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MUSLIM LAW

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I INTRODUCTION

When judicial committee of Downing Street interprets Manu and Mohammad of India and Arabia, marginal distortions are inevitable.

THIS OBSERVATION of Krishna Iyer, J is equally applicable to the judges of independent India while they interpret Muslim law. Basant, J of the Kerala High Court and some others, may indeed be exceptions who have interpreted Muslim law in its true letter and spirit both. Their judgments also form part of this survey. During this survey year there have been cases both on status as well as property law of Islam. However, most of the litigation has been on maintenance of wife and some cases have been reported on *Hizanat* (custody of minor), *Vilayat* (guardianship) and *Fasid* (irregular marriage and its after effects on children born out of this wedlock). The issues of divorce and polygamy have also come in for litigation. But the cases dealing with property law is limited only to *waqfs* and no important case is reported on the other two important aspects of property law, *viz*, gift and will. All the important decisions are discussed hereunder under various headings.

II DIVORCE

Bigamy as ground of divorce

Saidali K.H. v. *V. Saleena*[1] is a case related to divorce initiated by the wife for dissolution of her marriage under section 2(ii),(iv) and (viii)(a)(d)&(f) of Dissolution of Muslim Marriages Act, 1939. The dissolution was allowed by the family court. The husband, therefore, filed an appeal in the High Court of Kerala.

The wife had sought a decree for dissolution of marriage on different grounds under the Dissolution of Muslim Marriages Act. Without adverting to any such ground, the family court granted divorce on the sole ground that

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1 2008 (4) KLT 885.

the husband had contracted a second marriage. On appeal the question before the Kerala High Court was whether the wife was entitled to a decree of divorce for the only reason that the husband had contracted a second marriage. If the reason stated by the family court was to be accepted, a Muslim man cannot marry more than once when his first marriage subsists. The court observed:[2]

> Apart from the religious and legal aspects of marriage, there is a social aspect also under Islamic law. Islamic law gives a high social status to the women after marriage. Restrictions are placed upon the unlimited polygamy of pre Islamic times and a controlled Polygamy is allowed. Prophet Mohammed both by example and precept, encouraged the status of marriage. The prophet restrained polygamy by limiting the maximum number of contemporaneous marriages and by making absolute equity towards all, obligatory on the man. It is worthy to note that the Clause in the Qur'an which contains the permission to contract four contemporaneous - marriages is immediately followed by an injunction which puts the preceding passage to its normal and legitimate dimensions. The former passage says that a man can marry two, three or four times, but not more. The subsequent lines declare that if the man cannot deal equitably and justly with all, he shall marry only one.

The court realized that though Islam recognizes polygamy, the restrictions imposed makes it impossible. The judge quoted from the *Qur'an* which teaches as follows:[3]

> If ye fear that ye shall not be able to deal justly with the orphans marry women of your choice, two, or three or four; but if ye fear that ye shall not be able to deal justly with them, then only one or that your right hands possess. That will be more suitable to prevent you from doing injustice.

The court quoted with approval the observations of V.R. Krishna Iyer, J in *Shahulameedu* v. *Subaida Beevi*[4] made as early as in 1970:

> It follows from these passages that the Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognised the difficulty or treating two or more wives with equal

2 *Id* at 889.
3 Chapter 4 Verse 3 (*Al Nisa'a* - meaning "woman").
4 1970 KLT 4.

> justice and, in such a situation, directed that an individual should have only one wife. In short, the Koran enjoined monogamy upon Muslims and departure therefrom as an exception. That is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context). A keen perception of the new frontiers of Indian law hinted at an Article 44 of the Constitution is now necessary on the part of Parliament and the Judicature.

In this context, the court took notice of the Muslim Family Laws Ordinance, 1961 which was issued to give effect to certain recommendations of the Commission on Marriage and Family Laws and observed how the ordinance, in the true spirit of Muslim law upholds the rights of women in Islam and puts restrictions on the man to marry arbitrarily caring little about the feelings of the first wife. The court has lamented over this social evil and has rightly pointed out:[5]

> Even in the 21st century, though the practice of polygamy is allowed in the strict sense by Islam, there is no system in India to supervise or control such indiscreet marriages. *Ulema, Qazis* and clergymen in India have not given their serious thought to this social problem nor have they chosen to appeal to the government to make appropriate legislation on the subject. A legislation for setting up bodies at the central and regional levels to regulate, control and supervise the sanctity of marriage and divorce is the need of the hour.

The court after profusely citing from Islamic sources held that it was the duty of the husband to set up separate residence for his wife. At the same time, the court observed that inequitable treatment to one wife against the Quranic injunction gives rise to a tenable claim for divorce. The family court had failed to examine whether the wife was entitled to a decree for dissolution of marriage under any or all the heads for which there was sound foundation. Consequently, the family court's order under appeal in the high court was set aside by the latter and the case was remanded to the family court for fresh disposal in accordance with law. Though the judge of high court has described the evils prevalent among Muslims in India and how much their personal law has been distorted but he has rightly sent the case back to the family court to decide according to the grounds specifically

5 *Id.* at 892.

mentioned in the provisions of Dissolution of Muslim Marriages Act in order to avoid any controversy.

Validity of *Talaqnamah*

The Rajasthan High Court case of *Shahanaj Khan (Smt.)* v. *State of Rajasthan and Ors.*[6] deals with school teachers' recruitment. In this case the court had to decide whether the "*talaqnamah*" could be accepted as equivalent to or as substitute for a decree of divorce granted by the competent court, to make a woman eligible to be appointed to the post of teacher in a primary school.

The petitioner submitted that as per the Muslim law the husband can give divorce to his wife by way of *'talaq'* as envisaged under the *sharia* and, therefore, the proof of such *talaqnamah* should be treated as a conclusive proof and it was not necessary to produce a decree of divorce and the insistence of the department that even a Muslim woman should also produce decree of divorce, was arbitrary and uncalled for. The petitioner also relied on *State of Rajasthan* v. *Mst. Shamim Akhtar*[7] wherein the single judge of the high court had held that when a Muslim lady submitted an affidavit that she got *talaq* orally and failed to produce a decree of divorce, her case could not be taken out of consideration for the purpose of appointment in the category of divorced women.

After hearing both the parties and having gone through the writ petition and the reply affidavit, the court opined that when as per the personal law applicable to a candidate, divorce can be given in a particular manner, there is no reason why such type of divorce is not recognized for the purpose of employment. If such *talaq* is to be recognized in other fields, there is no reason why the same should not be treated as a valid document, provided there is a genuine *talaqnamah*, for the purpose of considering the claim of a candidate in the category of divorced woman. The court also provided a caveat that the authenticity and veracity of the *talaqnamah* must be tested before the same can be relied upon.On the ground of above, the petition was allowed by the high court with no order as to costs. The court has rightly affirmed the existing principles of law of divorce in India and also provided justice to a poor educated Muslim divorcee.

II MAINTENANCE

Cr PC v. Muslim Women Act

In *S.Taj Ali (Dr.)* v. *Shabana Ali and Anr.*[8], an application under section 125 Cr PC for maintenance of the wife and daughter was filed. The wife had been divorced and the husband had paid the amount of dower and maintenance required during *iddat* period. The trial court allowed the application under

6 RLW 2008 (3) Raj 2390.
7 RLW 1998 (1) Raj 111.
8 (2008) DMC 7680, MANU/CG/0101/2008.

section 125 Cr PC and did not uphold the fact of divorce as no efforts were made for reconciliation. The order of the trial court was challenged in the high court. The appellate court reversed the decision holding that since the parties to the suit are Muslims so they would be governed by the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The appellate court recognized the factum of divorce; it found that the illegality related to *talaq,* as determined by the trial court, was not sustainable.

