IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1709 of 2025

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE Sd/-

and
HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA Sd/-

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Approved for Reporting	Yes	No

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Versus
NONE

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Appearance:
MR SAMRAT R UPADHYAY(11939) for the Appellant(s) No. 1,2
MS. URVASHI PUROHIT, AGP

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CORAM:**HONOURABLE MR. JUSTICE A.Y. KOGJE**
and
HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA

Date : 23/07/2025

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.Y. KOGJE)

1. This appeal is preferred jointly by husband and wife, as appellants against order dated 19-04-2025 below Exh-1 in Family

Suit No.30 of 2025, by which, family suit has been dismissed treating the same to be not maintainable.

2. It is the case where the appellants have approached the Family Court for declaration of their marriage to have been dissolved by following mode of their personal law recognized by the Muslim Personal Law (Shariat) Application Act, 1937 being 'mubaraat'.

3. The facts in brief are that the Marriage between the parties has been solemnised between the parties as per Islamic Shariyat and in accordance with the customs and rituals of their caste at Vil.-Chhajana, Dist.-Madhubani, Bihar between the Appellant No. 01 and 02 on date: 15/03/2021. Thus, the Appellant No.01 and Appellant No.02 are legally wedded husband and wife.

3.1 Out of this wedlock three children have been born 1) aged about 3 years; 2) , aged about 1 year; and 3) aged about 7 months. After the said marriage the Appellant No. 02 has cohabited and lived with Plaintiff No.01 at Rajkot, and

currently the permanent residence of both the appellants is at Rajkot. After marriage, there occurred a differences which increased day by day up to the extent that the Appellants felt it impossible to live with each other. Due to the arising conflicts on account of difference of opinions, the Appellant No. 02 had to leave her matrimonial home and since more than one year the Appellants have been living separately. The Appellants have tried to solve the problems by themselves, even the elders and family members of both the Appellants have tried enough for the compromise; but all in vain, as the conflicts arose up to that limit that, both the Appellants cannot sustain their married life further with each other. As the Appellants have not been able to live together and both the Appellants have mutually agreed that their said marriage be dissolved in the interest of future to come.

4. As the Appeal is preferred jointly by husband and wife and the issue requires consideration on the law point of maintainability, the Court by its order dated 10-06-2025 appointed learned AGP to assist the Court in this regard.

5. Learned Advocate for the appellants has argued that an error is committed by Family Court in holding that the petition for declaration of dissolution of marriage by way of 'mubaraat' is not maintainable in the present form.

6. It is submitted that Section-7 of the Family Courts Act confers jurisdiction upon Family Court for declaring the status of the marriage and therefore, cause of action of the appellants squarely fell within jurisdiction of the Family Court despite the Family Court has not entertained the suit.

7. Learned Advocate for the appellants has argued that an error is committed by the Family Court in holding that 'Mubaraat Agreement' is sine qua non for entertaining such suit, whereas even as per Shariat, requirement of written agreement is not necessary at all. It is only between Muslim- husband and wife, where they jointly come to an Agreement that the marriage can be dissolved by process of 'mubaraat'.

8. It is argued that Family Court has erroneously considered that Agreement to part has only to be in Written Form, whereas Shariat does recognized, Agreement which is not even in written form. It is

submitted that in any case, whether the Agreement to dissolve the Muslim marriage exist or not is also triable issue and it cannot be said that the suit for such declaration is not maintainable.

9. Learned AGP has submitted that impugned order regarding maintainability is justified particularly pointing out that the Family Court has ordered that petition is not maintainable in the present form and therefore, it cannot be said that suit filed by the appellant itself is not maintainable. It is still open for appellants to file the suit after complying with necessary formalities.

