

A.F.R.

**Court No. - 75**

**Case :-** APPLICATION U/S 528 BNSS No. - 14448 of 2025

**Applicant :-** Furkan And 2 Others

**Opposite Party :-** State of U.P. and Another

**Counsel for Applicant :-** Alok Kumar Pandey, Prashant Kumar, Susheel Kumar Pandey

**Counsel for Opposite Party :-** G.A.

**Hon'ble Arun Kumar Singh Deshwal, J.**

1. Heard Sri Alok Kumar Pandey, learned counsel for the applicants and Sri Pankaj Saxena, learned A.G.A. for the State.
2. The present application has been filed to quash the charge-sheet no. 318/2020 dated 08.11.2020 and cognizance and summoning orders passed in Criminal Case No. 17364 of 2021 (State of U.P. Vs. Furkan & others) against the applicants arising out of Case Crime No. 5 of 2020 u/s 376, 495, 120-B, 504, 506 I.P.C., Police Station- Mainathar, District- Moradabad, pending before the court of learned Additional Chief Judicial Magistrate-06, Moradabad.
3. Learned counsel for the applicants has submitted that this fact is admitted by the opposite party no. 2 in her statement recorded u/s 164 Cr.P.C. that applicant no. 1 was already married and this fact was not disclosed to her. Though opposite party no. 2 has admitted that she married the applicant no. 1 after being in a relationship with him, and she has been residing in Delhi. Therefore, being a married wife, no offence u/s 494 I.P.C. is made out because under Mohammedan Law, a muslim man can get married upto 4 times, and it is further submitted that the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as the "Shariat Act") permits the muslim man to get married more than once then, even after getting a second marriage with the opposite party no. 2, no offence u/s 494 I.P.C. will be made out against him.

4. Learned counsel for the applicants has further submitted that Section 2 of the Shariat Act permits all the issues regarding marriage and divorce shall be decided as per the Shariat Act, which permits the man to get married even during the lifetime of the spouse. It is further submitted that the Shariat Act was enacted in 1937, which is a Special Act, while I.P.C. is the General Act, which was enacted in 1860. Therefore, in view of the maxim, *Generalia specialibus non derogant*, the special act will prevail over the general act.

5. In support of his contention, learned counsel for the applicants has relied upon the judgement of the Apex Court in the case of **Smt. Sarla Mudgal Vs. Union of India and others, 1995 3 SCC 635**, wherein the Apex Court has observed that freedom of religion is the basic foundation of secularism, and that was guaranteed by Articles 25 to 28 of the Constitution of India and right to profess, practice and propagation, including external overt acts of the individual, is a matter of faith and the same is guaranteed by the Constitution of India. Therefore, the issue of marriage, which belongs to the religious liberty is protected by the Constitution of India. It was further observed in that judgement that only in those cases offence u/s 494 I.P.C. would be attracted where a second marriage is void, like contracting a second marriage after conversion into Islam, he has to get his first marriage dissolved. It is further submitted by the learned counsel for the applicants that in the case of **Smt. Sarla Mudgal (supra)**, the Apex Court has also observed that the government should look into the issue to frame the Uniform Civil Code to check the abuse of religion by any person, but till date, the Uniform Civil Code has not been enacted. The Shariat Act will prevail over the I.P.C. being Special Act. It is also submitted that the Apex Court, in the case of **Lily Thomas Vs. Union of India & Ors., 2000 6 SCC 224**, has observed that the second marriage under the Mohammedan Law is not an offence if the first marriage was performed as per Mohammedan Law and in the present case, it is not in dispute that the first marriage was contracted by the

applicant no. 1, with applicant no.2, Khusnuma, as per the Mohammedan Law. Therefore, the marriage of the applicant with the opposite party no. 2 is a valid marriage.

6. Learned counsel for the applicants has further relied upon the judgement of the Division Bench of Bombay High Court in the case of **Kalim Shaikh Munaf and others Vs. The State of Maharashtra and another, Criminal Application No. 2255 of 2019**, wherein the Division Bench has relied upon Apex Court's judgement in the case of **Dr. Surajmani Stella Kujur Vs. Durga Charan Hansdah and another, (2001) 3 SCC 13** as well as judgement in the case of **A.S. Nazar and others Vs. Jissa and another, 2017 SCC Online Ker 17001**, wherein it is observed that to attract offence u/s 494 I.P.C., second marriage must be void, but in Mohammedan Law, the second marriage is not void if the first marriage is also performed as per Mohammedan Law. It is further submitted that as per the Mohammedan Law, a Muslim man can perform upto 4 marriages, and all marriages would be valid.