In another case *Shahid Jamal Ansari S/o Irshad Ahmad Ansari* v. *The State of U.P. and Smt. Anees Fatima Wife of Shahid Jamal Ansari and D/ o Ajimulhaq Ansari*[9] the revision before the High Court of Allahabad comprised of two cardinal questions for consideration against the order of the Family Court, Gorakhpur, whereby maintenance was granted to a Muslim divorcee. One was relating to claim of maintenance by a divorced Muslim woman from her former husband under section 125 Cr PC and the second was whether interim maintenance can be granted under the proviso to section 126 Cr PC?

The brief facts were that an application under section 125 Cr PC was moved by Smt. Anees Fatima against Shahid Jamal Ansari alleging that she was the legally wedded wife of opposite party who had turned her out from his house and since she was unable to maintain herself, she should be given maintenance by the husband. In the Family Court, Gorakhpur, the respondent alleged that application under section 125 Cr PC was not legally maintainable by a divorced wife. However, one of the important sections of the 1986 Act, section 3 provides that a divorcee is entitled to a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband. While upholding the constitutional validity of the 1986 Act the Supreme Court also interpreted the Act and observed that the liability of a Muslim husband to his divorced wife arising under section 3(1) (a) of the Act to pay maintenance is not confined merely to the *iddat* period.

The court referred to various high court decisions where it was held that a divorcee was entitled to a fair and reasonable provision for her future being made by her former husband and also to maintenance being paid to her for *iddat* period. A full bench decision of the Punjab and Haryana High Court in *Kaka* v. *Hassan Bano*[10] was also referred to by the Allahabad High Court which confirmed the view taken earlier that under section 3(1)(a) of 1986 Act, a divorcee can claim maintenance beyond the *iddat* period. As far as this case is concerned, having regard to the facts and circumstances of the case, the court endorsed the decision to grant maintenance under section 126 Cr PC as in appropriate cases, such order can be passed after giving an opportunity to the other side to make his submission. On this matter the high court justified its conclusion that even if it is assumed that the revisionist had divorced his wife prior to filing the application under section 125 Cr PC

9 MANU/CG/1049/2008.
10 (1988) ZDMC 85.

he would be liable to make payment of fair provision and maintenance etc. to his wife under the provisions of the 1986 Act. The revision was consequently dismissed and the revisionist was directed to make the payment of the amount of arrear of interim maintenance within two months.

In another case *Mohammad Yaseen* v. *Smt. Jareena Bano,*[11] the court had to decide as to whether a woman who had sufficient means of livelihood could file an application under section 125 Cr PC The trial court gave relief to the woman and the same was not challenged in appeal. However, she filed another petition under section 3 of the Muslim Women Act, 1986, claiming that her rights arising out of divorce which was allowed by the trial court was set aside by the revisional court. After 10 months of the finality of the revisional court's order, the divorcee again filed an application under section 125 Cr PC for grant of maintenance beyond the period of *iddat* after she had already been granted on 31.10.02 maintenance during the *iddat* period. The court held that it did not find any reasonable cause for filing of petition under section 125 Cr PC and asserted that she could have obtained the relief under section 125 Cr PC had she challenged the earlier order of 31.10.2002 for getting maintenance beyond the *iddat* period.[12]

Aboobacker C.K. v. *Rahiyanath and Anr.*[13] is another interesting case dealing with Muslim divorcees' right to maintenance. In this case the couple lived happily for about 16 years. However, they had no issue. After 16 years of such harmonious matrimony, the husband sought the permission to remarry. She reckoned this as betrayal in terms of emotions, sentiments, trust, faith and property and thus did not give consent to such marriage. The divorce was effected ultimately by unilateral pronouncement of *talaq* on the sole ground that the wife did not agree for the second marriage for her husband. The husband, thereafter married another school teacher. No payment was made under the Act of 1986, nor any maintenance was paid after divorce. The wife persued her claim under section 3 of the Muslim Women Act, 1986 and the magistrate directed the husband to pay an amount of Rs.50,000/- as the amount which the husband was liable to return to the wife along with an amount of Rs.2,70,000/- as fair and reasonable provision and maintenance (*mata*). The revision was laid before the sessions court which set aside the direction to pay the amount of Rs.50,000/-; but confirmed the direction to pay an amount of Rs. 2,70,000/- as fair and reasonable provisions and maintenance (*mata*). The husband went to the high court under section 482 of the Cr PC to invoke its extraordinary inherent jurisdiction contending that quantum of *mata* is excessive and the wife having remarried was not entitled for anything more than maintenance for the period from divorce till remarriage. Basant J of the Kerala High Court while delivering the judgment raised, *inter alia,* the issue of whether the rights of a divorced

11 RLW 2009 (1) Raj 128.
12 *Ibid.*
13 2008 (3) KLT 482.

Muslim woman under section 3 of the Act of 1986 are larger and supplemental to the rights under section 125 Cr PC?

The court held that the rights under section 3 are larger than the rights under section 125 Cr PC. The court held this by tracing the history of Muslim law in India relating to maintenance of wife. With regard to the special rights of Muslim wife which she acquires on her divorce, the judge illuminatingly elucidated the Islamic jurisprudence explaining *mata* and its computation. He observed:[14]

> Islam in its humanism appears to have stipulated in Ayat 241 of Sura II that the divorced husband has a duty to pay Mata on a reasonable scale to his divorced wife. Whether Mata be – gift, provision or maintenance, it is imperative that Mata must be reasonable. What is reasonable has to be decided with reference to the era and the society in which such divorced husband and wife exist as also the factual situation of a given case...Reasonableness of the amount payable as Mata cannot be decided in a vacuum. Nor can it be decided on the basis of the norms and morals that were available in medieval Arabia. The elastic expression "reasonable scale" in *Ayat* 241 which is seen repeated in Section 3 by the stipulation that the payment (Mata) has to be reasonable brings with it the obligation to be reasonable in the era and in the context of the society in which one exists.. If that be so, the payment has to be reasonable and to the reasonable it cannot be a pittance. It has to an amount – Though not mathematical equivalent atleast a reasonable substitute for right to maintenance. That is the rock bottom of the amount payable under Section 3.

Thus, the court made it clear that it could never be contended that the divorced wife under section 3 cannot claim anything in excess of what she could have claimed if section 125 were applicable to her.

The court laid down the critical factors to be considered while assessing *mata bi al maroof:* the nature and duration of matrimonial life, its prospects, reason of dissolution, willingness or otherwise of the woman, emotional suffering and material interest in the matrimony. Further, the second marriage by itself cannot legally deny relief to the ex wife under section 3 of the Act. However, it is always relevant to keep in mind that the quality of life under second marriage is generally inferior and has to be factored in.[15]

14 *Id.* at 485.

15 It is notable that the judge's opinion is in conformity with the view of Maulana Ashraf Ali Thanvi about the plight of divorcees who could be deemed as an architect of the Dissolution of Muslim Marriages Act, 1939. [See Abdul Majid Daryabadi, *Hakimul Ummat*, 212 (1942)].

So far as the method of quantification of amount under section 3 is concerned, the court was not satisfied with the earlier assessment and held that the fair and reasonable provision fixed under section 3(1)(a) of the Act deserves to be modified. The court further took note of the fact that this was not a case where the multiplier multiplicant method has to be adopted. The subsequent incident of re-marriage, could be ignored altogether in the facts and circumstances of this case.

