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MUSLIM LAW

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I INTRODUCTION

TODAY THE Muslim law in India is found in a most distorted position. It is misunderstood not only by lay men but sometimes even by law-men. However, Krishna Iyer J and some others have interpreted it in its true letter and spirit. The present survey contains some important issues on Muslim law of India relating to status and property. The significant decisions of various high courts and the Supreme Court on contemporary issues are given below with brief comments.

II *HIZANAT* AND *VILAYA*T

It is a peculiar characteristic of Islamic family that it envisages two separate and well defined concepts of *Hizanat* and *Vilayat* of minor children. While minors shall remain in the custody of their mother for certain period, the guardianship always remains with the father shouldering the responsibilities of their maintenance and upliftment. If conflict arises between the spouses who live separately regarding the custody law takes its own course irrespective of the wishes of the minor. The High Court of Bombay at Aurangabad countenanced such type of a situation when it had to adjudicate the dispute in *Sayyad Sabdarali Sy. Nyajali* v. *Shahista Begum*.[1] The issue before the court was as to whether Muslim personal law or the Guardians and Wards Act, 1890 was applicable in deciding the mater relating to the appointment of guardian of the minors The spouses namely, Shahista Begum and Sayyad Sabdarali, were at loggerheads due to incompatible temperaments. They were living separately. They had three minor children. The wife submitted an application for her appointment as guardian and claimed custody of the minor sons. Her case was that the husband worked for the whole day and neglected the minors and keeping in view their welfare the custody should be given to her. The husband resisted the contentions and asserted that he had financial resources and as such was capable of maintaining the minors whereas his wife was at the mercy of her brother and

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1 2007 (6) MhL.J 532.

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had no financial support. It was argued that Muslim personal law permits the mother for custody of minor sons till they attain the age of seven years; and thereafter it shall ordinarily be with the father if there is no likelihood of any ill-treatment of the minor. The court expounded that the welfare of the child has been the most significant criteria to be applied while considering the question of custody. The fitness of person seeking custody is one of the important aspects relating to the well being of the minor. The court found both of them as partly fit It held that mother was partly fit in the sense that she had not remarried and had natural love and affection for the children. Regarding the fitness of the father the court laid down that he also had not remarried and had financial capacity to provide better education to the children. Having decided the issue relating to fitness, the court also resolved the issue relating to the application of the tenets of the personal law and the provisions of the special enactment, that is, the Guardians and Ward Act, 1860. The court was of the view that on a true construction of the provisions of section 17 and section 25 of the Guardians and Wards Act, there could not be any doubt that while appointing or declaring a guardian of a minor, the relevant factors such as age, sex, religion, character and capacity of the proposed guardian as well as welfare of the minor are the relevant factors. Adopting a harmonious construction of the provisions of Muslim personal law and the Guardians and Words Act the Court held "the personal law of the parties and requirement of the Guardians and Wards Act must be blended appropriately so as to ensure the welfare of the minor while appointing a guardian"[2] Thus, the court decided that minor should have access to the mother though the custody should be with the father.

III RIGHT OF INHERITANCE OF A FOREIGN NATIONAL

The High Court of Allahabad In *Re: Estate Late Shri Muslim Siddiqui, Bhai Lal Shukla*.[3] had to decide an important issue relating to the right of inheritance of a Pakistani national in the property left by a deceased Indian Muslim. The deceased Muslim was a bachelor and left huge property with none to inherit in India. One Bhai Lal Shukla had claimed letters of administration of his estate on the basis of the will made in his favour by the deceased. The Administrator General of U.P. also claimed letters of administration under section 7 read with section 9 of the Administrator General Act, 1963. One Suhail Siddiqui, a nephew of the deceased who is a Pakistani national, claimed his right under the Muslim law of inheritance. The court found no substance in the claims of Bhai Lal Shukla and Adminisrator General of UP. The question which the court had to decide *inter alia*, was as to whether Suhail Siddiqui had a right to contest the proceedings. After scrutinizing the legal position of a Pakistani national to claim the right of inheritance in the property of the deceased Indian Muslim,

2 *Id.* at 535.
3 2007(1) All L J 567.

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the court found that the provisions of the Enemy Property Act, 1968 were not applicable to the inheritance of properties in India by a Pakistani national the management of which vested in the custodian of enemy property on 11.9.1965. The court also examined the applicability of section 31 of the Foreign Exchange Regulation Act, 1973 which places restriction on acquisition, holding, transfer or disposal of any immovable property. Under section 6 (5) of the said Act, a foreign national is entitled to inherit any property situated in India from a person who was a resident in India The court found no legal prohibition in acquisition of property in India by a foreign national by inheritance subject to the permission, if any, to be granted by a competent authority.

IV THE INSTITUTION OF QAZI

The *Qazi*, appointed under the Kazi Act, 1880 has limited functions to discharge, one being the performance of rites and ceremonies of marriage of Muslims. In *Qazi Habeeb Abdullah Rifai* v. *Principal Secretary to Government, Minorities Welfare Department, Govt. of A.P. and another*.[4] the petitioner and his deputy were removed from their posts by the Government of Andhra Pradesh after making enquiries against them on the charge of performing matchless marriage of an Arab Sheikh of 73 years of age with a Indian Muslim girl of 19 years old. The woman so married filed a complaint in the police station alleging harassment by her husband. The report appeared in the local dailies as well. It stirred the state government who called for a report from the A.P. Wakf Board on the subject. The government suspended the appointment of the petitioner as *Qazi.* This was followed by an enquiry by the Wakf Board of A.P. On the basis of the findings of the enquiry the government removed the petitioner from the post of *qazi* which was challenged by him. The government contended that notwithstanding the limited role played by the *Qazi*, the petitioner ought to have been careful, in ascertaining the ages of the parties, to marriage. It was alleged on behalf of the government that in the course of enquiry several such instances where the petitioner had arranged marriages between aged Arab Sheikhs and young innocent girls in the city of Hyderabad had come to light. It was also contended that the petitioner and *naibs* had provided facilities to the Sheikhs for their stay and marriage by collecting huge amounts. It was averred that no procedural irregularity had been committed while removing the petitioner.

The court framed two issues for consideration, namely, (i) the scope of powers and functions of a *Qazi,* in the context of marriage between Muslims; and (2) compliance with the procedural requirements, while terminating the appointment of the petitioner. It is interesting to note that in 1864, the Registration Act[5] was enacted to repeal all the regulations, then in force,

4 2007(4) ALT 301.
5 Act IX of 1864.

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relating to *Qazis*. However, the British government enacted the Central Kazi Act, 1880 but, the *Qazis* were totally stripped of their judicial powers.[6] The relevance of the institution of *Qazi* was confined to the celebration of marriage. Explaining the scope of the working of the *Qazi* the court asserted that "one of the important particulars to be entered by the *Qazi* in the registers maintained by him is about the marital status of the bridegroom — once a *Qazi* is satisfied that parties to the marriage have attained the age of majority, the consent of bride for the marriage is free and that the bridegroom does not have more wives than three, he has no option but to perform the rituals of marriage."[7] It was further observed by the court that the *Qazi* has no other role to play. Having enunciated the scope of the power and function of the *Qazi*, the court adjudicated that in the instant case the bride did not complain of any lapse on the part of the *Qazi*. Her only complaint was that her husband started harassing her for additional dowry after few days of marriage. The court held that petitioner or his *naib* was not expected to do anything about it. The court held that grounds on which the proceedings were initiated against the petitioners were totally unrelated to the functions of a *Qazi.* Also several procedural lapses were committed by the government as well as the enquiry officer. None of them were clear as to the allegations against the petitioner. The court, therefore, quashed the order of the government removing the petitioner from the post of *Qazi* and held the same illegal and arbitrary and violative of the principles of natural justice.

