20

MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

IT IS a popular fallacy that Muslim male can have four wives and enjoys an arbitrary power of dissolving the marriage or that he can inherit property leaving behind his mother and sisters. Women have not been given appropriate place in Islam. The property in Islamic law is divided indiscriminately and orphan grand-children are sometimes deprived of getting their shares in inheritance. These and such other misunderstandings are found not only among a common man but lawmen are also blissfully oblivious about the superb law of Islam as Krishna Iyer, Basant and Baharul Islam JJ had stated time and again. Sometimes, the understanding of the contemporary judges about Islamic law is not very sound as they are dependent only on writers like Mulla and others who have never read a single book of Islamic law based on its original sources, leave the Arabic, even in Urdu language. Therefore, barring few exceptions, the judgements are not given according to the true spirit of *Shariah*. Following are the few decisions of various High Courts and the apex court, which have been analysed, in the true spirit of Islamic law. They cover both law of status as well as law of property. The major issues covered under the law of status comprise of marriage including dissolution, maintenance and guardianship and custody of children, *etc*. Similarly, the law of property covers gift, *waqf* and inheritance. The Supreme Court has handed down the decisions on guardianship and *waqf* while various High Courts have also decided cases relating to status as well as property which include marriage, divorce, maintenance, custody of child, gift, *waqf* and inheritance.

II *NIKAH* (MARRIAGE)

Nature of marriage

The High Court of Kerala, in an attempt to seek the meaning and concept of equitable treatment in accordance with the injunctions of Quran, in *Abdurahiman* v. *Khairunneesa*,[1] travelled a long distance and took pains to

* M.A. (Sociology), LL.M., Ph.D., Associate Research Professor, The Indian Law Institute, New Delhi. Email: f2ahmad2@gmail.com.

1 2010 (1) KLT 891.

find out the validity of polygamous marriage in Islamic jurisprudence. The court reviewed the purpose of marriage, Quranic restraints imposed on the polygamy and the need of the polygamous marriage at different points of time. The court held:[2]

> An attempt to understand Islamic law cannot be undertaken without understanding the core concept of Islam that marriage is an institution to facilitate enjoyment of life and if the institution does not cater to enjoyment of life, the parties (the mates as they are referred to) have the option to walk out of the same.

The court praised this liberal and humanist decision of the law of marriage and divorce of Islam. The court took the view that in Islam marriage is basically a human contract but it has solemn significance also wherein parties enter matrimony voluntarily on their own free will. The dominant purpose of marriage is the enjoyment of life by the spouses. The court viewed that in the domain of marriage, the spouses together must be able to enjoy life. The court said that marriage in Islam is not a cage where the parties, who entered into contract, have no key to unlock the cage and liberate themselves even when the marriage does not beget happiness.

The court conceded that Islam permits polygamy with inbuilt restraints. It quoted verse 3 and verse 129 of the *Sura* IV of the Quran and took help of the exegesis provided in Abdullah Yousul Ali's translation of the Quran. The court extolled the conditional permission of polygamy with mandatory rides of perfect equality and equitable justice meted out to all wives, which is deemed by Quran not possible by the man even if it is his ardent desire. Therefore, the Muslim male has been ordered to content with one. The High Court noted that Islamic provisions insist on equitable treatment of wives in a polygamous marriage. The court was of the view that equitability was the crux of the problem of polygamy in Islamic parlance. The court visualized the ground justifying the case of polygamy, when it observed:[3]

> [T]here may be situations, as existed in Arabia at the relevant time that wives may be able to feel contentment, security and safety under one husband when there are no enough male persons to offer them such companionship separately. There may be situations where on account of compulsions women may be able to accommodate and tolerate more than one under the umbrella of marriage satisfactorily. Then and then can only such case polygamous marriage be permitted.

The High Court asserted that the polygamous life is not a meaningful life. "It is not a life with dignity. It is a life of perpetual agony and suffering." In

2 *Id.* at 898.
3 *Id*. at 906.

this perspective, the court pleaded the constitutional test for the validity of the provision relating to polygamy. It explained that "the polygamy is permitted, tolerated, accepted and enforced by Indian Court's only because the Muslim Personal Law (Shariat) Act, 1937 mandates that the Muslim Personal Law (*Shariat*) which permits polygamy has to be followed by the Indian Courts".[4] In that view of matter, the High Court advised that the permitting polygamy must also have to pass the test of constitutionality under article 13 of the Constitution of India. In this case, the High Court left this issue unresolved as it was not called upon to undertake that question with reference to Shariat Act. However, it lamented on this situation and expressed its anguish holding that "the Courts also, despite the dynamic interpretation of article 21 have not been called upon to, or at least they have not been embarked so far on that course, to decide whether polygamy permitted or tolerated by Indian law offends the fundamental rights to a Muslim woman".[5] The High Court attempted to awake public opinion and judicial conscience and questioned "how long can the Parliament and Judiciary avoid their duty/ obligation to tackle this bull by horns"?[6]

Inter-religious marriage

In *Asfaq Qureshi* v *Aysha Qureshi* (Nivedita Yadav),[7] the High Court of Chattisgarh had to decide the legality and validity of marriage between Muslim male and Hindu female. This was an appeal against the judgment of the family court which had declared the marriage and marriage certificate as null and void in the absence of evidence as to the *factum* of marriage and conversion of the woman into the Islamic faith.

The case of appellant was that the respondent had converted her to Islam and after her conversion she had solemnized marriage with the appellant according to Muslim law. The appellant further submitted that any suit for dissolution of marriage solemnized between the parties in accordance with the Muslim law would be dissolved as per provision of the Dissolution of Muslim Marriages Act, 1939. The High Court did not accept this line of argument and held that the respondent had not filed any suit for dissolution of her marriage solemnized in accordance with the Muslim law or Hindu law, but had filed a suit for declaration of her marriage as null and void. She denied that she never married the appellant but fraud had been played upon her. She prayed for the declaration of her marital status. The High Court reached the conclusion that the appellant had failed to prove the *factum* of her marriage and the respondent had denied her conversion to Islam. Therefore, in accordance with justice, equity and good conscience, the High Court held that the appellant and the respondent were not legally wedded spouse under the Muslim law and no

4 *Id* at 902.
5 *Id* at 903.
6 *Ibid* .
7 AIR 2010 Chh. 58.

valid *nikah* was solemnized between them. The High Court upheld the submissions of the respondent that she never converted to Islam.

It is respectfully submitted that there is no doubt that freedom of faith and to convert from one faith to another is a fundamental right under the Constitution and it is also recognized by human rights law as well as under the Islamic law. However, it is highly surprising as to why conversion is usually translated in the form of marriage within a very short time. Faith is not such a mean thing, which can be adopted only just to legalize the romance of the couple and later create a lot of problem in the society. Of course, this type of conversion is not permitted in Islam, even if unlike this case, the girl in order to strengthen her romantic life makes herself a fake confession of conversion.

III DISSOLUTION OF MARRIAGE

Lack of equitable treatment between wives

The High Court of Kerala had to decide an appeal against the decision of the lower court passing the order for the dissolution of marriage under section 2(viii) (f) of the Dissolution of Muslim Marriages Act, 1939. In *Abdurahiman* v. *Khairunneesa*,[8] the plea taken by the wife was that the husband had indulged in cruel behavior and did not give her equitable treatment commanded by the Quran in case of plurality of wives. After analysing the evidence adduced in the court below, the court held the wife entitled to a decree of divorce as claimed and the court below passed the order to that effect. The husband, aggrieved by the order of the court below, instituted an appeal against that order before the High Court. The High Court framed an issue as to whether the second marriage of the husband during the subsistence of first marriage itself constituted the negation of the equitable behavior to be provided to the first wife in accordance with the injunctions of the Holy Quran and the subsistence of polygamous marriage is the ground for the dissolution of Muslim marriage under section 2(viii)(f) of the Dissolution of Muslim Marriages Act.