7. Learned counsel for the applicants has fairly submitted that polygamy in Mohammedan Law is not in the category of 'obligatory' and 'recommended' but in the category of 'allowed' and has submitted that as per the verse 4:3 of the Quran, marriage more than one - two, three or four is subject to equity in man's dealing with his wives as to expenditure, accommodation, food, clothing and kind treatment. If a man feels that he will fail to observe such equity, then he is not allowed to practice this choice. Therefore, the message of the Quran is obvious. If a man is unable to fulfil the condition of being just with all his wives, then he is not allowed to have more than one wife.

8. *Per contra*, learned A.G.A. has submitted that a second marriage performed by a Muslim man will not always be valid marriage because in case the first marriage was not performed as per the Muslim law but performed as per Special Act or Hindu Law, then second marriage would

be void and the offence u/s 494 I.P.C. would be attracted. It is also submitted by learned A.G.A. that if a non-muslim married man during the lifetime of his spouse, converted to Muslim religion and contracted the second marriage, then the second marriage would be void and offence u/s 494 I.P.C. would be attracted. He also relied upon paragraph no. 32 of **Lily Thomas (supra)**, wherein the Apex Court has observed that offence u/s 494 I.P.C. would be attracted only if the second marriage is void. Learned A.G.A. has also relied upon **Jafar Abbas Rasoolmohammad Merchant Vs. State of Gujarat, 2015 SCC Online Gujarat 5552**, wherein in paragraph no. 40, exceptions to polygamy in Mohammedan Law have also been discussed. Relying on this judgement, learned A.G.A. further submitted that a Muslim man has no unfettered power to get married more than once during the lifetime of his spouse. It is only in those cases where second marriage does not fall within the exception carved out in paragraph no. 40 of **Jafar Abbas Rasoolmohammad Merchant (supra)** that marriage would be valid.

9. Learned A.G.A. has also submitted that the issue of validity of Shariat Act is also sub-judice before the Apex Court in **Writ Petition No. 202 of 2018, Ashwini Kumar Upadhyay Vs. Union of India**.

10. As the issue is already pending before the Apex Court, the same cannot be adjudicated till the Shariat Act is declared invalid by the Apex Court, the Act would still hold good and continue to be treated as valid.

Analysis and Conclusion :-

11. After hearing learned counsel for the parties and perusal of record, the sole question that arises for determination is that even after contracting a second marriage during the lifetime of the spouse, a Muslim male will not be liable for bigamy u/s 494 I.P.C.

12. For the applicability of Section 494 I.P.C. [corresponding to Section 82(1) B.N.S.], it is necessary that at the time of second marriage, there

must be a living spouse, and second marriage is void. Section 494 I.P.C. is being quoted as under :-

### **Section 494 in The Indian Penal Code, 1860**

#### **494. Marrying again during lifetime of husband or wife.—**

*Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

*Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.*

13. From a perusal of Section 494 I.P.C., it is clear that even if a second marriage is performed or contracted during the lifetime of a living spouse but if second marriage is not void then ingredients of Section 494 I.P.C. will not be attracted. In other words, for attracting the ingredients of Section 494 I.P.C., second marriage must be void.

14. As per Section 2 of the Shariat Act, the validity of marriage among two Muslims (male and female) shall be decided as per the Shariat. Section 2 of the Shariat Act is being quoted 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. Marriage under Muslim Personal law (*nikah*) is a civil contract entered into between two persons of the opposite sexes with a view to the mutual enjoyment and legalisation of children. The Islamic concept of marriage differs from the Hindu concept, under which the marriage is not a mere civil contract but a religious sacrament (*samskara*). The design and object of marriage under Islam is not only the procreation of children but also mutual enjoyment. Celibacy and asceticism are not recognized in Islam as they lead to innumerable evil consequences. Muslim marriages can be classified into three categories, and these marriages were discussed in *Mullah's* principle of Mohammedan Law, in paras 260 to 264 :-