V MARRIAGE AND DIVORCE

Break down theory of divorce

In *A.M. Jagjakh* v. *Rajathi Ziaudeen and Anr*.[8] the High Court of Madras faced a piquant situation where the husband wanted a reunion with his wife after having divorced her, which she denied. The high court took cognition of the battle between the spouses which was going on for 12 years. The husband filed a petition before the trial court for dissolution of his marriage. Later on the husband filed a memo and averred that the divorce petition had been filed by mistake. It was pleaded in the memo that instead of praying for restitution of conjugal rights, he had prayed for divorce. This had happened due to lack of proper legal assistance at that time. The plaintiff husband therefore prayed that his plaint need not be acted upon and further that it be dismissed to facilitate him to file a fresh petition for restitution of conjugal rights. The respondent wife asserted that the husband had already divorced her. The trial court reached the conclusion that the petitioner husband had expressed his intention for *talaq* and decreed the suit, thereby

6 See Objects and Reasons, *Gazattee of India*, pat V 20, 27 (1880).
7 *Supra* note 4 at 302.
8 1 (2007) DMC 365.

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granting *talaq*. Aggrieved by this judgment the husband filed this appeal. On perusal of the averments of both the parties the high court found that the parties were living separately for almost 12 years which meant that there was an irretrievable breakdown of marriage and that "because of such breakdown of marriage the parties had been rendered a complete deadwood."[9] Relying on *Durga Prassanna Tnpathy* v. *Arundhati Tripathy*[10] wherein it was held that in such circumstances "a workable solution is certainly not possible" the court took notice of the letters expressing *talaq*, dismissed the appeal and confirmed decree passed by the trial court.

Validity of talaq namah (divorce deed)

The High Court of M.P. in *Abdul Wahid* v. *Smt.Raisa Bi*[12] had to decide the issue whether a woman who has been divorced through a *talaq namah* executed in writing was the wife of the deceased on the date of his death in the absence of oral pronouncement of divorce. The court held that even if there was no oral prouncement of divorce it could not be said that divorce did not take place. The court was of the view that a Muslim husband under all schools of Muslim law can divorce his wife by his unilateral action and without the intervention of the court. The court further held that "there was a clear admission in the plaint itself that there was a divorce; it could not be said that in the absence of proof of specific proclamation the divorce would not have taken place." The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be major and possess a sound mind at that time. The court took note of the legal position that no special form is necessary for effecting divorce. The court accordingly held that 'in view of the position of Muslim law it cannot be said that *talaq namah* was not sufficient to dissolve the marital relations.'

Relinquishment of mehr

A single judge bench of the Rajasthan High Court in *Hasina Bano* v. *Alam Noor*,[13] had to decide the validity of the right of the wife to relinquish her *mehr* set out in the contract of marriage. The dispute started over the payment of dower under the provisions of section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The appellant wife had demanded the payment of *mehr* from the respondent husband. The husband denied his liability to pay the same on the ground that she had relinquished her right to the *mehr* through an agreement. The trial court rejected her claim for *mehr;* and in revision the additional session judge also dismissed her claims. Aggrieved, the petitioner went to the high court. The court held that one of the essential conditions of a valid marriage under Muslim law was

9 *Id.* at 366.
10 MANU/SC/6500/2005.
11 *Supra* note 4 at 302.
12 AIR 2007 (NOC) 1108 (MP).
13 AIR 2007 Raj 49.

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the payment of *mehr*. The wife is entitled to get her *mehr* from her husband by virtue of entering into the marriage contract. Although it is an obligation upon the husband, the wife is well within her rights to relinquish the same since it is a debt. The court expressed the view that "since the concept of contract is the basis of marriage, the principle of a valid contract would be applicable to the relinquishment. Thus, the relinquishment should be made voluntarily. It should not be induced by duress, fraud, misrepresentation, undue influence, or mistake. It should be made with free consent"[14] In the instant case the court found that the wife entered into an agreement of relinquishment of her *mehr* in the presence of her family members. Therefore, it drew the inference that there was no flaw in her consent. Moreover, the wife was major and had the capacity to enter into the agreement. The court held that she would be bound by the agreement. 'Once she has relinquished her right to receive the *mehr* under a valid agreement she is prevented from claiming the same'.[15]

Like every institution of social significance the institution of *mehr* – as a constituent of *nikah* – too has undergone change and for the worse. What was supposed to be a gift (as per *Quran*) – albeit a compulsory one – has turned into a liability The spirit of *mehr* and even its true nature is in its prompt payment so as to pave the access of man towards his wife, a status she voluntarily accepts *vis a vis* the husband. The fact that one has to have the capacity to pay the prevalent quantum of *mehr* – or the amount as demanded by the woman – is evident to establish the instant nature of its payment. The scope of deferment is more an exception than the rule in order to avoid the greater inconvenience and not to make *nikah* always a cumbersome affair. However, in view of the rising evil of routine practice of deferred *mehr* coupled with the evident practice of insisting upon its relinquishment, is indicative of a clear social malpractice.

What should have made the husband to feel as a debtor and hence under some sense of guilt - if he gains the capacity to pay the *mehr* – has emerged as a shameless legal battle to prove that wife has, by some agreement relinquished the same. It is, nevertheless, correct that being a claimant under the agreement of *nikah* she can very well quit her claim to dower at any time she pleases.

However, in view of the distortion creeping into the institution of *mehr* - especially when the condition of our women in a domestic set up is less than equal – it is felt that *mehr* as a rule be made payable before the consummation of marriage and its deferment be allowed only on the *proved* ground of husband's *temporary* financial constraint and not as a routine option. Further, the moment he regains the financial position to make the payment it should be insisted upon by the wife.

14 *Id.* at 51.
15 *Id.* at 52.

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VI DIVORCED MUSLIM WOMAN'S RIGHT TO MAINTENANCE

One of the areas of family law of Muslims in which there are significant differences regarding the application of law concerns the right of divorced Muslim woman for maintenance. Her claim for maintenance has been occasioned by reinterpretation and redefinition of the applicability of the provisions of section 125 of the Criminal Procedure Code, 1973 or sections 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Some of the high courts have handed down significant judgments relating to this aspect. In *Mohd. Siddique Ali* v. *Mustt Fatema Rahid*,[16] the High Court of Gauhati had to resolve the conflict regarding the applicability of the legal schemes as contained either in Cr PC or the Muslim Women Act. The court framed certain queries to find out the true legal position in this regard. The queries included: (i) whether a Muslim woman, whose marriage had been dissolved by pronouncement of *talaq,* could make an application under section 125 of the Cr PC, seeking maintenance from her former husband; (ii) if yes, what were these conditions subject to which such a claim for maintenance could be upheld under section 125 Cr PC?; (iii) whether the court could direct a husband, who had dissolved his marriage by pronouncement of *talaq,* to pay maintenance allowance per month if he had already paid maintenance to his former wife for the period of *iddat* under the Muslim Women Act, 1986?; (iv) whether a divorced Muslim woman was entitled to make an application under section 3 of the Muslim Women Act, for direction to her former husband who had dissolved the marriage by pronouncement of *talaq* and who had also paid maintenance to her for the period of *iddat*, to make provision for her beyond the period of *iddat*, and if so, subject to what conditions, such a direction could be given?; and (v) whether the family courts had jurisdiction to try suits instituted under the Muslim Women Act? These were some of the questions before the high court in the case under comment.

