

Bombay High Court

Mrs. Nayana M.Ramani vs Mrs. Fizzah Navnitlal Shah on 17 March, 2021

Bench: R.D. Dhanuka, Virendrasingh Gyansingh Bisht

FCA-179-2019-XOB-30564-2019-J.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.179 OF 2019
WITH
CROSS OBJECTION (STAMP) NO.30564 OF 2019
IN
FAMILY COURT APPEAL NO.179 OF 2019

MRS. NAYANA M. RAMANI)
An Adult, Indian Inhabitant, Aged 66 years)
Residing at 57/24 Jay Mahal, 3rd Floor,)
Opposite Kotak Mahindra Bank Jain Society)
Sion (West), Mumbai - 400 022)...APPELLANT
V/s.

MRS.FIZZAH NAVNITLAL SHAH)
An Adult, Indian Inhabitant, Aged 66 years)
Residing at Flat Nos.M-3, M-4, N-4,)
th th
Eden Hall, 13 & 14 Floor, Loyal C.H.S. Ltd.,)
Dr.Annie Besant Road, Worli, Mumbai-400018)...RESPONDENT

Mr.Vineet B. Naik, Senior Counsel a/w. Mr.Sheroy M. Bodhanwalla
i/b. M.S.Bodhanwalla and Co., Advocate for the Appellant.

Ms.Deepti Panda a/w. Mr.Kirtida Chandarana and Ms.Nandini
Chittal i/b. Mahernosh Humranwala, Advocate for the
Respondent.

CORAM : R. D. DHANUKA &
V. G. BISHT, JJ.

RESERVED ON : 17th FEBRUARY 2021 PRONOUNCED ON : 17th MARCH 2021 avk 1/43
FCA-179-2019-XOB-30564-2019-J.doc JUDGMENT : (PER : V. G. BISHT, J.) 1 This appeal arises from the common order dated 15 th July 2019 on Exh. 1 and Exh. 11 passed by the Judge, Family Court No.2, Mumbai, whereby the learned Judge dismissed Family Court Petition No.B-62 of 2016 under Order 2 Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). 1A The respondent also assails above said order by way of cross-objection in as much as grounds for rejection of said Family Court Petition viz. locus, limitation and non-joinder of necessary party were rejected by the learned Judge of the Family Court. 2 Facts which lie in narrow compass required for disposal of this appeal can be stated as follows :

(a) The appellant herein is a married daughter of late Mr.Navnitlal R. Shah (for short the appellant's father) with whom the respondent alleges to have got married on 24 th July 2003 after the demise of appellant's mother viz. Hiralaxmi Shah in February 2003. The marriage between the avk 2/43 FCA-179-2019-XOB-30564-2019-J.doc appellant/petitioner's father and the respondent was solemnized before the Marriage Officer, Mumbai.

(b) The appellant's father expired on 30th June 2015 leaving behind three married daughters and one married son. The appellant's father was a Jain by religion and the respondent was a Muslim belonging to Dawoodi Bohra Section of the said religion, at the time of the alleged marriage.

(c) According to the appellant, her father was an extremely successful businessman who built the business of "Ashapura Group" comprising of several Companies. He owned various assets and properties and was till some years ago a Director in many of the Companies in the Ashapura Group. The appellant alleges that the respondent was already married to Mr.Mansoor Hatimbhai Chherwala but was not divorced, which fact she deliberately concealed and suppressed from the appellant's father. She falsely portrayed herself as a divorcee but was not a divorcee at all. This fact came to be avk 3/43 FCA-179-2019-XOB-30564-2019-J.doc unearthed and came to the knowledge of the appellant/petitioner recently when she happened to come across copies of the alleged divorce documents while going through the personal files of her father and after verifying the authenticity of those doubtful documents. There is no issue to the appellant's father and the respondent out of the alleged wedlock.

(d) Alleging further, the appellant contends that the respondent took undue advantage of the mental ailments, infirmities and unsoundness of mind of her father, which she was very well aware of, got married to him and then exercised and applied undue influence, coercion and duress upon him with the intention and motive of siphoning his entire properties. She even got executed various documents including his Will and several Gift Deeds of various valuable immovable properties and deprived the true legal heirs of their rights. The respondent also compelled her father to transfer a huge quantity of shares of Ashapura Group of Industries to her avk 4/43 FCA-179-2019-XOB-30564-2019-J.doc name and also forcibly took away custody of the jewellery "Stridhan" of her mother after her death.