Jumana Bai v. *Mushtaq Ali*[16] is again a case relating to maintenance of wife. The issue before the high court was whether a Muslim woman under section 125 of the Cr PC is entitled to maintenance. The court observed that the judge of the revisional court was not right in his notion that a Muslim woman could not file an application under section 125 of the Cr PC for maintenance. The high court relied on *Iqbal Bano* v. *State of U.P. and Anr.*[17] wherein the apex court had held thus:[18]

> The view expressed by the First Revisional Court that no Muslim woman can maintain a petition under Section 125, Cr.PC is clearly unsustainable. The Muslim Women (Protection of Rights on Divorce) Act, 1986 only applies to divorced women and not to a woman who is not divorced. Furthermore, proceedings under Section 125, Cr.PC are civil in nature. Even if the Court noticed that there was a divorced Muslim who had made an application under Section 125, Cr.PC, it was open to the Court to treat the same as a petition under the 1986 Act considering the beneficial nature of the legislation, especially since proceedings under Section 125, Cr.PC and claims made under the Muslim Women Act are tried by the same Court.

Judgment of the revisional court was set aside and that of the trial court was restored by the high court and maintenance was reaffirmed.

In *Firdaus Bano* v. *Mohammad Ashraf*[19] the facts were that *nikah* of the petitioner was solemnized with the respondent and a son was born to them. The petitioner and son applied for maintenance under section 125 of the Cr PC with the allegations that she was harassed and tortured by the respondent and his family members for dowry while she was pregnant and she was left by them in her parental home. Further, the petitioner contended that she was not able to maintain herself whereas the respondent was employed in railways and was drawing a salary of Rs. 10,000/- per month. She, therefore, prayed for maintenance of Rs. 3,000/- p.m. for herself and Rs. 2,000/- p.m. for her son. The respondent in his reply denied the allegations and stated that he had

16 2008 (5) MPHT 425.
17 AIR 2007 SC 245.
18 *Ibid*.
19 2008 (2) MPHT 111 (CG).

already divorced the petitioner through *talaq- e-hasan* and she ceased to be his married wife, therefore, her application under section 125 of the Code was not maintainable.

The trial court (additional chief judicial magistrate) allowed the petition and awarded maintenance to the petitioner and her son with a finding that the respondent had failed to prove that he had divorced the petitioner in accordance with Muslim law. It held that the petitioner was a legally married wife of the respondent, she was residing separately for valid reasons and was not able to maintain herself and her son. The revisional sessions court allowed the revision and set aside the order of the trial court relating to maintenance as divorce had been effected. The revisional court further held that in view of the provisions of the Muslim Women Act, the petition under section 125 of the Code was not maintainable. However, the revisional court confirmed the order of the trial court granting maintenance of Rs. 1,000/- p.m. to the son with an observation that the maintenance amount should be paid from the date of passing of the order by the trial court.

On a petition under section 482 of Cr PC by the wife for quashing the revisional session court order, the high court had to face the question as to whether the respondent had been able to prove by leading evidence that he had validly divorced the petitioner. If yes, whether application for maintenance under section 125 of the Code by a divorced Muslim woman was maintainable in view of the Act of 1986?

The high court discussed the various forms of *talaq* as described by many celebrated authors and referred to many decided cases on the issue. The court also paid heed to the beneficial construction of the statute and referred to constitutional authorities. The court observed that in the instant case, the three *talaqnamahs* sent by the husband to his wife were in English and the wife was not conversant with English. The signature in the *talaqnamahs* did not tally with each other and the husband had not explained the reasons for the same. It was further observed that the witnesses of *talaqnamah* had not been examined by the husband, that there was no evidence that the declarations of *talaq* were made in the successive menstruation period and that they did not have a husband and wife relationship in this period.

As per the opinion of the high court, the additional sessions judge, ignored the glaring discrepancy in the stand of the husband and had held that he had legally divorced the wife in accordance with Muslim law. Thus, the petition of the wife was allowed by the high court and the order passed by the additional chief judicial magistrate was restored. It may be submitted that to intersperse the issue of *talaq* with maintenance may not be in the spirit of the beneficial legislation.

The case of *Musarat Jahan and Anr.* v. *State of Bihar and Anr.*[20] is also related to maintenance of wife and her minor daughter. The wife in his case filed an application under section 125 of Cr PC against husband, for payment

20 AIR 2008 Pat 69.

of maintenance of Rs. 3000/- to her and her minor daughter. It was stated that she did not have means to maintain herself and her minor child while the husband was a well off person. The wife stated that the marriage was still subsisting and as such she was entitled to maintenance for herself and her minor child. The husband stated that he had divorced the wife and as such she was not entitled to any maintenance beyond the *iddat* period. He had further stated that she was only entitled to *mahr* and maintenance up to *iddat* period and not beyond that.

The main issues involved in this case were (i) whether the divorce was to be conclusively accepted from the date of filing written statement/show cause by husband wherein claim of divorce has been made; (ii) whether under the Muslim Women (Protection of Rights on Divorce) Act, 1986 a divorced woman, was entitled to maintenance only till the *iddat* period (three months and ten days) from her husband.

The principal judge of family court held that both wife and daughter were entitled to maintenance and the daughter was entitled to maintenance till the time she attains her majority and the wife was entitled to maintenance only from the date of filing of the petition to the date of filing of show-cause filed by the husband wherein he claimed that he had already divorced his wife.

The high court opined that it would appear from section 3(a) of 1986 Act that it does not restrict the payment for maintenance only till the *iddat* period; it rather mandates that fair provision and maintenance (*mata*) is to be made for her within the *iddat* period so that the same may take care of her till she remarries or is able to maintain herself. This decision is not in conformity with the law applied in India.

Maintenance of Illegitimate Child

Chand Patel v. *Bismillah Begum and Anr.*[21] deals with fasid (irregular) marriage under the Muslim law and maintenance of children born out of this marriage. The question to be decided was whether the law of maintenance under section 125 of Cr PC could be extended to the illegitimate child born out of an irregular marriage. The court held that section 125 of the Code was applicable to all persons belonging to all religions and had no relationship to the personal law of the parties. The personal law of the Muslims in no way stood against Muslims to claim maintenance. The petitioner was liable to maintain the wife and children till the marriage between them was declared null and void by a competent court. Thus, the magistrate committed no illegality or irregularity while granting maintenance to the respondents.

The apex court went on to discuss the facets of prohibited marriages in Muslim law, namely, *fasid* (irregular) and *batil* (void) marriages referring to books on Islamic law. It made a clear distinction between *fasid* and *batil* marriages as under:[22]

21 AIR 2008 SC 1915.
22 *Id.* at 1920.

(i) a marriage which is not valid may be either void or irregular;
(ii) a void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguity, affinity, or fosterage is void, the prohibition against marriage with such a woman being perpetual and absolute;
(iii) irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses.