It was the opinion of the court that ordinarily a divorced Muslim woman is not entitled to make or maintain an application under section 125 Cr PC for maintenance against her former husband. However, for application of this rule the factum of divorce should be proved failing which he would not be deemed to be absolved from his liability under section 125 of Cr PC. Thus, the mere pronouncement of *talaq* orally or in writing, is not sufficient to terminate the marital relations. The factum of divorce should be proved by independent witnesses and the failure of the attempts directed at reconciliation between the spouses. In the absence of proof of divorce the husband would not be absolved from liability relating to the maintenance of his wife under section 125 of the Cr PC.

16 (2007) Cr LJ 1763.

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The court also explained the scope of the limits of -fair and reasonable provision in the elaborate discussion. It was of the view that the scheme envisaged under sections 3 and 4 of the Muslim Women Act, has been designed to extend protection against destitution and vagrancy The former husband is bound to give maintenance during the period of *iddat* and he is under an obligation to make fair and reasonable provision during the period of *iddat* and for her future maintenance as it would take care of her for the rest of her life. This reasonable and fair provision may include provision for her residence, food, clothing, etc. This, in turn, shows that at the time of divorce, a Muslim husband is required to contemplate the future needs of his wife and make suitable arrangements, in advance, for meeting those needs. The court further held that "the reasonable and fair provision would mean that the former husband has to take into account the needs of his divorced wife, his own means, and the standard of life, which his wife was enjoying during the subsistence of marriage." While interpreting the scheme of section 3(i)(a) read with section 4 of the Muslim Woman Act the court noticed this judicial opinion's preponderance in the country. Defining the scope of section 4 the court opined that "it is only when he is unable to make reasonable and fair provision for the future of his wife that the obligation is cast on the relatives of the divorced woman to provide for her maintenance in terms of section 4. The court observed that it is not necessary in every case that a divorced woman has to apply under section 4, seeking maintenance from her relatives or the *waqf* board. The necessity of resorting to section 4 would arise only in such a case where the husband has not only failed to maintain her, but also is unable to make provision for her future necessities. In case where the husband is impecunious and unable to provide lumpsum amount of money, as a reasonable and fair provision, the court explored and envisaged that "he may be granted instalments by the court, should the court consider instalments necessary and in the interest of justice."

As regards the jurisdiction of the family court, the Gauhati High Court was of the opinion that Muslim Women Act is a later enactment. Therefore, the provisions of the Family Courts Act, 1984 will not override the provisions of the former Act. Exploring the scope of section 20 of the Family Courts Act the high court observed that "it has over riding effect only in respect of anything inconsistent therewith contained in any other law for the time being in force. The question of Family Court, does not arise at all." The court asserted that the Muslim Women Act contains special mechanism for protecting the right of Muslim women upon her divorce.

In another case *Dilshad Begam Ahmadkhan Pathan* v. *Ahmadkhan Hanifkhan Pathan*[17] the High Court of Bombay had to decide a similar issue i.e. the applicability of section 125 Cr PC in the case of a Muslim wife who had not been divorced by the husband in accordance with the provisions of Islamic *Shariat* as contained in the holy *Quran*. In the instant case the wife

17 2007 (TLS) 1325 320, Cr.Rev.Appl 314 of 1999 decided on 17.01.07.

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sought maintenance under section 125 Cr PC from her husband which was granted by the judicial magistrate. The husband filed an application under section 127 for the cancellation of the maintenance order on the plea that he had divorced his wife and paid the *mehr* and maintenance due under the Muslim personal law; while the wife filed an application for enhancing of maintenance allowance. The application of the husband came to be dismissed whereas that of the wife came to be allowed. The revision filed by the husband was allowed setting aside the order of maintenance passed by the judicial magistrate as the additional sessions judge did not agree with the findings of the judicial magistrate. It was held that the factum of *talaq* was proved and, therefore, the wife was not entitled to the benefit of maintenance under section 125 Cr PC and her rights were governed by the Muslim Women Act. The contentions of the husband were accepted by the judge that he had pronounced *talaq* in the presence of witnesses in a *Masjid* and this was duly proved by documents. The woman aggrieved by this judgment approached the high court.

The point of issue before the high court was as to whether the proved pronouncement of *talaq* could be sufficient for holding that the husband had given a legal *talaq* as per Muslim law. The court quoted with approval its earlier judgment in *Dagdu Chotu Pathan* v. *Rahimbi Dagdu Pathan*[18] wherein it was held:[19]

> The above discussion does indicate that mere pronouncement of *Talaq* by the husband or merely declaring his intentions or his acts of having pronounced the *talaq* is not sufficient and does not meet the requirements of law. In every such exercise of right to *talaq* the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for *talaq*. Conveying his intentions to divorce the wife are not adequate to meet the requirements of *talaq* in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as condition precedent for the husband's right to give *talaq* to his wife. It is, thus, not merely the factum of *talaq* but the conditions preceding to this stage of giving *talaq* are also required to be proved when the wife disputes the factum of *talaq* or the effectiveness of *talaq* or the legality of *talaq* before a court of law. Mere statement made in writing before the court, in any form, or in oral depositions regarding the *talaq* having been pronounced sometimes in the past is not sufficient to hold that the husband has

18 2002(3) Mh LJ 602,.
19 *Id*. at para 26.

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> divorced his wife and such a divorce is in keeping with the dictates of Islam.

The court relying on the above decision held that it was evident that the additional requirements for proving a valid divorce, i.e., appointment of arbiters, arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, have not been proved in this case. Therefore, the court quashed and set aside the order passed by the additional sessions judge and held that in the absence of proof of *talaq,* the wife is entitled to avail the scheme as contained in section 125 Cr PC.

The some high court in *Kausar bi K.Mulla* v. *State of Maharashtra*[20] reiterated that under the Muslim law there must be a reasonable cause for divorce and it might be preceded by attempts at reconciliation. Merely by taking the plea of *talaq* in the written statement it could not be said that wife would be deemed to be divorced from the date of filing of the written statement. Therefore, the wife was entitled to get maintenance under section 125 of Cr PC. Again, in *Shameem Baig* v. *Najmunnisa Begam & Ors* [21] the court upheld its earlier judgment regarding the application of section 125 Cr PC to a Muslim woman purported to be divorced. It was held that the provision of section 3 of the Muslim Women Act, was applicable only to a Muslim woman, who was married according to Muslim law, and has been divorced in accordance with Muslim law as envisaged under section 2(a) of the said Act. In the instant case, the woman was pregnant at the time of her marriage and the husband had the knowledge of this fact at the time of marriage. The court held that the husband was estopped from challenging the validity of marriage later on. It is submitted that this position is against the basic tenets of Islamic law because such type of marriage is invalid, being *fasid.* The position of law in this regard seems to be that the marriage shall not be deemed valid marriage as envisaged under section 2(a) of the Act of 1986.