3 In the above factual backdrop, the appellant filed the said Family Court petition seeking declaration that the marriage allegedly solemnized between her father and the respondent on 24th July 2003 is null and void and also the status of the respondent as on today continued to be the wife of the said Mr.Mansoor Hatimbhai Chherwala under the provisions of Section 7 (1) Explanation (b)and (d) of the Family Courts Act ("the Act" for short).

4 The respondent resisted the petition by filing her written statement. At the very outset, the respondent raised objection as to the jurisdiction of the Family Court by contending that the Court does not have the jurisdiction to try and entertain the petition and therefore deserves to be dismissed in-limine.

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According to her, she divorced her husband viz.

Mr.Mansoor Hatimbhai Chherwala on 23rd August 1984 vide a duly executed Talaqnama in Urdu and thereafter on 21 st February 2003 after the demise of the wife of the appellant's father, got married to him. The Registrar of Marriage, Mumbai, registered the marriage after satisfying himself of the facts, scrutiny of all documents submitted and after complying with procedure as required.

6 The respondent, on her part, also alleges that the appellant and her siblings with sole intention filed various litigation in various courts so as to make the respondent and her late husband succumb under their pressure so that they could usurp all of their father's property.

7 The respondent further contends that the petition is barred by Law of Limitation in as much as the appellant had knowledge of her father's marriage and any petition or action avk 6/43 FCA-179-2019-XOB-30564-2019-J.doc challenging the validity of the said marriage, therefore, ought to have been filed within three years of the said marriage. 8 Similarly, the appellant has no locus, whatsoever, to challenge the validity of the respondent's marriage. Only parties to a marriage can challenge the validity of the marriage. In other words, besides parties to the marriage, no third party can seek such a declaration with regard to the validity of the marriage and more so when one of the spouses is no more.

9 The respondent further contends that the petition suffers from defect of non-rejoinder of a necessary party viz. Mr.Mansoor Hatimbhai Chherwala. The only ground on which the appellant claims the respondent's marriage with her father to be invalid is that the divorce between her and her ex-husband Mr.Mansoor Hatimbhai Chherwala was invalid. This question cannot be decided behind the back of Mr.Mansoor Hatimbhai Chherwala and he is therefore a necessary party to the present avk 7/43 FCA-179-2019-XOB-30564-2019-J.doc proceedings. The present petition is, therefore, bad in law for non-joinder of a necessary party.

10 On going through the record it is seen that during pendency of the proceedings, the respondent moved an application dated 10th September 2018 (Exh. 11) raising preliminary objections viz. maintainability of the petition, locus standii, non-joinder of necessary party and that it being barred by Law of Limitation, the grounds which were raised in her written statement and have been quoted in extenso by us. 11 The above application was duly replied and resisted by the appellant by filing her reply. The appellant denied all the preliminary objections and reiterated almost the same facts which are raised in the main petition in defence of those objections. 12 It is in the above factual backdrop the learned Judge after hearing both the parties passed the order below Exh. 1 and Exh. 11. The learned Judge after elaborately discussing the avk 8/43 FCA-179-2019-XOB-30564-2019-J.doc various proceedings between the parties came to the conclusion that the appellant could have raised the issue before this Court in original petition and the High Court could have entertained the same. The learned Judge further held that the appellant thus had deemingly relinquished, given up her

portion of the claim pertaining to the declaration of the marital status of the respondent and thus the bar under Order 2 Rule 2 of the Code shall be applicable.

13 The learned Judge, however, rejected the objections of the respondent as to the locus, limitation and non-joinder of necessary party raised by the respondent.

14 The present appeal is thus against the impugned order dated 15th July 2019 rejecting the claim of the appellant on the ground of bar of Order 2 Rule 2 of the Code. So also, Cross Objection against the rejection of grounds raised by the respondent. That is how both the parties are before us.

