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MUSLIM LAW

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I INTRODUCTION

MUSLIM PERSONAL laws always remained an interesting area where the judiciary has applied its legal wit to bring them in the main stream of the national legal system. There are noticeable decisions handed down by the judiciary in 2011 covering law relating to succession, property, marriage, divorce, maintenance, guardianship, partition, *spes successionis*, gift, will, *waqf* etc. The judgments covered in this survey reveal that people are increasingly becoming aware of their legal rights and the remedial process to get them enforced in case of violation of such rights. This may be the result of general awareness and enhancement of literacy among the Muslims who are otherwise regarded as illiterate or ignorant. Indian judges, jurists and academia have made strenuous efforts to dispel ignorance from the Muslim community. They have ventured to point out the lacunae in the Muslim law, as applicable in India, to make room for reforms and remove deficient safety valves from Muslim personal law. This survey presents an analysis of cases relating to Muslim personal law. The cases have been divided into two major parts, namely, law of status and law of property and analysed accordingly in the following heads.

II *NIKAH* (MARRIAGE)

Marriage after conversion

The High Court of Delhi in one case decided the validity of conversion of religious faith of the parties to the marriage and *nikah*. In *Faheem Ahmad* v. *Naviya @ Luxmi*,[1] the twin problem before the court was whether there was valid conversion. In this case, the petitioner/respondent had converted from Hinduism to Islam and the high court had to determine the status of the marriage solemnized after conversion. The petitioner/respondent and respondent/appellant were friends since college days. The case of the petitioner/respondent girl was that she wanted to get the membership of library in the Jama Masjid, Delhi. The respondent/appellant boy gave an assurance to help her to get the same. He persuaded her to convert to Islam for the purpose. The respondent deposed that she signed and executed certain documents which the appellant claimed to be registration of the marriage and

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1 178 (2011) DLT 671.

conversion certificate and that by virtue of those documents she became his wife. The respondent challenged the validity of these documents and prayed before the trial court for having the registration of marriage declared to be of no effect. The trial court decreed in favour of the respondent. But the trial court did not accept the story of the girl relating to conversion that was about seeking the membership of library in the Jama Masjid. The trial court discovered that the respondent wanted to convert for marriage with Muslim boy. It was contended by the appellant that the learned trial court ignored the documentary evidence which was brought on record by the appellant to prove the conversion of the respondent from Hindu to Muslim religion and also solemnization of the marriage between the parties according to Muslim religion. The contention of the appellant was that the conversion affidavit was duly proved on record, *nikahnama*, public notice about the change of name from Luxmi to Maviya were presented before the trial court. It was further submitted that even a complaint in writing was made by the respondent to police wherein she had disclosed the fact of her marriage with the appellant and sought her safety from her parents. Thus, it was contended by the appellant that these vital documents could not have been ignored by the trial court which clearly had established the *factum* of conversion and marriage between the litigants. It was further submitted that the respondent was a well-educated lady and voluntarily came forward to agree for conversion as well as marriage according to Muslim rites and customs. It was further argued that the cross-examination of the appellant did not reveal that he forced the respondent for the said conversion or any fraud was played on the respondent to seek registration of the marriage. The respondent, on the other hand, supported the findings of the trial court. The respondent took exception to the finding that the respondent wanted to convert her religion from Hinduism to Islam. The high court did not accept this contention of respondent and did not find any infirmity in the finding of the trial court and held that the respondent converted herself to Islam with a view to get married to the appellant. But the high court held that it should not be an exercise undertaken by someone as a mere pretence to achieve some mere limited objectives or purpose like entering into matrimonial contract. The high court held that in the present case there was no genuine conversion of the respondent from Hinduism to Islam. The high court further held that since there was no conversion of the respondent from Hinduism to Islam and thus, there could not have been any valid marriage between the parties as the marriage of a Muslim with a non-Muslim is invalid in itself.

The high court observed that all the other contentions relating to the valid marriage according to Muslim rites and customs were found to be devoid of any merit. The court further laid down that even assuming that there was a void conversion of the respondent, the putative marriage lacked all essential requirements for a valid marriage under Muslim law like offer, acceptance, two male witnesses and free consent etc. The *nikahnama* itself did not indicate a requisite marriage; it is a testimony for a fact which had not been proved in the instant case. Therefore, the high court held there was no valid marriage subsisting between the litigants. The high court went a step further and approved the suggestion made by the High Court of Kerala to settle the controversy relating to the conversion and felt that there was a dire need for legislative intervention and hence it was imperative to

mitigate and curb the judicial battles and controversies arising out of the converts religious status in matrimonial proceedings. The Law Commission of India thus acting on the suggestion of Kerala High Court in its 235th Report[2] has made its recommendations relating to this problem of converts.

***Factum* of marriage**

To enjoy matrimonial benefit, it is essential for the parties to prove the subsistence of marriage. The Madras High Court in *Tajuddin* v. *S. Bibi John*[3] had to decide as to whether a woman can claim matrimonial benefits. It had been observed by the court that section 125, Cr PC has been enacted in the interest of a wife and one who intends to take benefit has to establish that she was the wife of the person concerned. If there was no marriage between the two as per their personal law, there can be no status of wife. Moreover, the subsistence of marriage must be proved as solemnized in accordance with the requirements of Muslim law in case marriage is denied. Further, the court was inclined to accept the marriage by acknowledgment. It held:[4]

> (I)f the claimant in proceedings under section 125, the Court succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses in such a situation, the party who denies the marital status can rebut the presumption.

Restitution of conjugal relations

In *Shaikh Abdullah* v. *Husnaara Parveen*,[5] the High Court of Bombay was called upon to clear doubts relating to restitution of conjugal rights. The high court laid down that two queries must be answered in deciding this controversy, namely whether there existed a valid marriage in accordance with Mohammadan law between appellant and respondent and whether respondent had withdrawn from the society of the petitioner without reasonable cause.

The present appeal was filed by the petitioner husband against the judgment and order passed by the family court dismissing his petition for restitution of conjugal rights. The appellant and the respondent were cousins living adjacent to each other. The case of appellant was that they fell in love and their love affair had developed into an agreement to enter into matrimonial relations. The appellant and respondent got married as per the provisions of the Muslim personal law. It was submitted on behalf of the petitioner that the marriage was consummated and he made her wife a nominee in his bank account. According to the appellant, he and the respondent led marital life for about four months.

The respondent denied the marriage and sent a notice through her lawyer alleging that marriage was performed fraudulently and that the appellant had misused her

2 Law Commission of India, Conversion/ Reconversion to Another Religion Mode of Proof, Report no. 235, available at, lawcommissionofindia.nic.in.

3 Crl. R.C. No. 1775 of 2007, decided on 9.2.2011, MANU/TN/1618/2011.

4 *Id*. para 7.

5 2012 (1) Mh LJ 174.

signature on certain forms. The respondent also lodged complaint with the police. The family court held that no valid marriage was proved and thus, question of restitution of conjugal rights did not arise.