- (i) Sahil, i.e., a valid marriage being in conformity with all the rules, mandatory and directory, of marriage under the Muslim Law. Such a marriage creates between the parties mutual rights, duties and obligations as per Islamic law.
- (ii) Batil, i.e., a void marriage, the prohibition against which is perpetual and absolute, e.g., marriage between two persons standing in prohibited degree of relationship by consanguinity or affinity or fosterage or marriage with another man's life. Such a marriage is non est in the eye of law. It does not create any civil rights or obligations between the parties. The offspring of a void marriage is illegitimate.
- (iii) Fasid, i.e., irregular marriage which is not per se unlawful, but unlawful in its attributes, e.g., a marriage without witnesses or requisite number of witnesses, marriage with a woman undergoing iddat, marriage affected by unlawful conjunctions, marriage of a 5<sup>th</sup> wife during the subsistence of the marriage with 4 others, marriage with a non-muslim wife etc. An irregular marriage does not create mutual rights of inheritance between the husband and the wife but the children are legitimate.

16. Sri Alok Kumar Pandey, learned counsel for the applicants has submitted that in Islam, we have three degrees for permitted deeds :

(i) Obligatory

(ii) Recommended

(iii) Allowed.

He has further submitted that polygamy falls in 3<sup>rd</sup> category. Polygamy is permitted for many social reasons. However, it is by permission and not an obligation or recommendation in the Quran for a Muslim male to indulge in polygamy. The Islamic law jurist, Asaf A.A. Fyzee commented :-

*“Polygamy is only permissive in Islam. It is not the fundamental right of a Muslim to have four wives; therefore, it cannot be said that any provision of law in favour of monogamy involves a violation of Article 25 of the Constitution.” (Asaf A.A. Fyzee: Outlines of Mohammedan Law p.212).”*

17. In reference to marriage, under subject, ‘Cruelty’, Fyzee observes :

*“Muslim law permits polygamy but does not encourage it, and the Koranic injunction (Koran iv, 3) shows that in practice perfect equality of treatment on the part of the husband is, for all practical purposes, impossible of achievement. Hence, ‘Muslim law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged.’”*

18. The concept of Muslim Law is based upon the edifice of Shariat, Muslim Law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though the capacity to do justice between co-wives in law is a condition precedent. Even under Muslim Law, a plurality of marriages is not unconditionally conferred upon the husband.

SURAH NISAA :

TAFSIR IBN KATHIR :

*3. And if you fear that you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them),*

*then only one or (the captives and the servants) that your right hands possess. That is nearer to prevent you from Taulu.*

*129. You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them so as to leave the other hanging. And if you do justice, and do all that is right and have Taqwa, then Allah is Ever Oft-Forgiving, Most Merciful.*

TAFSIR AL-MIZAN

*(3) And if you fear that you can not act equitable towards orphans, then marry such (other) women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one or what your right hands possess; this is nearer that you may not deviate from the right course.*

*(129) And you have it not in your power to do justice between wives, even though you may wish (it), but be not disinclined (from one)- with total disinclination; so that you leave hear as it were in suspense: and if you effect a reconciliation and guard (against evil), then surely Allah is Forgiving. Merciful.*

19. The Quran allows polygamy for a fair reason, but the men use that provision today for a selfish purpose. Polygamy finds mention in Quran only once, and it is about conditional polygamy. There is a historical reason why the Quran allows polygamy. There was a time in history when a large number of women were widowed, and children were orphaned in primitive tribal tussles in Arabs. The Muslims suffered heavy casualties in defending the nascent Islamic community in Medina. It was under such circumstances that the Quran allowed conditional polygamy to protect orphans and their mothers from exploitation.

20. From the above-quoted verses of the Quran, it is clear that the Quran asks men first consider taking care of the orphans and only when they think they may not be able to do justice to the orphans' interests while staying in isolation, should they consider marrying their widowed mothers, on the condition that the new family would be dealt with justly on par with the existing one.

21. From the above discussion, it is clear that second marriage during the lifetime of a living spouse is permissible in Mohammedan Law, but



with certain condition. Therefore, if a Muslim man contracts a second marriage as per Muslim Law, during the lifetime of the living spouse then, his second marriage will be a valid marriage subject to the condition that the first marriage was also contracted as per the Muslim Law. The second marriage still can be declared as Batil (void marriage) under the Mohammedan Law but unless such a declaration is made, a second marriage of two Muslims (male and female) would be valid.