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Mr.Naik, learned senior counsel for the appellant/

petitioner, scathing a mounting attack on the approach of the learned Family Court strenuously submitted that the learned Family Court erred by proceeding on the incorrect and illogical basis that as the appellant did not seek the relief of a declaration in respect of the validity of the marriage of the respondent in previous proceeding filed by her before the High Court, she had deemingly relinquished and given up the portion of her claim that is the subject matter of the petition before the Family Court. According to the learned senior counsel, the appellant had filed the petition before the Family Court seeking a declaration that the purported marriage allegedly solemnized between the appellant's father, the late Mr.Navnitlal R. Shah (the deceased) and the respondent is null and void and also that the status of the respondent as on the date of filing of the petition continued to be the wife of the one Mr.Mansoor H. Chherawalla as per the provisions of Section 7(1) of the Act. 16 Stretching further, the learned senior counsel contended that it is settled law that for invoking Order II Rule 2 of the Code, the relief which the appellant has claimed in the second avk 10/43 FCA-179-2019-XOB-30564-2019-J.doc proceeding/suit must have been available to the appellant for being claimed in the previous suit on the cause of action pleaded in the previous suit against the respondent and yet not claimed by her. The concept of Order II Rule 2 is alien to the Family Court proceedings. It is also a settled law that under Section 7 of the Act, a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Court. The cause of action arose only after the earlier suits had been filed and it is only the Family Court that could have granted the relief sought for by the appellant in her petition. The said relief was not available to the appellant in any other proceeding or before any other forum. Therefore, there was no question of relinquishing or giving up the claim (that forms the subject matter of the petition before the Family Court)in other proceedings before the Civil Court.

17 The learned senior counsel next contended that the

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learned Family Court erred in holding that the appellant could have raised the issue regarding the validity of the marriage of the respondent before the Civil Court and that the Civil Court could have entertained the same. The impugned order is contrary to the law laid down by the Hon'ble Apex Court which holds that a petition regarding a dispute on the matrimonial status of a person which seeks a declaration in that regard has to be sought only before the Family Court.

18 The learned senior counsel then lastly contended that the learned Family Court thus committed a grave error of jurisdiction by dismissing the petition under Order II Rule 2 of the Code.

19 Advancing the next limb of argument, the learned senior counsel submitted that the appellant being daughter of the deceased Mr.Navnitlal R. Shah has every locus standi in as much as it is well settled law that not only spouses are entitled to file petition challenging the validity of the marriage but the interested persons and beneficiaries related to the spouses may also avk 12/43 FCA-179-2019-XOB-30564-2019-J.doc challenge it if they bring ample evidence of its illegality. In this regard, the learned senior counsel heavily pressed into service Explanation (b) to Section 7 of the Act.

20 The learned senior counsel next submitted that as far as objection regarding non-joinder of necessary party viz. Mr.Mansoor Hatimbhai Chherwala is concerned, according to the appellant/petitioner, there was no necessity to join him in the present proceedings as any presumed testimony from his end with regard to the validity of the divorce would have made no difference to her case particularly since the compliance of Fatimid law with regard to divorce had not been carried out by the parties. 21 The learned senior counsel lastly, while replying to the point of limitation, submitted that the very petition was filed well within the time as the same was filed immediately after the discovery of the relevant facts along with the documents. Even otherwise, it being a mixed question of law and facts, the Family Court rightly rejected the said issue raised by the respondent for the reasons recorded in the impugned order.

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22 Summing up the submissions, the learned senior

counsel urged that for all the aforesaid reasons, the impugned order in so far as it is impugned by his client deserves to be set aside.

23 To buttress his submissions, the learned senior counsel placed reliance on the order of this Court in case of Nayana Ramani (Applicant) In the matter between Aruna Shah vs. Fizza Shah & Anr.¹, Aruna Shah vs. Fizza Shah & Anr. 2, Judgment of Kerala High Court in case of Syamaladevi vs. Sarla Devi and Others³, Judgment of Supreme Court in case of Balram Yadav vs. Fulmaniyua Yadav⁴ and in case of Sucha Singh Sodhi (Dead) through LR vs. Baldev Raj Walia & Anr.⁵ and Judgment of this Court in case of Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff⁶. 24 Per contra, Ms.Panda, learned counsel for the respondent, on the other hand, would seek to sustain the order 1 Order dated 17.4.2017 in Chamber Summons No.1755 of 2016 2 Order dated 27.9.2017 in Appeal (L) No.202 of 2017 3 2009 SCC Online Ker 508 4 (2016) 13 SCC 308 5 (2018) 6 SCC 733 6 2000 (3) Mh.L.J. 468 avk 14/43 FCA-179-2019-XOB-30564-2019-J.doc dated 15th July 2019 passed by the learned Family Court. At the very outset, we make it clear that the learned counsel has mainly argued on the point of locus, limitation and non-joinder of necessary party, as all these objections were negatived by the learned Family Court.