Another case on the same point came from the High Court of Jharkhand at Ranchi. In *Gama Nisha and Munna Ansari* v. *Chottu Mian*[22] the court had to decide as to when and under what circumstances a former Muslim husband is exonerated from the application of section 125 Cr PC to provide maintenance to his former wife. The court followed the line of thought established by the Supreme Court in *Shameem Ara* v. *State of U.P. and Anr*.[23] It was held by the apex court therein that "under the Muslim law plea of previous divorce taken by husband in written statement in proceedings

20 AIR 200 (NOC) 419 Bom (Aurangabad Bench).
21 AIR 2007 (NOC) 2085 (Bom).
22 2007 (2) BLJR 2026.
23 AIR 2002 SC 3551.

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initiated by wife for maintenance cannot at all be treated as pronouncement of *talaq* by husband on wife on the date of filing of written statement in court. It neither stands dissolved the marriage between the parties on the date of filing the written statement nor does the liability of the husband to pay maintenance comes to an end on that day."[24] Accordingly, the high court held that "the factum of divorce was a question of fact, which had to be proved by the evidence."[25]

A similar case of maintenance was decided by the Supreme Court in the survey year in *Iqbal Bano* v. *State of U.P.*[26] This is an appeal against the order passed by a single judge of the Allahabad High Court dismissing her revision petition against the order passed by the Judicial Magistrate, Aligarh, for grant of maintenance under section 125 Cr PC. The appellant had married respondent no. 2 in the year 1959 and a child was born to them in 1966. Respondent no. 2 who was living separately from the appellant stopped coming to the house of the appellant where she was staying and also did not pay anything for her subsistence. Therefore, an application under section 125 Cr PC was filed by the appellant claiming maintenance of Rs. 500 per month. A written statement was filed by respondent no.2 wherein it was stated that long back he had divorced his wife by uttering the word "*talaq*" thrice and also paid *mehr* when the *iddat* period was over. He also stated that he had contracted a second marriage. Further, he also contended that after the enactment of the Muslim Women Act a petition under section 125 of the Cr PC was not maintainable. The magistrate rejected the plea of divorce and ordered payment of maintenance but additional sessions judge accepted the plea of the respondent and held that after the enactment of the Act, married Muslim women were not entitled to maintenance under section 125, Cr PC In a writ petition before the high court, the appellant submitted that there was no bar on Muslim women claiming maintenance in terms of section 125 Cr PC. It was also contended that the Act of 1986 applies only to divorced women and not to the Muslim married women who are not divorced. The high court dismissed the writ petition summarily and observed that the additional district and sessions judge had committed no illegality by rejecting her petition. Hence present appeal before the Supreme Court.

It may be recalled that in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[27] and *Danial Latifi* v. *Union of India*[28] the Supreme Court had held that a Muslim husband was liable to make a fair and reasonable provision for the future of his divorced wife including her maintenance. Also, as per the Muslim Women Act, under section 3(i) (a), the reasonable and fair provisions extend beyond the *iddat* period. A divorced woman who had not remarried and who was not able to maintain herself after the *iddat* period

24 *Id*. at 3552.
25 *Supra* note 22 at para 7.
26 AIR 2007 SC 245.
27 1985(2) SCC 556.
28 2001(7) SCC 746.

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could proceed as provided under section 4 of the Act against her relative and if any of her relatives were unable to pay maintenance, the magistrate might direct the state *Waqf* board established under the Act to provide for the same.

In the instant case also the court observed that the Muslim Women Act only applied to a divorced woman and not to a woman who was not divorced. The conclusions that in view of the statement in the written statement about the alleged divorce 30 years ago by utterance of the words '*talaq'*. thrice was sufficient in law was not sustainable. A mere plea taken in the written statement of *talaq* having been pronounced some time in the past could not by it self be treated as effectuating *talaq* on the date of delivery of the copy of written statement to the wife. Proceedings under section 125 Cr PC being civil in nature, even if the court was of the opinion that the woman in question was a divorced one, it was open to the court to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under section 125 Cr PC and claims made under the Act are tried by same court.

How should the expression reasonable and fair provision be construed in the light of the 1986 Act as well the scope of Cr PC 125 is yet to be finalized and, therefore, the courts have been giving varying opinions in this regard. The Act of 1986 was passed in a politically charged atmosphere and therefore carries inherent flaws, which creates problem in its interpretation.

The issue of maintenance gets invariably inter-linked with the issue of divorce. Apparently this is a fair situation because under the prevalent Muslim unilateral divorce in India a woman gets maintenance differently depending upon her marital status. If she is divorced, it is dealt with under the Muslim Women Act and rightly so. The issue gets complicated when a claim for maintenance is linked with the factum of divorce i.e. the counter claim of the husband that he had divorced, is not accepted by the court on evidentiary ground. The factum gets further complicated when the court ventures into the hitherto established Quranic injunctions regarding *talaq*.

This situation is rather simple as far as maintenance is concerned. It lands into the jurisprudential model of *talaq* in India which is not even touched by the constitutional bench of apex court constituted especially for this purpose.[29] Hence, it is submitted that the courts need not go beyond evidentiary aspect of *talaq* in order to establish the entitlement of the woman as a wife, or otherwise. It may be advisable that a jurisprudential analysis of *Quran* relating to Islamic law (In India i.e. Muslim Personal law generally) is left to a formally constituted body of Muslim scholars adequately representing leading stream of the thoughts.

So far as the substantive issues of unilateral *talaq* or triple *talaq* and other controversial problems of Indian Muslim family law are concerned, the present surveyer has already made a humble contribution which is an off quoted/referred work by scholars and judges. He has made a request to the

29 *Khatoon Nisa* v.*State of U.P. and others*, 2002 (6) SCALE 165.

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leading scholars and Muslim jurists in India that on the lines of the Dissolution of Muslim Marriages Act, 1939 these issues may be resolved on the basis of *Takhayar* (ecletic choice).[30] Rigid adherence to a particular school seems to be the barrier in the development of Muslim law in India. Thus, if a code is prepared by concerned persons/organizations and get a legislation enacted by Parliament, it would solve the problem of every stake holder.[31]

VII OTHER MATTERS RELATING TO MAINTENANCE

Nushuz

As per Islamic law a wife is not entitled to maintenance if her conduct is not chaste and she is unfaithful to her husband. The contention to this effect has been raised by the husband in *Pakku S/o Soppi* v. *Nagath Subaida D/o Abdullah*[32] before the High Court of Kerala. The petitioner husband had been directed to pay an amount of Rs.1, 90,500/- under section 3 of the Muslim Women Act to his divorced wife. He contended that an amount of Rs.1,30,000/- had already been paid by him under section 3 and produced an agreement entered into between them, the validity of which was disputed by the claimant divorcee. The high court upheld the findings of the lower courts and came to the conclusion that the said agreement had not been proved to be genuine and true as it was not proved satisfactorily. The second contention of the husband, that his wife was unchaste and unfaithful to him and as such she was not entitled to any amount under section 3 of the Act, was also not accepted by the court. The court held that no interference with quantum fixed by the courts below was justified. Thus, the decision as far as *Nashishza* is concerned, does not accord to Islamic rules of maintenance.

Application of the Act of 1986 to cases decided before its enactment and jurisdiction of Maintenance of children

The High Court of Bombay had to decide the scope of section 7 of the Muslim Women Act in *Mohammed Abdul Hai alias Farooq Pasha* v. *Saleha Khatoon and others*.[33] The application for maintenance under section 125 Cr PC was decided in favour of the divorced Muslim woman prior to the coming into force of the 1986 Act. Therefore, the provisions of section 7 of the Act, were not made applicable to the revision filed by the husband and pending before the court. Such revision petition was to be decided in accordance with the provisions of the Cr PC. Moreover, the right to maintenance of minor children of Muslim wife under section 125 Cr PC

30 For details see, Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect* (1994).

31 Such an effort has recently been done by Muslim Personal Law Board. However, it needs consensus among Muslim scholars of different views.

32 2007(TLS) 1109-650 Crl. M.C. No. 527 of 2006 decided on 3.2.07.

33 (2007) Cr LJ 1394.

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could not be taken away by the provisions of section 3(1) (b) of the Act of 1986.

Recovery of maintenance allowance

In *Mohammed Basheer* v. *P. Khadeeja*[34] the High Court of Kerala granted the prayer of the petitioner for postponement of the payment of Rs.five lakhs. The petitioner was the power of attorney holder of his father who was working abroad during the proceedings under section 3 of the Muslim Women Act. The claim against the father of the petitioner was allowed. The magistrate initiated steps for recovery of the amount by issue of *restraint* warrant. The petitioner as the power of attorney holder of his father, rushed to the high court to stay those proceedings and deposited the amount of Rs. one lakh to show his *bona fides*. The court granted the relief in part and held that the actual sale of the property belonging to the respondent (husband) alone could be postponed for a period of three months from this date.

