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MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

SOME OF the provisions of Muslim personal law have acquired overtones of controversy amongst people of different shades of ideology. A small group of people puts it as unsuitable to the ever-changing socio-economic conditions and thus it is perceived as an archaic law. This situation has emerged due to sheer ignorance of some people, misunderstanding of many, and prejudicial attitude of few of them. Overly-emotional Muslims, the communal forces, non-religious ultra-secularists and few politicians have contributed a great deal to this maligned approach towards Muslim personal law. To some extent, the judiciary too has not lagged behind in following their predecessor British judges or relying on writers like Mulla and others, who have hardly referred to even an elementary fundamental book on Islamic law in Urdu, leave alone Arabic. At the same time, our ill-educated *maulavis* have also played their role in distorting Muslim law in India as they lack in-depth knowledge to interpret the Holy *Quran* and other leading books of Islamic jurisprudence. Such a situation calls for all Islamic scholars and intellectuals to come forward and dispel the misgivings prevailing amongst the literates, and the not so literates.

The present survey is an attempt to analyse various decisions relating to the formation and interpretation of the rules of Islamic jurisprudence decided by the apex court as well as the High Courts both on status as well as property. The major issues covered under the law of status comprise of marriage, dissolution of marriage and maintenance, amongst others. Similarly, the law of property covers gift, inheritance and *waqf* administration. The Supreme Court has handed down a decision on 'gift' and various High Courts have decided cases relating to property, women protection, inheritance, *waqf*, marriage, divorce and maintenance. In this survey, the law relating to status has been dealt with in sections II to IV and the law relating to property has been dealt with in section V to VII.

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II *NIKAH* (MARRIAGE)

Presumptive marriage

The High Court of Delhi in *Shamsuddin* v. *State*[1] was invited to address the question of validity of marriage in the absence of any oral or documentary evidence. In this case, a petition seeking a writ of *habeas corpus* was filed by the petitioner for the production of his daughter, Gulshan, alleged to be illegally detained by one Bhura. Gulshan was located and produced in the court through the respondent state. Earlier, Gulshan categorically had stated before the metropolitan magistrate that she had left her house about five months ago, on her own volition, with one Bhura and got married in the court. But she failed to produce evidence indicating the court marriage. However, she lived with Bhura as wife along with the parents of Bhura in a village in district Bulandshahar, U.P.. Thereafter, they moved back to Delhi and lived as husband and wife, in a rented accommodation. The case of the petitioner was that his daughter was married and had not attained the age of 15 years but the girl stated that she was 20 years of age. An ossification test could not be performed because the girl was in the family way. The girl's father was claiming the custody over the girl while she herself had categorically and clearly indicated her preference to reside with her husband and not return to her parental home. The court held that, in view of the fact that the parties were *sunni* Muslims and governed by the *hanafi* law, any person, who had attained the age of puberty, was entitled to contract marriage. In the instant case, no *nikahnama* was produced before the court nor was any other documentary evidence adduced to indicate that Gulshan and Bhura had entered into a *nikah*. However, Gulshan asserted that she had been married and that a *nikah* had been performed between them. The court approvingly observed, that under Muslim law, the mere fact that a couple cohabits for a length of time as a husband and wife also raises the presumption of marriage. In any event, normally it is for the either party to the marriage to assert or deny the *factum* of marriage. The court was of the view that in the present case neither party to the marriage had denied the *factum* of the marriage. Resolving the controversy as to the age of puberty of the girl, the court held that, "it is now abundantly clear that she has attained the age of puberty in as much as she is now in the family way."[2] The court allowed Gulshan to reside with her parents-in-law till the time her husband was released from custody and thereafter it was left to her to reside wherever she wanted.

As far as validity of Muslim marriage is concerned, there is no formal requirement to tie up the parties in a holy relationship provided they have joined this relationship in one sitting and with a free consent. This was observed by Mahmood, J. in his famous judgment on the nature of a valid

1 MANU/DE/2189/2009.
2 *Ibid.*

Muslim marriage in *Abdul Kadir* v. *Salima*.[3] However, the proof of a valid *nikah* is necessary to legitimise the sexual relationship between the spouses. The essentials of valid (*sahih)* marriage are *ijab*, *qubul*, *mahr* and two witnesses. In this regard, it is respectfully submitted that under the Islamic law, there is no doctrine of presumption of marriage as such.

III DISSOLUTION OF MUSLIM MARRIAGES

Requirement of decree of civil court

Smt. Khatiza Qubra alias Tara Bano v. *Iabal Mohd.*[4] deals with the right of *khayar ul bulugh* conferred on a minor girl given in marriage by her father or her guardian. The questions raised in this case were: (i) In a situation where the option of puberty was exercised by a lady by her conduct and the same was admitted by the opposite party, was it necessary to obtain a decree for dissolution of marriage from a competent court? (ii) In the facts and circumstances of the present case, was the suit for restitution of conjugal rights maintainable? (iii) When the plaintiff himself had admitted that the appellant had entered into a second marriage, was the decree for restitution of conjugal rights justified? and (iv) Could the decree of restitution of conjugal rights be executed when both the parties had remarried?