25 Starting with the application of Section 7 of the Act, the learned counsel vehemently submitted that the appellant/ petitioner does not have locus standi to file and maintain the petition under Section 7 of the Act. According to the learned counsel, in the light of mandate of Section 7 of the Act, the marriage can be challenged only by the parties to the marriage and no third party can seek any declaration regarding the validity of the marriage as is sought by the appellant in the Family Court petition, particularly after the demise of her father. The learned Family Court patently erred in rejecting this ground and therefore on this ground alone the petition ought to have been dismissed. 26 The learned counsel then next submitted that the learned Family Court ought to have held that the petition suffers avk 15/43 FCA-179-2019-XOB-30564-2019-J.doc from non-joinder of necessary party i.e. Mr.Mansoor Hatimbhai Chherwala - the ex-husband of the respondent in whose absence no declaration could have been passed regarding the alleged existence of the marriage between Mr.Mansoor Hatimbhai Chherwala and the respondent on the date of alleged marriage of the respondent with the father of the appellant and the consequent alleged invalidity of the marriage between the appellant's father and the respondent.

27 Lastly, the learned counsel would submit that the learned Family Court failed to appreciate that the appellant had knowledge of the marriage between the respondent and her father since 2003 and any petition challenging their marriage, therefore, ought to have been filed within three years of the date of the marriage. The learned Family Court was therefore wrong in rejecting the objection raised on the point of limitation admittedly when the petition had not been filed within three years. 28 The learned counsel also placed reliance on the judgment delivered by various Courts in cases of Smiti Nitikona avk 16/43 FCA-179-2019-XOB-30564-2019-J.doc Banerjee vs. Ram Prasad Banerjee⁷, Vasumathi vs. Chandriyani Madhavi⁸, K.A.Abdul Jaleel vs. T.A. Sahida ⁹ and Sri P. Srihari vs. Kum. P. Sukunda and Another¹⁰.

: LOCUS STANDI :

29 The first plea raised by the learned counsel for the respondent is that the appellant has no locus whatsoever to challenge the validity of the respondent's marriage to her father. The learned counsel derives inspiration from the interpretation of Section 7 of the Act and painstakingly dwelt upon

nuances of Section to bring home the point only to emphasize that besides the parties to the marriage, no third party can seek a declaration with regard to the validity of the marriage and more so when the appellant's father is no more.

30 It will be useful to refer the statutory provision contained in Section 7 to the extent it is relevant for the purpose, 7 2018 SCC Online Gau 1577 8 1990 SCC Online Kar 66 9 1997 SCC Online Ker 83 10 2001 (1) A.P.L.J. (HC) avk 17/43 FCA-179-2019-XOB-30564-2019-J.doc as follows :

"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 purposes 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;

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(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."

31 It does not take much discernment to see that the Family Court has jurisdiction exercisable by any District Court or by a subordinate Civil Court under any law for the time being in force in respect of suits and other proceedings of the nature referred to in Explanation (a) to (g). Clause (a) under the Explanation refers to nature of proceedings between the parties to a marriage for a decree of nullity of marriage, as the case may be, annulling the marriage or restitution of conjugal rights etc. Essentially, this is a proceeding between the spouses.

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32 Clause (b) under the Explanation is in the nature of a

declaration as to the validity of a marriage or as to the matrimonial status of any person. What should engage our attention here is unlike Clause (a) it does not say that such suit or proceeding should be between the parties to the marriage. To note that Clause (b) is widely couched to encompass in its ambit and include the proceeding of the nature referred to regarding declaration of the validity of the marriage or it could be for a declaration of the matrimonial status of any person, would be a but fair comment.

33 Here we are also mindful of Statement of Objects and Reasons of the Act. In the Objects and Reasons it is stated that :

"STATEMENT OF OBJECTS AND REASONS Several association of women, other organisations and individuals have urged, from time to time, that family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and avk 20/43 FCA-179-2019-XOB-30564-2019-J.doc evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore felt, in the public interest, to establish Family Courts for speedy settlement of family disputes."

