 2 of the Act of 1979 which also amounts to a divorce (under the law) obtained by the wife. For the purpose of maintenance, this mode is governed not by clause (b) but by clause (c) of sub-section (3) of s. 127 of the 1973 Code; whereas the divorce given under modes (1) and (2) would be covered by clause (b) of sub-section (3) of s. 127."

24. In ***Anjum Nayyar v. Yavar Ehsan*** *(supra)*, a Division Bench of Delhi High Court held as under:-

"That the dissolution of marriage by way of Mubarat under the Muslim Personal Law is duly recognised as one of the modes of extra-judicial divorce. It is also evident that after the marriage between the parties is dissolved by way of Mubaraat, it is open for them to enter into an agreement referred to as the 'Mubaraat Agreement' to record the factum of dissolution of their marriage through the mode of Mubaraat. However, this agreement is only a private agreement between the parties and therefore, in case, the parties desire the factum of the dissolution of their marriage to be recorded in a public document, it is always them to seek a declaration regarding the status of their marriage under Section 7(b) of the Family Courts Act."

25. We are in respectful agreement with the aforesaid view of law taken by Delhi High Court and see no reason why in the present case also, based on the same analogy, divorce be not granted on the ground of Mubarat.

26. As an upshot, in the light of this legal position as enunciated herein above and the factual position of the case in hand, we are of the opinion that the appellant is also entitled to a decree of declaration that marriage of appellant with the respondent stands dissolved on the basis/ground of dissolution of their marriage by way of 'mubarat' recognised under the Muslim Personal law.

27. Accordingly, we allow this appeal, set aside the impugned judgment/order passed by the learned Family Court and pass a decree declaring that the marriage of appellant with the respondent stands dissolved.

28. In the parting, we may also note that it has been pointed out by both the counsels appearing for the appellant-wife as well as the respondent-husband that such like similar petitions wherein dissolution of marriage is sought by invoking Muslim law are being routinely rejected by Family Courts in Rajasthan. In somewhat similar circumstances, Delhi High Court framed certain guidelines[8] for the family Courts at Delhi. We are of same view that Delhi High court guidelines ought to be kept in mind by learned Family Courts in Rajasthan while dealing with petitions filed under Section 7 of the Family Courts Act, 1984 seeking declaration with regard to status of marriage under through extra-judicial means under Muslim Personal Law. Having had the benefit thereof, it is deemed

[8] *Anjum Nayyar, supra*

appropriate similar exercise is carried out for the state of Rajasthan as well. Accordingly, we hold that it is expected of Family Court that:-

(a). In case it is so pleaded in the petition that marriage between the parties has already been dissolved under Muslim Law through extra-judicial divorce, the learned Family Court would seek the personal presence of the parties to record their statements to the same effect and satisfy itself that it is without any coercion or duress and on their own volition;

(b). in the event it is pleaded that divorce has been reduced in writing by way of an agreement, whatever be its nature, i.e. Mubaraat nama or Talaq Nama or Khula Nama, same shall be required to be produced before the Court so as to satisfy it qua the veracity thereof ;

(c). upon being satisfied, the Court shall exercise its jurisdiction under Section 7 of the Family Courts Act, 1984 to pass appropriate order/decree, applying its mind independently as per its judicial outlook, qua the status of the marriage between parties.

29. With these observations, the appeal stands disposed of.

(YOGENDRA KUMAR PUROHIT),J **(ARUN MONGA),J**

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