Thus, the court held the following marriages as irregular, namely - (a) a marriage contracted without witness; (b) a marriage with a fifth wife by a person having four wives; (c) a marriage with a woman undergoing *iddat*; (d) a marriage prohibited by reason of difference of religion; (e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried.[23]

The reason laid down as to why the aforesaid marriages are irregular, and not void, is that in the first case the irregularity arises from an accidental circumstance; in the second case the objection may be removed by the man divorcing one of his four wives; in the third case the impediment ceases on the expiration of the period of *iddat*; in the fourth case the objection may be removed by the wife becoming a convert to the Islam, Christian or Jewish religion, or the husband adopting the Islamic faith; and in the last case, the objection may be removed by the man divorcing the wife who constitutes the obstacle. Thus, if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

The court also dealt with the effects of a void marriage and held that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The off springs of a void marriage are illegitimate. Citing from *Baillie* the court clarified that if consummation has taken place then, (i) the wife is entitled to *dower*, proper or specified, whichever is less; (ii) she is bound to observe the *iddat*, but the duration of the *iddat* both on divorce and death is three menstrual courses; and (iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife.[24]

Altamas Kabir, J held that the bar of unlawful conjunction (*jama bain-al-mahramain*) rendered a marriage irregular and not void. Consequently, under the *Hanafi*, law as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance

23 *Ibid.*
24 *Id.* at 1921.

under the provisions of section 125 of the Cr P C. [25]

Thus, the court did not find any reason to interfere with the order passed by the Karnataka High Court and the appellant was ordered to pay to the respondents all the arrears of maintenance, within a period of six months from the date of this judgment. The judge has, of course, cleared the misunderstanding as regards the various kinds of Muslim marriages, particularly the difference between *batil* and *fasid* and the status of children born out of these marriages.

Maintenance of minor child born after divorce

In *Md. Rizban Alam @ Bablu @ Md. Rijwan* v. *State of Bihar and Anr*[26] the main issues which the court had to resolve were (i) whether a divorced Muslim woman can prefer an application under section 125 of Cr PC for maintenance of her minor child? (ii) Whether the child of a divorced Muslim woman is entitled to maintenance only for two years and that too under the provisions of the Muslim Women Act, 1986 and not under section 125 of Cr PC?

The court observed that clause (b) of section 3 (1) refers to grant of maintenance to a divorced woman, on her own behalf, and for maintaining the child for a period of two years and living with her. Presumably it is aimed at providing some extra amount to the mother for her nourishment, for nursing the infant up to age of two years. Thus, section 3(1) (b) of the Act has nothing to do with the independent right of a child of a divorced Muslim woman to claim maintenance under section 125 of Cr PC. The court observed that "the obligation of a father to maintain his minor children who are living separately or with their divorced mother is being universally recognized by persons belonging to all religions as an aspect of basic human rights, gender and social justice."[27]

Apart from the issue of maintenance, the case also involved the question of legitimacy of the child. The husband's contention was that the wife remained in her *sasural* (in-laws house) only for some time and usually had not been living with him, and therefore, the child was not his. Rejecting the contention as superficial the trial court held that the wife gave a birth to the child at her *naihar* (parental house) much within 280 days of leaving her husband. The reasoning was based on section 112 of the Indian Evidence Act, 1872 which deals with the presumption of legitimacy of a child. The court observed:[28]

> [I]f a child is born during the continuance of valid marriage and within 280 days after dissolution and the mother remaining

25 *Ibid.*
26 MANU/BH/0076/2008.
27 *Ibid*.
28 *Ibid.*

unmarried, it shall be conclusive proof that he is the legitimate son of that person.

The petitioner was, accordingly, directed to pay interim maintenance of Rs.300/- per month to child. The decision of the court is of course within the ambit of Islamic law irrespective of the fact that it was decided under Cr PC.

Remedy in default of payment of maintenance

In *Mohd. Hasib* v. *Rubina*[29] the divorced wife filed a complaint against her husband under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 before the Judicial Magistrate, Bhopal. She was granted Rs. 25,786/- towards *mahr* amount, Rs. 6,000/- as maintenance for *iddat* period and Rs. 3,00,000/- for reasonable and fair provisions, and maintenance etc. The court also directed the husband to return all the items given at the time and during subsistence of marriage. However, the husband did not comply with these orders and the wife moved an application for execution of the order for payment of maintenance. The appellant was sentenced to one year imprisonment. The crucial question before the high court was whether the husband was liable to serve further imprisonment for the default if the amount due was not paid or recovered in the execution proceedings? The court made a distinction between a mode of enforcing recovery and sentencing a person to jail. Sentencing a person to jail is a mode of enforcement; it is not a mode of satisfaction of the liability. The liability can be satisfied only after making actual payment of amount to the wife.

Thus, the petition was partly allowed and the high court directed the trial magistrate, Bhopal to proceed according to law in the light of its observation and execute its earlier order. However, the respondent was not allowed to approach the court praying that the petitioner be sent to jail again under section 3 (4) of the Act in default of payment.

III LEGITIMACY VERSUS LEGITIMATION

In *H. Anwar Basha* v. *The Registrar, General (Incharge), Madras High Court and the Principal District Judge*[30] the issue was related to the legitimacy of those off springs who were born before *nikah* of the parties. In this case, legitimacy of the petitioner was questioned as he had obtained appointment on compassionate ground after demise of his putative father before the performance of *nikah* of his parents. The Muslim law does not prescribe any mode to make the child legitimate, who is born before the marriage of the parents. The court did not consider the status of the

29 2009 (1) MPHT 58.
30 MANU/TN/0855/2008.

dependant of the deceased who has been given appointment on compassionate ground. It kept the issue of acknowledgement and presumption of the fact of marriage at bay and decided the issue of appointment solely on the basis that the dependent of the deceased has taken care of the family of the government employee who died in harness. The court did not apply the issue of legitimacy and accordingly restored the appointment.

IV VILAYAT AND HIZANAT

Conflicts between vilayat and hizanat (guardianship and custody of child)

In *Atowar Ali and Anr.* v. *Mustt. Jaitun Nessa Bibi*[31] the issue was mother's right to custody of her child *vis-a-vis* the guardianship of father. In this case, a complaint was made to the chief judicial magistrate alleging that appellant quarrelled with the complainant/respondent and drove her out of her matrimonial home along with her minor child and dropped them at the residence of her elder brother and since then, she had been residing there. Later on, he along with his cousin came to the residence of her brother and forcibly took away the baby from her custody. She along with her elder brother and others went to the house of her husband to bring her minor child, but she was not allowed to do so. She therefore, alleged that the child was under wrongful custody of the appellant and his cousin and they were guilty of offences under section 365/343/50634 IPC.

The court, however, held that no case of commission of any offence under the above mentioned sections could be said to have been made out against the two accused inasmuch as both father and mother are natural guardians of the said child and taking away of the child by his father, who was a guardian, did not amount to an offence of wrongful confinement.

Aggrieved by this order, the complainant filed a revision. The sessions judge directed the father to produce the child in the court. Meanwhile, a petition under section 482 of the Code was filed in the high court by the father seeking to set aside and quash the orders whereby directions for production of the child and also for issuance of search warrant were passed by the sessions judge.

The high court, reversing the findings of the lower court, and dismissing the petition held that it is an incorrect proposition of law that a father would never be held liable for offence of wrongful confinement. The court observed that in the present case, the father did not produce the child in the court, on one pretext or another. When a direction given by a court is according to law, such a direction cannot be evaded by resorting to one excuse or the other. In fact, at the time of hearing of this criminal petition, it was not agitated before the court that the petitioner had any legal or justifiable cause for not producing the child in the court and hence, the sessions judge was competent to enforce the order of production of the child

31 2008 IV GLT 659.

by giving appropriate direction(s) to the police to ensure production of the child in the court. The point at issue related to Muslim law was also taken into consideration by the court and the observation made by the Privy Council in *Imambandi* Case[32] was quoted in this regard which runs thus:

> It is perfectly clear that under the Mohammedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant.