The relevant facts of the case deserve to be mentioned in a nutshell. The plaintiff-husband, Iqbal Mohd., filed a suit for restitution of conjugal rights in the trial court with the averment that his marriage took place with the appellant wife, Smt. Khatiza Tul Qubra, on 14.4.1984, according to *Sharia,* at Bhilwara. She was a minor at the time of marriage and was contracted into marriage by her father with the plaintiff. Upon attaining majority, she did not join the matrimonial home of the plaintiff. Therefore, the plaintiff filed the present suit. The defendant-wife filed written statement to the suit denying the *factum* of marriage and submitted that she was only 7 years of age at the time of alleged marriage on 14.4.1984 and even if her father contracted her into marriage at the age of 7 years, she had repudiated the said marriage upon attaining the age of puberty and had remarried another person. Since the marriage in question was never consummated with the plaintiff, she was not bound to go with him and the so-called marriage was void and repudiated and therefore, the suit deserves to be dismissed.

On the basis of the adduced evidence, the trial court decided the case in favour of wife and dismissed the suit of the plaintiff-husband. But the appellate court allowed the first appeal of the plaintiff. The first appellate court found that the defendant could not prove repudiation of her marriage with the plaintiff and, thus, decreed the suit. Being aggrieved, the defendant-

3 (1886) 8 All 149.
4 RLW 2009 (1) Raj 847.

wife filed a second appeal under section 100 of CPC in the High Court of Rajasthan.

The High Court of Rajasthan reversed the judgment of the appellate court and restored that of the trial court recognising the repudiation of marriage by the wife as legal and valid. The court distinguished it from the *Shahnaz Bano* case,[5] which was relied upon by the counsel of husband, and observed that it was a case under section 482 of Cr PC and not about effect of absence of a decree for dissolution under section 2 of the Dissolution of Muslim Marriages Act, 1939. Moreover, it was observed that dissolution could not be done by the *qazi* appointed by the Muslim Personal Law Board. The considered opinion of the court was as follows:[6]

> It is not necessary for a Muslim lady to obtain a decree for dissolution of her marriage after she exercises her option of puberty (*Khyar-ul-Bulugh*) upon attaining the age of puberty *i.e.* 15 years. If the *factum* of such revocation or exercise of option of puberty is proved before the trial court even by oral evidence and the trial court returns the findings of facts in her favour in a suit filed by the husband, even then it should be sufficient satisfaction of requirement of Section 2 of the Dissolution of Muslim Marriages Act, 1939.

It may be pointed out that the court has rightly decided the matter according to the spirit of Islamic law relating to *Khyar-ul-Bulugh*, without giving much importance to the procedural technicalities.

Talaq al-Biddat

In *Mohd. Usman s/o Sri Mohd. Irfan* v. *Smt. Gulshan Ara d/o Shri Abrar Hussain*,[7] the husband filed a suit for declaration of divorce in the Family Court of Roorkee, Dist Haridwar, which was dismissed. The aggrieved husband went to the High Court of Uttaranchal against the judgment of the family court. It was pleaded by the husband that he pronounced *talaq* thrice to his wife at '*majma aam'* (before public gathering) in civil court premises in the presence of witnesses and sent the intimation of the same to his wife (respondent). The husband-appellant contended that even after being divorced, the respondent had wrongly implicated him in criminal cases and was claiming maintenance under section 125 of Cr PC. The respondent denied the *factum* of divorce. The High Court opined that under the Muslim law, the husband has a right to give *talaq* to his wife whether or not there exists any ground for doing so. What is required under Muslim law is that '*talaq*' must be given in accordance with the Muslim personal law. The court observed that the fact of

5 *Shahnaz Bano* v. *State of Rajasthan*, 1999 (2) RCD 980 (Raj).
6 *Supra* note 4 at 852.
7 MANU/UC/0205/2009.

pronouncement of *talaq* has been corroborated by the witness who was present at the time when the husband pronounced the *talaq* and intimation of the said *talaq* was communicated to the respondent through notice. The High Court held that the trial court has committed a grave error of law by entering into the controversy of the character of the wife and justification of divorce. The court observed:[8]

> After we have reassessed the evidence on record, we find that the husband has sufficiently proved it on the record that he pronounced thrice that he gives 'talak' to his wife Gulshan Ara, making the intention clear to this effect. He has not concealed the pronouncement of 'talak' and communicated the same to his wife. Not only this, he has reiterated the same before the court. The pronouncement is not in intoxicated condition. In the circumstances, it cannot be said that the marriage between the parties existed after the husband (appellant) Mohd. Usman gave 'talak' to his wife on 19.07.2004. That being so, the impugned judgment and decree, passed by the trial court, is liable to be set aside.

The High Court held that the trial court should have examined the evidence on record under the principles of the Muslim law to come at the conclusion whether the respondent stood divorced from her husband or not. After reassessing the evidence on record, the court concluded that the husband has sufficiently proved that he had divorced his wife and had intimated the same to his wife. Moreover, the court found that the pronouncement was not in an intoxicated condition. The court, with this reasoning, set aside the decision of the trial court.