In appeal before the high court, it was urged on behalf of the appellant that the finding of the family court was, in general, illegal. It was further argued that the court below had erred in interpreting the law by holding that the marriage was not legal and valid. It was submitted that the appeal ought to be allowed as there was sufficient evidence to prove that there was valid marriage between the appellant and the respondent. It was contended by the appellant that the respondent had withdrawn herself from the company of the appellant on the ground that she was educated and the appellant was illiterate. It was submitted on behalf of the respondent that she had not been married to the appellant and there was no cohabitation at all. It was contended that there was no possibility of marriage taking place in the absence of family members of the respondent. It was further contended that a legal notice was served that her signatures were taken by fraud or perforce.

The high court held that under Muslim law, marriage was a civil contract and all the ingredients of a valid contract must be satisfied. The court was of the view that a proposal in the presence and hearing of the witnesses and unqualified and absolute acceptance of the said proposal, at the same meeting can constitute a valid *nikah* under Muslim personal law. Free consent of the respondent and/or the appellant was a *sine qua non* for a valid *nikah*. If her consent was obtained by coercion or fraud, it could not lead to a valid marriage. Considering the evidence on record, the high court concluded that the "claim of the appellant was not corroborated by any satisfactory proof as to valid *nikah* as well as to cohabitation and consummation of marriage, as claimed". The court laid down that "in order to succeed in a petition for restitution of the conjugal rights, it was obligatory upon the appellant to prove the existence of a valid marriage between him and the respondent".

The courts in the above cases tried to decide the issues under the orbit of Islamic law in its true spirit including the conversion from one faith to another which indeed should be taken into consideration after having analysed all the situations of pre- and post-status of the parties who have been converted. The conversion should not be only for the purpose of marriage.

III *FASKAH NIKAH* (DISSOLUTION OF MARRIAGE)

In the present age of information and technology, the populace at large is still misinformed that a Muslim woman has no right of divorce and it is the man who is empowered to dissolve his marriage. This wrong information needs to be dispelled. Under the Islamic legal system, a woman cannot pronounce divorce but she can seek divorce from her husband and/or seek dissolution of her marriage through the court. The Dissolution of Muslim Marriages Act, 1939, embodies this right of women and women folk are enjoying the right. On this point, a case has been decided by the High Court of Uttaranchal, Nainital, namely *Smt. Nafeesa* v. *Shamim Ahmad*.[6] In this case, the wife alleged in her petition for divorce moved under section 2 of

6 2011 (2) UC 1401: 2011 (2) UD 24 : AIR 2011 (NOC) 379 (Utr).

the Dissolution of Muslim Marriages Act, 1939 that her husband/respondent, after two years of marriage, started subjecting her to harassment and mental and physical cruelty. It was also pleaded by her that the respondent was a thief who was involved in the business of selling meat/beef of stolen animals. With these allegations, the appellant sought a decree of divorce from the trial court. The respondent husband denied all allegations and opposed the prayer of dissolution of marriage. The trial court did not accept the allegations of cruelty and dismissed the suit of the wife. On appeal, the High Court of Uttarakhand found some truth in the averment of the petitioner wife when she specifically pleaded that the respondent used to beat her and assault her physically. She further stated that she was ousted from her matrimonial house by her husband when she was pregnant and her second daughter was born in her parental house. The court declined to toe the argument advanced by the husband denying the allegation of cruelty and neglect as he had nowhere stated as to what amount and when maintenance was paid by him to his wife or the children who were admittedly living in the parental house of their mother. The high court reversed the judgment of trial court and held that the respondent had treated his wife with cruelty and also neglected to maintain her who was living with her two daughters in her parental house.

Rights on divorce

A Muslim divorcee is entitled to seek benefit of section 125, Cr PC or the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, relating to her rights after dissolution of her marriage. In *Md. Atar Rahman* v. *Mustt. Sahajun Begam*,[7] the High Court of Guwahati resolved that in case the divorce between the husband and wife became final, the divorcee can demand and recover under section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 her unpaid *mehr* and maintenance during the period of *iddat* in one application filed before the magistrate. In this case, the appellant had divorced his wife and that fact was not denied by the appellant in his written statement. The trial court decided the case in favour of the divorcee awarding Rs. 25,101/- as the amount of *mehr* and Rs. 3000/- as maintenance for the period of *iddat*. In the revision filed before the sessions judge, the appellant husband claimed that he had not divorced the opposite party. The sessions judge refused to attribute any significance to the statement made by the petitioner. The sessions judge found that the opposite party, the respondent, had been able to prove that her marriage had been dissolved by pronouncing *talaq* and the *mehr* was fixed as Rs. 25,101/-. The revision petition was dismissed. On appeal, the high court maintained the findings of the courts below and held that the situation in the appeal did not call for any interference in the exercise of the court's inherent power under section 482 of the Code of Criminal Procedure. Thus, the revision failed and stood dismissed.

IV *NAFQA* (MAINTENANCE)

Several high courts have handed down judgments relating to the law of maintenance involving Muslims. The provisions relating to maintenance contained

7 Criminal Revision Petition No. 332 of 2004, decided on 2.6.2011.

in the Cr PC are anti-vagrancy and embody the spirit of welfare of the indigent dependents. The issue relating to maintenance of ex-wife, particularly divorcee, always remains a bone of contention for the judiciary, law men and jurists. In *Smt. Mumataz Begum* v. *Shri Sabir Husain*,[8] the High Court of Delhi was called upon to enhance the amount awarded as *interim* maintenance. The petitioner filed petition under section 125, Cr PC before the metropolitan magistrate, which was pending for final disposal. The metropolitan magistrate had awarded *interim* maintenance @ Rs. 500/- per month to each child with effect from January, 2006. The petitioner filed a criminal revision before the additional sessions judge against the order of metropolitan magistrate which had been disposed of by the order under dispute in the present petition. Against this order, the appellant went before the high court under section 482, Cr PC. It was admitted that the respondents and petitioner were gainfully employed. After the implementation of sixth pay commission, they had seen getting more. Therefore, the amount of Rs. 500/- per month was a meager amount. On behalf of the respondent, it was submitted that he had more responsibilities towards his family. The respondent had re-married and had been blessed with one male child from his second wife. The respondent was looking after them also. Therefore, it was argued before the court that the petitioner was earning sufficient amount to maintain her child and the maintenance awarded by the trial court was just and appropriate. The high court envisaged that it was the legal and moral responsibility of each parent to look after his/her children. Future of the children could not be put in jeopardy on account of matrimonial acrimony between husband and wife. The father could not absolve himself from his responsibility to provide financial assistance to the petitioner's children to meet their needs and education, etc. The high court observed that the amount awarded by the court below could not be termed as just and reasonable by any standard. It directed that the respondent should pay a sum of Rs. 2500/- to each child and that would be just and appropriate.