The High Court tried to find out the standards and meaning of the equitable treatment to co-wives in accordance with the injunctions of Quran as enshrined in section 2(viii)(f) of the Act. This section provides "an escape route for a married woman who finds a third person (women) intruding into the space of matrimony, which has place only for two",[9] the court held. The court further said that if a third one barges in, and one within the matrimony is not willing to accommodate third, the unwilling second must have the option to walk out. The court asserted that "this is the principle which section 2(viii)(f) of the Act unmistakingly recognizes. This principle is expressed in the language that the wife can seek dissolution on the plea that her husband has not treated equitably in accordance with the injunctions of the Quran."[10]

8 2010 (1) KLT 891.
9 *Id*. at 903.

The court noted the language employed by the legislature in this section which insists on equitable and not equal treatment of the wives and that too is to be done in Quranic perspective and not in accordance with the tenets of Muslim law in India. The court observed that "an attempt to justify treatment as equitable on the basis of any subsidiary sources of Muslim law does not appear to be permitted or to be tolerated in the light of the clear language of the law"[11] enshrined in section 2(viii)(f) of the Act of 1939. After explaining the object of the law, the court searched out the answer to the query as to "what the Quranic injunctions" was. The court took help of the translated excerpts of the Holy Quran by Abdullah Yousuf Ali regarding two verses of *Surah* IV which are deemed to the court to be Quranic injunctions about equitable treatment to wives. The verse 3 of the *Surah* IV of the Holy Quran, in eyes of the court embodies this psycho-social norm. The commentary of Yousuf Ali contains that:[12]

> The unrestricted number of wives of the "Times of Ignorance" was not strictly limited to a maximum number four, provided you could treat them with perfect equality, in material things as well as in affection and immaterial things....

In its efforts, to elucidate the concept of equitable treatment to wives, the court referred to verses 129 of *Surah* IV and found that "no man shall ever be able to be fair and the just when he has plurality of wives even if that be his ardent desire".[13] The court laid down that the principle underlying in verse 129 gave the real clue to interpret section 2(viii)(f) of the Act of 1939. It felt necessary to reconcile the principles enshrined in the above mentioned two verses of the Holy Quran and asserted that there may be situations, as existed in Arabia at the relevant times, that wives may be able to feel contentment, security and safety under one husband when there were no male persons to offer them companionship separately. There may be situations, where on account of compulsion, a woman may be able to accommodate and tolerate more than one under the umbrella of marriage satisfactorily. Then only such polygamous marriage may be permitted. Therefore, the court held that "it is her assessment that matters. It is not the assessment of the partisan husband who notwithstanding the declaration of *Ayat* 129 may feel that he is ardently attempting to do the same and is actually treating his wives equitably."[14] The court found that the standards of husband and his "egoistic assessment, and evaluation about himself are irrelevant and unconvincing"[15]

10 *Ibid*.
11 *Ibid*.
12 Abdullah Yousuf Ali, *Commentary of Quran,* as cited by the court, *id*. at 904.
13 *Id* at 905.
14 *Id* at 906.
15 *Ibid*.

The court conceded the fact that polygamous marriage by itself is not recognized as a ground for dissolution of marriage under section 2(viii)(f) of Act of 1939 but it was the firm opinion of the court that "the underlying assumption definitely is that the wife would like to continue in such a polygamous marriage only if she finds happiness and contentment in such marriage."[16] The logical consequence is that it is for her to decide whether she is satisfied that her husband is treating her equitably in accordance with the injunctions of the Holy Quran, otherwise she can walk out of the marriage. Finally, the court held that "she cannot be stopped from claiming divorce on the ground section 2(viii)(f) of the Act if she perceives after such marriage, at any point of time that the husband has treated her inequitably."[17]

Another moot point taken into consideration by the court was whether the law of dissolution of marriage as contained in section 2(viii)(f) of the Act of 1939 passed the test of constitutionality and was not *ultra vires* the spirit of article 21 of the Constitution of India. The court framed a litmus test and asserted that the constitutional perspective of the fundamental right to life, *i.e.* right to life with dignity and self respect, must also inform us while trying to understand the true meaning of the expression "does not treat her equitably" in section 2(viii)(f) of the Act. Though this question raised by the court itself deserved a careful consideration, but court, in its wisdom, left it unanswered and skipped over to the concept of polygamous nature of the marriage holding that "the question whether polygamy offends the right to life under article 21 is definitely the question that has to be considered by the polity and civil society in this country."[18] The court refrained from treading this path but lamented that despite the unquivocal mandate of article 44, the Parliament has not moved an inch in this direction. Advocating common civil code for all Indians, the Kerala High Court made a bold significant observation and hoped:[19]

> When such a uniform code comes into being, it is our ardent hope that there shall be a liberal borrowing from the concept of Islam about easy, simpler, non expensive, non cumbersome, and user-friendly procedure prescribed for unwilling spouses to walk out of such dead marriage with honour, self-respect and dignity duly providing for the economic security of the fragile partner of such fractured marriage....

Unilateral termination of marital tie

In an attempt to resolve the conundrum as to applicability of the provision of section 125 of the Cr PC and for the normative structure as contained in the Muslim Woman (Protection of Rights on Divorce) Act, 1986, the Kerala High

16 *Ibid*.
17 *Id* at 909.
18 *Id* at 902.
19 *Id* at 900.

Court had to decide the issue of validity of termination of marriage by husband in *Kunhi Mohammed* v *Ayishakutty*.[20] The High Court followed the *ratio* propounded by the apex court in *Shamimara*.[21] The court declared:[22]

> Though there has been meek acceptance by the system that the husband has the prerogative to unilaterally liquidate the marriage for good, bad or indifferent reasons and such divorce will be perfectly valid whether he has done it under compulsion or in jest or in anger, winds of change have started blowing and the Supreme Court in *Shamimara* case (supra) has without the trace of any doubt declared that this view is not acceptable to the court in the present time.

The High Court explained the intricacies involved in the rules established by the earlier decisions on this point. The court held that "(i) For a termination of Muslim marriage by unilateral pronouncement of talaq by husband to be valid, attempt for reconciliation by two arbiters in accordance with Ayat 35 Sura IV must precede ; (ii) If such a failed attempt for reconciliation had preceded such pronouncement of divorce, it shall be deemed that there has been a reasonable cause for such divorce. The reasonableness of the substantive cause for divorce shall not be justiciable by courts".[23]

The High Court also threw light on the role of arbiters observing that arbiters are not judges or arbitrators but facilitators who must attempt reconciliation. The High Court strongly supported the traditional, judicial and political cry regarding enactment of common civil code when it observed that:[24]

> The impact of the constitutional fundamental right to equality under Article 14 and the fundamental right to life under Article 21 of the constitution and the play of Article 13 have not been considered by the civil society in India, the Parliament of India or even the courts in India. … most unfortunately despite the mandate of Article 44 of the Constitution, legislatures - Central and States, have not addressed themselves to the question.

20 2010 (2) KLT 71.
21 *Shamim Ara* v. *State of U.P.* (2002) 7 SCC 518.
22 *Supra* note 20 at 90.
23 *Id.* at 96.
24 *Id*. at 89.

