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MUSLIM LAW

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I INTRODUCTION

IN THE cases reported this year, pride of place must go to those pertaining to public wakfs. This indicates the growing importance of this branch of the law which must increase as the years go by.

There is one interesting case in tort and another affirming the undoubted right of a Muslim woman to stipulate in the marriage contract for a "delegated right of divorce" that places her in an advantageous position vis-a-vis her husband, who is not exempted from his duty to pay the deferred *mahr* to his wife on such divorce effected by her.

II WAKFS

The main legal point decided in *Abuthir* v. *Peer Mohammed*[1] was to affirm the undoubted position in our law (which is also a fundamental rule of Islamic law— *audi alteram partem)* that no decision shall be given adversely affecting a party's rights without hearing him.

In this case the question was the settling of a scheme or schemes under section 15 of the Wakf Act, 1952. The court rightly held that insofar as schemes in respect of some of the wakf properties had been framed without the affected parties being heard, the same were voidable and liable to be set aside.

In *Syed Abdul Jabbar* v. *Board of Wakfs in Karnataka*[2] there was an elaborate discussion of the law relating to notices generally and under the Wakf Act in particular. It was held that for framing scheme notice was bad.

In *K.P. Zainulabadeen* v. *Tamil Nadu Wakf Board, Madras*[3] there were proceedings under section 45(1) (b) of the Wakf Act inquiring into alleged mismanagement and administration of the wakf. The wakf board can authorise somebody to make such an enquiry and submit report to the board. This was held to be not abdication of its authority.

In *S.K. Rahimuddin* v. *S.K. Serajuddin*[4] it was held that the absence of notice to the wakf commissioner under section 70(4) of the Wakf Act rendered the decree not void but voidable and commissioner having appealed at a later stage and supported decree, the same must stand.

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1 (1992) 1 MLJ 172.
2 AIR 1992 Kant 43.
3 AIR 1992 Mad 298.
4 AIR 1992 Cal 58.

Although the fact situation in *Abdul Jaleel* v. *Aishabi*[5] incidentally concerned a wakf, this was really a case under order 1, rule 10(2) of the Code of Civil Procedure, 1908 regarding the adding of necessary parties to a suit for specific performance of contract to sell property gifted to the wakf board. In this case such parties were the wakf board and the *muthavalli* who was in charge of the wakf.

In *Karnatak Board of Wakfs* v. *Hayrath Ataullah Shah Dergah Bangalore*[6] it was held that the special rule of limitation provided in sections 3 (l), 5 (2) and 6(1) of the Wakf Act applied only to a "person interested" in the wakf as defined under section 3(1). It was further held that this definition of "person interested" would not extend to one having only a proprietary interest such as a non-Muslim whose grievance was that his land had been wrongly included in the list of wakf property published by the wakf board under section 3 (1).

III MAINTENANCE (CHILDREN)

In *Siraj Sahebji Mujawar* v. *R.S. Mujawar*[7] TD Sangla J has rightly held that under the Muslim law the obligation of the father to maintain his children, after the mother has been divorced by him, is absolute so long as he is in a position to maintain the children and the latter have no independent income. This position is in no way affected by any provision of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The respondent father was rightly it seems, ordered to pay costs to the winning party. The judge states his understanding of the agitation against the Supreme Court decision in the *Shah Bano* case[8] as being primarily directed against the court's reference to the desirability of a common civil code and the citation from a living author which the latter later repudiated.

IV TORT

Noor Mohammad v. *Mohammad Jiajddin*[9] is a very interesting case where a bridegroom and his father were held unreasonably and illegally to have refused to take home the bride lawfully married on the presumed ground of the bride's father refusing to pay for the services of a nautch girl gratuitously thrust upon him by the groom's party, though it was alleged that expenses had been incurred which were due to be reimbursed. By this conduct of the bridegroom's side, the bride had been deprived of matrimonial solace and support and had also been defamed.

The judgment is learned, citing, *inter alia*, articles 14(2) and 51 A(e) of the Constitution of India and the UN Declaration of the Rights of the Child (1959), Fyzee, Mulla, Black, Halsbury and other authorities. The propositions of Muslim law enunciated are right including the little known *Abdul Nabi* v. *Syed Ajmat Hussain*[10] that, "No religious ceremony or the intervention of any priest is

5 AIR 1992 Kant 380.
6 (1992) 2 Kar LJ 36.
7 (1992) Mah LJ 500.
8 *Mohd Ahmed Khan* v. *Shah Bano Begum*, 1985 (2) SCC 556.
9 AIR 1992 MP 244.
10 AIR 1935 Nag 123.

necessary for a valid Muslim marriage." The judge has also permitted himself to indulge in a purple passage, "A foresaken bride's pride and honour....". Such words in the judgment sound almost *fulmen brutum.* But alas, while one cannot fault him for not increasing the damages due to the bride and her father, consequent on the exigencies of legal procedure, there was nothing to prevent him from awarding handsome costs to the plaintiffs (bride and father). TN Singh J is right in holding that the claim in tort was of a hybrid type and thus not governed by the bar of limitation of one year.

V TALAQ BA TAFWIZ

In *Mangila Bibi* v. *Noor Hossain*[11] the court rightly held that under the Muslim law it is permissible for the husband unilaterally to grant to the wife the right to exercise on his behalf the power of divorce *(talaq)* vested in him and she having done so, he was bound thereby.

VI JURISDICTION

In *Amjum Hasan Siddiqui* v. *Salma B.*[12] it was held that only a magistrate duly empowered under the Muslim Women (Protection of Rights on Divorce) Act, and not the family court can entertain an application by a divorced woman.

VII MISCELLANEOUS

In *Haji Osman Haji* v. *Bai Jenam*[13] the facts were: One Haji Osman Haji claimed that his father, the late Haji Aziz (mispelt Ajiji) Taher Mohammad Chamdia had died on 17.12.1975 at Gondal and that the properties should be administered by the court and due shares be apportioned to the various heirs under the Muslim law. He further alleged that his stepmother (defendant) was wrongfully in possession of the properties. The defendant in her reply claimed that the properties had been gifted to her by her husband in his lifetime. Apparently, as appears from the judgment, she did not specify the date or dates of the gift or gifts. Faced with this situation the plaintiff pleaded in rejoinder that the gift, if made at all, was made during *marz ul maut* or death illness and was thus subject to the usual rule of 1/3 limitation that applies to *marz ul maut.* In these circumstances the court non-suited the plaintiff and this was upheld by the appeal court. It seems to this writer that the plaintiff might have responded to the written statement (alleging the gifts by the deceased to his widow) by demanding further and better particulars, *ie* the dates of the alleged gifts and demanded proofs thereof. The burden of proving the said gifts on the alleged dates thereof would then have been on the defendant stepmother. What course the case might then have taken is a matter for speculation. In any case this issue relates to burden of proof, pleadings and practice and not to Muslim law.

11 AIR 1992 Cal 92.
12 AIR 1992 All 322.
13 Vol. XXXIII (2) Guj L Rep 1112 (1992).