Basis of maintenance to wife

Muslim women enjoy two legal devices to resolve their controversies relating to maintenance. The wife and ex-wife can seek maintenance under Muslim law as well as under the scheme of the Cr PC as envisaged under sections 125 and 127. Both legal systems demand the solemnization of marriage, directly or presumed from the conditions and circumstances in a given case. In the instant case,[9] the High Court of Madras had to resolve the controversy relating to the existence of valid marriage as a *sine qua non* for obtaining maintenance by the wife under section 125, Cr PC. The high court referred the decision of the Supreme Court in *D. Velu Samy* v. *D. Patchaiammal,*[10] wherein the apex court had laid down that "there is no scope to include a woman not lawfully married within the expression of 'wife' and a divorced wife is treated as a wife but if a person has not even been

8 Crl. MC No. 1440/ 2007, decided on 3.5.2011.

9 *Tajuddin* v. *S. Bibi John, supra* note 3.

10 (2010) 10 SCC 469.

married obviously that person could not be divorced and hence cannot claim to be the wife". The Supreme Court had further observed:[11]

> Section 125 of Code (of Criminal Procedure) has been enacted in the interest of a wife and one who intends to take benefit under sub-section (1)(a) has to establish the necessary consideration, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained.

After analysing the decisions of the Supreme Court, the High Court of Madras held:[12]

> In my considered view, the claimant having failed to prove either her marrital or living together relationship with the Respondent for reasonable duration in the nature of marriage, is not entitled to claim any maintenance and the award of maintenance passed by the trial court is hence factually and legally unsustainable.

Retrospective application of the Act of 1986

The central legislation has recognized the rights of Muslim women available to her at the time of divorce through the Muslim Women (Protection of Rights and Divorce) Act, 1986. Since then, women are filing suits under this legislation and the courts, to an extent, are appreciating the scheme underlying this legislation directed for the protection of divorcee's rights. The High Court of Allahabad considered the question of retrospective operation of the Act. In *Mohd. Abbas* v. *Mst. Ejazan*,[13] the high court stated that in order to consider the question whether 1986 Act was applicable to the Muslim women who were divorced before the enforcement of the Act, it would be appropriate to consider primarily that in the entire Act, there was nothing to show that the Act would be applicable only to those cases where a Muslim woman was divorced after enforcement of that Act. The court was of the view that the word "divorced woman" used in section 2(a) of the Act meant a Muslim woman who was married according to Muslim law and had been divorced by, or had obtained divorce from, her husband in accordance with Muslim law. Therefore, the court held that it had "no manner to doubt that it would apply to Muslim woman who has been divorced even before the enforcement of the 1986 Act".

Higher amount of maintenance

In *Abrar Ahmad* v. *Union of India*[14] the respondent wife aged 70 years wanted that 50 per cent of her husband's pension should be commuted to meet the rising inflation and the cost of living. The divisional railway manager passed an order

11 *Savitaben Soma Bhai Bhatiya* v. *State of Gujarat* (2005) 3 SCC 636 at 642.
12 *Supra* note 3, para 16.
13 2011(7) ADJ 481 : (2011) 6 AWC 5613: 2012 Cri LJ 580.
14 Writ. A. No. 9905 of 2006, decided on 5.5.2011.

directing 50 per cent pension of the petitioner to be given to the wife/respondent for her maintenance. An application was filed by the petitioner challenging this order before an appropriate and competent authority but the same was dismissed. The petitioner went to the higher court through this writ petition. A criminal revision arising out of the proceeding under section 127, Cr PC for enhancement of the maintenance was pending in the court. It was admitted that the respondent's wife was entitled maintenance @ Rs. 400/- per month, unless it was enhanced by the court or mutually settled to be enhanced by the parties. Keeping in view the age of the parties, the high court was of the opinion that they should settle the matter to live in peace. Thus, the consent of the litigative parties the pending matter was referred to the Allahabad High Court Mediation and Conciliation Centre.

Incidents of maintenance

The High Court of Kerala in *Ismayil* v. *Fathima*[15] had an occasion to tackle the question as to whether the concept of maintenance under section 125, Cr PC includes the expenses of marriage of an unmarried adult daughter. Speaking on behalf of the division bench of the High Court of Kerala, R Basant J had answered the question in positive holding that it was one of the incidents of the right to maintenance as the definition given under section 125 was not exhaustive. It was rather inclusive and illustrative. The case of the plaintiff/respondent before the trial court was that the husband and father of the respondent was under legal obligation to pay past and future maintenance to his wife and daughter as also the prospective marriage expenses of the unmarried adult daughter. It was also prayed through an application that in case of non-payment 50 per cent the property belonging to the father/husband should be attached. That petition was allowed and attachment was effected. The petitioner husband filed an application praying for lifting the attachment. The court below rejected the application for lifting the attachment. The aggrieved father/husband went to the high court against the order of the court below. On behalf of the petitioner/defendant, it was contended that the Muslim father has no obligation to meet the expenses of marriage of his unmarried daughter. It was further asserted that whatever may be liability of fathers similarly situated belonging to other religious communities, the Muslim father had no such liability. After analysing several judicial decisions, the High Court of Kerala had realised the need to "take within the wings of the right of maintenance not only food, raiment, and lodging but also all other necessary expenses for the mental and physical well-being of the recipient". The court was of view that so far as unmarried daughter was concerned, marriage was also something essential and necessary for her mental and physical well-being. The court felt that the marriage expenses could certainly be included in the concept of maintenance which father was under obligation to provide for his unmarried adult daughter.

The court took into account the prevailing social milieu and the position of women in the present level of emancipation of the Indian women. It is impossible to accept that an unmarried daughter can find for herself and enter into marriage without support of the father. The court further observed that in case she was able

15 2011(4) KLT 40.

to choose a bridegroom for herself, then the father had social obligation to arrange the marriage expenses. The court stretched this notion and applied it to all fathers belonging to any religious denomination and held that father is perceived to discharge the responsibility of giving his daughter and bear all marriage expenses. In the view of the court, the concept of right to maintenance in the present day in the Indian society could not be allowed to be understood and interrelated under conditions that prevailed in medieval Arabia. The court said that whether father in Saudi Arabia during the ancient period had the obligation to meet the marriage expenses of his daughter was irrelevant.

It was submitted before the court that there was not a single precedent and section 125, Cr PC or its predecessor's provisions which laid down that marriage expenses are included in the right to maintenance. The court did not pay attention to this argument and rejected it. The court expressed the view that the concept of maintenance, though claimed under personal law, must yield to a uniform and common understanding of the concept. The court further asserted that conceptually maintenance could not mean different things for followers of different religions. Seeking light from article 14 (equality before law) and article 44 (uniform civil code), the court found the law of maintenance as provided under the Hindu law, that is to say, section 3(b) of the Hindu Adaptation and Maintenance Act, 1956. Under this law, the Hindu father is under an obligation to meet the expenses of marriage of his unmarried daughter. The court applied this law applicable to Hindus to Muslims holding that Hindu father and the Muslim father lived in the same society with identical duties and obligations in the moral plain to his father. It was explicitly submitted before the court that Muslim father was not under obligation according to their personal law to meet the expenses of his unmarried adult daughter. Despite this, the court sought assistance from Hindu law binding the Muslims under the umbrella of Hindu law. The court held:[16]

> (W)e deem it unnecessary to interpretationally exempt the Muslim father from his responsibility to maintain his unmarried daughters. We deem it only proper and appropriate to include in that obligation, the obligation to meet the marriage expenses of his unmarried daughter.