Dissolution of marriage at the instance of wife

*Sabah Adnan Sami Kha*n v *Adnan Sami Khan*[25] raised an important issue before the High Court of Bombay regarding the legal position of *halalah* (intervening marriage) in case a marriage was dissolved by *khula*, *i.e.* at the instance of wife. In this case, the wife claimed that her marriage contract was terminated by *khula* and, after three years, she again married her ex-husband without observing the necessary formality of *halalah*. The issue before the High Court was whether the second marriage was *baatil* (void) or *sahih* (valid).

The first marriage of the couple was dissolved by a single oral pronouncement which was later on recorded into writing for the sake of evidence. That agreement was signed between the parties before the second marriage. It was stated on behalf of the wife that the dissolution of marriage was attempted through the mode of *khula*, while the husband argued that the dissolution of the marriage was through the mode of single oral pronouncement. The High Court had to decide which contention was correct and whether *halalah* was necessitated in any situation. The High Court recognized the established legal position regarding *khula* and observed:[26]

> A *Khula* divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (Talak-*i-bain*, that is, irrevocable divorce).

And, as such, it could not be treated as *talaq* by triple pronouncement. The court observed, "A talak in the Ahsan mode and a talak in the talak-i badai by a single pronouncement mode, Halala need not be observed".[26*a*] The High Court also recognized the legal position that there is no need to go through *halalah* in case of dissolution of the marriage through the mode of *ahsan* and *hasan*, if the *talaq* was pronounced in two different *tuhrs*. The court was of the view that the need of *halalah* arose only if the marriage had been dissolved by three pronouncements at a time or at different *tuhrs*. The court held that in both situations, a prohibited decree is created by ex- husband and ex-wife. The estranged husband and wife have no capacity to enter into a valid contract of marriage. The ex-wife has to observe *halalah* and then prohibitive decree shall be removed.

The High Court took note of two kinds of irrevocable *talaq*, namely *bianunat-e-khafifah* (minor separation) and *bianunat-e-ghalizah* (major separation). Less than three *talaqs* affect *bianunat-e-khafifah*, otherwise there will be *bianunat-e-ghalizah*. The court observed that in case of minor

25 AIR 2010 Bom. 109.
26 *Id.* at 119.
26*a* *Id.* at 117.

separation (*bianunat-e-khafifah*), the parties by mutual consent remarry. However, in case of major separation (*bianunat-e-ghalizah*), they cannot marry unless a formal *halalah* is complied with by the wife. The court held that a *talaq* in *ahsan* mode, and a *talaq* in the *talaq-i-badai* by a single pronoucement mode, and dissolution through *khula* or *mubaraat, halala* need not be observed.

It is respectfully submitted that the learned judge to a certain extent interpreted the Muslim law in its true spirit regarding various modes of *talaq*, intervening marriage and its mandate. However, it could not define the nature of *khula* in its true spirit, which is already misunderstood by many other lawmen as a bargain by husband to the wife. [27]

IV *NAFQAH* (MAINTENANCE)

Maintenance of ex-wife

In *Moulvi Shuayb Abdussatar Bhagliya* v *Kubra d/o Soleman Hayat*,[28] the issue before the Gujarat High Court was whether the Muslim divorcee should exercise her option of applicability of section 125, Cr PC on the first date of hearing of the proceedings filed under the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court did not agree with the contention of the applicant/former husband that unless the option was availed on the first date of hearing of the proceedings under the Act of 1986, any proceedings by Muslim divorcee invoking provision of section 125 of the Code were not applicable and thus, the suit under the Code of 1973 was not maintainable. The court held that law on the issue was no more *res integra*. The court considered the provisions of section 125 of the Code and sections 3, 4 and 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and took the crux of the *ratio* propounded by the apex court in *Shabana Bano* v. *Imran Khan*[29] and *Iqbal Bano* v. *State of U.P.*[30] and reached to the conclusion that a divorced Muslim woman was entitled to receive maintenance under section 125 till she remarries.

It is most respectfully submitted that judge seems to be ardent to exclude application of the Muslim law of maintenance in spite of the same being a welfare piece of legislation (Act of 1986), which later proved more beneficial to the women. The judiciary always took the view that the provision of section 125, Cr PC were aimed against vagrancy leaving an impression that Islamic law was a potent source of creating and maintaining vagrancy in case of divorced Muslim woman. However, in this connection, reference may be made to a

27 This author has discussed the issue in depth stating that this is not the bargain but it is wife's right in the same way as the husbands' right of *talaq*. As in *talaq*, the husband has to pay dower immediately, in *khula* wife is to forego her dower. See Furqan Ahmad, "Women's Right to Divorce – An Apparently Misunderstood Aspect of Muslim Law in India", 13 *Del. L. Rev.* 85 (1991).

28 MANU/GJ/0125/2010.

29 2009 (14) SCALE 331.

30 (2007) 6 SCC 785.

decision[31] given by Basant J of Kerala High Court who, profusely quoting from the original sources of Islamic law and interpreting in-depth the Act of 1986, rightly observed that Islamic law was more beneficial to women even in case of maintenance of wife and ex-wife. Basant J in this case also viewed that the Muslim Women (Protection of Rights on Divorce) Act, 1986 was more progressive and beneficial in comparison to section 125, Cr PC.

Maintenance of minor daughter

The High Court of Delhi had to decide in *Gulam Rashid Ali* v *Kaushar Parveen*[32] as to whether a minor girl had been disentitled to seek maintenance under section 125, Cr PC after the enactment of the Muslim Woman (Protection of Rights on Divorce) Act, 1986. It was argued on behalf of petitioner-appellant that in view of section 3(1)(b) of the Act of 1986, the right of the child to claim maintenance from father after two years of divorce of the mother did not survive. The High Court of Delhi found, and rightly so, this contention as baseless. The court was of the view that the benefit under section 125, Cr PC could not have been denied to a minor daughter because of any restrictive provision contained in the 1986 Act.

Though the above case related to the maintenance of minor daughter, the court picked up the opportunity to throw light on the applicability of the provision of section 125 of the Code to Muslim divorced women. In the instant case, the issue of the maintenance of Muslim divorcee was not involved, nevertheless the court found it incumbent to discuss it. The court held that "even a wife who has been divorced under Muslim Law is entitled to claim maintenance under section 125 Cr PC after *Iddat* period". This was nobody's litigation.

Maintenance of divorcee's application under section 3 of the Act of 1986

The Kerala High Court has countenanced a piquant situation that apart from death, remarriage, the actual payment of amount payable under section 3 of the Muslim Woman (Protection of Rights on Divorce) Act, 1986 would extinguish a Muslim divorced woman's right under section 125, Cr PC to claim maintenance. In *Kunhimohammed* v *Ayishakutty*,[33] the High Court had to resolve the conflict as to applicability of sections 125 and 127(3)(b), Cr PC and/or section 3 of the Act of 1986. The High Court framed the question thus: "Does a divorce valid under the Muslim Law *ipso facto* extinguish the liability of the husband under section 125 (of the code of criminal procedure) to pay maintenance to his wife even when it is admitted or proved that amounts due under the Muslim Woman (Protection of Rights on Divorce) Act, 1986 have

31 *Abu Bakar* v. *Rahiyanath*, 2008 (3) KLT 482.
32 171 (2010) DLT 340.
33 2010 (2) KLT 71.

not been paid"?[34] Tracing the history of the applicability of the provision of section 125 and 127(3)(b), the court observed:[35]

> This provision of S. 127(3) (b) found its way into the amended Code, at some point of time before its final acceptance and it is transparent that it is only the followers of Islam who are entitled to the benefit of that provision.