Though the High Court of Uttaranchal has decided according to the prevalent practice of Indian *sunni* Muslims, it is humbly submitted that such type of instant divorces are highly debatable under the Islamic law.[9]

Difference between maintenance claim of wife and ex-wife

In *Shabnam Bano* v. *Mohd. Rafiq*,[10] the facts were that the petitioner married Mohd. Rafiq, in accordance with Muslim customs, in Jaipur. He had refused to maintain his wife and their child. Wife filed an application under section 125 Cr PC. before the family court in Jaipur. She alleged that her husband and his family started torturing her for dowry demands and had thrown her out of their matrimonial home forcing her to reside with her parents. It was also the case of the wife that, without any justifiable reason, the husband refused to maintain her and their child. The husband denied the

8 *Ibid*.

9 See Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Social-Legal Aspects* (1994, Regency Publications, New Delhi).

10 RLW 2009 (4) Raj 3158.

allegations with regard to cruelty committed by him and his family members. He further claimed that, through a registered letter, he had divorced the petitioner. Therefore, she was no longer his lawfully-wedded wife. Thus, she could not claim maintenance under section 125 Cr PC.

The trial court reached at a rather contradictory conclusion. On one hand, it held that the husband could not prove that he had divorced his wife through a registered letter and, on the other hand, the court concluded that since the husband had stated in his testimony that he had divorced the petitioner, therefore, the divorce would be taken to have occurred. The trial court passed twin orders allowing maintenance for the period before the pronouncement of divorce, and for the period of *iddat* for three months. Thereafter, on the petition of the aggrieved wife for quashing the order of the trial court, the High Court had to countenance the question of *factum* of divorce, that is to say, whether the respondent-husband had validly divorced the petitioner.

The High Court of Rajasthan examined the constitutional position and relied upon the decision of Justice V.R. Krishna Iyer in *Yusuf Rawther* v. *Sowramma*[11] and also referred to other decided cases on this point.[12] The court observed:[13]

> A person's action should be in accordance with, both the Constitution of India, as well as, in accordance with personal law, to which he is subject to. The Constitution of India in its preamble not only promises equality, but most importantly, ensures social and economic justice. Articles 14 and 15(3) and provisions of the directive principles speak about woman empowerment. In an era of gender justice, personal laws also need to be re-interpreted in the light of constitutional mandates and philosophy.

The court appreciated the position of Islamic law relating to divorce and opined:[14]

> It is, indeed, a misnomer that a Muslim husband has unbridled, uncontrolled, unlimited and unilateral power to divorce his wife. Such a power is neither granted by the Islamic Law, nor warranted under the constitution of India. Islam has always stood for equality amongst people. It has championed the cause of woman as well. The whole Koran expressly forbids a man to seek pretext for divorcing his wife, so long as she remains faithful and obedient to him. "If

11 AIR 1971 Ker. 261.

12 *Abdul Mannan* v. *Saira Khatoon*, 2000 (4) Crimes 438; *Iqbal Bano* v. *State of U.P.*, AIR 2007 SC 2215.

13 *Supra* note 10 at 3160.

14 *Id.* at 3160-61.

> they (namely, women) obey you, then do not seek a way against them. (Koran IV:34). The Islamic law gives to the man primarily the faculty of dissolving the marriage.

After stating the legal position of divorce, the court observed:[15]

> The requirement of a valid *talaq* under Islamic law is that: firstly, *talaq* must be for a reasonable cause, and secondly, it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the family of husband. If their attempts for reconciliation fail, *talaq* may be affected.

In the case under review, the High Court held that the *factum* of *talaq* was a statement uncorroborated by any sort of evidence, oral or documentary, and, thus could not be taken as proof of divorce. The court decided that, since the petitioner has not been validly divorced, she was certainly entitled to file an application for maintenance under section 125 Cr PC and held the findings of the trial court relating to the maintenance for *iddat* period as legally unsustainable.

As far as the law of *talaq* is concerned, R.S. Chauhan J of Rajasthan High Court has rightly interpreted the Islamic law of divorce following Badar Durrez Ahmad J of Delhi High Court, who had delivered an exhaustive judgment on triple divorce (*talaq al-biddat*) by relying upon the elementary sources of Islamic jurisprudence.[16]

IV *NAFQAH* (MAINTENANCE OF WIFE)

Application of Cr PC

The Indian judiciary, time and again, had been called upon to adjudicate upon the matters relating to maintenance of wife under section 125 of the Cr PC. In some of the cases, a plea of divorce is taken by the husband in the written statement and if not proved, the court passes an order for maintenance in favour of wife. This is what happened before the Madhya Pradesh High Court in *Irshad Khan* v. *Smt. Rani*.[17] In this case, Smt**.** Rani submitted an application under section 125, Cr PC, for maintenance to the effect that she was married to the applicant, Irshad Khan, and a daughter was born out of their wedlock. The applicant started torturing and harassing her and ultimately abandoned her to reside with her parents without having sufficient means of livelihood. The husband took the plea that divorce had been effected between them and, therefore, she was not entitled to

15 *Id.* at 3161.
16 See for detail *Masroor Ahmad* v. *State (NCT of Delhi)*, 2008 (103) DRJ 137.
17 MANU/MP/0004/2009.

maintenance under section 125 of the Cr PC. The trial court, after appreciating the evidence of the deserted wife, allowed the application filed by the respondent and directed the husband to provide maintenance to his wife and daughter. Being aggrieved by the said order, revision was preferred before the High Court.