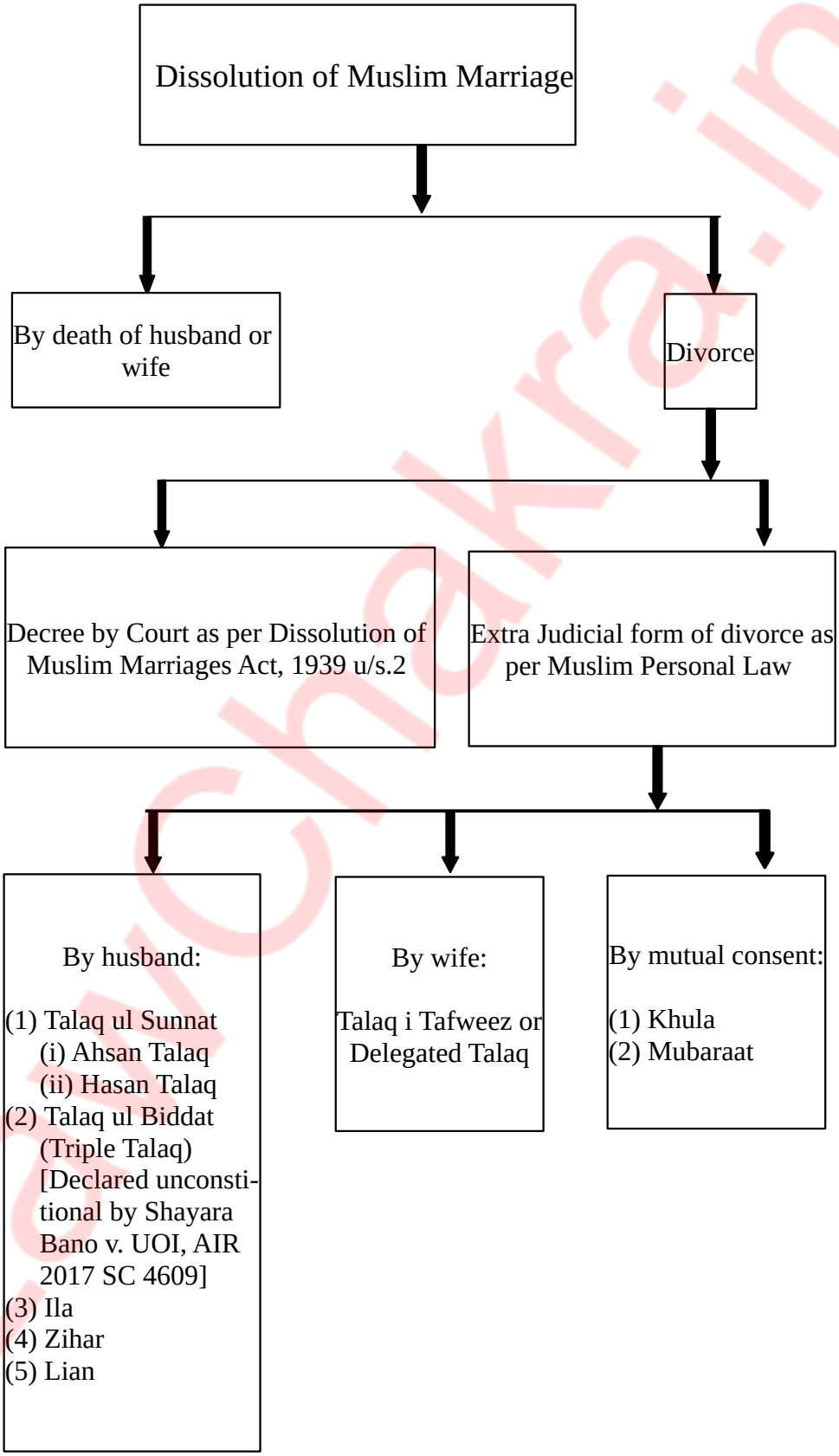
10. In this connection, she has drawn attention of our attention to plaint of the suit itself and submitted that nature of prayer made is for actually dissolution of marriage and not that of declaration. It is submitted that considering the provisions of Personal Law, the Family Court will have no jurisdiction for dissolution of marriage, as the same would be governed by Personal Law.

11. Learned AGP has therefore taken this Court through processes by which dissolution of muslim marriage is recognized by Personal Law specifically emphasizing on 'khula' and 'mubaraat'. She has

submitted that these options for divorce are available to Muslim women, who can demand dissolution of marriage and agreed to by the husband, which would be treated as 'khula' and where there is dissolution of marriage by mutual agreement of the parties, it has to be treated as divorce by way of 'mubaraat'. She has thereafter, taken this Court through various decisions of other High Courts and one of that being of Delhi High Court in MAT.APP.(F.C.) 37/2023 dated 07-11-2024.