22. The issue of second marriage in the Mohammedan Law and prosecution u/s 494 I.P.C. in respect of second marriage was considered in the case of **Smt. Sarla Mudgal (supra)**. The Apex Court in this case was considering the question of whether a Hindu husband, married under Hindu law, by embracing the Islam, can solemnize a second marriage without dissolution of the first marriage and whether such a husband would be guilty u/s 494 I.P.C. The Hon'ble Apex Court after a detailed discussion observed that Hindu marriage solemnized under the Hindu Marriage Act can be dissolved only on the ground specified under the Act and till the time hindu marriage is dissolved as per the Hindu Marriage Act, none of the spouses can contract second marriage by converting to Islam, as the conversion into Islam itself will not dissolve the marriage performed under the Hindu Marriage Act and in such case, person contracting second marriage will be liable for prosecution u/s 494 I.P.C. Paragraph nos. 17, 18, 19, 20 and 21 of **Smt. Sarla Mudgal (supra)** are being quoted as under :-

*17. It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his*

*Hindu wife the second marriage is in violation of the provisions of the Act and as such would be nonest. Section 494 Indian Penal Code is as under:-*

*“Marrying again during lifetime of husband or wife. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

*The necessary ingredients of the Section are: (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void; (4) by reason of its taking place during the life of such husband or wife.*

*18. It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy.*

*19. The expression "void" for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the Section. On the other hand the same expression has a different purpose under Section 494, IPC and has to be given meaningful interpretation.*

*20. The expression "void" under section 494, IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494, IPC.*

*21. A Hindu marriage solemnised under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494, IPC. Any act which is in violation of mandatory provisions of law is per-se void.*

*23. The issue of second marriage under Mohammedan Law after conversion from Hindu to Muslim and prosecution u/s 494 I.P.C. in respect of second marriage was again considered by the Apex Court in the case of **Lily Thomas (supra)**. In this case, the Apex Court again reiterated the legal position that mere conversion to Islam will not bring an end to the marital ties of first marriage and despite conversion to some*

other religion, a married Hindu would be liable for prosecution for the offence of bigamy u/s 17 of Hindu Marriage Act r/w Section 494 I.P.C. It was also observed by the Apex Court that prosecution u/s 494 I.P.C. on second marriage can be avoided only when the first marriage is under the Mohammedan Law not if the first marriage was under any other personal law. Paragraph nos. 32 and 33 of **Lily Thomas (supra)** are being quoted as under :-

*32. From the above, it would be seen that mere conversion does not bring to an end the marital ties unless a decree for divorce on that ground is obtained from the court. Till a decree is passed, the marriage subsists. Any other marriage, during the subsistence of first marriage would constitute an offence under Section 494 read with Section 17 of the Hindu Marriage Act, 1955 and the person, in spite of his conversion to some other religion, would be liable to be prosecuted for the . offence of bigamy. It also follows that if the first marriage was solemnized under the Hindu Marriage Act, the 'husband' or the 'wife', by mere conversion to another religion, cannot bring to an end the marital ties already established on account of a valid marriage having been performed between them. So long as that marriage subsists, another marriage cannot be performed, not even under any other personal law, and on such marriage being performed, the person would be liable to be prosecuted for the offence under Section 494 IPC.*

*33. The position under the Mahommedan Law would be different as in spite of the first marriage, a second marriage can be contracted by the husband, subject to such religious restrictions as have been spelled out by Brother Sethi, J. in his separate judgment, with which I concur on this point also. This is the vital difference between Mahommedan Law and other personal laws. Prosecution under Section 494 in respect of a second marriage under Mahommedan Law can be avoided only if the first marriage was also under the Mahommedan Law and not if the first marriage was under any other personal law where there was a prohibition on contracting a second marriage in the life-time of the spouse.*

24. In the case of **Dr. Surajmani Stella Kujur (supra)**, the Hon'ble Apex Court again considered the issue and observed that the fact of second marriage being void is a sine qua non for the applicability of Section 494 I.P.C. as unless the second marriage is declared to be void as per the existing customs having force of law or binding effect, offence u/s

494 I.P.C. will not be attracted. In this case, the Hon'ble Apex Court was considering the second marriage of Santhal Tribe, which permits bigamy. Paragraph no. 14 of **Dr. Surajmani Stella Kujur (supra)** is being quoted as under :-