After perusing the records, the High Court arrived at the conclusion that the findings of the lower court appeared to be reasonable. Since no reasonable cause had been assigned to the divorce and no mention had been made of any reconciliation between the parties before affecting the divorce, it had not been proved that divorce was effected between the parties. Therefore, the husband was under an obligation to maintain his wife. It had also been brought on record that the husband had sufficient means whereas his wife was not in a position to maintain herself. The lower court, therefore, had rightly directed him to pay maintenance to his wife.

It is submitted that the duty to maintain one's wife is unequivocal whether the husband has means or not. At the same time, Islamic law also imposes some penalties upon him when he exercises such type of undesired practices of divorce. Therefore, to punish husband for the same in the form of maintenance to the wife is not contrary to the spirit of Islamic law.[18]

Claim of past maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986

In *Thoombath Haris* v. *Khadeeja Sherbin*,[19] a Muslim divorcee claimed past maintenance from the date of her marriage till the date of divorce under section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The marriage and divorce between the spouses was proved and the lower court directed payment of maintenance at the rate of Rs 9000/ per month. The divorcee went to the High Court of Kerala against the decision of the lower court. The counsel for divorcee contended that the claim for past maintenance prior to the date of divorce also fell within the expression maintenance under section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court did not accede to this contention and observed that, "past maintenance undoubtedly is not an amount payable on divorce. That obligation has nothing to do with the subsequent divorce."[20] The judgment is in conformity with the *Sharia*.

Conflict between sec. 125 Cr PC and sec. 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986

In *Hashim Huzursab Sayeed* v. *Goribi Hashim Sayeed, Sohil Hashim Sayeed and The State of Maharashtra*,[21] the respondent filed an application under section 125 Cr PC claiming maintenance from her husband. The respondent claimed to be the wife of the applicant. She contended that her

18 For detail see *supra* note 9.
19 2009 (3) KLT 905.
20 *Id.* at 908.
21 2009 (3) Mah. LJ. 217.

husband had refused to maintain her and her son born out of their wedlock. The applicant showed his inability to pay maintenance as he did not have sufficient means to pay the same and contended that the respondent had left the matrimonial house willfully.

The trial court allowed application granting maintenance of Rs. 500/- p.m. to wife (Respondent No. 1) until the *Iddat* period was over as *mehar* amount and Rs. 250 to son (Respondent No. 2). Aggrieved by the decision of the trial court, a criminal revision was filed by respondent wherein the sessions court directed the applicant/husband to pay maintenance of Rs. 500/ p.m. till her death or till she re-married, from the date of application, and dismissed the criminal revision filed by the husband for setting aside judgment and order passed by trial court. Thereafter, a criminal revision was filed by the husband in the Bombay High Court contending that the wife was not entitled to claim maintenance under section 125 Cr PC after coming into force of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The question before the High Court was whether a divorced Muslim woman was entitled to claim maintenance under section 125 of Cr PC after coming into force of the Muslim Women (Protection of Rights on Divorce) Act, 1986. S.S. Shinde J opined: [22]

> I am of the considered view that in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the application filed by the wife for maintenance under Section 125 of Cr PC is not maintainable.

This view of the learned judge of the High Court is correct. After the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a suit under section 125 of Cr PC should not be entertained as it would increase litigation by exploiting provisions of both the legislations in order to get relief.

V *HIBA* (GIFT)

Abdul Rahim v. *Abdul Zabar*[23] pertains to transfer of possession validating a gift under Muslim law. Haji Sk. Abdullah was owner of the property in question. He had two sons and four daughters. S1 was his elder son and S2 (since deceased), the father of appellants, was the younger son. Abdullah's married daughters were gifted some lands by their father in 1960, who in turn relinquished their right in their properties. Abdullah executed a registered deed of gift in favour of S2 in 1973 whereby a house was gifted. Adjoining thereby was a small patch of land belonging to the state.

22 *Id* at 220.
23 (2009) 6 SCC 160.

The state had granted a temporary lease in favour of Abdullah. This was used for ingress to, and egress from, the said gifted house. Abdullah executed various documents in the year 1975, transferring his properties in favour of S1 and his sons and also the sons of S2, appellants herein. S1 filed a suit seeking declaration that the deed of gift executed in 1973 was illegal, void and inoperative. Two issues that arose for consideration of the learned trial judge were: (i) Was the suit barred by limitation? and (ii) Had Haji Sk. Abdullah handed over the possession of the properties in question in favour of Razak?

During pendency of the suit, S2 died and his legal heirs, appellants, were substituted in his place. The trial court dismissed the suit on the ground the same was barred by limitation and also the deed of gift was held to be valid in law. Since S2 was collecting the house rent in his own capacity and also the order of mutation was in his favour, the respondent preferred an appeal against the order of the trial court in the High Court. The High Court of Orissa, in appeal, held that S2 had been realising rent from the tenants even prior to the death of his father and nothing was adduced to show that the father had divested himself of the title of the said property and S2 was in possession thereof. The High Court, therefore, held that the gift was invalid. The aggrieved party approached the apex court against the decision of the High Court. The Supreme Court had to countenance the averment as to whether it was necessary to transfer possession and transfer absolute ownership to make the gift valid under Muslim law? The court opined:[24]

> A gift indisputably becomes complete when a person transfers with immediate effect the ownership of his moveable or immoveable property to another person and that other person himself or someone else with his consent takes possession of the property gifted.