The high court then observed that the right of a mother to have custody of her child though continues even if she is divorced by the father of the child. Such right to have the custody would cease only if she marries again, and in that case the custody of the child would belong to the father. Since the child was, admittedly, two years old, though male, the personal law of the parties concerned made the mother entitled to take such a child into her custody if the child had been forcibly removed from her custody even by his father. Thus, the court at the same time affirmed the peculiar right to *hizanat* as well as the principle of natural justice to deprived woman.

The case of *Mohammad Maaz and Mohammad Moin both minors, both sons of Mohammad Maroof Advocate through their Mother Smt. Wakeela Bano wife of Mohammad Maroof Advocate* v. *State of U.P. through its Senior Superintendent of Police, Station House Officer and Mohammad Maroof, Advocate S/o Shri Mohammad Tahir*[33] also pertains to mother's right to custody of her minor child. In this case, through a *habeas corpus* petition, the mother sought custody of her two minor children, who were boys aged about 4 1/2 and 2 1/2 years, from her husband. The children were living with the father for the last more than a year and were said to be doing well. The sister and mother of the husband were looking after the children with great care and affection; the mother was unemployed. Along with the plea of irreplaceable love and affection of the mother, the petitioner emphasized upon the Muslim law providing the right of *hizanat* to the mother - boys up to 7 years and girls up to the age of puberty.

But the court, insightfully, observed that the paramount consideration to decide custody is the welfare of children, and the court had to see where the welfare of minor lies. In view of the overall circumstances in the family, the court observed that it would be in the interest of the children, if they were allowed to remain with their father, where they were living for more than a

32 *Imambandi* v. *Mustaddi*, (1918) 45 IAS 73.
33 2008 (2) AWC 1881.

year and had become accustomed to the atmosphere. If the father, however, remarries the mother would have a right to ask the court to reconsider the question of custody. It further opined that the mother must be given a chance to meet her children and for that purpose, the father would take them every week to the mother's house for five hours in the day. In case of non-compliance, the mother would have a right to ask the court to reconsider the question of *hizanat*. With these observations, the petition was dismissed.

It is submitted that the right of the mother to have her minor children in her exclusive custody to provide them real love and affection is guaranteed under Muslim law and no one can interfere in this right except in extraordinary circumstances where the mother is incompetent to give her love and affection.

Guardianship and hizanat of a minor wife

In *Mohd. Nihal* v. *State*[34], the husband, sought the custody of his wife by means of a *habeas corpus* petition. He asserted that he was 22 years of age and married her in consonance with Muslim law, at Delhi. The age of his wife was the cause of the dispute in this case. One of the witnesses to this marriage was his co-brother who, according to Nihal, had acted as her guardian (*wali*).

The court clarified that under Muslim law the marriage of a girl who has not attained puberty is nevertheless legitimate provided it has the consent of her guardian (w*ali)*. In such cases, however, the wife has the option to repudiate the marriage when she reaches puberty. From the very outset it was the contention of the petitioner that the brother-in-law of his wife was not only a witness to the marriage but also had acted as her guardian (*wali*). The court found no evidence or material, whatsoever, reflecting the presence or consent of the father of the wife to her marriage. The age given before *qazi* was 22 years for the husband and 19 for the wife. However, it was established that these statements were not correct and the wife was much younger than 19 years. On the contrary, it found uncertain whether she was even 15 years of age or had actually reached puberty on the date of her marriage. It observed that as regards the factum of her *wali,* having consented to the marriage, it must be noted that this important function cannot be fulfilled by a brother-in-law. In fact, to all schools of Islamic law the father, and in his absence the paternal grandfather, brother, uncle and granduncle or the mother, must perform the rights, duties and obligations of a *wali*. In no case, during the lifetime of the father is any relative competent to function as the w*ali*.

Medical tests conducted could not conclusively prove whether she was 15 years of age at the time of her marriage. However, it unequivocally indicated that she was not 19 years of age and that the petitioner had

34 MANU/DE/0980/2008.

submitted a false affidavit pertaining to her age. The court held that she had not attained puberty and reiterated that these events should have been proved by the petitioner, as it was he who asserted them. Thus, the petitioner failed to establish that she had obtained puberty at the time of marriage and reached the age of 15 years. Since her father was alive, only he was competent to act as her *wali* for the purposes of her marriage as, prima *facie,* she was a minor at that time. Therefore, the court declared the purported marriage as *batil* or void *ab initio.*

As regards her custody, the court held that since a valid marriage was not performed between the petitioner and his wife he had no right to claim her custody. In this regard, the court emphasized the views of the division bench in *Shama Beg* v. *Khawaja Mohiuddin Ahmed.*[35] The court, however, inquired from her whether she wished to reside with her husband. She replied that while she would like to meet the petitioner, she desired to reside with her mother. The petition was, accordingly, dismissed by the high court and the wife was left free to decide her own future as by that time she had attained majority, entitling her to exercise the option of puberty (*Khyaral-bulugh*) under Islamic law. Thus, the court decided under the spirit of s*hria*.

In *Israt Jahan Tabassum* v. *Union of India (UOI) and Ors.*[36] the petitioner had filed a *habeas corpus* petition against her ex-husband, praying for the production of their minor daughter, and, thereafter, for restoring the custody to her. The daughter was born at Dhaka and she was about six years old. The father had converted to Islam and that they had got married under Muslim law. The husband had pleaded that the admission of their daughter in a school was with the consent of the mother, thereby indicating that her custody was shared equally between the two parents.

The court declined to accept the mother's allegation that she was tricked into signing the document seeking admission and her Indian passport had been made under false pretences. The court observed on the aspect of the custody of a female child and said that where there is no friction between parents the question of who should have the custody of children is wholly superfluous. Custody becomes relevant only where a dispute arises between the parents; even in such cases, they may jointly agree that their children should receive education in a residential school. It found that *prima facie*, admission had been done with the consent of both parties, leading to the inference that both parties had shared custody of the daughter. This arrangement did not violate Muslim law. Therefore, the court held that issuance of a writ of *habeas corpus* would not be an appropriate course of action. It directed that the father would make necessary arrangements to meet the expenses of the mother if she was desirous of accompanying the child to the school. Failure to do so would mean that the she was motivated by selfish reasons rather than the welfare of daughter.

35 ILR (1972) 2 Del 73.
36 MANU/DE/0396/2008.

The court thus, rightly avoided the controversy between guardianship and custody since the constructive custody of the mother already existed in this case.

VI WAQF AND WAQF ADMINISTRATION

Nature of waqf property

In *Karnataka State Board of Wakfs represented by its Chief Executive Officer and Dargah Syed Sultan Shah Saheb Arab (Sunni), A wakf registered under the Wakf Act represented by its Muttuwalli Syed Shikshahwalli S/o Syed Abdul Khadarsab* v. *The Land Tribunal represented by its Chairman and Neelamma W/o Nagalingappa*[37] the land in dispute had been duly notified as *waqf* property in terms of the Wakf Act, 1954. The second respondent claiming as the wife of one Nagalingappa filed an application and claimed that in terms of an agreement, she be conferred occupancy rights. The claim was contested by the first petitioner and it was primarily contended that the land could not have been leased out by the *mutawalli*, in violation of the Wakf Act, 1954, which prohibited the lease of Wakf property, for any term exceeding three years, without prior permission or sanction of the Karnataka State Wakf Board and that the transaction, in any event, would not bind the petitioners. The tribunal granted occupancy rights and hence the petition was filed in the high court. The tribunal found that the name of Nagalingappa was shown as the cultivator in the revenue records on the appointed date and, therefore, held that he was entitled to the grant of occupancy rights. The questions carved out by the high court were:

(i) Whether the provisions of the Karnataka Certain Inams Abolitions Act, 1977 can be made applicable to the properties which have been declared as "wakf properties"?
(ii) Whether the provision of the Karnataka Certain Inams Abolitions Act, 1977 is inconsistent with the personal law of Mohammedans relating to *waqf*?
(iii) Whether provisions of the Karnataka Certain Inams Abolitions Act, 1977 are in violation of the fundamental rights guaranteed to religious denominations under Articles 25 and 26 of the Constitution of India?