34 It is further stated that Family Court is intended to provide an exclusive jurisdiction of the matters relating to matrimonial relief including nullity of marriage, judicial separation, divorce, restitution of conjugal rights or declaration as avk 21/43 FCA-179-2019-XOB-30564-2019-J.doc to

the validity of marriage or as to the matrimonial status of any person, the property of the spouses or of either of them, declaration as to the legitimacy of any person, guardianship of a person or the custody of any minor, maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure. 35 Relying on the Objects and Reasons, the learned senior counsel for the appellant earnestly submits that Clause (b) under the Explanation must be construed having due regard to the Objects and Reasons to the Act. Not only the spouses are entitled to file the petition challenging the validity of the marriage but the interested persons and beneficiaries related to the spouses may also challenge it, supplemented the learned senior counsel. 36 The learned senior counsel has also drawn strength from the decision given in *Syamaladevi Devi* (supra) wherein the Kerala High Court while drawing a distinction between Clause (a) and (b) under Explanation, pointed out that unlike Clause (a), Clause (b) does not say that such proceedings should be between the parties to the marriage. In other words, Clause (b) is widely avk 22/43 FCA-179-2019-XOB-30564-2019-J.doc couched to include the proceedings of the nature referred to regarding declaration of validity of the marriage or it could be for a declaration of the matrimonial status of any person. We have also offered same interpretation as to Clause (b) under the Explanation and respectfully agree with the view taken in the case of *Syamaladevi Devi* (supra).

37 In this case, the appellant is seeking declaration as to the validity of the marriage of her late father with the respondent and as also, according to her, the status of the respondent as on today still continued to be the wife of Mr.Mansoor Cherwalla as per provisions of Section 7 (1) Explanation (b) of the Act. Having regard to the Objects and Reasons of the Act vis-a-vis literal construction of Clause (b) under Explanation, in our considered view, the appellant has every locus to bring in question the validity of marriage of her father with the respondent and as also respondent's status.

38 The ratio laid down in the case of *Vasumathi* (supra), *K.A.Abdul Jaleel* (supra) and *Sri. P. Srihari* (supra) cannot be avk 23/43 FCA-179-2019-XOB-30564-2019-J.doc made applicable to the case in hand.

39 In *Vasumathi* (supra) the petitioner had sought Succession Certificate under Section 372 of the Indian Succession Act, 1925, from City Civil Court who transferred the proceedings to the Family Court. The petitioner challenged this order before the High Court. The learned Single Judge held that in the absence of such a power having been conferred on the Family Court, the Civil Court was not right in transferring the proceedings to the Family Court.

40 In *K.A.Abdul Jaleel* (supra) the Division Bench of Kerala High Court held that the disputes between the appellant and respondent are to be decided by the Family Court and it has got jurisdiction under Section 7(1)(c) of the Family Courts Act, even though the appellant and the respondent are no longer parties to a subsisting marriage.

41 Lastly, in *Sri. P. Srihari* (supra) the suit was filed by the

sisters against the brothers and others claiming partition of the property left behind by their father. The Division Bench held that by no stretch of imagination can the Family Court assume jurisdiction, if there is a dispute between the brothers, sisters, mothers, fathers etc. concerning property and the case on hand being one such, the Family Court had clearly no jurisdiction. Completely different situation then in the case in hand. 42 To say that, as is submitted by the learned counsel for the respondent, the appellant has no locus, whatsoever, to challenge the validity of respondent's marriage with the appellant's father under Section 7 of the Act is nothing but a straitened interpretation of the provision of Section 7 of the Act. This is wholly incompatible with the spirit of Section 7 as well as Objects and Reasons of the Act.

43 The inescapable conclusion is that the appellant's case
will squarely fall under Section 7(b) of the Act. The plea of

respondent, therefore fails.

: NON-JOINDER OF NECESSARY PARTY :

44 Order 1 Rule 9 of the Code deals with mis-joinder and

non-joinder of parties. It reads as under :

"9. Mis-joinder and non-joinder. -

No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it :

Provided that nothing in this rule shall apply to nonjoinder of a necessary party.

A plain reading of Rule 9 makes it clear that mis-joinder or non-joinder of parties is not fatal unless it is non-joinder of necessary party. Where either a necessary or proper party is not impleaded in the array of parties, it is said to be non-joinder of party. A necessary party is one without impleading whom no effective decree can be passed. That is why a proviso is added in Rule 9 that nothing in the Rule shall apply to non-joinder of necessary party.