The court enunciated that under the Muslim law, "it is a contract which takes effect through offer and acceptance." The court analysed different conditions to make a valid and complete gift under Muslim law and reached the conclusion that the gift deed in the instant case was a registered one, containing a clear and unambiguous declaration of total divestment of ownership of the property and the donor had himself started the process of, and prayed for, the mutation in favour of the donee S2, in the revenue court. S2 also started collection of rent from the tenets during the lifetime of donor. The court further expounded the law relating to gift stating:[25]

> If by a reason of a valid gift the thing gifted has gone out of the donees' ownership, the same cannot be revoked. The donor may

24 *Id.* at 165.
25 *Id.* at 166.

> lawfully make a gift of a property in the possession of a lease or mortgage. For affecting a valid gift, the delivery of constructive possession of the property to the donee would serve the purpose. Even a gift of a property in possession of trespasser is permissible in law provided the donor either obtains possession and gives possession to the donee or does all that can be put it within the power of the donee to obtain the possession.

The apex court has given proper interpretation to the law of gift as it is described in the leading books of Islamic law.

Validity of a gift deed

The High Court of Patna in *Sk. Azimmur Rahman and Sk Muzzibur Rahman, sons of late Abdul Hafiz* v. *Nurul Huda, son of Late Sk Farman, Shafi Ahmad Siddiqui, son of late Sk Farman, Sk Shamshad Ahmad S/o Sk Jamaluddinn and Bibi Zaifa W/o late Sk Abdul Kudus*,[26] had to decide the legality and validity of different gift deeds supposedly executed by Sk. Abdul Aziz, plaintiff in the original suit contested in the trial court. The case had been filed for a declaration that the deeds of gift supposedly executed on different dates be declared as forged and fabricated. One of the gift deeds was claimed to be executed in favour of Shakila Khatoon, the wife of the plaintiff, in lieu of dower debt. The defendants opposed the case made out by the plaintiff and denied the allegation made in the plaint. The defendant also challenged the *iqrarnamah*, which had been executed by the original plaintiff, through which the plaintiff donated his property to his wife in lieu of *mehr*. They contended that they were enjoying possession of the land gifted to them.

The trial court came to the findings, on the basis of the report of the expert, that the deeds of the gift were not genuine. The court also held that the gift deeds executed by the plaintiff in favour of his wife were genuine and further went beyond the pleadings to hold that the unregistered *iqrarnamah*, by which lands were transferred to plaintiffs' wife, was binding on the parties. The aggrieved parties preferred an appeal in the High Court against the judgment of the trial court. The question before the court was whether the signature/left thumb impressions (L.T.I.) on the gift deeds executed by the plaintiff were genuine or not? The contention of the respondent/plaintiff was that the gift deeds, except a gift deed in favour of his wife, were forged and fabricated documents.

The High Court held that on examination of L.T.I, it was found that both the experts had given conflicting evidence regarding genuineness of the said thumb impression. The court was of the view that it had become difficult for

26 MANU/BH/0165/2009.

the court to conclude that the deeds of gifts were genuine. Moreover, the High Court distinguished between a *hiba* and a *hiba bil ewaz* (gift for consideration). The court rightly held that both these concepts of gift were undisputedly recognised under Muslim law. The view of the court was that "as the letter was not gift *simpliciter* but a sale in real sense of the term," therefore, the a gift by a Muslim, in lieu of dower debt after marriage, had always been held by judicial decisions to be a *hiba–bil ewaz* which is really a sale of property within section 54 of the Transfer of Property Act, 1882. However, the court decided that the wife of the original plaintiff would be entitled to four *annas* of her share according to Muslim law and also be entitled to the value of lands for Rs. 10,000/-, in lieu of dower debt. The trial court was thus directed to prepare a decree in terms of the judgment.

From the above, one may conclude that the High Court gave the judgment under the parameters of Islamic law of gift, keeping in view the facts and circumstances of the case.

VI *WAQF* AND ITS ADMINISTRATION

Right of the town area committee to hold the land of *Qabristan*

In *U.P. Sunni Central Board of Waqf* v. *Town Area Committee*,[27] the High Court of Allahabad had to decide whether the land in dispute of plot no. 80 on the abolition of zamindari in U.P. had vested in the state of U.P. under section 4 of the U.P.Z.A. & L.R Act, 1950 and had been entrusted to the Town Area Committee, Sahapur, for management under section 117 of that Act? The initial suit was instituted by the Town Area Committee, Sahapur, in a representative capacity against Ilyas and others. The U.P. Sunni Central Board of Waqf, Lucknow, was impleaded under the order of the court. The court of first instance dismissed the suit but the appeal preferred by the plaintiff - Town Area Committee - had been allowed, with a mandatory direction to the defendant No. 3, to remove the existing construction from the area under dispute. U.P. Sunni Central Board of Waqf, Lucknow, went to the High Court in second appeal.