The high court observed that there was no dispute that the land in question was a *waqf* property, duly notified under the Wakf Act, 1954. Further, the claimant was in occupation and in cultivation of the same, claiming as an occupant under section 5 of the Karnataka Certain Inams Abolitions Act, 1977, on the appointed date under the Act. While answering the above questions the court opined that the provisions of the Karnataka Certain Inams

37 2008 (3) Kar LJ 641.

Abolitions Act,1977 being inconsistent with the personal law of Mohammedans relating to *waqfs* is not relevant for the purposes of this case. It further observed that as the possibility of a lease in respect of *waqf* property is contemplated even under the Wakf Act,1995, the attraction of the provisions of the Karnataka Certain Inams Abolitions Act, 1977 cannot be questioned as being in violation of the fundamental rights guaranteed to religious denominations under articles 25 and 26 of the Constitution of India. Accordingly, the writ petition was allowed and the order was quashed,

Extent of powers of tribunal under Act of 1995

In *H.P. Wakf Board through its Estate Officer* v. *Shri Maulana Mumtaz Ahmad Quasmi*[38] the appeal was filed by the Wakf Board of Himachal Pradesh against the *imam* of the *masjid* against the order of the Tribunal, H.P., Wakf Board (District Judge), Shimla. In the petition before the tribunal, the Wakf Board sought relief of recovery of possession of *waqf* property held by the *imam* of the *masjid*; restraining the *imam* to run the *madarsa* in the *masjid* and guest house attached. The defendant took the plea that the Wakf Act, 1995 did not cover this dispute, therefore, the tribunal did not have any jurisdiction to decide this petition. The tribunal accepted this plea. The applicant came before the high court challenging tribunal's order.

The question for consideration before the high court was whether the dispute in issue could be said to be a dispute arising under the Act, determinable by the tribunal. The court observed that the Wakf Act, 1995 was enacted to provide for the better administration of *waqfs* and for matters connected therewith or incidental thereto. The court referred to the statement of objects and reasons of the Wakf Act and section 3 (r) which defines the *waqf* and observed that the Wakf Act was enacted to provide better administration of *waqfs*. The wakf board can sanction any transfer of immovable property of a *waqf* by way of lease in accordance with the provisions of the Act. The court observed:[39]

> The petition is to prevent the misuse and also recovery of the Wakf property. Admittedly property in question is a Wakf property and, therefore, the administration of the same has to be a disputed under the Act. The Board is enjoined with a duty to protect and preserve the Wakf property and also take action against the erring officials. The Tribunal having all powers of civil court can determine all rival contentions. Any interpretation to the contrary would render the provisions of the Act, empowering the Board to protect and preserve the property to be superfluous and redundant. The Act specifically ousts the jurisdiction of the civil court in respect of any dispute, question or other matters relating to Wakf or Wakf property. Thus,

38 2008 (2) Shimla LC 207.
39 *Ibid.*

> no other interpretation can be given to the expression 'any dispute' under 'the Act'. The dispute for protection and preservation of the property is certainly a dispute falling under the Act.

As per the high court's view, the order passed by the tribunal was unsustainable in law. The court observed that the recovery of possession and use and occupation charges definitely constitute a dispute relating to the *waqf* under the Act. However, merely removal of an *imam* inducted into the *waqf* property, would not be treated as a dispute against a third person having nothing to do with the *waqf*. The court thus allowed the appeal and set aside the order. In this case, the court rightly emphasized that the administration of the *waqf* property is an issue to be decided under the Wakf Act.

Whether the Wakf Act 1995 has retrospective effect?

In *T. Kaliamurthi and Another* v. *Five Gori Thaikkal Wakf and Others*[40] the *Waqf*/respondents filed two suits for recovery of possession of the suit properties and for *mesne* profits. They claimed that the suit properties belonged to them. The appellants denied the said allegation and submitted that the suit properties belonged to one Syed Kasim and certain others and that their heirs and legal representatives had sold the suit properties to the appellants. Appellants further alleged that the suits were barred by limitation under article 134-B of the Limitation Act, 1908 and that they had perfected their title by adverse possession.

The trial court held that the suit properties were *waqf* properties. However, as the suits were barred by limitation and the appellants had perfected the title by adverse possession, it dismissed the suits. The first appellate court confirmed the finding of the trial court that the suit properties were *waqf* properties. But on the question of limitation and adverse possession, it held that the suits were not time-barred and that the appellant-defendants had failed to prove their perfection of title by adverse possession. Accordingly, it decreed the suit.

During the pendency of the appeals before the high court, the Wakf Act, 1995 came into force w.e.f. 1.1.1996. While confirming the concurrent finding of the two courts below that the suit properties were *waqf* properties, the high court held that in view of section 107 of the Wakf Act, the bar of limitation no longer existed and also held that in view of section 112 of the Wakf Act, such provision also applied to the pending proceedings. Accordingly, it dismissed the appeals. The appellant/ defendants then filed the appeals by special leave to the Supreme Court.

Allowing the appeals the Supreme Court held that the first appellate court was not justified in holding that the suits were filed within the period of limitation as prescribed under section 96 of the Limitation Act, 1963 and the

40 (2008) 9 SCC 306.

view taken by the trial court was the correct one and article 134-B of the Limitation Act, 1908 would apply. The Supreme Court observed that section 107 of the Wakf Act, 1995 virtually repealed the Limitation Act, 1963 insofar as the *waqf* properties are concerned. Thus, presently, there is no bar of limitation for recovery of possession of any immovable property comprised in a *wakf* or any interest therein. There is no specific provision which stipulates that section 107 has any retrospective effect. The High Court has proceeded on the assumption that a reading of section 112 of the Act leads to the conclusion that the provisions of the Act are intended to apply to pending proceedings also. It is not possible to accept that section 112 shows that the Act had a retrospective effect. Section 112 (2) of the Act is a saving clause and saves the actions already done or taken under the repealed enactment. This cannot lead to the conclusion that the Act has been given a retrospective effect. Rather, this saving clause in the absence of any specific provision providing retrospective effect to the Act, reinforces the suggestion that the Act has no retrospective effect. Section 112 is in conformity with section 6 of the General Clauses Act, 1897. Thus, under operation of the repealed enactment or the legal proceedings or remedies instituted, continued or enforced, etc. are saved. Therefore, the reasoning of the high court was entirely mistaken.