Taking note of the spate of litigation relating to the ambit and scope as well as the nature and quantum of the amount payable under section 127(3)(b) of the Code,[36] the High Court took the view that it was unambiguously held that what is payable under section 127(3)(b) of the Code, though not a mathematically equivalent, but must be a reasonable substitute for the liability to maintain the divorced wife under section 125, Cr PC. The court found that:[37]

> The object of section 127(3)(b) of the Code… is not to bailout the Muslim husband from his liability to pay maintenance under section 125 of the Code; but only to ensure that a devout Muslim husband who has already discharged such liability to provide for his divorced wife, in accordance with his personal law, is not obliged to pay further amounts again under S.125 of the Code.

The High Court deduced from the decisions of the apex court that the purpose was only to ensure that the divorced wife claims no double benefits. The court tried to create a nexus between the provision of section 127(3)(b) of the Code and the Muslim Woman (Protection of Right on Divorce) Act, 1986. It analysed the principle underlying the Statements of Objects and Reasons of the Act of 1986 holding that the Parliament had only seized the opportunity to specify the rights, which a divorced woman was entitled to, at the time of divorce, for protecting her interest. The court read between the lines that this provision was meant to protect the right of Muslim women available on divorce under the Code of Criminal procedure, 1973. The court asserted that there was no controversy before the apex court as to whether section 125 of the Code was applicable to the divorced Muslim wife or not. The court averred that:[38]

34 *Ibid*.
35 *Id*. at 79.
36 In this connection, reference was made to *Bai Tahira* v. *Ali Hussain*, AIR 1979 SC 362 *and Fuzhumbi* v *Khader Vali*, AIR 1980 SC 1730.
37 *Supra* note 33 at 80.
38 *Ibid*.

> What payment was to be made under section 127(3) (b) of the Code by a divorced Muslim husband to his divorced Muslim wife to avoid liability under section 125 of the Code was the only question in *Shah Bano*. The Parliament seized the opportunity to authentically resolve that controversy.

It is respectfully submitted that the intention of Parliament in enacting the Act of 1986 was to resolve the controversy as to applicability of the provision of section 125 of the Code and the Islamic law relating to maintenance of divorced wife. The phrase "protection of rights on divorce" is crystal clear in its ambit, scope, meaning and nature. Any person who wants to protect the rights of Muslim women available on divorce under provision of Islamic law should not merely adhere to the Cr PC but should also go through the provisions of the Act of 1986 which covers many more benefits. Besides maintenance during *iddat* period, it also covers *mata* (fair provision), the right of unpaid *dower,* her property, ornaments and other gifts which she had received from the either side, *i.e.* from her parents as well as in-laws and husband, *etc*. Moreover, the divorcee can claim maintenance from her ex-husband under the Act of 1986 even when she is able to maintain herself and possesses means of livelihood and wealth, which is not the case under section 125, Cr PC. Thus, the courts should apply the Act of 1986 in respect of Muslim divorcee as the same has proved more beneficial. It would not only be in consonance with Islamic law but also prevent the parties from getting benefits of both the legislations, which increase litigation. Further, it is also not in the interest of society particularly in the interest of those who are economically very week and backward.

The Kerala High Court was of the view that extinguishments of the existing rights are not to be assumed and presumed lightly. The court did not accept the line of argument that the special provision excludes the general one and, therefore, the extinguishments of the provision of sections 125 and 127(3)(b) of the Code relating to divorced Muslim woman will not be presumed after the enactment of section 3 of the Act of 1986 or the Act itself, though the court laid down that she has to choose between the two. The court further explained:[39]

> If she chooses to claim amounts under S.3 of the Act and if such payments are actually made either voluntarily or in response to an order of court, such payment of the amount shall extinguish the liability under S.127 (3) (b) of the Code, not earlier. The mere enactment of the Act and S. 3 therein cannot satisfy the Muslim woman. Until she gets the larger amount under the Act, her right under Section 125 must remain alive.

39 *Id.* at 82.

This decision seems to deliberately make the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 inapplicable and bring the divorced Muslim women under the umbrella of the provisions of the Cr PC the application of which was intended by the Parliament to be excluded in case of divorced Muslim women.

V *VILAYAT* (GUARDIANSHIP) AND *HIZANAT* (CUSTODY OF CHILD)

Husband as guardian of his minor wife

In *Syed Dowlath Hussain* (*died*) (*Rahmatunnissa*) v. *Khatoon Bi* (*since Deceased*),[40] the moot point before the High Court of Madras was whether a husband could be legal guardian of his minor wife and could lawfully alienate her property by way of sale deed as a guardian. Khatoon Bi, was the minor wife and gained immovable property from her deceased mother by way of bequeath subject to the redemption of some of the mortgaged properties which were part of the *wasiyat* (will). It was contended before the High Court that in Muslim law, the husband of the minor wife could not act as guardian for her property and the sale deed itself was void *ab initio* and the said document had been void from inception. The High Court deemed it fit to see the position in Muslim Law as the guardian of the property of the minor under the Muslim law are: father or father's executor or father's father or the executor of father's father are entitled, in the order mentioned. The father or father's father may appoint any person as his executor or executrix in which case they become legal guardian and would have all powers of a legal guardian of the minor. The court may also appoint anyone as guardian of the property of the minor, in which case he will have all the powers of a guardian appointed by the court. Others, whatever may be the relationship with the minor, could not act as a guardian for the minor and deal with his/her property. The High Court was of the view that "if there is violation or deviation from this provision, then the transaction is inevitably to be declared as void". The High Court declared that, "Husband of a minor wife can never be a guardian to her unless he is appointed by the Court". In the present case, the High Court found that "since the husband of the first respondent was neither recognized as a guardian by Law nor had he been appointed as a guardian for the property of his minor wife", he could not alienate or convey her property by way of sale.

It is submitted that the High Court did not deviate from Islamic law of *vilayat* (guardianship) in the above case and rightly described the chain of guardian of a minor.

***Hizanat* of the child**

In *Shefali Begum* v *State of West Bengal*,[41] the High Court of Calcutta had to consider the right of custody of the minor child under Muslim law. In this

40 MANU/TN/0940/2010.
41 MANU/WB/0621/2010.

case, the mother of the female child, aged 3 years and seven months, had died and the child was living with her mother's mother who was financially well off. The father of the child took her away from the petitioner's house (child's mother's mother) and refused to return her back to the petitioner. The petitioner reported this sequence of event to the police. As no action was taken by the police, the petitioner filed an application under section 97 of the Code of Criminal Procedure before the magistrate for getting back her granddaughter. The magistrate dropped the case. Aggrieved by the order of the magistrate, the petitioner filed the present revision petition. The High Court had to examine whether the impugned order of the magistrate was legal, correct and justified or not.

After perusal of the Muslim law on the point, the High Court reached the conclusion that mother's mother would have priority regarding the custody of a minor girl in case her mother dies and search warrant under section 97 of the Code of Criminal Procedure could also be issued for recovery of such minor girl from the custody of some other person. The High Court held that in such a case the petitioner had not lost her right of custody of her granddaughter or had become disqualified for any other reason. The High Court also noted that father of the girl and her legal guardian was residing at distant place and he had married again. While the minor girl was living with her grandmother properly, suddenly she was taken away by her father from the petitioner. The High Court found the order of the magistrate dropping the matter not legal and correct and the petitioner's prayer ought to have considered under section 97 of the Criminal Procedure Code. The High Court held that since the magistrate had not done that, there had been failure of justice.