The court was of the view that article 44 casts a duty on the judiciary to work to secure uniform civil code. The court held that "where the interpreter has elbow room, he must invoke the powers of interpretation as a functionary of the state consistent with the mandate of the article 44 of the constitution". The court further laid down that "the interpreter need not wait for the parliament to enact a uniform civil code. Till that is done by the Parliament, the interpreter as a functionary of the state must draw inspiration from article 44 of the constitution in performing the duty/power of the interpretation". So the court proclaimed that the duty to maintain the unmarried daughter under the personal law must in the present day include the obligation to meet the marriage expenses of them. This ratio and intrinsic rule covers all members of the Indian society and the Muslim father in the view of the

16 *Id.* at 48.

court, is not exempted. The court has tended to add that the right/duty is only to meet the reasonable expenses "that too only when the daughter is dependent on the father".

Another case of maintenance was handed down by the High Court of Bombay, namely *Shaikhhinabee Sayyad Wali Shaikh* v. *Sayad Wali*,[17] in which court reiterated the position of law established by the apex court in numerous judicial pronouncements like *Shamim Ara*.[18] The high court held that in a suit of maintenance filed by the wife under section125, Cr PC, the husband cannot rely on the pronouncement of divorce in written statement effected after the institution of the maintenance suit. The court further held that such divorce should be proved and affected in accordance with the provisions of *Quran*, if the *talaq* is not legal or valid. That intention of the husband was to use the plea of divorce as a device to defeat the legal proceedings relating to the maintenance.

V *VILAYAT* (GUARDIANSHIP)

The Muslim law of guardianship consists of two components: one, relating to *vilayat* and second, relating to *hizanat*. Many times, controversy arises as to the physical possession of the minor child during the sour relationship of the parents. The layman, being ignorant about the distinction between the *vilayat* and *hizanat*, prefers to go to the court for resolving the conflict relating to the issue of guardianship. In *Shahid Khan* v. *Anjum Pasha*,[19] the Delhi High Court decided the issue of a writ of *habeas corpus* seeking production of his son stated to be aged over 7 years from the custody of his ex-wife. The high court did not accept the line of arguments presented by the counsel of the petitioner based on *Gauhar Begum* v *Suggi*,[20] where the *habeas corpus* petition was held maintainable for the reason that the respondent had no logical right to the custody of the minor children. The court held that "such is not the position here". The high court dismissed the petition with liberty to the petitioner to approach the competent court to adjudicate guardianship/custody matters because the petition necessarily entailed questions of suitability and best interest of the minor.

In another case, namely, *Bashir Ahmad Mir* v. *Rubeena Akhter*,[21] the High Court of Jammu and Kashmir had to countenance the issue of custody of minor child after dissolution of the marriage of his parents. In the instant case, the male child aged 3 years stayed with his father who had entered into a second marriage. The divorcee had asked the custody of her minor son. It was argued on behalf of the divorcee that the petitioner had married a second wife and her minor child would not be safe in the hands of the step mother who had also born a child to the petitioner. It was also submitted that the divorcee was having her income through the occupation of tailoring. It was further stated that she had not yet re-married. More importantly, it was submitted that she was not a party in the execution of so-

17 2011 (4) AIR (Bom) R 217.
18 *Shamim Ara* v. *State of U.P.* (2002) 7 SCC 518.
19 180 (2011) DLT 597.
20 AIR 1960 SC 93.
21 2011 (1) JKJ 937.

called divorce deed as she did not put any signature therein. The paramount welfare of the child was also pleaded on behalf of the divorcee. The high court found itself inclined to adhere to these arguments and held that "this court is of the firm view that the mother is entitled to get the child in her custody". The court further held that "when mother is entitled under the law to get the custody of the child under the age of seven years, the father under Muslim Law is not permitted to keep the child in his custody".

VI *HIBA* (GIFT)

Muslim law of gift is a branch of Muslim law of contract. All the requirements of modern law of contract for a valid contract are essential elements of the Muslim law of gift. The salient feature of later is that it also recognizes the contractual transactions done without consideration. This type of contract can be entered into either by oral agreement or reducing the subject-matter into writing. The present survey covers cases decided by apex court and some high courts.

Effect of non-registration of gift deed

In *Hafeeza Bibi* v. *Shaikh Farid (dead) by LR,*[22] the Supreme Court had to define the legal character of gift made by a Muslim in writing without getting it registered under the Indian Registration Act, 1871. One Shaikh Dawood had died intestate leaving behind three sons and five daughters to inherit his legacy. Plaintiffs in the original suit filed a suit for partition and averred that they were inheritors of the deceased Shaikh Dawood. One of the defendants, namely Mohd Yakub contested the suit and set up the defence that Shaikh Dawood, his father, had executed *hiba* (gift deed) and gifted his properties to him and Shaikh Dawood had put him in possession of the *hiba* properties on that day itself. The trial court, after recording the evidence and on hearing the parties, reached the conclusion that *hiba* became complete and the plaintiff was fully aware of that fact. The trial court, therefore, held that *hiba* executed was "true, valid and binding on the plaintiffs" and held that plaintiffs were not entitled to the shares claimed in the plant. On appeal, the high court set aside the judgment and decree of the trial court. It was persuaded by the arguments of the appellant that the gift, being in writing, was compulsorily required to be registered and stamped. Since the gift deed was not registered, it could not be accepted or relied upon for any purpose and such unregistered gift deed would not confer any title upon Mohd Yakub, one of the defendants in the original suit. The high court further held that the unregistered gift deed would not confer any title on the donee. The high court sent the matter back to the trial court for the purpose of passing a preliminary decree. The aggrieved party went to the Supreme Court against the decision of the high court. The apex court had to determine as to whether that a gift affected by the unregistered gift deed was not a valid gift and conveyed no title to the defendant no. 2, Mohd Yakub. The Supreme Court noted the decision in *Mohammad Abdul Ganikhan* v. *Fakhr Jahan Begam*,[23] where in Privy Council had referred to *Mohammedan Law* by Syed Ameer Ali and approved the statement