For this conclusion the Supreme Court relied on *Ram Murti* v. *Puran Singh,*[41] where it was observed that for the application of section 107, on 1-1-1996 the property must be comprised in the *waqf* or the *waqf* must have some interest in such properties. If, however, the right to property stands extinguished, then section 107 cannot apply. Thus, when the right stood extinguished, as has happened in the impugned case, section 107 cannot have the effect of reviving the extinguished right/claim. Further, the court observed that it is true that there is a difference between extinguishing a right and barring a remedy. However, in the present case, once it is held that the suits for possession of the suit properties filed at the instance of the *waqf* were barred under the Limitation Act, 1908, the necessary corollary would be to hold that the right of the *waqf* to the suit properties stood extinguished in view of section 27 of the Limitation Act, 1963 and, therefore, when section 107 came into force, it could not revive the extinguished rights. It is submitted that the decision is not in the interest of *waqf* properties which is the ultimate object of the Wakf Act, 1995.

Is office of mutawalli an office of profit

In *Mohd. Akram Ansari* v. *Chief Election Officer and Others*[42] the seminal question of law involved in this case whether the office of chairperson or members of the *wakf* board is an office of profit so as to disqualify a person from being elected as a member of the Legislative

41 AIR 1963 Pat 393.
42 (2008) 2 SCC 95.

Assembly of NCT of Delhi. The facts were that Haroon Yusuf was declared elected as member of Delhi Legislative Assembly when he was also the chairman of Delhi Wakf Board.

The Supreme Court pointed out that the Wakf Act, 1995 was amended by the Wakf (Delhi Amendment) Act, 2006[43] by inserting section 31-A in the Act, which laid down that the offices of the chairperson or members of the board constituted for Union Territory of Delhi shall not be disqualified and shall be deemed never to have been disqualified for being chosen as, or for being, a member of the Legislative Assembly of the National Capital Territory of Delhi.[44]

The court further clarified that though the amendment did not specifically state that it was retrospective, the use of the words *"and shall be deemed never to have been disqualified"* in section 31-A made it clear that it was retrospective. The court opined that such observation had been approved and followed by it in a catena of cases and it referred to *Bhavnagar University v. Palitana Sugar Mill (P) Ltd*[45]. and *Raja Shatrunji* v. *Mohd. Azmat Azim Khan*[46]. Dismissing the appeal, the Supreme Court held that if the elected candidate was disqualified in the year 2003, he had to be deemed not to have been disqualified in view of section 31-A which was inserted in the year 2006.

Waqf by users

In *Faqruddin (Dead) through L.Rs.* v. *Tajuddin (Dead) through L.Rs,*[47] the facts of the case were that one Hazrat Ziauddin Sahib was a great s*ufi* (saint). He and Gulam Rasool Sahib belonged to *sunni* sect of Islam. For his spiritual attainments, 7 *bighas* of land at Moti Katla, Jaipur was given to him by the then ruler of the State of Jaipur for the purpose of maintenance of a garden. He, however, also acquired some land out of his own funds. Indisputably, on the said land, there are prayer rooms, *dargah, mosque,* garden, graveyard, shops, houses, lodge, etc. On the demise of Hazrat Ziauddin Sahib, his *mazar* (tomb) was treated as a sacred place and attained the status of a *dargah*. Gulam Rasul Sahib, son of his sister, was the first s*ajjadanashin* and *mutawalli* of the *dargah*. And then, Sayed Immauddin Sahib succeeded to the said office followed by Syed Mohiuddin Sahib. Syed Mohiuddin Sahib was convicted by a criminal court and therefore, the s*ajjadagi* was handed over to Kamaluddin, the younger brother of Mohiuddin as he was considered fit for holding the said post. Kamaluddin died and nominated Amminuddin, his eldest son as s*ajjadanashin* and Faqruddin, another son as *mutawalli* by a will.

43 Delhi Act 3 of 2006.
44 *Id.* at 97.
45 (2003) 2 SCC 111.
46 AIR 1971 SC 1474.
47 (2008) 8 SCC 12.

Moinuddin, son of Mohiuddin (the convicted s*ajjadanashin*), filed a suit against Kamaluddin claiming inheritance in the year 1939. He also filed a suit against Aminuddin claiming election to the post of *sajjadanashin* by Muslim public. Both the suits were dismissed. Appeals preferred thereagainst were also dismissed. During pendency of the said proceedings, Aminuddin died and in his place Tajuddin was substituted. In the said suit, *waqf* in question was held to be *waqf al aulad*. Tajuddin filed another suit, for a declaration that he was the rightful *sajjadanashin* of the *dargah* in question. A prayer was made for removal of Faqruddin, from the office of *mutawalli*.

The trial court held that the purported election was not valid and the plaintiff was not entitled to be *sajjadanashin* as the land is question was a private land. The appeal preferred there against was dismissed and the said proceeding attained finality. On the death of Syed Saidduddin Sahib, who became *sajjadanashin* on the demise of Aminuddin, Faqruddin became *sajjadanashin* (heir to the shrine) according to custom. He continued to hold the office of *mutawalli* also. A notification was issued under section 5 of the Wakf Act, 1954 declaring the properties to be *waqf* properties.

Another round of litigation started in the year 1974 where the board of revenue observed:[48]

> ...The only son of Aminuddin named Tajuddin is alive and he has somehow (sic) been deprived of the office of *Sajjadanashin* so far, but as indicated above, the Board if not concerned with the appointment of the *Sajjadanashin* for Dargah Mirza Zaiuddin which is civil matter....

It was further observed:[49]

> In exercise of the powers conferred by Section 10(d) of the Rajasthan Jagir Decisions and Proceedings (Validation) Act, 1955, we, therefore, sanction succession of the last holder Kamaluddin son of Immamuddin in the name of this eldest real grandson namely Tajuddin son of Aminuddin in respect of 7 bighas 'Kham' State grant given for the maintenance of a garden by former Jaipur State Patta dated Shrawan Budi 4, Samwat 1856 whose Khasra numbers have since been delineated in the Judgment of Deewani of former Jaipur State dated 19/2/1938 and confirmed by the Full Council of State Jaipur under Rule 13 of the Jaipur Matmi Rules 1945.

Relying on the said entry, the respondent filed a fresh suit. According to him, he, having been declared to be the *matmidar* became the holder of land. As a holder of land, he became the *mutawalli* and *sajjadanashin* and,

48 *Id.* at 19.
49 *Ibid.*

thus, entitled to possess the same exclusively. The trial court held that it was proved that Faqruddin was the *mutawalli* and *sajjadanashin* of dargah since long. A first appeal against the said decision was preferred. Meanwhile Faqruddin died, and his legal representatives were substituted in his place. He also died issueless. One Abdul Rashid was substituted in place of deceased claiming his right on the basis of an alleged will. The other respondents were also added as parties as they claimed their rights under another will. Dismissing the said appeal, the appellate court observed that the genuineness of the said wills was not the subject matter of the dispute. The claim made on the basis of the order of the board of revenue was not upheld. However, a single judge of the high court allowed the second appeal, and then Faqruddin (through his LRS) filed the appeal before the Supreme Court by special leave.

The apex court observed that *sajjadanashin* is a spiritual office while *mutawalli* is a manager of secular properties. Both of them are connected with a *dargah* or a *waqf*. The law of inheritance amongst the Mohammedans is governed by their personal laws. If the properties are *waqf* properties, the offices of *sajjadanashin* and *mutawalli* are to be filled up in accordance with the law or the custom. If the properties are heritable, those who are the 'quranic heirs' would be entitled to hold the said posts. Indisputably, the law of primogeniture has no application amongst the Mohammedans vis-'-vis their law of inheritance.