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The question to be considered is whether right of the

party shall be affected if he is not added as a party. In the instant case, the appellant has come with a specific case that her father was a widower at the time of alleged marriage with the respondent. The respondent who portrayed herself as a divorcee was not a divorcee at all and this fact was unearthed when the appellant happened to come across copies of divorce documents while going through the personal file of her father. It is her further case that during verification of those divorce documents, she came to know that the so called divorce document was nothing but a forged document showing her to be divorcee of Mr.Mansoor Hatimbhai Chherwala. Thus, according to her, the marriage of respondent with her father was null and void for non- fulfillment of conditions of Section 4(a) of the Special Marriage Act. Needless to say, it is on this ground the appellant seeks declaration that the marriage allegedly solemnized between her father and respondent on 24 th July 2003 is null and void and also the status of respondent as on today continued to be the wife of avk 27/43 FCA-179-2019-XOB-30564-2019-J.doc said Mr.Mansoor Hatimbhai Chherwala.

46 Since the appellant had branded the documents of divorce allegedly arrived at between the respondent and her erstwhile husband Mr.Mansoor Hatimbhai Chherwala as forged and fabricated, necessarily the burden is on her to prove so by adducing necessary evidence to that effect. Moreover, no specific relief is claimed against Mr.Mansoor Hatimbhai Chherwala. At the most, the appellant may opt to examine Mr.Mansoor Hatimbhai Chherwala during the course of trial, if so advised, to prove that he did not pronounce talaq to the respondent and the documents submitted and relied on by the respondent at the time of her marriage with the father of the appellant were invalid, improper and fake. The respondent also may opt to examine Mr.Mansoor Hatimbhai Chherwala to prove her case. In our view, it was thus not necessary for the appellant to have impleaded Mr.Mansoor Hatimbhai Chherwala in the present proceedings. 47 The learned senior counsel for the appellant during the course of arguments also impressed upon us that there is no avk 28/43 FCA-179-2019-XOB-30564-2019-J.doc necessity to joint Mr.Mansoor Hatimbhai Chherwala in the present proceeding as any presumed testimony at his end with regard to the validity of the divorce would have made no difference to appellant's case, particularly since the compliance of Fatimid law with regard to valid divorce has not been carried out by the parties. It appears to us that since the appellant has also raised a grievance about the non-compliance of Fatimid Law governing the valid divorce between the respondent and Mr.Mansoor Hatimbhai Chherwala, this will necessarily require the evidence from both the sides and on this count also, in our considered opinion, the

learned senior counsel is justified in his submission. Thus, for all the aforesaid reasons, we do not find any merit in the second plea as well. The second plea also, therefore, fails. : LIMITATION :

48 In the present case the issue of limitation is raised by the respondent. According to her, the appellant had knowledge about the marriage between the respondent and her father since 2003 and, therefore, the petition ought to have been filed within avk 29/43 FCA-179-2019-XOB-30564-2019-J.doc three years of the date of the marriage, which admittedly, was not filed. This being so, the learned Family Court ought to have rejected the petition on the point of limitation itself. 49 It is fairly settled that so far as issue of limitation is concerned, it is a mixed question of fact and law. Looking at the averments made in the petition we find that the alleged fraudulent conduct of the respondent only came to be unearthed after receipt of documents from the office of Marriage Officer, Mumbai, on 10th and 12th February 2016 and thus the petition was filed well within time. In our considered opinion, such an issue, in the light of averments made in the petition, is required to be determined having regard to the facts and the law. 50 Since, prima facie, it appears from the petition that the alleged fraudulent conduct of the respondent was noticed by the appellant on 10th and 12th February 2016 and the fact that the petition immediately was filed after the discovery of the relevant facts along with documents, it cannot be said that the petition was avk 30/43 FCA-179-2019-XOB-30564-2019-J.doc barred by law of limitation. Even otherwise, in the light of pleadings of both the parties, this will have to be determined by the learned Family Court while deciding the petition finally. We, therefore, do not find any merit in the submission. Therefore, the third plea also fails.

51 In view of above, we hold that all the objections viz. locus, non-joinder of necessary party and limitation raised by respondent are rightly rejected by the learned Family Court. : ORDER 2 RULE 2 OF THE CODE :

52 Order 2 Rule 2 of the Code reads as under :

"2. Suit to include the whole claim:

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim: - Where a plaintiff omits to sue in respect of, or intentionally avk 31/43 FCA-179-2019-XOB-30564-2019-J.doc relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs: - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute

but one cause of action.