12. Referring to aforesaid decision, she has submitted that Delhi High Court was faced with facts of similar nature and considering overall facts situation, has given Guidelines for dealing with divorce in Muslim marriage by Agreement. She has drawn attention of the Court as an Officer of the Court that it is in support of the facts of the present case as well.

13. Learned AGP has taken pains in preparing a flow chart with regard to the dissolution of Muslim marriage, which the Court deems it fit to reproduce hereunder:



14. Having heard learned advocates for the parties and having perused the documents on record, it appears that the issue pertains to dissolution of Nikah by a mutual understanding, which is referred to as 'mubaraat' in the Muslim Personal Law. In this regard, the Court may refer to the provisions of the Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the said Act reads as under:-

> "2. **Application of personal law to Muslims.**—Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or any other provision of personal laws, 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 rules of decision in cases where the parties are Muslims, shall be the Muslim Personal Law (Shariat)."

15. The procedure recognizes a dissolution of Nikah by way of Talaq, Ila, Zihar, Lian, khula and mubaraat. Of the aforesaid, process of divorce in Muslim Personal Law, Khula is a process which is exclusively available to Muslim women, whereas mubaraat is available to the Muslim women with mutual consent agreement with the husband. The Court may refer to the discussion of Dr.

Paras Diwan in his Text Book 'Family Law', wherein in Chapter 12 of divorce by mutual consent while referring to the divorce my mutual consent under various Personal Laws, he has referred to Hadith which is a collection of the traditions of Prophet Mohammad arising out of Quran. Mubaraat or Mubaraa, according to the writer is a process when aversion is mutual, proposal of divorce may emanate from either side, which is called Mubaraa (Mubaraat) and drawing differences between Khula and Mubaraa (Mubaraat), the writer has differentiated the Khula to be initiation by the wife to be released from Nikah to which the husband agrees for consideration, whereas in case of Mubaraa, it is both the parties who have bonafide feeling that the bond of marriage has come to an end and it is desirable that the parties separate out. Under the Muslim law, Mubaraa is treated to be an irrevocable divorce, however, the requirements of Mubaraa on the part of the wife are similar to that when the divorce is by way of Khula i.e. the wife has to undergo in iddat.

15.1 The roots of the Mubaraat can be traced into Holy Quran. The Court refers to the revised Edition of the English translation

and commentary of Arabic text of the Holy Quran by Maulana Muhammad Ali printed in Lahore, Pakistan being 6th Edition of 1973, where the relevant Quran verse for our purpose are verse 128, 129, 130, which are as under:

> "128 And if a woman fears ill-usage from her husband or desertion 832 no blame is on them if they effect a reconciliation between them. And reconciliation is better. And avarice is met with in (men's) minds. And if you do good (to others) and keep your duty surely Allah is ever Aware of what you do.
>
> 129 And you cannot do justice between wives, even though you wish (it), but be not disinclined (from one) with total disinclination, so that you leave her in suspense. And if you are reconciled and keep your duty, surely Allah is ever Forgiving, Merciful.
>
> 130 And if they separate, Allah will render them both free from want out of His ampleness. And Allah is ever Ample-giving, Wise."

16. Over and above, verse 130 supports procedure of Mubaraat by which the mutual separation from the Nikah is recognized and freedom is given to both the parties to free themselves with the blessing of Allah.