*14. Nowhere in the complaint the appellant has referred to any alleged custom having the force of law which prohibits the solemnisation of second marriage by the respondent and the consequences thereof. It may be emphasised that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage being void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non- est. The fact of second marriage being void is a sine qua non for the applicability of Section 494 IPC. It is settled position of law that for fastening the criminal liability, the prosecution or the complainant is obliged to prove the existence of all the ingredients constituting the crime which is normally and usually defined by a statute. The appellant herself appears to be not clear in her stand inasmuch as in her statement in the court recorded on 24th October, 1992 she has stated that "I am a Hindu by religion". The complaint was dismissed by the trial court holding, "there is no mention of any such custom in the complaint nor there is evidence of such custom. In the absence of pleadings and evidence reference to Book alone is not sufficient". the High Court vide the judgment impugned in this appeal held that in the absence of notification in terms of sub-section (2) of Section 2 of the Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage cannot be termed to be void either under the Act or any alleged custom having the force of law.*

25. The issue of the validity of a second marriage and attraction of Section 494 I.P.C. in respect of second marriage under the Mohammedan Law also came into consideration before the Gujarat High Court in the case of **Jafar Abbas Rasoolmohammad Merchant (supra)** wherein, Justice J.B. Pardiwala has considered several verses of the Quran and interpretation of Mohammedan law and observed that a second marriage among two Muslims (male and female) is in the permissive category subject to certain conditions. In that case, it is also observed by the Gujarat High Court that Quran forbids polygamy if the purpose of

marrying more than once is self interest or sexual desire and further observed that it is for the maulvis to ensure that Muslims may not abuse the Quran to justify polygamy for their self interest. The Court also observed that there is no law which declares second marriage under Mohammedan law as void, therefore, the same will not be punishable u/s 494 I.P.C. Paragraph nos. 61, 62 and 71 of **Jafar Abbas Rasoolmohammad Merchant (supra)** are being quoted as under :-

*61. As social conditions in this nation and throughout the world continues to change, the reality of life is, that even without a code on personal law of Muslims in so far as the marriage is concerned, polygamy is going into oblivion. Education, changing patterns of the family structure, the structure of a family in the context of reality of the world, and economic necessities are on their own precipitating a situation where monogamy is becoming the reality though the religion permits a Muslim, with such sanction of conscience to venture into polygamy. But, the code upon which polygamy rests in Islam is strict and difficult to keep.*

*62. Moreover, Quran forbids polygamy if the purpose to marry more than once is self-interest or sexual desire. It is for the maulvis and Muslim men to ensure that they do not abuse the Quran to justify the heinously patriarchal act of polygamy in self-interest.*

*71. In view of the above, so far as the offence punishable under Section 494 of the I.P.C. is concerned, I am left with no other option but to accept the submission of Mr. Joshi that his client cannot be prosecuted for the offence punishable under Section 494 of the I.P.C. To this extent, the petition will have to be allowed, and is, accordingly, allowed.*

26. Though Muslim law does not prohibit the second marriage by male during lifetime of his first marriage, but it strictly prohibits the woman to contract a second marriage during the lifetime of her husband as this marriage is Batil (void marriage) under Mohammedan law and such a woman would be liable to prosecution u/s 494 I.P.C. In India, we have five marriage laws, all of which prohibit second marriage during the subsistence of the first marriage. These laws are as follows :-

- (i) Special Marriage Act, 1954
- (ii) Foreign Marriage Act, 1969
- (iii) Christian Marriage Act, 1872

(iv) Parsi Marriage and Divorce Act, 1936

(v) Hindu Marriage Act, 1955

Therefore, if the first marriage is performed under any of the above mentioned acts, then the second marriage would be void even after conversion to any other religion.

27. The above issue also came into consideration before the Bombay High Court in the case of **Kalim Shaikh Munaf (supra)** wherein the Bombay High Court considered the issue of second marriage by a Muslim male and applicability of Section 494 I.P.C. regarding the second marriage. The Bombay High Court, after considering the judgement of Apex Court in the case of **Dr. Surajmani Stella Kujur (supra)** as well as **A.S. Nazar (supra)** has observed that a Muslim male can contract upto four marriages, therefore, a second marriage by a Muslim male is not void, therefore, prosecution u/s 494 I.P.C. cannot be initiated against such Muslim male.