53 It is clear from the reading of Order 2 Rule 2 of the Code that the object is to prevent multiplicity of suits. The Rule is based on the principle that no one should be vexed twice for same cause of action. The test for raising objection under the Rule is that whether the claim made in the subsequent suit could have been made in the earlier suit or not. The cause of action must be same for application of the Rule.

avk 32/43 FCA-179-2019-XOB-30564-2019-J.doc 54 In Sucha Singh Sodhi (supra) the Hon'ble Apex Court at paragraph 26 held as under :

"26. In our opinion, the sine qua non for invoking Order 2 Rule 2(2) against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was also available to the plaintiff for being claimed in the previous suit on the causes of action pleaded in the previous suit against the defendant and yet not claimed by the plaintiff." 55 Therefore, we have to examine the question as to whether the appellant was entitled to claim relief of declaration in the previous suit(s) on the basis of cause of action pleaded by her in the previous suits against the respondent in relation to the validity of the marriage of her father with the respondent. 56 Perusal of the impugned order would show that learned Family Court found that the appellant has filed three original suits before this Court but it was not shown whether the appellant had raised the issue of validity of talaq between the respondent and her ex-husband Mr.Mansoor Chherwala in those cases. The learned Family Court further noted that the appellant avk 33/43 FCA-179-2019-XOB-30564-2019-J.doc raised very contention in her Notice of Motion No.1622 of 2006 in Original Suit No.1018 of 2015 before this Court but did not find it fit to include the prayer of declaration of validity or invalidity of marriage between her father Navnitlal Shah and the respondent. We also note that the learned Family Court was not clear whether or not the appellant had pleaded these aspects in the Original Suit No.1018 of 2015. This simply suggests that the learned Family Court had failed to examine the pleadings in Original Suit No.1018 of 2015.

57 It appears to us that the learned Family Court lost sight of the fact that Original Suit No.1018 of 2015 was instituted in the year 2015 whereas the Notice of Motion No.1622 came to be filed in the year 2016 after the appellant discovered the fraud alleged to have been played by the respondent pursuant to documents dated 10th and 12th February 2016 secured by her through Right to Information Application. Thus, there was disclosure and discovery of new facts constituting new cause of action. We have also pointed out the sine-qua-non for attracting mischief avk 34/43 FCA-179-2019-XOB-30564-2019-J.doc contemplated under Order 2 Rule 2 is the same cause of action. The learned Family Court, therefore, erred in holding that provisions of Order 2 Rule 2 are attracted without examining the cause of action in the earlier plaints filed by the appellant. 58 Let us examine it from another angle. We assume and proceed on the premise that the learned Family Court did labour to find out that cause of action before it was very much a part of cause of action in the suits before this Court. What next the learned Family Court ought to have taken into consideration was whether in the light of Sections 7, 8 and 20 of the Act, this Court has jurisdiction to grant declaration as to the validity of the marriage between the appellant's father and the respondent sought by the appellant. In order to get an effective answer to this question, we

undertake a quick survey and implications of those said Sections.

59 As far as Section 7 of the Act is concerned, we have elaborately explained in the earlier part of our discussion and therefore we reiterate the same.

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60 Section 8 of the Act deals with the exclusion of jurisdiction which reads as follows :

"8. Exclusion of jurisdiction and pending

proceedings.- Where a Family Court has been established for any area,- .-Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub- section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any avk 36/43 FCA-179-2019-XOB-30564-2019-J.doc magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established."

61 Section 20 of the Act provides for over riding effect of the Act on other laws or any instrument having the effect of law which reads as under :

"20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. -The provisions of this Act shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

62 The Full Bench of this Court in Romila Jaidev Shroff avk 37/43 FCA-179-2019-XOB-30564-2019-J.doc (supra) after analyzing Section 7(1), 8 and 20 of the Act, Section 2 (4) of the Code and Clause (12) of Letters Patent (Bombay) held as under :