VIII ADOPTION AMONG MUSLIMS

The division bench of the High Court of Rajasthan pronounced a path breaking judgment giving recognition to adoption of a son by a Muslim. The court did not take into consideration the established position of Muslim law relating to adoption. This position has been taken by the court in *Allaudeen* v. *Board of Revenue and others*.[35] It was a suit of partition wherein the plea of adoption had been taken. The defendant claimed his sole ownership over the property on the ground that he was the adopted son of the owner of the property. He successfully produced evidence with respect to prevailing custom of adoption in their community. Various witnesses were examined who quoted several instances of adoption of a son in the community. Adoption deed was also placed on record. The trial court held that the factum of adoption was proved. The matter went to the revenue board which found lack of legal proof of adoption among Muslims on the ground that independent witnesses like *Qazi* or *Maulvi* or respected elder persons were not examined, and, thus, remanded the case. The petitioner went to the high court against the said order. It upheld the finding of the trial court establishing the practice of adoption of a son in the Muslim community on the basis of customary law and held the order of the revenue board as not proper.

IX LAW OF GIFT

The validity of oral gift under Muslim was to be decided by the Bombay High Court in *Azzizunnisa Abdurrahman Kadri* v. *Jamila Abdul Hussein*

34 2007 (TLS) 1109113; WP(C) 7465 of 2007 decided on 14.3.07.
35 AIR 2007 (NOC) 192 (Raj).

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Shaikh and others.[36] It was held by the court that oral gift was permissible. If all the essential ingredients were fulfilled the oral gift could not fail. In the instant case the donor and donee were living together in the same property. The formal possession was not viewed necessary by the court in such a situation. The declaration of the intention of the donor and the acceptance of the same by the donee are sufficient requirement for a valid gift in such situations. The subsequent preparation of a document reflecting the fact of oral gift would not destroy it. The court also observed that it is permissible under Muslim law that a Muslim can alienate and transfer his whole movable or immovable property during his life time by way of gift. The court held that there is no bar under Muslim Law on this right of a Muslim. The court decided the case in the right sprit of the Muslim Law of gift and it shows his perfect access to the law of property in Islam.

X *WAQF* AND ITS ADMINISTRATION

The survey year 2007 shows many cases on various issues of substantive law of *waqf* as well as its various technical issues relating to administration of *waqf* properties, status of *mutawallis* and gifts etc. that come under the purview of *waqf*. Some important issues are dealt with below.

Sustainability of the *waqf*

The decision of the Supreme Court in *Chhedi Lal Misra* v. *Civil Judge, Lucknow*[37] frustrated the efforts of the *waqif* and *mutawalli* to extinct the *waqf*. A *waqf* was created by Mirza Mohammad Haider of his entire properties, including the property in question in 1926. He appointed his son, Piarey Mian, as *mutawalli* of the *waqf*. The *waqf* had been registered under section 38 of the U.P. Muslim Wakfs Act, 1936 and was also notified in the official gazette in January, 1954. The *waqf* and its properties were duly registered in the register maintained by the board of *waqf*s. Dishonesty prevailed upon the *waqif* and the sons i.e. *mutawalli* and they hatched a conspiracy to convert the *waqf* property into their personal and private property. The *waqif*, in 1958 filed a suit against the *mutawalli* for a declaration that the properties in question did not constitute a *waqf*. The board of *waqf*s was not made a party to the suit. The *waqif* and the *mutawalli* connived at and arrived at a compromise which was decreed. Thereafter, the father and son transferred that property to the appellant.

When the Shia Central Board of *waqf*s came to know of the conspiracy of extinguishing the *waqf*, it requested the deputy commissioner to issue notice to the transferee, (the appellant) and direct him to hand over the possession of the properties in dispute to the secretary of the said board. On receipt of the notice the appellant filed an appeal in the court of District

36 AIR 2007 (NOC) 2238 Bom.
37 (2007) 4 SCC 632.

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Judge, Lucknow for quashing the same. Dismissing the appeal the court held that the compromise decree affected between the *waqif* and the *mutawalli* was not binding on the court as the board had not been made a party to the suit. The appellant went to the High Court by way of writ petition and challenged the said order of the civil judge. The writ petition was also dismissed by the high court holding that since the registration of the *waqf* in the register of *waqf*s maintained by the board, its notification in the official gazette, the notification issued under section 5 of the U.P. Muslim Wakfs Act, 1936 and the entries made in the *wakf* register maintained under section 30 of the 1960 Act had not been challenged before the trial court, such questions could not be raised in the appeal preferred under section 49(4) of the Act of 1960. The petitioner aggrieved by the decision of the high court filed an appeal in the Supreme Court. The apex court did not find any reason to take a view different from that of the high court. The Supreme Court appreciated the stand of the high court stating that "in our view the law relating to the creation and continuation of the *waqf*s has been correctly explained by the learned judge in keeping with the well-established principles that once a *waqf* is created, the *waqif* stands divested of his title to the properties which after the creation of the *waqf* vests in the Almighty."[38] The apex court further observed that the creation of the *waqf* may be questioned if it is shown that the *waqif* had no intention to create a *waqf* but had done so to avoid a liability."[39]

Waqf alal aulad

The nature, extent and concept of *waqf alal Aulad* had been a matter of conflict since a longtime. In the instant case, namely, *Tamil Nadu Wakf Board* v. *Larabsh Darga Panruti*,[40] the Supreme Court had to decide the nature of the *wakf* property belonging to Larabsha Darga. The bone of contention was that being the *waqf* property *waqf alal aulad,* the *waqf* board had no jurisdiction to appoint *mutawallis* for the said *Darga*.The trial court decreed the holding that the suit *Darga* and its property belonged to a private *waqf*. Aggrieved party went to the district court in appeal against the order of the trial court. The first appellate court allowed the appeal holding that the suit *Darga* and its property was not a private *waqf*. The high court restored the judgment of the trial court holding that the property in dispute was a private *waqf*. Ultimately, the matter went to the Supreme Court through SLP. The plea of the *waqf* board that it was a public *waqf* was contested by the respondent. The information contained in the Proforma maintained by the *waqf* board helped the court to arrive at the conclusion that the property in dispute did not belong to public *waqf*. It was mentioned in the proforma that the object of the *waqf* was that it was for the support of feeding of *fakirs* and

38 *Id.* at 634.
39 *Ibid*.
40 JT 2008 (1) 123 decided on 23.11.2007.

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lighting of the tombs of Larabsha and to do *fateha.* Name of the beneficiaries had been given and as rule of succession the principle of hereditary succession was prescribed. It was further given in the said proforma that a portion of the income derived from the suit property, was to be used for pious, religious and charitable purposes and the remaining for the maintenance of the family. Taking into account the information furnished in the proforma maintained by the *waqf* board and the management and function of the *Dargah* and its property, the Supreme Court observed that the amount to the spent on pious, religious and charitable purposes was much less than that to be spent for the family, and the *mutawallis* of the *waqf* were found as hereditary *mutawallis*. Hence, the apex court decided that these incidents satisfied the character of a private *waqf* i.e. *waqf alal aulad*. The apex court found itself in agreement with the high court that the suit property was a *waqf* property and it was not a private trust property.