22 AIR 2011 SC 1695.
23 (1922) 24 Bom LR 1268.

made therein that three conditions were necessary for a valid gift by a Muslim: (i) Manifestation of the wish to give on the part of the donor; (ii) the acceptance of the donee, either impliedly or expressly; (iii) the taking of possession of the subject matter of the gift by the donee, either actually or constructively. The Supreme Court also referred its earlier view taken in *Mahboob Sahab* v. *Syeed Ismail*[24] and noticed the legal position in relation to a gift by a Muslim. The apex court also analysed the law relating to the gift enacted under sections 123 and 129 of the Transfer of Property Act, 1882 (TPA). Section 129 of TPA contained an exception with regard to gifts by a Muslim. The Supreme Court also referred to section 17 of the Registration Act, 1908 which makes registration of instruments of gifts of immovable property compulsory. The court further made reference of section 49 of the Registration Act, which deals with the effect of non-registration of documents required to be registered. In the light of these legislative provisions, the Supreme Court framed a question relating to the applicability of section 17(1)(a) to a written gift executed by a Mohammedan in the light of section 129 of TPA and the rule of Mohammedan law relating to gift. The apex court examined the divergent opinion expressed by different high court in this regard. The court approved the view of Calcutta High Court laid down in *Nasib Ali* v. *Wajid Ali,*[25] wherein it had been observed that a deed of gift by a Mohammedan was not an instrument effecting, creating or making the gift but a mere piece of evidence. The high court had held that "such writing is not a document of title, but a piece of evidence". The Supreme Court also approved the view of the Gauhati High Court in *Md. Hababuddin* v. *Md. Hesaruddin,*[26] wherein a Mohammedan mother had made a gift of land in favour of her son by a gift deed written on ordinary unstamped paper. It was held by the high court that the deed of gift was immaterial for the creation of gift under Mohammedan law.

The Supreme Court posing a question on its own to the effect that "can it be said that because a declaration is reduced to writing, it must have been registered", answered that "we think not". The apex court held that in the present case, the gift deed was a form of declaration by the donor and not an instrument of gift as contemplated under section 17 of the Registration Act. The court resolved the conflict of views among different high courts and settled the law relating to a gift recognized by a deed reduced into writing though unregistered and held that gift as valid.

Validity of oral gift

In *Mohd. Hanif @ Cheem* v. *Mohd. Idris* and *Smt. Chunni Begam* (since deceased) v. *Mohammad Idris*,[27] the Allahabad High Court had to decide as to whether a mere statement was sufficient to validate an oral gift. This was a dispute between two real brothers, namely, Mohd. Idris and Mohd. Hanif, sons of Smt. Chunni Begam daughter of Gafuran. Mohd. Idris in his suit asserted that he had purchased property in dispute through registered sale deed dated 22.03.1965. It was further placed by Mohd. Idris that a room and some small land of the house

24 (1995) 3 SCC 693.
25 AIR 1927 Cal. 197.
26 AIR 1984 Gau. 41.
27 Second Appeal No. S 457 of 2010 and 458 of 2010, decided on 17.10.2011.

under dispute which was purchased by him in 1965 was given by him to his younger brother Mohd. Hanif as licencee and licence had been cancelled before filing the suit. On the other hand, Smt. Chunni Begam initially filed another suit stating that her mother Smt. Gafuran had executed an oral gift in her favour of the house in dispute. The courts below had found that in the plaint of Smt. Chunni Begam initially the date of alleged oral gift was mentioned as 07.01.1964, which was later on converted into 07.01.1946 by over writing. Both the courts below found that Mohd. Hanif, legal representative of Smt. Chunni Begam, who had died in 1997, could not prove the oral gift to Smt. Chunni Begam. On further appeal, the Allahabad High Court found that Mohd. Hanif was born after 1946 hence his statement regarding oral gift from her *nani* to her mother was nothing but hearsay. The High Court held that most important fact was that Smt. Gafuran had instituted a suit against Purushottam Lal, a tenant, in 1962 for eviction. In case, she had given the property in dispute through oral gift to her daughter Smt. Chunni Begam, there was no sense of filing suit against the tenant by Smt. Gafuran. The high court upheld the decisions of the courts below that the theory of oral gift was utterly bogus and oral gift had not been proved.

VII *WASIYA* (WILL)

Muslim law of property recognises the intestate and testamentary disposition of the property of a deceased Muslim. In case of testamentary disposition, the property can be alienated either by oral will or by a will executed in writing. The will executed in writing can be registered in the office of the competent authority. In case of a will executed in writing and registered, if any dispute arises about the existence and validity of the will, the same shall be determined in accordance with the provisions of Indian Succession Act, 1925 and the Indian Evidence Act, 1872 and if the will is executed orally or in writing without its registration, then Muslim personal law shall be applicable in proving the existence and genuineness of will. Muslim law does not require attestation of the will. This legal position has been examined at length by the High Court of Delhi in *Sheikh Anis Ahmad* v. *State*.[28] The appellants in this case sought letters of administration regarding the will dated 20.11.1984 allegedly executed by Ms. Nawab Begam the deceased testatrix. The respondent, on the other hand, contested the probate petition. While describing the will relied upon by the appellant as forged and fabricated, she also set up another will dated 05.06.1992 claiming to have been executed by Mst. Nawab Begam, the deceased testatrix in her favour bequeathing the whole of her property which was a registered document and had also been attested by two witnesses.

The trial court accepted the will set up by the respondent as genuine and valid even though the only attesting witness examined by the said respondent had not supported her. The next court below framed two issues relating to the genuineness of the disputed will. The ADJ had to decide; firstly, whether the deceased Smt. Nawab Begam had executed any valid will dated 05-06-1992 in favour of respondent no. 3, Mst. Gauhar Sultan and, secondly, if first issue was not proved, whether Mst.

28 FAO. No. 267/2010, decided on 16.3.2011.

Nawab Begum had executed any will dated 20-11-1984 in favour of petitioner, Shaikh Anis Ahmed. While, deciding issue no. 1 in favour of the respondent, the ADJ had not given any finding on issue no. 2 on the pretext that the will setup by the third respondent was later in time and thus superseded the earlier will propounded by the appellant and dismissed the petition filed by the appellant. However, the ADJ has granted probate of the will dated 05.06.1992 in favour of respondent no. 3. In appeal, it was submitted by the appellant that the will dated 05.06.1992 was forged and fabricated document and the said will had not been proved to have been executed by the deceased testatrix nor attestation thereof had been proved. Therefore, it was submitted that the said will was neither valid nor legal. It was further submitted by the appellant that the third respondent claimed that the deceased testatrix had signed the will in the presence of two attesting witnesses while only one witness had been examined who had stated that he did not know Smt. Nawab Begam and further deposed that she did not sign the will in her presence nor he had signed in her presence. However, he had identified his signature on the will but stated that his signatures had been obtained at his house by the husband of Gauhar Begam. He further stated that the other attesting witness did not sign the will in his presence nor he signed in the presence of other attesting witness. The other attesting witness had not been examined as a witness despite his availability. These facts showed that the third respondent had not proved the second will in accordance with the provision of section 63(c) of the Indian Succession Act, 1925 and section 68 of the Evidence Act, the appellant asserted. On the other hand, the appellant had examined two independent witnesses and himself to prove the due execution of the will dated 20.11.1984. But the court below had made no reference to the evidence of the appellant.