17. The Court may also refer to publication of a book by Author Aqil Ahmed, who has published the text book of Mohammedan Law

revised by Professor Iqbal Ali Khan, 27th Edition, wherein while referring to divorce at the request of wife as Khula and divorce by mutual agreement as Mubaraat and compared it with Khula, which the Court deems it fit appropriate to reproduce at this stage:

> "8. Mubarat (Divorce by mutual agreement) Mutual Release-Meaning-Mubarat is also a form of dissolution of marriage contract. It signifies a mutual discharge from the marriage claims. In Mubarat the aversion is mutual ind both the sides desire separation. Thus it involves an element of mutual consent.
>
> In this mode of divorce, the offer may be either from the side of wife or from the side of husband. When an offer of mubarat is accepted, it becomes an irrevocable divorce (talaq-ul-bain) and iddat is necessary.
>
> Under the Shiah Law the parties can dissolve their marriage by way of mubarat if it is impossible for them to continue marriage tie.
>
> **Distinction between Khula and Mubarat.**-(1) Khula is a "redemption" of the contract of marriage while mubarat is a "mutual release" from the marriage tie.
>
> (2) In khula the offer is made by the wife and its acceptance is made by and in mubarat, any of the two may make an offer and the other the husband accepts it.
>
> (3) In khula, a "consideration" passes from wife to the husband. in mubarat the question of consideration does not arise.
>
> (4) In khula the aversion is on the side of the wife while in mubarat there is mutual aversion.

Both khula and mubarat are to be followed by the observance of iddat:"

18. The Apex Court in case of ***Zohara Khatoon v/s. Mohd Ibrahim reported in 1981 (2) SCC 509*** has also opined on the processes of divorce only for the Muslim women, wherein in para-21 the Apex Court has 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 consiss 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.

(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."

19. Therefore, in the opinion of the Court, when parties to the

Muslim marriage come to an agreement to mutually dissolve their Nikah, they are at liberty to do so and by virtue of this mutual agreement, the Nikah stands dissolved. In the available literature as referred in the preceding paras, there is nothing to suggest that there has to be a written agreement of Mubaraat nor there is a practice prevailing regarding maintaining of the register to record such agreement for mutually dissolved Nikah.

20. Though the Court is conscious of the fact that when two Muslims entered into Nikah, the same is registered with the register maintained locally by the body recognized by the religious institution. Register is merely a register maintained and the Nikahnama issued on the basis of such register is only a declaration of an agreement between two Muslims to enter into Nikah. However, such registration is not an essential to the personal law. Similarly, the Court does not find that recording of an agreement between the parties to the Nikah in any written format is essential for recording the fact of dissolution of marriage. For the purpose of Mubaraat, the expression of a mutual consent to dissolution of Nikah is sufficient to dissolve the Nikah in itself.

21. Therefore, in the facts of the present case when both the husband and wife to the Nikah had decided upon to dissolve the marriage by Mubaraat, according to the pleadings to the said fact, then the suit filed before the Family Court was only for the purpose of recognizing the fact of 'Mubaraat' and declaring the dissolution of the Nikah entered into by both the parties by mutual consent.

21.1 An error is therefore, committed by the Family Court in holding that for written agreement for mutually dissolving the Muslim Law by Mubaraat is a sine qua non as the same is not subscribed to any verse of Quran, Haddit or the practice followed amongst the Muslims under the personal law. The logic given by the Family Court with regard to registering of a Muslim marriage under a register to treat it as a written contract is also erroneous as such register and Nikahnama only recognizes the agreement entered into by the parties to the marriage by uttering the words "Kabul" in presence of the witness that does not make a Nikahnama or registration of a Nikah part of an essential process of Nikah.

22. Similarly, there is no process by which the written agreement is essential requirement for Mubaraat.

23. The Court may also refer to the prayer clause of the Family Suit which would read as under:-

> "12. In view of the aforesaid facts, it is most respectfully prayed that"
>
> This Hon'ble Court may be pleased to declare a decree of divorce (Mubaraat) regarding mutual consent in respect of the marriage solemnized between the plaintiff and the defendant on 15/03/2021."

24. The aforesaid prayer is seeking a declaration of a dissolution of marriage by way of process of Mubaraat for which this Court is of the view is a triable issue which would require recording of evidence on the basis of which the Family Court is called upon to make a declaration.

25. Section 7 of the Family Courts Act, particularly Clause-b of explanation to Section-7 confers the jurisdiction upon the Family Court to declare a status of the litigation with regard to the marriage which pre-existed and therefore, in the facts of the present

case, when both the husband and wife jointly approach to recognize the process of Mubaraat for dissolution of their Nikah, it merely sought a declaration of their marital status thereon. Therefore, in the opinion of this Court, the family suit for the aforesaid relief prayed for was maintainable and it was within the jurisdiction of the Family Court to have acted under Section-7.