The disputed land, *i.e.* plot No. 80 in the basic year, *i.e.* 1359 *fasli* was recorded as '*banjar'* and '*marghat.'* It is said that with the abolition of the *zamindari* system in U. P., it had vested in the state of U.P. by virtue of section 4 of the U.P.Z.A. & L.R. Act, 1950, and its management was entrusted to the Town Area Committee, Sahapur, by a notification issued under section 117 of the Act. Later, the said land came to be recorded as '*qabristan.'* The defendants, on the area shown, constructed a room and a '*masjid'* and were in the process of constructing 10 shops with a '*veranda'* on the area, in which constructions were completed during the pendency of the proceedings. Therefore, the Town Area Committee contended that as the

27 MANU/UP/0177/2009.

land was entrusted to it for the purposes of management by the state government, the defendants had no authority of law to raise any constructions and the possession of the said area of the plot was liable to be restored to it. The defendant No. 1, through his written statement, contended that the plot in dispute was recorded as *qabristan*. It was the property of the U.P. Sunni Central Board of Wakf, Lucknow, on whose behalf a committee had been constituted to manage and supervise the working of the '*qabristan.*' It was further pleaded that even if in the basic year, the land was recorded as *'banjar,'* nonetheless, as it was in use as '*qabristan,*' it would be treated as '*qabristan'* and would not vest in the State of U.P. and, therefore, the plaintiff - Town Area Committee, Sahapur - was not entitled to any relief. The High Court had to resolve the problem as to whether the land recorded as '*qabristan',* and treated as a *waqf,* under the management of the Town Area Committee, Sahapur or managed by U.P. Sunni Central Board of *Waqf*? The High Court held that suit land stood vested under section 4 of the Act in the State of U.P. which was duly entrusted to the Town Area Committee, Shahpur under section 117 of the Act and no formal proof of the *gazette* was required as the court was empowered to take judicial notice of the same. The court observed:[28]

> The waqf in question is not a registered waqf and as such is outside the purview of the management of the defendant No. 3/appellant under Section 32 of the Wakf Act, 1995. Accordingly, the 'kabristan' in dispute or the waqf which was entrusted to the local body by the State under Section 117 of the Act shall continue to remain under the management and control of the Town Area Committee, Sahapur and would not be treated as vested with the U. P. Sunni Central Board of Waqf. Accordingly, defendant No. 3-appellant has no authority of law to raise any constructions either of shops or otherwise on the land of the 'kabristan' and to interfere with its management and possession of the Town Area Committee, Sahapur.

This surveyor is of the view that from a property law point of view, the judgment may be sound, but it frustrates the very object of the *waqf* if it is not permitted to use the *waqf* property for those purposes which are allowed under the Muslim law.

Constitutional status of the Wakf Act, 1995

In *Association of A.P. Sajjada Nasheens, Mutawallies and Khidmat Guzaran of Wakfs rep. by its President, Soofi Shah Mohd. Sabir Ali* v.

28 *Ibid.*

Secretary representing The Union of India (UOI), (Law) Department,[29] the petitioner sought to declare section 4 of the Wakf Act, 1995, as unconstitutional, arbitrary and violative of articles 14, 25 and 26 of the Constitution of India. It was contended that while the avowed object of the Act was to democratize the functions of *waqfs* and to make the *mutawallis* a self-governing body, the provisions of the Wakf Act, 1995, in fact, totally denuded *mutawallis* of powers and functions and purported to confer powers on a body constituted by persons who were totally unconnected with *waqfs* or their intent and purposes. It was further contended that while sub-clause (b) of sub-section (1) of section 14 provided for election of one or two members from the Muslim members of Parliament, state legislature, members of the bar council and the *Mutawallis* of the *waqfs* having annual income of one lac and above, sub-clauses (c), (d) and (e) of sub-section (1) empowered the state government to nominate certain officers or persons to the board. Thus, in pursuance of section 109 of the Wakf Act, 1995, the government of Andhra Pradesh framed rules for conducting elections in G.O.Ms. No. 68, dated 27-5-1996 and by subsequent G.O.Ms. No. 74, dated 11-6-1996, and constituted the wakf board by conducting elections of the members of the AP Wakf Board under sub-clause (b) of sub-section (1) of section 14. It was further stated that only one member could be elected from among *mutawallis*, whereas four members were required to be elected from other denominations. It was stated that the government was empowered to nominate upto two persons from each category of persons under clauses (c) and (d) and also appoint a government official under clause (e) of sub-section (1) of section 14 of the Act.

It was also contended by the petitioner that five persons were nominated by the government and four persons were elected from bodies which had nothing to do with the *waqfs*. As a result, out of ten or eleven persons, who would constitute the wakf board, nine or ten members were persons who were not at all connected with *waqfs*. It was stated that in the board which consisted of 11 persons under clauses (a), (b), (c), (d) and (e) of sub-section (1) of section 14 of the Act, only one member was representing the interest of the *mutawallis* of the *waqfs*. It was stated that there were more than one lac *waqfs* in the State of A.P. but only 22 *waqfs* satisfied the criteria for the purpose of choosing a representative of *waqfs* by virtue of the restriction laid down under section 14(1)(b)(iv) of the Wakf Act, 1995, *i.e. waqfs* having an annual income of one lac and above, and that higher income of a *waqf* could not be a criteria in choosing as a member of the wakf broad and this criteria was absolutely arbitrary, discriminatory and violative of the principle of equality enshrined under article 14 of the Constitution.