Alienation of *waqf* property

This is the established position of law that once a *waqf* always a*waqf*. Any person, be it *waqif* or *mutawalli* has no power to alienate the *waqf* property except with the permission of the *waqf* board and that too for the benefit of the *waqf* and better management of *waqf* property. The High Court of Andhra Pradesh in *Mohammedia Co-operative Building Society Ltd.* v. *Lakshmi Sreenivasa Co-operative Building Society Ltd. and Ors*.[41] had an opportunity to determine the legality and validity of the agreement to sell the *waqf* property. The court of first instance had decreed the suit holding that the plaintiff was entitled to the relief of specific performance by executing the sale deed on its depositing the balance of sale consideration within prescribed time. For a proper understanding, the factual back ground behind the controversy may be looked into. The suit schedule property was the property of the *Dargah* (defendant no.1). The *Mujawirs* of the *Dargah* (defendants 2-9) had proposed to alienate the suit schedule property at the specified rate. Gazette notification under rule 12(2) of the A.P. *Waqf* Rules read with section 36-A of the Waqf Act, 1954 was issued calling for objections from the public. Since no objections were received, the district collector published the same in District Gazette. In the said notifications, it was mentioned that sale shall be subject to the approval of the government. whereas the contention of the plaintiff society was that it had entered into an agreement of rate on 2.8.1982, the defendant society contended that it had addressed a letter to the *waqf* board, also a defendant in the present case, and it was requested that the suit schedule property should be alienated in its favour as it was consisting of Muslims. Thereafter, the *waqf* board addressed a letter to the Urban Land Ceiling Authority; the layout submitted was sanctioned and approved. Meanwhile, the plaintiff society filed a writ petition in the A.P. High Court but the court did not issue any interim order. The

41 2007 (3) ALD 282.

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government issued and conveyed its approval in favour of the defendant society for the consideration offered by a notification dated 4.5.1983 which remained unaltered. At this stage the plaintiff society filed a suit against the defendant society for permanent injunction, and obtained an interim order of *status quo*. From a perusal of the record, the high court found that the *waqf* board had given sanction to the *Dargah* and there was a sale agreement entered into between the plaintiff society and the *Dargah* through its legal representative, but it was subject to the approval of government. At this juncture the high court construed that for alienation of the *waqf* properties the approval of the government was imperative. The high court drew the conclusion that "if that be the case, the same principle applies to the alienation of the *waqf* properties in favour of the defendant No. 13 (society) also",[42] but there was no agreement of sale at all between the *Dargah* and the defendant society though the *Dargah* obtained government sanction to alienate the property in dispute. The question before the high court was as to whether the sanction was in conformity with the provisions of section 36-A of the Act. The high court declared the so called sanction accorded by the *wakf* board as null and void It held that the agreement of sale dated 1.8.1902 in favour of plaintiff society was genuine and legal which was made earlier to the sale transaction in favour of the defendant society. The high court dismissed the appeal and upheld the judgment of the trial court that the plaintiff society was entitled to the relief of specific performance of the sale deed.

Who can file a suit

The Kerala High Court had to decide a question relating to competency to institute a suit regarding any dispute of *waqf* property in *Muthwalli* v. *Kerala Jamath Islami Hind & Ors*.[43] The court held that any *mutawalli*, or any person interested in a *waqf* property or any person aggrieved by an order under the Act, is entitled to make an application to the *waqf* tribunal for the determination of any dispute irrespective of its registration with *waqf* board.

***Wasiyat* of the *waqf* property**

In *Aligarh Muslim University* v. *Syed Mohammad Sayeed Chishti & Ors*[44], one Hakim Saheb executed a *waqf alal aulad* in 1942 with regard to his house property. A substantial portion of the earning from the *waqf* property was for maintenance of *waqif* and his decedants. Since the *waqf* was not vague in its object and fulfilled the essential conditions of valid *waqf* under *Hanafi* law, it was registered under Wakf Act. After 16 years Hakim Saheb changed his mind and on 15.7.1966 he executed a will in favour of the appellant. Accordingly, the entire suit property was to go to the appellant after Hakim Saheb's death. The question was whether the will can change the

42 *Id.* at 283.
43 AIR 2007 (NOC) 2053 (Ker).
44 AIR 2007 (NOC) 2493 (Raj).

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nature of *waqf* though *waqf* himself had stated that subsequent *waqf* of 1966 was a result of fraud and misrepresentation. The division bench of the Rajasthan High Court held that *waqf* is an unconditional, irrevocable, perpetual dedication of property vested in God, the ownership of founder called *waqf* is extinguished. The usufruct or profit of property are used for the benefit of mankind and for purposes not forbidden by Islam. Its object should be pious, religious or charitable. Thus, Hakim Saheb could not have bequeathed the suit property through will as claimed. The claim for title over suit property on the basis of will was therefore, rejected. The court observed that the *waqf* property could not have been given by *wasiat*.

When *can a mutawalli* be appointed

The Andhra Pradesh High Court in *Syed Shah Mohammed Raju Hussaini Sani* v. *Andhra Pradesh State Wakf Board and Anr*.[45] has held that the powers conferred on the *waqf* board under section 63 of the Waqf Act 1995 to appoint *mutawalli* can be exercised only if there is a vacancy of *mutawalliship* or there has been a dispute as to the competence or eligibility of the existing *mutawalli.*

Election of mutawalli

The question of competence of the electoral college for the election of managing committee under section 10 of the Wakf Act, 1995 was raised before the High Court of A.P. in *Syed Munavvaruddin Quadri* v. *Chief Executive Officer, A.P.*[46] The court opined that the Act did not contemplate election of the managing committee by *musallis* [correct word is *muqtadi*], who perform prayer in the mosque.

***Inam* and *Atiya* – as *waqf* property**

In *Kurban* v. *Tasadduq Ahmedali & Ors*.[47] the High Court of Bombay at Aurangabad had found an opportunity to determine the status of the property given in *Inam* and/or *Atiya*. The question was whether such type of grants constitute *waqf*. A special civil suit for the recovery of money was decreed by the lower court. This money decree was put in execution seeking attachment and sale of the property of the law survey No. 329/H. The application for execution was allowed. This was challenged in the writ petition. The high court found that the property was owned by the *Jama Masjid* and as such was a religious *waqf*. It was an *Atiya* as defined in section 6 of the Atiyat Inquiries Act, 1952 (Hyderabad) which lays down that *Atiya* grants "means *Inams* to which the Hyderabad Abolition of Inams Act, 1954[48] is not applicable."[49] It was stated that the *Atiya* grants had not been liable to

45 AIR 2007 (NOC) 808 (AP).
46 AIR 2007 (NOC) 1210 (AP).
47 2007 (4) Mh LJ 486.
48 Act VIII of 1995.
49 *Id.* at s. 2(b)(ii) of the Act of 1952.

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be transferred or encumbered and that the court is not empowered to attach or sell any *Atiya* grant or any portion or share of it. The high court declined to consider the scope of the proviso to section 6 of the Act of 1952 and deemed it sufficient to say that the attachment and sale which was ordered by the trial court was illegal.