In this case, the High Court rightly affirmed a noble provision of Muslim law that is *hizanat* (custody of child). It is indeed different from the right of *vilayat* (guardianship) and both rights can vest into two different persons. However, it is a common misunderstanding that *hizanat* itself has no separate identity but part of *vilayat* which is neither inconsistent with the true spirit of Islamic law nor in the interest of welfare of minor.

Loss of right of custody of the minor

The High Court of Madras had to consider the validity of the grounds responsible for the loss of right of custody of minor child of the mother. In the present case, *Arafathunnisa* v. *T. I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*,[42] a divorced Muslim woman took away her minor daughter from the school without the knowledge of the father of the girl with whom the girl was residing. Later on she remarried. The High Court of Madras had to decide as to whether the mother was entitled to have the custody of the minor child after second marriage, under Muslim law. The High Court reiterated the established legal position holding that there could be no duality of opinion that welfare of the child must be the most significant criteria to be applied while

42 MANU/TN/2723/2010.

considering the question of custody and the fitness of person seeking custody must also be one of the important aspects. Considering all the legal position and other aspects the High Court expressed its opinion that "the custody of the minor child should be with the father", who was in a sound financial position to give all comforts to the child.

In this case though the right of *hizanat* is the mother's exclusive right. However, if she remarries the law permits in that case to consider the welfare of the child and accordingly the decision should be taken. Thus, the court in the instant case did not go much beyond the spirit of *Sharia*.

Custody under the Guardian and Wards Act

In *Athar Hussain* v. *Syed Siraj Ahmed*,[43] the Supreme Court considered the question as to whether the right of *interim* custody of Muslim minor children rested with father or with maternal grandparents. The grandparents and others initiated proceedings under sections 7, 9 and 17 of the Guardians and Wards Act, 1890, in the court of principal family judge, Bangalore. During the pendency of the petition, an application was filed under section 12 of the Act read with order 39 rule 1 and 2 of the Code of Civil Procedure, 1908, in which *interim* protection was prayed for the persons and properties of the minor children and also for an order of injunction restraining father, the appellant, from interfering or disturbing the custody of the minor children till the disposal of the application. The family court passed an *ex party interim* order restraining the father from interfering with the custody of the minor children of the appellant. The appellant filed an application under order 39, rule 4, CPC in the family court praying for vacation of *interim* order of injunction passed against him. The family court vacated the *interim* order of injunction granted to the respondents.

Aggrieved by the order, the respondents filed a writ petition before the High Court of Karnataka. It was contended by the respondents that the parties would be governed by Muslim law, which provides that in the absence of the mother, the maternal grandparents shall be the custodian of the minor children. It was further contended that the second marriage of the appellant disentitled him to the custody of children. The respondents prayed for setting aside the order of the family court. The High Court, setting aside the order of the family court, held that "while appointing the guardian or deciding the matter of custody of the minor children during pendency of guardianship proceedings, the first and foremost consideration for the court is the welfare of the children."[44] This standard, the High Court held, would apply with equal force to the question of *interim* custody. The High Court set aside the order of the

43 (2010) 2 SCC 654; AIR 2010 SC 1417 : 2010 (1) SCALE 95 : 2010(1) CTC 713.
44 *Id* at 661.

family court, which had vacated the *interim* order of injunction against the appellants. On appeal, the Supreme Court, upholding the order of the High Court, observed:[45]

> We are of the view that at this stage the respondents should be given interim custody of the minor children till the disposal of the proceedings filed under section 7, 9 and 17 of the Act.

Though the court found the father-appellant to be a fit person to be guardian to take care of the minor children and decided that father could continue to be the natural guardian of the children but opined that "the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative on serving his/her interest better".[46] It is submitted that the court in this case tried to balance the two rights recognized by Islamic law, that is *hizanat* and *vilayat* and gave a harmonious construction to them which is in accordance with the spirit of Islamic law.

VI *HIBA* (GIFT)

Validity of oral gift

In a suit for partition and separate possession of the property left by the deceased, a question was raised about the gift of a portion of the property. In *Mayana Saheb Khan* v. *Mayana Gulab Jan*,[47] the question for decision before the High Court of Andhra Pradesh was whether a gift, said to have been made by a Muslim, which in turn was evidenced through a written document, could be recognized in law. The High Court observed that it was a settled principle of law that it was the prerogative of a Muslim to effect a gift of immovable property even without executing a written document. Oral gift in respect of Muslims is permissible .The High Court further held that "where, however, the gift is said to have been made through the written document, it is required to conform with section 123 of the Transfer of Property Act."[48]

Oral gift regarding agricultural holding

In *Tahseen Khan* v. *Board of Revenue, U.P. Camp, Meerut*,[49] High Court of Allahabad considered the issue whether agriculture holdings could be given as a gift in accordance with the provisions of Muslim law. In this case, the petitioners were the recorded co-tenure holders of the land. One of the petitioners, Tahseen Khan contended that co-tenure holder gifted his share to him by way of *hiba zabani* (oral gift). In pursuance of the said gift,

45 *Id* at 663.
46 *Ibid.*
47 MANU/A.P/0365/2010.
48 *Ibid.*
49 2010 (109) R.D. 671.

proceeding for recording his name in the revenue court under section 34 of the U.P Land Revenue Act was initiated by him. His name was mutated in the revenue record by the competent authority. Subsequently, the co-tenure holder, who was supposed to make the oral gift filed a recall application which was allowed and the order of mutation was recalled. The matter ultimately reached to the board of revenue which held that the order regarding mutation passed in favour of the petitioner was valid. And after the recall of mutation order, the co-tenure holder transferred his *bhumidhari* right by executing the sale deed. This transaction of transfer of *bhumidhari* rights and sale deed were disputed before the trial court that found the same legal and negated the plea of oral gift as it was not proved. On first appeal, the additional commissioner of Meerut division held that under Muslim law, a Muslim was competent to make oral gift (*hiba zabani*) in respect of his agriculture property and after *hiba*, in the year 1992-1993, no land was available to execute the sale deeds. Against this order, second appeal was instituted before the board of revenue. Aggrieved by the judgment of the board of revenue, a writ petition was filed before the High Court.

The High Court had to decide whether a Muslim tenure holder can gift his agriculture holding by oral gift. In other words, whether the principles of Islamic law are applicable to agricultural holdings. The High Court considered the judgment delivered in *Mohd Ali* v. *Board of Revenue, U.P., Lucknow*[50] and noted that: [51]

> Undoubtedly, in the case of *Mohd Ali*, it has been held after taking into consideration the section 2 of Shariat Act, 1937 that section of Shariat Act cannot be so construed, as to say that Muslim personal law was not to apply to questions relating to agricultural land.

It was held that the purpose behind enacting section 2 of the Shariat Act, 1937, was to make it clear that custom or usage to the contrary will not supersede the Muslim personal law for deciding question relating to the subject (excepting agriculture land) enumerated therein. In other words, custom or usage contrary to the rules of Muslim law could affect the rule of Muslim law relating to agriculture land. The High Court noted that in this case it was held that section 2 of the Shariat Act could not be pressed into service since it excludes the rule of Muslim law relating to the gift of agricultural land. The High Court noticed the *ratio* of the *Mohd Ali* case and concluded that in view of the provisions of the U.P.Z.A. and L.R. Act and section 129 of TPA, a *bhumidhar* belonging to Muslim community can transfer his holdings by making oral gift, according to Mohammedan law and section 2 of the Shariat Act, 1937 does not affect this rule of the Mohammedan law. The High Court did not overrule these findings, but observed:[52]

50 2001 (92) RD 282.
51 *Supra* note 49 at 675.
52 *Ibid*.