28. From the above analysis, it is clear that second marriage contracted by a Muslim male is valid as per the Shariat, but in certain cases, a second marriage would be void if same is declared by the Shariat as Batil (void marriage), especially where marriage was performed or contracted within the prohibited degree of relationship, but the question arises who will declare the second marriage of Muslim male as Batil (void marriage) as per Mohammedan law. Section 2 of Shariat Act provides that all questions regarding marriage shall be decided as per the Shariat and as per Section 3 of the Shariat Act, the same can be decided by prescribed authority but State has not notified the prescribed authority u/s 4 of the Shariat Act. In the absence of any specific prescribed authority, normally such questions were decided by the maulvis, but on commencement of the Family Court Act, 1984, any question relating to validity of marriage or concerning the marriage can be decided by the Family Court in the exercise of its jurisdiction under Explanation (a) and (b) of Section 7 of the Family Court Act, irrespective of religion of parties to the marriage. The Family



Court Act, 1984 is a special act which was enacted to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of, dispute relating to marriage and family affairs. Section 20 of the Family Court Act has an overriding effect over all other law for the time being in force. Section 20 of the Family Court Act is being quoted 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.*

Therefore, being a special act, the Family Court Act will have overriding effect over all other laws, even if there is an inconsistency. Therefore, even for Section 494 I.P.C. or for other purposes, questions relating to the validity of marriage as per Section 2 of Shariat Act, Family Court can decide the issue u/s 7 of the Family Court Act. For reference, Section 7 is quoted as under :-

*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;*

*(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 circumstance arising out of a marital relationship;*

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

*(f) a suit or proceeding for maintenance;*

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

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

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

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

**29. It is also clear from the above analysis that as per the Mohammedan law, a Muslim male has no unfettered right to get second marriage unless he has the capacity to give equal treatment to all wives. Therefore, in view of the above analysis, as well as discussion, this Court holds :-**

**(i) If a Muslim male performs his first marriage as per Mohammedan law then second, third or fourth marriage will not be void, therefore, ingredients of Section 494 I.P.C. will not be attracted for the second marriage except in those cases where the second marriage was itself declared Batil (void marriage) as per Shariat by the Family Court u/s 7 of the Family Court Act or by any competent court.**

**(ii) If the first marriage by a person is performed under Special Marriage Act, 1954, Foreign Marriage Act, 1969, Christian Marriage Act, 1872, Parsi Marriage and Divorce Act, 1936 and Hindu Marriage Act, 1955, and he performs second marriage as per the Mohammedan law, after conversion to Islam then his second marriage will be void, and offence u/s 494 I.P.C. would be attracted for such marriage.**



**(iii) The Family Court has also jurisdiction u/s 7 of the Family Court Act to decide validity of a Muslim marriage performed in accordance with the Muslim Personal Law.**

**30. This Court would further like to observe that Article 25 of the Constitution of India gives religious freedom to profess, practice and propagate, which also includes external overt acts of individual as per his religious faith, but this right is subject to public order, morality and health and other provisions of Part-III of the Constitution. Therefore, religious liberty under Article 25 is not unfettered and can be regulated by the State.**

31. Though the Muslim Personal Law (Shariat) Application Act, 1937 declared that issues among Muslims mentioned in Section 2 of Act, 1937 shall be decided as per Muslim Personal Law, but Parliament has enacted the following laws in the exercise of its regulatory power for the welfare of Muslim woman :-

(i) The Dissolution of Muslim Marriage Act, 1939

(ii) The Muslim Women (Protection of Rights on Divorce) Act, 1986

(iii) The Muslim Women (Protection of Rights on Marriage) Act, 2019

32. From the perusal of several provisions of Muslim law discussed above, it is also clear that Islam permits more than one marriage only under certain circumstances and with certain conditions, but this permission is widely misused even against the mandate of Muslim law as mentioned in above quoted verses of Quran. Therefore, this Court is also of the view that the suggestion made in **Smt. Sarla Mudgal (supra)**, **Lily Thomas (supra)** and **Jafar Abbas Rasoolmohammad Merchant (supra)** regarding enactment of Uniform Civil Code in pursuance of mandate of Article 44 of the Constitution of India needs to be considered by the legislature.

33. Coming back to the controversy in hand, from the perusal of statement of opposite party no. 2, it is clear that she admitted that applicant no.1 has contracted second marriage with her and both are

Muslims, therefore, second marriage is valid, therefore offence u/s 376 I.P.C. as well as 495/120-B I.P.C. are not made out against the applicants.

34. Matter requires consideration.

35. Issue notice to opposite party no. 2 returnable at an early date.

36. List this case in the week commencing 26.05.2025.

37. Till the next date of listing, no coercive action shall be taken against the applicants in the aforesaid case.

**Order Date :- 8.5.2025**

KS