The third respondent contested the assertions of the appellant and said that since the will set up by her was executed by a Muslim, there was no requirement to prove such will in accordance with provisions of Indian Succession Act and Evidence Act. It was stated that no such plea had been raised by the said respondent in her written statement. Moreover, the case was required to be proved as pleaded. A plea which had not been raised cannot be relied upon. The appellant asserted that it was even otherwise illegal and void *inter alia* because it was in respect of the entire movable and immovable properties left by the deceased and had been violative of the rule that a Mohammedan cannot by will depose more than a third of his assets and bequests in excess one-third cannot take effect unless the heirs consent thereto after the death of the testatrix.

The high court observed that the respondent herself relied, acted and based her case upon section 63(c) of the Indian Succession Act and section 68 of the Evidence Act and, therefore, the respondent had been stopped from saying that the will dated 05.06.1992 did not require attestation. Hence, the high court observed that the respondent could not change her stand in the appeal and introduce a new case. Moreover, will dated 05.06.1992 was not an oral will. Admittedly, it was a written will attested by two witnesses, as was stated by the objector herself, out of whom only one was examined as a witness who did not prove the will dated 05.06.1992. The high court held that it was thus clear that the respondent no. 3 had failed to prove the will dated 05.06.1992. The high court also held that it was incumbent

upon the learned judge to have also gone into the evidence led on behalf of the appellant *qua* the will dated 20.11.1984. Therefore, the high court held that judgment/ order passed by the ADJ could not be sustained.

Determination of legal position of the title based on will

In line with the above discussion, the High Court of Andhra Pradesh, in *A. Askari Begum wife of Late Syed Nazar Hussain* v. *Mohd. Ayaz Khan S/o Sri Mohd. Abdullah Khan and Kubra Begam W/o Mohd. Ishaq*[29] had to determine the grounds for the validity and genuineness of a will. The high court laid down that the execution of the will must be established and extent of the bequest must be within the parameters set out by the Muslim law of bequest to the claim of title to the property purported to be alienated through the will of the deceased. It was view The court that a will was a compulsorily attestable document and it has to be proved that the executants of the will were conscious and aware of the contents.

VIII *WIRATHAT* (SUCCESSION AND INHERITANCE)

Exclusion from inheritance

The Muslim law of inheritance is a self contained and well defined system of succession to property of a deceased Muslim. It consists of some of the situations where an otherwise inheritor would be excluded from inheriting the property of the propositor. Under *Hanafi* law, an heir who is responsible for the death of the proprositor is excluded from inheritance while the situation under *Shia* law is somewhat different, that is to say, the murderer has to be excluded from the list of inheritors if he caused the death of the deceased intentionally. The High Court of Delhi had to decide a criminal case of death of a victim. The moot point was as to whether the legal heir of the deceased victim came under the definition of the victim in the context of the proviso to section 372, Cr PC. It is well established that the expression 'legal heir' in relation to a victim clearly referred to a person who was entitled to the property of the victim under the applicable law of inheritance. This situation had to be determined by the court in *Kareemul Hejazi* v. *State of NCT of Delhi*.[30] In this case, the victim of crime was a Muslim lady and, therefore, it was the Muslim personal law which would be applicable to decide the question of inheritance. The high court clarified that it is the principle of Muslim law that a person responsible for the death of another person from whom the first person is otherwise to inherit would be disqualified from such inheritance and would be regarded as non-existent. The court, observed that "employing this analogy in the present case for the purposes of determining as to who are the persons who can be regarded as victims in the context of the proviso to the section 372 of the Code, the respondent 3 (the husband of the deceased lady) would have to be treated as non-existent". Consequently, the court decided that "Nasreen's estate (deceased lady) would be inherited by her parents". The court was of the view that the father of the deceased lady would be her legal heir and, therefore, would fall within the meaning of victim for the purposes of the proviso to section 372, Cr PC.

29 2011 (4) ALT 479.
30 2011 (1) JCC 500.

Discharge of the liabilities of the propositors

Muslim law of inheritance embodies the principle that the legacy of the propositors shall be divided among the inheritors after the satisfaction of the debt of the deceased. It has remained a moot point as to whether the contractual liabilities of the deceased amount to or come in the ambit of debts of the deceased and the inheritors are under the legal obligation to discharge the contractual liability of the deceased as debt, particularly in the case of minor inheritors. The High Court of Jharkhand had to decide two issues in *Amar Ahmad Khan @ Amar Ahmad Khan* v. *Shamim Ahmad Khan @ Md. Shamim Khand.*[31] One related to contractual liabilities of the deceased to be discharged by the minors and the other was as to whether the mother of the minors as a legal guardian was entitled to alienate property of her minor children. The father of the appellants, namely Haji Imam Bux, had executed an agreement in favour of the plaintiff/respondent no. 1 on 20.08.1975 for the sale of land, for a consideration of Rs. 11,750/- and the possession of the land was handed over to the plaintiff/respondent no. 1 at the time of execution of the agreement. Imam Bux had died in 1978 before the execution and registration of the sale deed. Thereafter, the plaintiff requested the widow to register the sale deed at her own behest and on behalf of the minor children, being the natural guardian of the minor children (presently appellants). The plaintiff/respondent contended that the mother of appellants avoided execution of the sale deed on different pretexts though she received further consideration relating to the agreement entered into by her deceased husband after his death. Hence, the suit was filed for specific performance of contract.

It was stated before the court that under the Muslim law, mother was not a legal guardian of minors and, therefore, she could not alienate properties belonging to minors, and thus she had no right to accept consideration money on behalf of her minor children for alienation of immovable property. The opposite counsel submitted that under the Muslim law, on the death of a Muslim, his estate liabilities devolve on his heirs and they are liable to discharge said liabilities to the extent of their share.

The High Court of Jharkhand relied on a judgement of the Supreme Court in *N.K. Mohammad Sulaiman* v. *N.C. Mohamad Ismail*,[32] wherein the apex court had observed:[33]

> (T)he estate of a muslim dying intestate devolves under the Islamic Law upon his heirs at the moment of his death i.e. estate vests immediately in each heirs in proportion to the shares ordained by the personal law and the interest of each heir is separate and distinct. Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate.

Relying on this decision, the high court held that "on the death of the Mohammeden his each heir becomes absolute owner of the property proportionate

31 2011 (4) JCR 61 (Jhr.) : AIR 2012 Jhar 39.
32 AIR 1966 SC 792.
33 *Id.* at 794.

to his share". The high court held that Muslim heirs are independent owners of their specific shares and their liability is also proportionate to the extent of their share in the estate. The court laid down that "one share holder has no right, title and interest to alienate property of another share-holder".

As to the second leg of the alienation of the property of minor heirs by their mother, the high court held that "a mother is not *de jure* guardian of her minor children under Mohammdan law and therefore had no right to sale the interest of her minor children in an immovable property and such transaction is not merely voidable but void". The high court relied on the Supreme Court decision in *P.N. Veetil Narayani* v. *Pathumma Beevi*,[34] wherein the apex court had held that "when a Muslim died intestate, any acknowledgement made by one of the heir will not bind other heirs".