> However, it may be noted the Court (in the case of *Mohd Ali*) was not called upon to decide the effect, if any, of the new rights i.e. Bhimdhari, Sirdari, Assami, etc. that were created by the U.P. Z.A. and L.R. Act. The said aspect of the case was not argued, considered and decided therein.

The High Court did not enter into the said controversy and the matter was left to be decided at an appropriate time. Indirectly, the High Court approved the application of the law of gift of Islamic *corpus juris*. In this case, the High Court discussed the ingredients of a valid gift, namely declaration, acceptance and delivery of possession and actual control of the gifted property and divesting of ownership. The High Court found that all those essential requirements were lacking and hence the impugned transaction was not a gift/ oral gift. It is submitted that according to the circumstances of the present case, the *hiba* (gift) was declared illegal but it did recognize the established principle of Islamic law of gift that oral gift itself is not invalid.

VII *WAQF* (LAW OF DEDICATION)

***Waqf* by user**

The creation of *waqf* is an intentional action the part of the creator of the *waqf*. There must be a permanent dedication of movable or immovable property for any purpose recognized by Muslim law as pious, religious or charitable. Creation of w*aqf* can also be inferred by its user, that should be public in nature. The High Court of Delhi in *Hira Sigh (since deceased) through L.Rs.* v. *Delhi Wakf Board* [53] considered the character and status of the property in the impugned order as to whether it was a *waqf* property. Delhi wakf board had filed a suit for possession alleging that the property in dispute, *i.e.* a mosque, was a *waqf* property as the same had been used as a *waqf* since time immemorial. This property had been notified in the *gazette* as the *waqf*. This submission was challenged by the defendant who argued that the disputed property was in his lawful possession. The court was of the view that:[54]

> There may not always be an express dedication of the property as a *waqf* property; the dedication may be implied which can be inferred through the surrounding circumstances i.e. if from time immemorial the property is being used for a religious purpose. In such eventuality the title of the original owner may be extinguished and it could be said that the ownership of the property vests in God and it has become Wakf property. However, in the absence of any such evidence no Wakf can be created.

53 173 (2010) DLT 337.
54 *Id.* at 343.

The court observed that neither the preliminary survey by the wakf commissioner indicating any property as *waqf* property nor showing the same in the notification of the *gazette* any property as a *waqf* shall amount to the creation of a *waqf* in the absence of independent evidence to that effect. There was a mosque in the middle of the property occupying only a small portion of the disputed land which was used by, as a private prayer house. The court observed that in the absence of evidence to show that property was ever used as *waqf* property, it could not be held as a *waqf*.

It may be submitted that in the absence of any proof of the property to be *waqf* property, the court rightly concluded that no *waqf* was constituted. However, the dedication by the *waqif* (creator of a *waqf*) and purpose as well as use of the property as a mosque may create a doubt as to whether the property was a *waqf* property or not as far as substantive law of *waqf* is concerned.

Creation of *waqf* by a non-Muslim

In *Ramjas Foundation* v. *Union of India*.[55] the Supreme Court had to determine whether the land of the appellant was liable to be excluded from acquisition because it was a *waqf* property. In this case, one Rai Sahab Kedarnath was said to have made an announcement that he had created a *waqf* and dedicated and devoted all his movable and immovable properties to the school for charitable purposes, namely for the advancement and promotion of education to the public and poor students. He formed Ramjas College Society and got the name registered under the Societies Registration Act, 1860. In 1959, the chief commissioner of Delhi proposed the acquisition of lands for the planned development of Delhi, excluding, *inter alia*, the land under graveyards, tombs, shrines and the land attached to religious institutions and *waqf* property. It was argued on behalf of the petitioner that since the acquired land was dedicated to charitable purpose, it was a *waqf* as the educational society to which the property was given as *waqf* was not attached any specific caste or religion. The dedication of land was for a charitable purpose and thus, by itself, was conclusive evidence of his intention to create a *waqf*. Therefore, the land in question became part of *waqf* property and the same could not be acquired in the name of planned development of Delhi. The attention of the court was drawn to the amended definition of '*waqf*'' as contained in section 3(i) of the Wakf Act, 1954 and argued that a non-Muslim can also create a *waqf*. It was contended that there was no injunction under the uncodified or codified Muslim law against dedication of property to a charitable purpose recognized by Muslim law by a non-Muslim or a person not professing the Islamic faith. The court, after a perusal of the definition of *waqf* given under Wakf Act, agreed with this contention but ruled that a Hindu trust registered under the

55 (2010) 11 SCALE 598.

Societies Registration Act and a *waqf* were not analogous. The court held that mere mention of the word '*waqf*' in the creation of trust could not be deemed a *waqf* in the real sense.

It may be submitted that like other institutions of property law of Islam, *waqf* is also of secular nature which means that a property can be dedicated and executed by a non-Muslim and it may be utilised by a non-Muslim also, provided it should not be used against the purpose of *waqf* mentioned under Islamic law. One may agree with the observation of the court to the extent that a Hindu trust and *waqf* are not synonymous of each other. But it is a common misunderstanding of not only laymen but law men also that the *waqf* is exclusively an institution which relates only to Muslims and involvement of non-Muslims is not permitted. This decision is a welcome step in order to remove this misunderstanding.

Legality of declaration of property as a *waqf* in gazette notification

In *Union of India* v *The Delhi Wakf Board and The Wakf Commissioner of Wakfs*,[56] the northern railway company as a plaintiff had instituted a suit for declaration to the effect that the notification in the Delhi *gazette* notifying the suit property as a *waqf* property be declared illegal and *ultra vires*. The issue has been framed whether the property in dispute was a *waqf* property. Northern railway through Union of India claimed ownership of the suit property owned by them since the last 60 years. The High Court of Delhi held that the defendant, wakf board, specifically insisted that the disputed property was a *waqf* property. Therefore, the onus of proof was on the wakf board to establish that the suit property was a *waqf* property. Though it was contended on behalf of the defendant that the suit property comprised of a mosque and a mosque was for a religious purpose, therefore it had become a *waqf* property by user. But in the eyes of the court, this contention was not proved by evidence. The court was of the view that it was clear from the reading of sections 5 and 6 that the list of *waqf* published in the *gazette* was only final and conclusive *qua* the board, *mutalvalli* of the *waqf* or any person interested therein, but it could not be said that the third person was also bound by the notification.

Recall of order by wakf board as a quasi-judicial authority

There was a change in the *waqf* governing body by way of election. The change report was submitted to the *waqf* board and chief executive officer (CEO) of the wakf board passed an order accepting the change report. The High Court of Bombay (Aurangabad bench) had to decide in *Mansoor s/o Kasim Mulla* v *Guddu Saheb Ibrahim Mugale*[57] as to whether the Chief Executive Officer (CEO) of the waqf board can recall his order. It was found