26. The Karnataka High Court in case of ***Shabnam Parveen Ahmad v/s. Mohammed Saliya Shaikh passed in Miscellaneous First Appeal No.4711 of 2022 (SMA) dated 26-03-2024***, also on the issue of Mubaraat has held as under:-

> *"7. Section 7 of the Family Courts Act, 1984 provides that the Family Courts shall consider the suits and proceedings of the nature including 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. The Family Court is empowered also to consider a suit or proceedings for a declaration as to the validity of a marriage or as to the matrimonial status of any person. In the instant case, what was before the Family Court was a suit seeking a declaration of the status of the parties on the basis of the Mubarat Agreement entered into between them.*
>
> *8. 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" vs. "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.*

9. Having considered the contentions advanced and in view of the decisions which are relied on by the learned counsel appearing for the appellants we are of the opinion that the finding of the Family Court that the Family Court is not empowered to consider the application for Divorce by mutual consent when the parties are Muslims cannot said to be the correct proposition. In view of the fact that the parties have entered into Mubarat agreement and have decided to dissolve the marriage entered into between them by the said agreement, we are of the opinion that the prayer sought for by the parties i.e., for a declaration as to the dissolution of marriage ought to have been granted by the Family Court."

27. The Court may also draw strength from the decision of the Delhi High Court on the issue of Mubaraat, wherein in MAT.APP. (F.C.) 37/2023 dated 07-11-2024, the Delhi High Court has

recognized the dissolution of marriage through Mubaraat and has ultimately issued the guidelines by which the procedure can be concluded. The facts are identical which the Court has recorded in paras-3 and 4, where Nikah which was solemnized on 10.07.1997 had fallen apart and the parties are residing separately from April 2016. Upon failure of mediation, respondent-wife pronounced Talaq on 24.01.2020 and joint declaration was issued on affidavit and as there is no public record with regard to the dissolution under Islamic Law, joint petition was filed under Section 7 of the Family Courts Act. The Family Court had rejected such petition holding that the petition was not maintainable in its present form. The Court thereafter, embarked upon the principle of dissolution by mutual consent through Mubaraat however in the facts of the case before Delhi High Court, an agreement was executed on 24.01.2020, which was termed as Mubaraat. Making Mubaraat as a basis for declaration, the Delhi High Court issued guidelines as under:-

> *"18. For the aforesaid reasons, we allow the appeal by setting aside the impugned judgment and declaring that the marriage between the parties stood dissolved by Mubaraat on 24.01.2020. However, as it has been pointed out by learned counsel for the appellant that similar petitions are being routinely rejected by the learned Family Court, therefore, we*

deem it appropriate to issue the following directions for guidance of the Family Court while dealing with any petition filed under Section 7 of the Family Courts Act for seeking declaration of dissolution of marriage through extra-judicial divorce under the Muslim Personal Law.

i. The Family Court, after issuing notice to the respondent, will record the statements of both parties.

ii. In case, the terms of the divorce are recorded in an agreement i.e.. Talaq Nama, Khula Nama or Mubaraat agreement, the said original agreement will be produced before the Court. After satisfaction of the execution of the said agreement, the Court shall issue an order declaring that their marriage stands dissolve."

28. In view of the aforesaid discussion, a case is made out to allow the Appeal at the admission stage. Considering the nature of dispute involved and the age of both the parties and their future. While setting aside the order dated 19-04-2025 below Exh-1 in Family Suit No.30 of 2025, the Court deems it fit to remand the matter back to the Family Court, Rajkot to consider the family suit treating it to be maintainable and to proceed on merits. With due regard to the age and future prospects of both the parties, the Court deems it fit to direct the Family Court to conclude the proceedings as expeditiously as possible preferably within a period of three months from the date of receipt of the order of this Court.

29. Before parting, the Court appreciates the able assistance of the learned AGP for drawing attention of this Court to various scriptures and the decisions of the High Court referred to hereinabove

(A.Y. KOGJE, J)

(NSSG,J)

PARESH SOMPURA