Enquiry into claims of mutawalliship

Two sons of the deceased *mutawalli* of Ashoor Khana Asthana Asghari, a registered *waqf* in Hyderabad city, were at loggerheads to become *mutawalli.* Both of them made representations to the *Waqf* Board of Andhra Pradesh. The *waqf* board passed an order appointing an enquiry officer to conduct an enquiry into the rival claims of *mutawalliship.* The petitioner, in *Mirshabbir Ali* v. *A.P. State Waqf Board & Ors*.[50] sought a writ of *mandamus* declaring the *waqf* board's orders appointing an enquiry officer as one without jurisdiction under the provisions of the Waqf Act, 1995. The High Court of Andhra Pradesh laid down that a plain reading of the provisions of section 32(2)(g) read with section 32(2)(h) of the Act of 1995 would show that adequate powers were vested in the *waqf* board in the matter of administration of the *waqf*s. The court was of the view that the enquiry was not faulted. The court further observed that "if the Enquiry Officer adopts an unfair method in conducting enquiry, it would always be open for the aggrieved party to agitate the matter before the *waqf* Board."[51]

Status of committee after expiry of its term

The High Court of Rajasthan (Jaipur bench) had to resolve the controversy relating to the supersession of a management committee of *waqf* on or after the expiry of the term for which it was constituted. This interesting question arose before the high court in *Chief Executive Officer of Rajasthan Board of Muslim Waqf & Ors.* v. *Islamuddin and Anr.*[52] The dispute surfaced in relation to *waqf* property situated at Bharatpur for the administration and management of which a *waqf* committee was appointed for a term of three years. After the term of three years had expired the chief executive officer of the Rajasthan Board of Muslim *Waqf*, passed an order that on account of expiry of the term of specified five committees, the charge of such committees be handed over to the inspector of the *waqf* board who would take charge of *waqf* properties in question and this arrangement would continue till further order. The *waqf* tribunal set aside the said order as it was passed without complying with the principles of natural justice. The high court, however, did not sustain the order of the *waqf* tribunal and it was, accordingly, set aside. The court expressed its opinion that expiry of the term of any committee by itself could not be taken to be removal or supersession of the committee. Directions were issued by the court that the

50 2007 (1) ALD 259.
51 *Id.* at 260.
52 AIR (NOC) 1504 (Raj).

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waqf board must undertake the exercise for appointment of new committees in place of the aforesaid five committees within a given period.

Justification for appointment of a committee

In *Md. Saleem-ur-Rahman* v. *A.P. State Waqf Board*[53] the Andhra Pradesh High Court held that the management and administration of the *waqf* property vested with the *mutawalli* or the committee. But the appointment of the committee could be made only where the *waqf* property had no *mutawalli* to look after it. Therefore, appointment of the committee during the subsistence of the *mutawalli* was improper.

Status of mutawalliship

The High Court of Delhi in *Mohd. Akram Ansari* v. *Chief Election Commissioner*[54] had to decide whether the post of chairman of *waqf* board was disqualification for membership of legislative assembly. The court came to the conclusion that any post filled up under the Waqf Act could not legitimately be construed as an 'office of profit'. It was held by the court that holding office of the chairman of Delhi *Waqf* Board by the respondent would not lead to his disqualification as a member of the legislative assembly of NCT of Delhi.

Alienation of *waqf* porperty

There was a mosque in Nellore and it was a public *waqf* from time immemorial. Some property had been endowed for its upkeep and performance of *khatib* and *moazzin* services in the said mosque. The question before the High Court of Andhra Pradesh in *P. Radhakrishnan and Others* v. *Andhra Pradesh Waqf Board*[55] was whether this property was *waqf* property or the personal *Inam*. The case of the *waqf* board was that the property was given to the mosque and as such was a *waqf* the income of which was used towards the remuneration of the *khatib* and *moazzin* for the services rendered by them. The persons who were rendering the services have unlawfully alienated the schedule properties to various vendees. It was the case of the *waqf* board that the vendors had no right of alienation. The case of the vendees was that the properties given to the vendors was in recognition of their services and as such the schedule property *inam* lands were not *waqf* property. They submitted that they were originally *inam* lands and after its abolition *ryotwari pattas* were issued to them. The trial court came to the conclusion that the plaint schedule properties were endowed to the mosque and, therefore, they were *waqf* properties. Since they were given so as to render services to the mosque it would not confer any ownership on the service holders. It could not be alienated. The alienation were, therefore,

53 AIR 2007 (NOC) 2342 (AP).
54 AIR 2007 (NOC) 9 (Del).
55 Suit No.504 of 1996 decided on 31.08.07, MANU/AP/0657/2007.

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not valid. On appeal, the High Court of Andhra Pradesh did not agree with the findings of the trial court and held that the schedule property was not directly dedicated to the mosque. It was granted to the *khatib* and *moazzain* for performing services at the mosque. Therefore, the schedule property was not a *waqf* but personal *inam* to the service providers.

Civil court v. *waqf* tribunal

Some of the high courts handed down differing judgments regarding the jurisdiction of the civil court after the enactment and enforcement of the Wakf Act, 1995 wherein a different adjudicatory mechanism has been envisaged. The Supreme Court has resolved these differences in *Sardar Khan* v. *Syed Najmul Hasan*.[56] The facts are interesting. A suit relating to the dispute of *waqf* was filed before the additional district judge which was dismissed. An appeal was filed by the plaintiffs before the high Court taking the plea that by virtue of section 85 of the Wakf Act, 1995 the civil court ceased to have any jurisdiction in the matter relating to *waqf*s. The single judge of the high court allowed the appeal and directed the parties to appear before the *waqf* tribunal. Aggrieved by the order of the high court the appellants approached the Supreme Court in appeal through SLP. The apex court took notice of the fact that the Wakf Act, 1995 came into force with effect from 1.1.1996. From a perusal of section 6 of the Act of 1995 the court found no ambiguity about the jurisdiction of the *waqf* tribunals and the civil could held that the intention of the legislature was that from 1.1.1996 no suit or other legal proceedings relating to the *waqf* property shall be instituted in any civil court. The court also noted section 7(5) of the Act which enunciates that "the tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of this Act or which is the subject matter of any appeal from the decree passed before such commencement in any suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."[57] The court held that it was an admitted fact that the suit was filed on 19.12.1976 i.e. much before the commencement of the Act, on 1.1.1996. Therefore, this case would not be governed by the Act of 1995[58] and the civil court would have the jurisdiction to decide the matter.

Jurisdiction of civil court qua waqf property

A suit was filed in a civil court for injunction to restrain the defendant from interference with the property. The property under dispute was declared as *waqf* property and proceedings were pending before the *waqf* tribunal

56 AIR 2007 SC 1448.
57 *Id.* at 1449.
58 *Id.* at 1450.

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prior to the filing of the suit for injunction in the civil court. It was held by the High Court of Madras in *Abdul Suban* v. *Syed Tharu Hussain*[59] that the civil court would have jurisdiction to entain the suit for injunction.

The High Court of Kerala in *T.M. Mohammad Saheb* v. *Akkal Mohammad Ibrahim*[60] asserted that the phrase "no suit will lie" used in section 85 of the Waqf Act, 1995 carried the meaning that no fresh suit can be filed and will not affect pending suits."[61]

The decision of the High Court of Karnataka did not toe the line of other courts regarding the question of jurisdiction for determination of the dispute of w*aqf* property. In *Abdus Subhan* v. *Karnataka Board of waqf*,[62] a suit relating to *waqf* property was instituted in the civil court before the enforcement of the *Waqf* Act, 1995 to determine whether the property under dispute was *waqf* property or not. The high court held that the civil court could not decide the question in view of the bar under section 85 of the Act of 1995. The court was of the view that a plaint could be returned even at argument stage for filing before the *waqf* tribunal.

The High Court of Madras arrived at a conclusion that all properties in the state shall vest with the *waqf* board and it is for the *waqf* board to decide as to how the properties should be managed and by whom. The *waqf* board has got powers to appoint or remove *mutawalli*. Therefore, the court laid down in *Janab Dr. Hisamuddin Papa Saheb and Others* v. *E. Niyamathulla and Ors*.[63] that after the introduction of *Waqf* Act, 1995 the civil court had lost its jurisdiction and it was for the board to decide about the management of its properties. It further held that any person aggrieved by the order of the board can apply to the Tribunal specially constituted under the Act.