56 MANU/DE/2248/2010.
57 2010 (112) Bom LR 2207.

that the report of change of governing body of the *waqf* was submitted without calling the meeting and without obtaining the no-objection certificate of the earlier members of the managing committee. This reflected that incorrect information was provided to the CEO, which amounted to fraud. Further, the confirmation order contained a clause thus: "if the information regarding the said institution, submitted by the applicants found incorrect, this office will be entitled to reject the order passed by this office". Objections were raised against the order by the CEO of the waqf board and the notice of the said objections was served on the parties who filed their objections. The CEO set aside the order of acceptance of the change report. This recalled order was challenged before the wakf tribunal which rejected the application and came to the conclusion that the order impugned before it was rightly passed while exercising the jurisdiction vested in the CEO. The aggrieved party reached the High Court in civil revision. It was contended that the CEO had no power to recall his order. The party aggrieved by the order of acceptance should have moved to the waqf tribunal instead of the CEO. The CEO had exceeded his jurisdiction while passing the order of recalling the order of acceptance of the change report. It was further contended that wakf tribunal while deciding had wrongly interpreted the provisions of section 42 of Wakf Act, 1994. It was argued that the tribunal erroneously confirmed the order of the CEO by holding that the CEO had jurisdiction to review his own order. After having perused the agreements and evidence, the High Court came to the conclusion that if the order of acceptance of the change report analyzed in the light of the decisions of the apex court referred to here it was clear that order was obtained by the applicant by submitting incorrect/false information, in other words by applying fraud on the CEO. The High Court, following the rules founded by the Supreme Court, concluded that the CEO was a *quasi-judicial* authority and passes an order with respect to the rights of the parties. It was held that though there is no express provision under the Wakf Act that the CEO is empowered to review/recall his order, yet considering the view taken by the apex court, it could not be said that the order recalling his earlier order of acceptance of the change report was passed without jurisdiction. Therefore, the order of the presiding officer of the wakf tribunal that the CEO of wakf board passed an order that was within the power vested in him required no interference.

Bar of jurisdiction to civil court by Wakf Act

In *Musammat Naseem Ara Begum* v *Rizwan Danish Hussain*,[58] the Calcutta High Court examined the propriety of the order of the trial court wherein it was held that the *waqf* created by the *waqif* was "in the nature of *waqfal–al-aulad simplicitor"*. The trial court was of the view that since the *waqf* was created by the *waqif* in the nature of *waqf al-al-aulad* without

58 MANU/WB/0513/2010.

creating any immediate benefit for the members of the *Shia* community of Muslims for any religious or charitable purpose, such *waqf* could not be considered as *waqf* within the meaning of *waqf* defined in section 3(r)(iii) of the Wakf Act, 1995 and, as such, section 85 of the said Act could not be attracted in the present case for ousting the jurisdiction of the civil court for trying the suit.

The aggrieved party went to the High Court against the decision of the trial court. The High Court was of the view that the cause of action for the impugned suit would mature if it was found that the suit property was a part of the public estate and the same was dedicated for the use by the public at large or by a section of the public in connection with any religious or charitable purpose. In such a situation the civil court's jurisdiction would be ousted under section 85 of the Wakf Act. The High Court made strenuous analysis of decided cases and held that "section 85 of the Wakf Act consists of the two parts; first part deals with the general exclusion, subject to various provisions of the said Act which authorizes the civil court, to try certain types of dispute, and the second part deals with the exclusion of civil court's jurisdiction over those matters which are determined by the tribunal under the said Act".[59]

The High Court found that the plaintiffs had claimed that they were beneficiaries in *waqf* property. This suit was filed to establish their right of performance of religious functions in the suit property and for injunction for restraining the defendants from carrying on any act in contravention of the provision of the *waqf* deed. By applying the provision of section 90 of the Act of 1995, the High Court held that since the right of the plaintiff as beneficiaries under the *waqf* deed was sought to be enforced in this suits, it could be maintained before the civil court, "in as much as such type of suits are not excluded from the jurisdiction of the civil courts, either under the first part or under the second part of section 85 of the said Act".[60] Thus, the High Court, on over all consideration of the entire scheme of the Act, concluded that it could not held that the plaintiff's suit was liable to be rejected due to bar in maintaining the suit before the civil court under section 95 of the Wakf Act.

VIII *WIRASAT* (LAW OF INHERITENCE)

Child of predeceased son as inheritor

The issue before the High Court of Jharkhand in *Jamila Bibi* v. *Hasmuddin Ansari*[61] was whether children of the predeceased son could inherit the property of their grandfather. The suit was instituted to give effect to the partition of a property devolved on the inheritors. The High Court reiterated

59 *Ibid.*
60 *Ibid.*
61 MANU/JH/0529/2010.

the established position of Islamic law relating to the entitlement by inheritance of the property left by their grandfather in case the son had been died before his father. The court held that since the parties were governed by Muslim law of inheritance and since Usman Mian was predeceased son of his father Sultan Mian, the children of Usman Mian had no right of inheritance in the property of Sultan Mian. It may be noted that the decision of Jharkhand High Court is in conformity with Muslim law of inheritance.

Inheritance of the service and pensionary benefits

In *Shaik Tara Begum* v. *Shaik Sartaj Begum*,[62] the High Court of Andhra Pradesh considered the legal position of marriage with a sister in the presence of the elder sister as wife of a Muslim male. The court considered the issue of division of service and pensionry benefit to be shared by various inheritors. The deceased was attender in the commercial tax department of the state government. Service rules did not permit bigamy and Muslim law also did not allow a marriage with two sisters simultaneously. It was contended before the court that the second marriage was against a prohibition under the A.P Civil Services and Conduct Rules, 1964. Therefore, the second wife and the children from the deceased were not entitled to the service and pensionery benefits. This contention was opposed on the behalf of the second wife and her children arguing that the rule would govern the service conditions in the context of disciplinary action and these would not have effect on the law of succession and the service rules could not change the course of succession under the personal law. It was also contended that the second marriage between the deceased and the sister of his wife was illegally prohibited under personal law of Muslims.

Deciding the question of bigamy under service rules, the court observed, "The prohibition contained under the rules would certainly have entailed in disciplinary action against the deceased. However, no such proceedings were initiated. A condition in service rule, howsoever relevant it may be for efficient administration or for other related purposes, does not have the effect of defeating the rights of the citizens under their respective personal law".[63] The court held that even if an employee was liable to be dismissed from service on the ground of bigamy, a second or third marriage, contracted by a Muslim does not become void on that basis, if the marriage is otherwise valid. The court further held that the service rule, which imposed restriction on number of marriages, did not have effect of defeating the rights of the petitioners under their personal law.

With regard to the rule of unlawful conjunction, the court laid down that "in case a man professing Islam, marries two women, who are sisters, such marriage is only irregular (*fasid*) and not void. (*batil*)" The court held that the

62 2010 (5) ALD 290.
63 *Ibid.*

offsprings of such marriage are legitimate and entitled to inherit the property, left in whatever form, of the deceased. The court further held that the petitioner (second wife) and the respondent no.1 (the first wife) would be sharers. In case of other category of heirs, the court did not find any record and it was not clear from the evidence available.

It may be pointed out that in case of *fasid* marriage, wife enjoys no right of inheritance under Muslim law. On the basis of equity, the court determined the shares of the inheritors in the property of the deceased and laid down the scheme holding that "as a measure of equity, even while respecting the law of succession to certain extent, it is felt that it would be just and reasonable, if the first petitioner and the first respondent are held to be entitled to one-third share of the service benefits, each, and petitioners no. 2, 3 and 4 and respondent no.3 are entitled for the rest of the one-third in equal shares".

It is submitted that the court did not apply the law of succession of Islam though the court assiduously have applied the personal law in case of bigamy and *fasid* marriage and gave preference to the rules of personal law over service rules.

Effect of requisition on inheritance

The government for *fauji parva* required the immovable property of Aijaz Husain. When defense personnel proceed for a war or for any other reasons, they used to halt somewhere and utilize land, which is in nature of acquisition without intervention of the Land Acquisition Act, 1894. Such action on the part of the defense personal is known as ' *fauji parva'*. The High Court of Allahabad, in *Mohd. Naiyyar* v. *Competent Authority/District Magistrate*,[64] had to countenance a piquant situation as to whether the requisitioned property, after serving the purpose for which it was required, would be returned to its owner. Further, the court had to consider whether such property would be governed by the law of inheritance in accordance with Islamic system of jurisprudence.