It is submitted that the clouds have not been cleared from the controversy as to whether contractual liability falls with the category of debts charged on the deceased Muslim.

Partition

In *Maimun Bi @ Maimunnis and Maruthazha* v. *Amma ji*,[35] the High Court of Madras had to decide about the legality of a decree of the lower court relating to partition of the estate left behind a Muslim dying intestate. One Moideen Sheriff died intestate leaving behind his second wife and children from first wife who died in the life time of the deceased Moideen Sheriff and minor children from his second wife. A dispute had arisen relating to the partition of the property among the heirs. The partition suit had been filed in the lower court. The minor children had been allowed to be represented through their mother as a next friend. During the litigation, a compromise settlement was made among the litigating parties and the minors had been represented through their mother as a next friend. The compromise was made part of a decree passed by the civil court. This compromise was challenged on the ground that the mother was not a guardian of the minors under Muslim law. Hence, the minors claimed that they had not been properly represented in said compromise and thus the said decree incorporating the compromise entered into by their mother should be set aside. The court below dismissed the suit on the ground that during the final decree proceedings the minors had attained the age of majority and they had not taken any steps to challenge the preliminary decree. In appeal, the high court held that "as per the provisions of Order 32, rule 3 (a) of the CPC, in the absence of any prejudice cause to the minors, by reason of the conduct of the third Defendant, the natural guardian, the minors cannot plead for setting aside the decree passed against them".

Principle of s*pes successionis*

Islamic law of inheritance embodies a cardinal rule relating to the succession of a living person. It lays down that there is no succession to the property of a living person. Therefore, the children or *myan* expected inheritor has no right to their claim whatsoever in the property of a Muslim during his lifetime. One is the absolute

34 (1990) 4 SCC 672.

35 S.A No. 980 of 2011, decided on 8.9.2011.

owner of his property. There is no concept of jointness of ownership of the properties of a Muslim and his inheritors. Islamic jurisprudence does not contain the norm of relinquishment of future share by an expected heir. This principle has been recognized and reiterated by the judiciary on many occasions. However, if an heir expectant receives reasonable consideration or price of his probable share and relinquishes his right of probable inheritance, then he must not be allowed to claim the relinquished share as and when the right of inheritance arises. This has been recognized by the Supreme Court in *Shehammal* v. *Hasan Khan Rawther.*[36] Naralava Rawther was owner of some immovable properties. He helped all his children to settle down in his life time. His youngest son, namely, Hasan Khani Rawther, respondent no. 1, was staying with his father Maralavo Rawther even after his marriage, while all other children - two sons and three daughters - had moved out of the family house, either at the time of their marriage or soon thereafter. When each of his children left the family house, Meeralava Rawther used to get them to execute deeds of relinquishment on the receipt of some consideration. Each of them relinquished his/her respective claim to the properties belonging to Meeralava Rawther except Hasan Khani Rawther who was living with his father in the family house and was not required to execute the deed of relinquishment. After the death of Meeralava Rawther, three separate suits were filed in the lower court. One was filed by respondent no. 1 for the declaration of title, possession and injunction in respect of the property of the deceased, basing his claim on an oral gift made by his deceased father in his favour. Second suit was instituted by Mohammad Rawther, one of the brothers, praying for injunction against his brother, that is, respondent no.1. Third suit was instituted by Shehammal, the daughter of the deceased and present petitioner claiming her 1/9th share in the estate of her father and seeking partition of the properties under dispute. The lower court dismissed the suit of respondent no. 1 claiming property on the basis of oral gift for want of evidence. The suit of Shehammal was decreed and the suit filed by Mohammad Rawther was also dismissed. The matter went to the High Court of Kerala where the single judge held that the plaintiff Hasan Khani Rawther could not be non-suited even if he had failed to prove the oral gift in his favour because he alone was having the rights over the property of Meeralava Rawther in view of various deeds of relinquishment executed by the other sons and daughters of Meeralava Rawther. So far as the applicability of law relating to the doctrine of renunciation of an expectant heir in the property, it was argued that the doctrine was based on the concept that the Muslim law did not contemplate inheritance by way of expectancy during the life time of the owner and that inheritance opened to the legal heirs descended in specific shares.

The Supreme Court was called upon to resolve three main controversies, namely (i) whether in view of the doctrine of *spes successionis*, a deed of relinquishment executed by an expectant heir could operate as estoppel to a claim that may be set up by the executor of such deed after inheritance opens on the death of the owner of the property; (ii) whether an execution of a deed of relinquishment after having received remuneration for such future share, the expectant heir could be stopped

36 AIR 2011 SC 3609.

from claiming a share in the inheritance; and (iii) whether a Muslim, by means of a family settlement relinquishment, claim his right of *spes successionis* when he had still not acquired a right in the property.

The Supreme Court analysed the arguments based on the opinion of various jurists like Amir Ali and DF Mulla and the decisions in *Gulam Abbas* v. *Haji Kayyum* Al,[37] *Latafat Husain* v. *Hidayat Husain*[38] and *Mt. Khannum Jan* v. *Mt. Janbibi*.[39] The court reiterated its earlier views on the point under consideration and laid down:

(i) Rule of *spes successionis* has not been recognized by the Muslim Law since it entailed the giving up of something which had not yet come into existence.
(ii) Ordinarily there cannot be a transfer of *spes successionsis*.
(iii) The binding force of the renunciation of a supposed right would depend upon the attendant circumstances and the whole course of conduct of which it forced a part.
(iv) Mere relinquishment of a right to be vested in future cannot be covered by the equitable doctrine of estoppel.
(v) Application of the rule embodies in the principle of *spes successionis* can be avoided either by the execution of a family settlement or by accepting consideration for a future share. Such circumstances attract the application of the rule of estoppels which is far from being opposed to any principle of Mohammedan law, is really in complete harmony with it.
(vi) A family arrangement would necessarily mean a decision assured at jointly by the members of a family and not between two individuals belonging to the family.

The court ultimately held that the doctrine of estoppel was attracted so as to prevent a person receiving an advantage for giving up of his/her rights and yet claiming the same right subsequently. The court enunciated that "being opposed to public policy, the heir expectant would be stopped under the general law from claiming a share in the property of the deceased".

The apex court in the above case was not inclined to accept the methodology resorted to obtain relinquishment could not strictly be to be a family arrangement. The court did not entertain the special leave petitions and the same were dismissed.

Succession in agricultural land

The Allahabad High Court had to decide the applicability of personal law of inheritance of agricultural land. Though the present case[40] did not directly relate to the Muslim personal law, the high court was not inclined to agree with the contention

37 AIR 1973 SC 554.
38 AIR 1936 All. 573.
39 (1827) 4 SDA 210.
40 *Sangam Lal Shukla* v. *Rekha Man*, Second Appeal No. 212 of 2009, decided on 23.08.2011.

that the property was ancestral and, in oral partition, it had come to his share. The court reiterated well established judicial view that "in respect of agricultural land in U.P. principles of Hindu law or Muslim Law do not apply".