The Supreme Court also interpreted that '*waqf*' as taking something out of one's ownership and passing it on to God's ownership dedicating its usufruct- without regard to indigence or affluence, perpetually and with the intention of obtaining divine pleasure - for persons and individuals, or for institutions or mosques or graveyards, or for other charitable purposes. According to the apex court it is beyond any doubt or dispute that a *mutawalli* is the temporal head. He is the manager of the property. Office of *sajjadanashin*, however, is a spiritual office.[50] It has to be held by a wise person. He must be fit for holding the office.

The court observed that inheritance or succession to a property is governed by statutory law. Inheritance of an office may not be governed by law of inheritance; but, the office of *sajjadnashin* is not an ordinary office. A person must possess the requisite qualifications to hold the said office. The Supreme Court held that the impugned judgment could not be sustained and it was set aside accordingly. The appeal was allowed.

It is worth mentioning that regarding the nature of *waqf,* status and qualifications of its office bearers, the apex court has rightly pointed out the necessary conditions for protection and effective functions of the institution of *waqf*.

50 *Supra* note 47 at 27.

Application of the Wakf Act, 1995

In *Gandhi Ashram Anta Ghar* v. *Kr. Abdul Wasi Khan and Ors.*[51] the plaintiffs (the present respondent) filed a suit for ejectment of present applicant and for declaration that the suit property is *waqf alal aulad* (family *waqf*) and plaintiffs were *mutawalli*. Kr. Wasi Khan was the then *mutawalli* of this *waqf*. An application under Order VII Rule 11 of the CPC was filed that since the property is *waqf* property, the suit is barred in view of the provisions of Section 85 of the Wakf Act and the plaint is liable to be rejected. The trial court rejected the application. Aggrieved by the order passed by the trial court, present applicant approached the Allahabad High Court arguing that the application had wrongly and illegally been rejected. The issue raised by the appellant was that the suit property was *waqf-alal-aulad* and there was no allegation that it was dedicated solely for pious, religious or charitable purpose and therefore, would not be covered under the definition of *waqf* under section 3(r) of the Wakf Act, 1995. The high court considered the arguments advanced by the parties and perused the record. It also reproduced section 3(r) of the Wakf Act which defines the "*waqf"* which also covered *waqf-alal-aulad* under the Act provided the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable. As regards the issue of bar of civil court jurisdiction, the court observed:[52]

> Section 85 of the Wakf Act creates bar of jurisdiction of civil court in respect of any disputed question and other matter relating to Wakf property or other matter which is liable to be determined by the Tribunal appointed under Section 83 of the Wakf Act. There can be no dispute about the fact that mischief of Section 85 of the Act only come into play in respect of wakf or wakf property and unless it is wakf covered under the definition as contained in the Act and the provisions of Section 85 would not apply. The only allegation as contained in para 1 of the plaint is that property is Wakf Alal Aulad. There is absolutely no detail with respect to property being dedicated for any purpose pious, religious or charitable so as to include the *wakf-ala-aulad* in the definition of wakf.

Keeping in view the above facts and law, the application under order VII rule II CPC moved by the applicant was rejected. Thus, the revision failed and was dismissed.

VII CONCLUSION

The above discussion reveals that the interpretation of Muslim law in India - both codified and uncodified is still vague as it has been deliberately

51 MANU/UP/0053/2008.
52 *Ibid.*

interpreted under the shadow of common law or on the lines of legislation of other personal laws. The reason behind this is that, barring few exceptions, most of the lawyers and judges do not rely upon even an elementary book of Muslim law written in Urdu, usually translated from Arabic texts leave alone the original texts in Arabic. The text of the *Quran*, *Hadith* and other original sources of Islamic law are available in English language even then the decisions hardly go beyond Mulla and Fyzee's books, except by judges like Basant, Sinha JJ., *et al.*

The survey year covered the issues including maintenance of wife and children involving conflict of Cr PC and Muslim Women (Right to Divorce) Act, 1986. The judges should adhere to the Muslim Women Act, alone, in case of Muslim divorcee inspite of the fact that some demerits may be found in its drafting as suggested by the constitution bench of the Supreme Court in *Danial Latifi* case. A proper scrutiny needs to be done in every case to ensure that divorce should not become a patriarchal tool to harass innocent wives and a means of escape. However, in this survey Basant J of the Kerala High Court rightfully dealt with the case on divorce separately where bigamy is treated as a ground of divorce for the wife. He, indeed, interpreted the provisions of the Dissolution of Muslim Marriages Act, 1939 following the true spirit of *Sharia* while delivering the judgment on the issue of wife's right to divorce. He profusely quoted from *Quran* and *hadith* and other treatises of Islamic law and came to the conclusion that bigamy is a ground for the Muslim wife to obtain the divorce from her husband. Basant, Bahrul Islam and Krishna Iyer, JJ will always be remembered in the Indian history of Muslim law for their interpretation of law. Basant, J opined that Muslim Women Act is more beneficial to Muslim women than Cr PC. He determined the true nature of polygamy and divorce in Islam. He also referred to Family Ordinance, 1961 of Pakistan which has resolved all the complicated problems and it is submitted that the ordinance of Pakistan can also be applied in India.

The guardianship issue is important but at the same time custody of minor child (*hizanat*) is also an integral part of Islamic law. However, the custody may either be tacit or actual. The courts should, therefore, decide both *vilayat* and *hizanat* harmoniously as they have done in various cases. In the survey year the issue of legitimacy and legitimation that is peculiar from Islamic legal point, is also raised in a case where the court impliedly recognized legitimation. The court decided that the justification of employment of son of deceased was on compassionate ground and, therefore, it is immaterial whether the son was legitimate or illegitimate. Of course, the court does justice in specific circumstances with berieved family. However, it may be submitted that no legitimation is permissible in Islam.

Similarly, Altamas Kabir, J poignantly pointed out the distinction between *fasid* (irregular) marriage and *batil* (void) marriage, and maintenance of children born out of such wedlock. There is remarkable difference between *batil* and *fasid* marriages as the former is void *ab initio*

and has no effect at all while latter become regular when its irregularity is over. The judge corrected the lower court which was entirely unaware of the kinds of marriages in Islam, particularly the difference between the two forms of marriages, namely, *batil* and *fasid* along with their consequences.

Most of the cases on property law are relating to *waqf* and its administration. In a case, Sinha J insightfully, observed that if a *mutawalli* is also a s*ajjadanashin*, he should have the knowledge of Persian and Arabic so that he can rightly perform the spiritual function of *dargah* alongwith its management. The Wakf Act, 1995 should be given a retrospective effect, otherwise the purpose of legislation to protect the *waqf* properties in India cannot be achieved. The rule of office of profit cannot in any case be made applicable on m*utawalli* of *waqf* as a *mutawalli* performs his religious duties and, therefore, the court has rightly observed that office of *mutawalli* could not be covered under office of the profit.

Finally, it is submitted that it is high time to codify the Muslim law in India especially the controversial issues on the principle of eclectic choice (*takhayar*) on the lines of Dissolution of Muslim Marriages Act, 1939, and also taking into account the legislations of Muslim countries. This surveyor has repeatedly argued the same.[53] Strict adherence to a particular school of law does not meet the contemporary problems of Muslims in India and, therefore, inter-school divergence is the need of the hour in consultation with Islamic scholars of India.[54] It would remove the confusions galore and improve upon Muslim law in India giving a more definite trajectory for the judiciary to interpret it on different lines.

53 See for details Furqan Ahmad, "Muslim Law" XLIII *ASIL* 599 (2007) Also see, *An Analytical Study of Triple Talaq* (1995), chapter on *takhyer* (eclectic choice).