In the present case, a distinction has to be made between acquisition and reacquisition of the property. The court was of the view that "the acquisition means the acquiring of the entire title of the expropriated owner whatever the nature and extent of that title may be. The entire bundle of rights which was vested in the original holder passes on acquisition to the acquirer leaving nothing for the former".[65] But the concept of requisition involves merely taking or "acquire or control over property without acquiring rights of ownership and must by its very nature be of temporary duration." The court further observed that if requisitioning property could legitimately continue for an indefinite period of time, the distinction between requisition and acquisition would tend to become blurred because in that event for all practical purposes the right to

64 2010 (3) AWC 2647.
65 *Ibid.*

possession and enjoyment of the property which constitutes a major constituent element of the right of ownership would be vested indefinitely without any limitation of time in the requisitioning authority and it would be possible for the authority to substantially take over the property without acquiring it and paying full market value as compensation under the Land Acquisition Act, 1894. The High Court, guided by the decision of the apex court in *Charnjit Lal Chowdhry* v. *Union of India*,[66] held that the government can under the guise of requisition continue for an indefinite period of time, in substance acquire of property because that be a fraud on the power conferred on the government. The court was of the view that "if the government wants to take over the property for an indefinite period of time, the government must acquire the property but it cannot use the power of requisition for achieving that object."[67] The court held that unless the requisitioned property is acquired under section 7 of the Land Acquisition Act within a period of 17 years, it shall be released to its owner and as far as practicable, be given to the person from whom the possession had been taken at the time of the requisition or to the successor in the interest of such person. After making perusal of the existing provisions of the law applicable to the instant case, the court directed the government to vacate the property and hand it over to the petitioners who would hold the same as *custodia legis* till the decision of the competent civil court regarding shares of the petitioners in the property. The owner of the property in question was a *Shia.* Therefore, the property would be divided in accordance with the injunctions of Shia law of inheritance.

Applicability of Muslim law of inheritance in a firm

In *Chaudhary Abdul Majid Shahadat* v. *Smt. Shehnaz Abdulla Shahadat*,[68] the High Court of Bombay decided that the share of a deceased partner in a builder's firm had to be divided among the heirs of the deceased in accordance to his personal law in the presence of several agreement, namely consent terms, development agreement, power of attorney and relinquishment. The heirs of the deceased partners had to receive their shares in the proceeds of the sale and profit accrued in accordance with the Muslim law of inheritance.

Women as an absolute owner of her share

In a suit of partition, the trial court decided the issue of giving effect to the principles of Hindu law holding that the property was not the absolute property of a female, if the source from which the property has been purchased, was proved to be of the joint family or by the husband then would not be considered to be the property of the female. Aggrieved by this judgment, the appellant went to the High Court. The High Court of Jharkhand, in *Mukhtar*

66 AIR 1951 SC 41 : 1950 SCR 869.
67 *Ibid.*
68 MANU/MH/0627/2010.

Ahmad v. *Mahmudi Khatoon*,[69] had to resolve the controversy raised in the decision of trial court. After going through the averments of the parties and evidence on record, the court held that there was no concept of jointness known in the Muslim law and step children would not inherit from step parents. The court laid down that "according to Muslim law, since all properties in the name of a female belongs to her exclusively and there is no concept of jointness of nucleus,"[70] the deceased Muslim woman was absolute owner of the property and, after her demise, her property would be divided among her children and their shares should be determined according to the injunctions of Muslim law of inheritance and the partition should be effected accordingly.

IX CONCLUSION

The foregoing survey makes it clear that the courts, particularly higher judiciary, in our country, are vigilant in protecting the rights of women and remedying violations of these rights by husbands, be they concerned with maintenance, divorce, or *hizanat*. It seems plain that the courts have increasingly assumed the role of benefactors, providing new connotation to social institutions. In case of Muslim divorcee's maintenance, the judiciary seems clear to restrict, and ultimately remove, the application of the Muslim Women (Protection of Rights on Divorce) Act, 1986 by twisting the intention of law-makers, by interpreting the provisions of the Act as subservient to the provisions of sections 125 and 127(3)(b), Cr PC in the name of elimination of vagrancy and destitute situation. It gives an impression that Islamic law is to promote vagrancy and destitute by denying social protection and welfare to Muslim women and work against gender justice which is not very sound preposition for those who are acquainted with the true spirit of Sharia.

The cases relating to *hizanat* brought before the court show that the behaviour of father of a minor child, whether son or daughter, had been loveless for children, after having contracted second marriage, after the demise of first wife, even if the relatives of the deceased wife are of poor economic conditions. This year's survey shows that the court did refuse custody of a boy to his father who has sufficient and enough means to support his son. The only ground for refusal was his second marriage after the death of his first wife. However, the court did not deviate from the Islamic law of *hizanat* while giving importance to the welfare of the child.

In most of situations, unscrupulous husbands try to reap undeserved benefit from existing legal safety valves. The High Court of Bombay tackled this situation when the normative significance was under review. The court

69 (2010) 2 JLJR 636.
70 *Ibid.*

correctly observed that the *halala* was not necessary in case of *talaq–e-bain*, if the estranged couple wish to rejoin in *nikah* voluntarily. The observance of *halala* practice is a *sine quo non* for remarriage between the divorced couple, if the *talaq* had become *talaq-e-mughalliza.* The norm of *halala* is a preventive measure to deter the husband from pronouncing *talaq* third time and deprives the husband to take undue advantage of revocability of divorce and make the woman hapless, diminishing the chance of remarriage with other person. Revocability may turn to be a source of perpetual mental agony and social exploitation.

This survey reveals that the High Court of Kerala took a liberal view in determining the connotation of "equitable treatment in accordance with the injunctions of Quran" as contained in section 2(viii)(f) of the Dissolution of Muslim Marriages Act, 1939. The court adopted a liberal interpretation when it observed that bigamy in itself was not a ground for seeking dissolution of Muslim marriage but it provides an impression that it would create circumstance where equitable treatment to both wives would not be possible and practicable. The plea taken by the wife that the second marriage of her husband deprived her of equitable treatment is sufficient to allow the dissolution of her marriage.

In case of a *fasid* marriage, the High Court of Andhra Pradesh did adopt a correct approach recognizing it as an irregular marriage, but lost sight of the fact that under such type of marriage, right of inheritance does not accrue to any spouse in case of death of the either. But the court allotted the shares to both sisters who were simultaneous widows to inherit after the death of husband.

This survey includes a case decided by the High Court of Allahabad which seems to embody the doctrine of corrective justice. The court approved the *ratio* propounded in an earlier case decided in 2001, wherein it was held that *bhumidar* belonging to Muslim community can transfer his holdings by making an oral gift according to Muslim law and section 2 of the Shariat Act, 1937 did not affect this rule of Muslim law.

The present survey has brought to light some errors which inadvertently crept into judicial pronouncements. The High Courts of Andhra Pradesh and Bombay took the textbooks as legislated statutes. They used such phrase as "sections 260, 263 and section 267" of Muslim law referring the book of Mulla on the subject. Similarly, the High Court of Bombay said that "section 257, chapter xiv in Mulla's Mohammedan Law" and the court again referred to Mulla and said "section 311 and 312". When one looks at the corpus of Muslim personal law, one finds that there is uncodified as well as codified Muslim law. The court needs to be careful in referring the uncodified law given in books as the same is not codified into sections by any legislative authority.