29 2010 (1) ALT 112.

The representatives of the central government controverted the averment of the petitioners contending that the provisions of the Act were not violative of article 14 as reasonable classification has been effected having nexus with the purpose of the Act. The state government also denied the allegations leveled by the petitioners. After making perusal of the voluminous arguments, the Andhra Pradesh High Court held that the petition appeared to have been filed upon unfounded apprehensions and concocted grounds. The court observed:[30]

> Quashing of section 14 or any other part of the Act would defeat the very purpose for which the Act was enacted resulting in the mismanagement of the wakf property, which would endanger the purpose for which the wakfs are acknowledged to have been created and dedicated.

The court further opined:[31]

> Inclusion of elected Muslim members of Parliament, State Legislature and Bar Council in the Wakf Board of a State is based upon consideration of their obligation and responsibility to the people in general and Muslims in particular and they contribute positively for providing better administration of wakfs and for matters connected therewith or incidental thereto and inasmuch as the functions of the Wakf Board are secular and supervisory in nature, no exception can be taken for such a composition. Individual grievances of specific misuse of powers by the Wakf Board can be redressed in appropriate forum.

The court held that section 14 of the Wakf Act was not violative of article 14 of the Constitution. The composition of the wakf board did not interfere with the freedom of conscience or the right to freely profess, practise or propagate religion by the petitioners. Therefore, the court held that the provisions of section 14 of the Wakf Act, 1995, or any other provisions of the Act did not infringe the rights of the petitioners given under articles 25 and 26 of the Constitution.

It is submitted that the learned judges of the Andhra Pradesh High Court had done a commendable job of stopping unnecessary interference in the *waqf* matters which would allow mismanagement therein.

30 *Id.* at 131.
31 *Ibid*.

VII *WIRASAT* (INHERITANCE)

Consolidation of holdings and share in property

In *Abubakar Husein Mulani* v. *Jafar Ahmad Mulani*,[32] a civil suit was filed by Abubakar Husen Mulani, the present appellant in the trial court, to get partition of property against several persons. He claimed his share and separate possession in land property as well as house property situated at different places. The court held that the plaintiff was entitled to 1/6th share, *i.e.* 1/3rd of half share in the land Gat Nos. 300, 303 and 309 of Budh. It rejected the contention of the defendant No. 1 that the suit was barred by *res judicata* in respect of the houses property at Vaduj and granted 1/3rd share to the plaintiff. The appellate court, while maintaining the right of the plaintiff to share in the land at Wakeshwar reduced the share from 1/3rd to 1/4th holding that the plaintiff, his two brothers, *i.e.* defendant nos. 1 and 2 and their sister and mother were also entitled to a share in the property at Wakeshwar. These findings were challenged in two appeals before the High Court of Bombay.

The High Court had to decide *inter alia* as to whether the first appellate court was wrong in reducing the share of the plaintiff/appellant from 1/3rd to 1/4th inspite of the fact that the defendant nos. 3 and 4, being sister and mother, respectively, had 'relinquished' their shares by making such statement in their written statement. After perusing the averments of the litigating parties, the High Court held that in view of the settled legal position, the finding of the appellate court in the said appeal would operate as *res judicata* if a similar issue arises between the said plaintiffs and the defendant no.1 in future, but it could not operate as *res judicata* in the litigation between the present plaintiff and the defendant no. 1, who were co-defendants in that earlier litigation.

The court further held that after consolidation, title over the said land vested in the sons of Ahmad. Therefore, the plaintiff could not get any share in the said property. If he wanted to challenge the consolidation, he could take an action under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. Under Muslim law, on the death of their father, all the three brothers would be entitled to equal share and the mother and sister would get half of the share of each brother. After stating this legal position regarding succession, the court, held that the defendant nos. 3 and 4 had specifically relinquished their share in the property. Thus, the property would be divided equally between the three brothers. In the facts and circumstances and in the light of legal position, the finding of the first appellate court in this respect was clearly wrong. The plaintiff and the defendant nos. 1 and 2 could claim equal share in the suit houses situated at Vaduj.

32 MANU/MH/0940/2009.

It is pertinent to note that in the above case, according to Islamic law of inheritance, mother (deceased's wife) is entitled to get 1/8th of the total property as sharer. The rest of the property, *i.e.* 7/8th will be divided among brothers and sisters with the ratio of 2:1 as residuary. These are the shares fixed by the Islamic law of inheritance about which not only layman but often lawmen have little knowledge. An attempt in this regard was initiated through the Shariat Act, 1937. However, this effort has also practically been undone by feudal Muslims in order to deprive women of their legitimate share in inheritance, who instead advocate towards following customary practices which are totally contrary to the precepts of Islamic law. There is nothing called 'relinquishing' a share acquired because death confers absolute ownership and property can be transferred only by an instrument under the Transfer of Property Act, 1882, and not otherwise.