A dispute regarding the jurisdiction of the civil court in the dispute of *waqf* property cropped up before the High Court of Punjab and Haryana in *Punjab Waqf Board* v. *Satish Kumar and ors*.[64] The plaintiff respondent filed a suit on 1.5.1999 against the *waqf* board relating to *waqf* property. Later on, a notification was issued on 25.9.2001 constituting a tribunal under the Wakf Act, 1995. An application was moved for return of the plaint for want of jurisdiction of the civil court to try and entertain the suit presented in the civil court. The trial court directed the return of the plaint for presentation before the competent court. In appeal it was argued that the plaint must not have been returned but it should have been transferred to the competent court. Accepting the appeal, it was ordered that the suit be transferred to the tribunal constituted under the Waqf Act, 1995. In revision the high court found no merit and dismissed the revision petition.

59 AIR 2007 (NOC) 817 (Mad.).
60 AIR 2007 (NOC) 1104 (Ker).
61 *IbId.*
62 AIR 2007 (NOC) 388 (Kar).
63 (2007) 2 MLJ 1069.
64 AIR 2007 P&H 141.

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In *Chintala Uday Shanker & Ors.* v. *M/s Subedar Saheb Choaltry, Trust Board and Ors.*[65] the High Court of Andhra Pradesh asserted that any suit filed prior to the Wakf Act, 1995 came into force must be in accordance with the provisions of the Wakf Act, 1954. It was further laid down by the court that any action under the Wakf Act, 1954 before its repeal shall be deemed to have been done or taken under the Waqf Act, 1995.

The High Court of Gauhati presented a comparative view regarding application of section 115 of the Code of Civil Procedure and section 83(9) of the Wakf Act, 1995. Pronouncing the judgment in *Md. Taiyab* v. *The Meghala Board of Waqf & Ors*[66] the high court asserted that a bare comparison of the provisions of section 115 CPC with that of the proviso attached to section 83(9) of the Wakf Act, 1995 would show that while the revisional powers under the CPC has restricted the authority of the high court with regard to reversing the impugned order, the provisions of the Wakf Act have unequivocally authorized the high court to examine the correctness, legality or propriety of the orders of the *waqf* tribunal and while doing so, the high court can confirm, reverse or modify the orders of the *waqf* tribunal or pass such order as it may think fit. The high court further threw light on another significant aspect and held that "after the 1999 amendment the contours of section 115 CPC have been reduced in size and in sum way the *suo moto* revisional power has now been extinguished, whereas section 83(9) of the Wakf Act still provides wide, unbridled and *suo moto* powers of revision".[67] This comparison made by the court shows that the parameters of revisional power under the Wakf Act are far greater than the powers conferred under section 115 of the CPC.

XI CONCLUSION

The judicial decisions relating to Muslim law, surveyed above, have thrown up some controversies about the theoretical framework of rights and normative structure of the precepts and practices of the Muslim personal law. The issue of adoption is one such controversy. Muslims in India, by and large, opposed the Adoption Bill, 1972 as it affected certain clear injunctions and mandatory provisions of Islamic legal system. Application of Muslim personal law is generally regulated in India by the Shariat Act, 1937. Under this Act adoption is one of those subjects in respect of which Muslims are not governed by the Sharaiat unless he makes a declaration before the prescribed authority to be governed by the same. In such a situation if a Muslim establishes a custom of adoption in his family, locality or community he may be allowed to adhere to the customary law of adoption. In a case relating to adoption, under the survey year, the court did not take

65 AIR 2007 (NOC) 697 (AP).
66 AIR 2007 (NOC) 2485 (Gau).
67 *IbId.*

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cognizance of the Islamic norms with reference to adoption and adopted literal interpretation of the Shariat Act. The court, it is submitted, deviated from the practice adopted by the courts that there is a presumption that Muslims have given a declaration regarding the application of Shraiat Act.

As regards the judgment relating to maintenance of parents, children and wife there is little controversy between Muslim law and law as contained in the Cr PC. The only exception lies in case of maintenance to be provided to the divorced or ex-wife. The impact of sections 125-127 of the Cr.P.C. on the maintenance rights of Muslim ex-wife has been the subject of scrutiny in a series of cases handed down by different high courts particularly with reference to the application of section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The courts have laid down that in case a Muslim wife has been divorced by her husband by oral pronouncement or in writing, the factum of divorce must be proved and without proof of divorce, it shall be ineffective. The woman shall be deemed as wife and shall be entitled to seek maintenance under section 125 Cr PC. This is a queer trend which keeps a broken relation intact as body without spirit for material gain. The courts have unnecessarily dragged the issue of proof of divorce while they have prayed to resolve the question of maintenance and *Mata-e-maaruf*. V.R. Krishna Iyer J avoided, and rightly so, to express any opinion about the proof of divorce when the apex court was deciding the issue of maintenance in *Fuzlumbi* v. *Khadervali*.[68] To quote Iyer J, "… Maybe, when the point *directly arises* the question will have to be considered by this court, but enough unto the day, the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."[69] The judicial trend revealed by the cases under survey is clear deviation from the line adopted by the apex court in yester years.

The opinion of the court regarding marriage registration and the institution of *Qazi* are supplementary to the traditions of Islamic jurisprudence. Pressurising the wife to relinquish her *mehr* in favour of her husband is against the policy of law and thus it should be decided very carefully The *mehr* is debt, though conserved and that must be paid in each and every circumstance. It does not require rocket science to guage the actual position of a woman - especially the Indian woman in her in-law's house where to insist upon her claim, is unthinkable. Her weak social condition generally prompts her to bargain for a better marital life instead of claiming *mehr*. Hence, it should be the settled position that any relinquishment, after the husband is established to have capacity to pay the same, should be taken as an influenced decision of the wife, and hence not a valid one. Why should she relinquish what was demanded as a precondition of *nikah*?

Explaining and interpreting the provisions of the Foreign Exchange Management Act in consonance with the Muslim personal law the court has

68 AIR 1980 SC 1730.

69 *Id.* at 1737 (emphasis added).

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held that a Pakistani can inherit the properties left by an Indian at his death. This is a noteworthy judgment which may prove helpful in resolving many conflicts relating to the legacies of Indians who have no inheritors in India.

The opinion of the court about *hizanat* conforms to the provisions of Muslim law. However, the court seems to have lost sight of the two distinct and well defined concepts of *Hizanat* and *Wilayat*. The latter always lies with the father of the child while the former always remains with the mother till the child attains the prescribed age.

As regards *waqfs* most of the cases, decided by the apex court and the high courts related to various position of the *waqf*s. In a case of alienation of *waqf* property the apex court foiled the attempt of the *waqif* (father) and the beneficiary (son) to transfer the *waqf* property and saved the *waqf* from extinction. In another case, the court observed that the *waqf* property can be alienated with the permission of the government and that too for the better management of the *waqf* property. The court reiterated that once a *waqf* is always a *waqf*. In another significant judgment the court upheld the validity of *waqf al-al aulad*. There are some rulings relating to right to file a suit in case of dispute of *waqf* property, *Wasiyat* of the *waqf* property, appointment and election of the *mutawalli* and justification for removal of the *mutawalli*. These and some other judgments in the suits of *waqf* have thrown light on the practical effects of the provisions of the Wakf Act, 1995 *vis-a-vis* the Civil Procedure Code.

This survey of the judgments shows that our courts have adhered to the traditional approach of the Muslim law except in the case of maintenance and adoption where they adopted a somewhat different approach and not in consonance with the sprit of Islamic tenets while applying and expounding the legal provisions of codified and uncodified laws.

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