"On the basis of Section 7 of the Family Courts Act, 1984 so far as the suit for maintenance is concerned, it is covered by the provisions of the said Act and, therefore, the Court, as contemplated by the said Act, will be the one to hear the same. Sections 7 and 8 of the Family Courts Act show that the jurisdiction of the District Court as well as subordinate Court is ousted in respect of the matters which can be entertained by the Family Court. If therefore in exercise of its Ordinary Original Civil Jurisdiction within the local limits, High Court is taking up those very matters which are covered by the Family Court Cases, and if it is acting as a District Court, it certainly would lose the jurisdiction. With reference to section 2(4) of the Code of Civil Procedure, for all practical purposes, save and except section 120 of the Code of Civil Procedure, the High Court which exercises its Original Civil Jurisdiction will be in the same position as the District Court in relation to a District viz. Principal Civil Court of Original Jurisdiction.

avk 38/43 FCA-179-2019-XOB-30564-2019-J.doc The Original Civil Jurisdiction of the High Court is confined to a limit and, therefore, that would be a District Court for the purpose of High Court in exercise of that jurisdiction. When the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a District Court as understood therein. It would, therefore, lose its jurisdiction.

63 Similarly, in Balram Yadav (supra) the Hon'ble Apex Court held as under :

"7. Under Section 7(1) Explanation (b) of the Family Courts Act, 1984, a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 of the said Act, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the avk 39/43 FCA-179-2019-XOB-30564-2019-J.doc matrimonial status. Section 20 of the Family Courts Act also endorses the above since the said Act has an overriding effect on other laws."

64 Having closely studied and pondered and in the light of above pronouncements an irresistible and inescapable conclusion would be that when the High Court exercises its ordinary original civil

jurisdiction in relation to the matters under the Act, it would be a District Court as understood therein. Resultantly, it would be denuded of its jurisdiction. In our view, since in view of Explanation (b) to Section 7(1) of the Act, the reliefs sought in the proceedings filed before the Family Court could not have been granted by the Civil Court in the suits filed by the appellant, question of applicability of Order 2 Rule 2 did not arise even remotely.

65 The learned counsel for the respondent, in this regard, heavily placed reliance on the decision of Smiti Nitikona Banerjee (supra) wherein the High Court of Gauhati (Division Bench) while interpreting Section 7(b) of the Act held that though in Section avk 40/43 FCA-179-2019-XOB-30564-2019-J.doc 7(b) of the Act, the expression "parties to a marriage" does not occur, keeping in view the nature of relief that is provided before the Family Court, it would be only between the parties to a marriage to seek for such declaration for their benefit against the person who claims or contends not to be a party to the marriage. It further held that if that aspect of the matter is kept in view, a third party questioning the marriage of any other party would not be entitled to maintain proceedings before the Family Court. In any event, if such a party has any grievance, the remedy is available before the ordinary civil Court by filing a suit therein. 66 We, respectfully differ from what has been held by the learned Judges of the Gauhati High Court for the simple reason that it is against not only the letter and spirit of provision of Section 7 but as also against the rationale behind the Object and Reasons of the Act, which we have already adhered to and explained. Besides, the observations of the Gauhati High Court appears to be wrong in the teeth of decision given in Balram Yadav (supra) by the Hon'ble Apex Court.

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In view of the foregoing discussion, we cannot concur

with the reasoning and conclusion arrived at by the learned Family Court which wrongly dismissed the appellant's petition as being barred by the provision of Order 2 Rule 2 of the Code. We are satisfied that the impugned order of the learned Family Court cannot be sustained to the extent to which the bar enacted under Order 2 Rule 2 of the Code has been applied.

68 We, therefore, pass the following order :

ORDER

(i) Appeal succeeds and is accordingly allowed.

(ii) The impugned order is set aside to the extent that the petition is barred by provision of Order 2 Rule 2 of the Code.

(iii) Cross Objection stands dismissed.

(iv) Family Court Petition No.B-62 of 2016 filed by the appellant against the respondent is held maintainable. It is accordingly restored to its original file for being tried on merits and in accordance with law.

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(v) The learned Family Court is directed to decide the Family Court Petition No.B-62 of 2016 expeditiously and preferably within six months from the date of receipt of this order on its own merit.

(vi) No orders as to costs.

(V. G. BISHT, J.) (R.D.DHANUKA, J.) Learned counsel for the respondent seeks stay of the operation of the order. Application for stay is rejected.

(V. G. BISHT, J.)

(R.D.DHANUKA, J.)

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Khatate
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avk