VIII CONCLUSION

An analysis of the aforesaid judicial decisions of the Supreme Court and High Courts reveals that courts have largely been supportive of the tenets of Islamic jurisprudence pertaining to family relations. It is also evident that courts have adopted the classical Islamic law of *Maliki* school relating to repudiation of marriage by the minor girl, contracted by her guardian during her minority, on the attainment of puberty if that marriage is not being ratified either orally or by conduct. Traditional Muslim law does not impose any obligation on women to obtain a conformity decree in this regard from the court. In deciding the issue of puberty, the court adopted a rational interpretation and held that there was no need to obtain a decree of the court if the woman has exercised her option of puberty under the Dissolution of Muslim Marriages Act, 1939.

In case of *iqrar-e-banwa* (acknowledgement of the subsequent marriage), the court took a liberal view and approved the statement of the putative wife that she and the man, with whom she was living, were husband and wife. Perhaps, one might feel, that it would have been proper had the court insisted upon calling the witness(es) to a marriage performed recently.

Determining the controversy over the maintenance claim of wife and ex-wife, which has remained a perennial bone of contention, the court avoided taking a tough stand and made it clear that wife is entitled to claim maintenance under the provisions of section 125 of Cr PC while an ex-wife is equipped to obtain maintenance allowance under the provision of the Muslim Woman (Protection of Rights on Divorce) Act, 1986. Further, protecting the right of maintenance of minor child, the court reiterated that the minor could claim maintenance under section 125 of Cr PC.

So far as the law of property is concerned, in the matter of law of gift, the court adopted a mechanical view holding that the transaction of *hiba-bil-ewaz* amounts to a sale. The cases relating to administration of *waqf* are

perhaps most important as they cover the issue of constitutional validity of the Wakf Act, 1995. The procedure and process for the formation of *waqf* board had been challenged as being violative of articles 14, 25 and 26 of the Constitution. The High Court of Andhra Pradesh did not adhere to the line of argument adverted by the association of *mutawallis*. The court made a distinction between religious and secular aspects of the institution of *waqf* and opined that the enactment of law governing secular aspects of the *waqf*, for example, administration of the *waqf*, does not amount to the infringement of the right to profess and propagate religion and establish religious institutions, as contained in articles 25 and 26 of the Constitution. The court also held that the provisions of the Wakf Act, 1995, relating to representation of different classes of Muslims is not in violation of article 14 of the Constitution.

As far as inheritance is concerned, the court tried to divide the share as per Muslim law but could not do so successfully. Compounding the jural misery, the woman was deprived of her right in the name of 'relinquishment of the right,' which has become a tested trick of feudal Muslims, to deprive a woman of her inherited property. Under Islamic law of inheritance, there is no provision relating to the 'relinquishment of right' *albeit* one can make *hiba* of his/her property in favour of any one, including brothers, orally or in writing. It seems that the mother and sister did not declare her intention to make the gift explicitly and, therefore, her share stands unaltered. Under Islamic law, as soon a person takes his last breath, his property devolves onto his/her heirs according to their share, whether they are male or female. They become the sole and absolute owners and, therefore, can alienate the property at their will. However, in such cases, the Transfer of Property Act, 1882, shall govern the transaction of property except *hiba*. Therefore, no question of 'relinquishment of right' arises here so as to acquire the property of sisters, by her brothers; it is a (mal) practice *simpliciter*.

The Muslim law of inheritance is still under the shadow of misunderstanding. Since long, in India, a woman has been deprived of her right to inherit because of the prevailing customary laws. For this purpose, the Shariat Act, 1937 was passed after obtaining prior approval of the masses, on the initiative of Maulana Ashraf Ali Thanvi and others. According to this legislation, the *Sharia* will prevail over customs and thus a woman is entitled to get her share in inheritance like her male counterpart. But since at the time, the Muslim League had majority in the legislative council, a well known leader of the Muslim League and member of legislative council, Mohd. Ali Jinnah, under the pressure of zamindars, made this provision optional during the passage of the Shariat Bill. However, through amendment in Shariat Act, 1937, many states of south India, and even in the country later led by Jinnah, made a change in this regard and a woman was made entitled to inherit all the properties. The question remains as to why the Act was not amended again in India to undo the Jinnah's amendment in the original Bill? If this were to be done, Muslim women

would inherit in all properties, whether self-acquired, inherited, urban or agricultural.[33]

It is submitted that if Muslims themselves adhere to the *Sharia's* mandate and give women their divinely ordained due, there would not be much debate and judges like R.S. Chauhan J[34] and others would also tend to accept *Sharia* as a truly humane and rational legal system.

33 This surveyor was invited by the National Commission for Women to discuss this issue and a resolution was passed in this regard by some legal luminaries which was sent to the Government of India for its approval to undo this injustice. A private member bill was also introduced in the Lok Sabha a long while back. However, all these exercises proved futile. For details, see Furqan Ahmad, "The Muslim Personal Law (Shariat) Application (Amendment) Bill, 1986", VI *Islamic & Comparative Law Quarterly* 271 (1986).

34 See, for details, *Shabnam Bano* v. *Mohd. Rafiq, supra* note 10.