IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1014 CRIMINAL APPLICATION NO.166 OF 2022

SHAIKH TASLIM SHAIKH HAKIM
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

Mr.Shaikh Wajeed Ahmed, Advocate for the applicant.
Mr.S.S. Dande, APP for the respondent/State.
Mr.Samir Shaikh, Advocate for respondent No.2.

CORAM : V.K. JADHAV &
SANDIPKUMAR C.MORE,JJ.
DATED : 29.03.2022

PC :-

01. Heard finally with the consent of learned Counsels for the parties at the admission stage.

02. The applicant/accused is seeking quashing of FIR bearing Crime No.514 of 2021, registered with Police Station Nanalpeth, Parbhani for the offences punishable under sections 498(A), 323, 504, 506 of the Indian Penal Code and also consequential charge-sheet bearing RCC No.178 of 2022, pending before the Judicial Magistrate, First Class, Parbhani, on the ground that the parties have arrived at amicable settlement.

03. Learned Counsel for the applicant submits that applicant – husband and respondent No.2 – wife got separated by mutual consent and accordingly approached the Family Court, Parbhani for declaration of their matrimonial status in terms of provisions of section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 read with section 7(1)(b) Explanation (b) of the Family Courts Act, 1984. By judgment and order dated 09.03.2022 learned Judge of the Family Court at Parbhani had allowed the petition and declared their status as they are no more husband and wife in terms of the mutual agreement between them. It is further agreed between the parties that the applicant-husband shall pay an amount of Rs.5 lakhs to respondent No.2 as the amount for future maintenance in total. Learned Counsel for respondent No.2 submits that respondent No.2 has filed consent affidavit-in-reply and she also received said amount of Rs.5 lakhs. Learned Counsel for respondent No.2 submits that respondent No.2 is not interested in prosecuting the applicant in connection with aforesaid crime and continue with the criminal proceedings arising out of said crime.

04. We have heard learned APP for the respondent/State. Learned APP Mr. Dande has placed before us a case of Madras High Court in C.R.P.

(NPD) No.161 of 2021, wherein the Madras High Court by referring the law laid down by the Supreme Court in the case of **Mst. Zohara Khatoon Vs. Mohd. Ibrahim, (1981) 2 SCC 509**, submits that mubarat is a form of extra-judicial divorce based on mutual consent under Islamic Law and same is valid, as it remains untouched by the Dissolution of Muslim Marriages Act. The Madras High Court in para No.17 of the judgment as made following observations :-

> "17. Coming to the present case on hand, the learned Principal District Munsif, Alandur has refused to entertain the petition in the light of provisions under Order VII Rule 11(d) of CPC and the Judgment of High Court of Karnataka in Miscellaneous First Appeal No.200834/2019(FC) [Zuber Vs. Mahezabeen] and the same is challenged in the present revision. It appears that the petitioner filed O.S. before the learned Principal District Munsif at Alandur to declare that the Marriage solemnized between the petitioner and respondent on 01.12.2018 to be dissolved in terms of MOU entered between them. However, the same was returned several times for want of several reasons and thereafter, the said petition was dismissed even without numbering the petition. As already mentioned supra, the Hon'ble Division Bench of High Court of Kerala at Ernakulaam, had categorically held that 'mubaraat' is a form of an extra-judicial divorce based on mutual consent under Islamic law and same is valid, as it remains untouched by the Dissolution of Muslim Marriages Act. The court below, in such circumstances, is neither called upon to adjudicate nor called upon to dissolve the marriage by decree of divorce. On the other hand, the Family Court only has to declare the maritial stauts by endorsing the mubaraat invoking jurisdiction under Explanation (b) of Section 7(1) of the Family Courts Act. Once a declaration of joint divorce invoking bubaraat is produced before the Family Court, the Family Court has to pass a decree declaring the matrimonial status of the parties. The inquiry in such cases is limited to the extent to find out whether both parties have agreed upon to dissolve such marriage invoking mubaraat. Once the Family Court is satisfied that mubaraat is executed by both the parties, it shall declare the matrimonial status of such parties. Hence, this Court is of the considered view that the Family Court is bound to entertain a petition for declaration of the status based on mubaraat. In view of the above, the order passed by the learned Principal District Munsif, Alandur in

> O.S.Sr.No.744/2020 dated 28.09.2020 is set aside and the parties are at liberty to approach the concerned Family Court with appropriate jurisdiction. Thereafter, the concerned Family Court shall dispose of the matter, if both the parties have filed petition and after making a formal inquiry without any further delay treating it as an uncontested matter in the light of the guidelines issued by the Hon'ble Division Bench, High Court of Kerala, Ernakulam in the judgment in O.P.(FC) No.352/2020 and connected cases dated 23/3/2021 and the present Civil Revision Petition is allowed. No costs.

05. We have carefully gone through the allegations made in the complaint and also police papers. It appears that the parties have decided to get separated by mutual consent and accordingly approached the Family Court by filing a petition No. F No.28 of 2022 under section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 read with section 7 (1)(b) of the Family Courts Act for declaration of status. It appears that the parties have arrived at amicable settlement voluntarily.

06. In the case of **Gian Singh vs. State of Punjab and others,** reported in **(2012) 10 SCC 303,** the Supreme Court in para 48 has quoted para 21 of the judgment of the five-Judge Bench of the Punjab and Haryana High Court delivered in **Kulwinder Singh v. State of Punjab (2007) 4 CTC 769**. *A* five-Judge Bench of the Punjab and Haryana High Court, in para 21 of the judgment, by placing reliance on the various judgments of the Supreme court, has framed the guidelines for quashing of the criminal proceeding on the

ground of settlement. Para 21 of the said case of **Kulwinder Singh's** *judgment* is reproduced by the Supreme Court in para 48 of the judgment in **Gian Singh**. Clause 21(a) which is relevant for the present discussion reads as under :-

> "21.
> (a) Cases arising from matrimonial discord, even if other offences are introduced for aggravation of the case."

The Supreme Court in paragraph no.61 of the judgment of **Gian Singh (supra)** has made following observations :-

> "61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the

> compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

07. In the instant case, in terms of provisions of section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, all the questions about the property, marriage, dissolution of marriage including talaq, illa, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be considered as per the provisions of Muslim Personal Law (Shariat). It further appears from the bare reading of section 7 of Family Courts Act, 1984, which prescribes jurisdiction, in terms of section 7(1), Explanation (a) and (b), suit for a declaration as to the validity of a marriage or as to the matrimonial status of any person can also be a subject matter before the Family Court. Further, we have also gone through the law laid down by the Supreme Court in the case of **Mst. Zohara (supra)**, in para 22 of the judgment, the Supreme Court has made following observations :-

“22.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 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.
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> (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 by 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.)
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> (3) By obtaining a decree from a civil court for dissolution of marriage under s. 2 of the Act of 1939 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.”

08. It thus appears that the learned Judge of the Family Court has rightly applied the provisions of Muslim Personal Law (Shariat) Application Act, 1937 to the parties before us and accordingly declared the status of marriage as no more in existence by mutual consent.

09. In view of above and the ratio laid down by the Supreme Court in above cited cases, we proceed to pass following order :-

O R D E R

(i) The Criminal Application is allowed in terms of prayer clause (A-1).

(ii) The Criminal Application is accordingly disposed of.

[SANDIPKUMAR C. MORE,J.] **[V.K. JADHAV,J.]**