IX *WAQF*

Law of *waqf* is a specific branch of Islamic jurisprudence which pertains to the beneficial application of the property and its income for the people at large, particularly for those who belong to marginalised, down-trodden and weaker sections of the society. But there is no dearth of fraudulent persons who misuse, rather abuse, the property to attain selfish interest and indulge in the annihilation of the *waqf* property leading to litigation in the name of promotion and protection of the objectives of the institution of *waqf*. Nowadays it has become the order of the day to mismanage the properties relating to *waqf*, particularly the land of the *Qabristan* by the managers or officials responsible for the *wakf* governance. The wicked people are engaged to mould, interpret and use enacted law to justify their nefarious acts in the name of good governance and safety of *waqf*. Allahabad High Court in *Wali Mohammad* v. *Add. Distt. Judge, Jhansi*[41] had to consider a situation where several Muslims purchased some plots from a non-Muslim and got sale deeds registered. These properties had been claimed as *wakf* properties. One FA Mansori, claiming himself to be the secretary of *waqf Qabristan*, made application before Wakf Board complaining that a number of persons had unauthorisedly occupied land of *Qabristan*. In pursuance of this complaint, Wakf Board issued notices under section 57A of the Wakf Act, 1960 read with rule 9(i) of 1972 Rules to the petitioners and other persons. Petitioners submitted reply. The Wakf Board directed the petitioners to appear before the Board to adduce relevant evidence and avail opportunity of oral hearing. That was also replied by the petitioners. Thereafter, the Wakf Board passed an order holding that the property in question was *waqf* property and, therefore, the collector of Jhansi was requested to obtain possession and restore it to the secretary of management of the Wakf Board. Consequently, the collector issued orders of delivery of possession of property in question. The petitioners made objection and filed an appeal under section 49-B(4) against the orders. But the same was rejected by the appellate authority. In the writ petition filed before the High Court of Allahabad, the petitioners raised a basic question about the applicability of the Wakf Act, 1960. The petitioners contended that where the property in question was possessed or transacted by persons including non-Muslims, the provisions of the Wakf Act, 1960, had no application. It was submitted that the property in dispute was not the Wakf property. In this situation, the Wakf Board had no jurisdiction to proceed in the matter. The basic issue before the high court was that the mere fact that the property was mentioned as a *waqf* property in the register maintained by the Wakf Board, would it be binding on a non-Muslim and the proceedings against him could be initiated under the Wakf Act, 1960. The second question raised was whether such a person should have no remedy to challenge the very claim that the property in question was not a wakf property.

41 Writ. 6 C. No. - 6289 of 1991, decided on 3.11.2011.

The high court, after extensively quoting views of Islamic scholars and examining the judgments of several high courts, held: "Whenever such a dispute is raised which goes to the roots of the matter, the same has to be dealt with sufficient details. A finding of fact must be recorded particularly when the property is occupied by non-Muslim is involved". The court was of the opinion that in the proceeding in question all these aspects had not been given due consideration and, therefore, the single judge of the High Court laid down that:[42]

> (I)n my view matter needs be remanded to Wakf Board to consider the objections of the petitioners in correct perspective and in particular the issue whether the property in question is Wakf property or not and whether the Wakf Act 1960 itself would apply to the property in question or not and such other incidental and ancillary issues which are necessary for proper adjudication of the above issues.

Removal from service of a person

In *Mohammad Rizwanul Haque* v. *Central Wakf Council,*[43] the High Court of Delhi had to consider the validity of the order of central Wakf Board removing an officer from service. The petitioner was working as secretary to the Central Wakf Council after meeting due qualifications and had been absorbed permanently. The petitioner contended that the rule 7 of the Wakf Rules, 1998 clearly empowered the council to fix the terms and conditions of appoint. In pursuance of powers under rule 7, the council had approved and implemented the suggestion of its planning and advisory committee and extended the age of retirement of the petitioner to 62 years in contradiction to 60 years which was mentioned in the order dated 10.3.2010. The petitioner submitted that the impunged order, being contradictory to the age fixed by the council, was bad and liable to be quashed. It was further contended that the terms of appointment fixed by the council should prevail.

After analysing the provisions contained in rules 7 and 13 of the Central Wakf Council Rules, 1998 and examining various judicial rulings, the court found that the respondents had acted beyond the legal bounds as envisaged under the Wakf Act and the rules. The impunged order of 23.03.2010 was, therefore, quashed being in violation of rule 7 of the Central Wakf Council Rules.

Test for the *waqf*

In *Anbu* v. *Chinakarasamangalam Sunnath Val Jamath by its Patel* and *Muthawali K.K. Hajibasha (died) Present Managing Trustee P.K. Khader Sheriff*,[44] the Madras High Court had to resolve a controversy between Hindus and Muslims. Muslims, plaintiff in the original suit, claimed ownership of property in dispute being the mosque and burial ground for Muslims for more than 100 years. The plaintiff claimed to be in full and absolute possession and quiet enjoyment of the scheduled property. The mosque and burial ground had been registered with the Tamil Nadu State Wakf Board as the wakf under section 25 of the Wakf Act, 1995

42 *Id.* para 14.
43 176 (2011) DLT 753.
44 A.S. No. 712 of 2008, decided on 9.8.2011.

as 288-A, North Arcot. The Karashamangalam Muslim community had the schedule property only as burial ground and there was no other property available to bury their dead. Some people belonging to Hindu community raised a dispute claiming that they needed a part of the land for their own purposes and asserted that it could be used for a cemetery or burial ground or even for cremation. Hence, the original suit was filed for a declaration and permanent injunction. It was contended on behalf of the defendants that there were originally two separate grounds bearing survey no. 268/2 and survey no. 263. It was argued by them that Muslims never used the land under survey no. 263. After having appraising the evidence on record and considering the related facts and circumstances, the trial court proceeded to decree the suit after declaring the plaintiff's title to the suit property and, consequently, granting the relief of permanent injunction in favour of the plaintiff. The aggrieved defendants went to the high court in appeal against the decree and order of the lower court.

The high court found that there was no express dedication pertaining to the suit property. But the usage of the land as Muslim burial ground for a long time would itself make the land a wakf property. The high court was of the view that "but the fact remains as to whether the usage of the land for a long time would entitle the respondent/ plaintiff to claim exclusive right to have relief of declaration as claimed by them in plaint". The court found that possession and usage of the Muslims for time immemorial was established. But the high court reached the finding that it was unambiguously established that the lands comprised in the survey numbers of *waqf* belonged to the state government and, hence, presumably the government was the owner of land in dispute. The government had given permission to the respondent/ plaintiff to build a compound wall so as to prevent the encroachment of outsiders in consideration of the long usage of the land. It was also clear that the plaintiff/ respondent had been in use and enjoyment of the suit land for a long time. However, the high court held that plaintiff's long usage of the land would not confer any title to them as the land belonged to the government. The land in dispute could not acquire the character of wakf and the same was not wakf property.

Jurisdiction of *waqf* tribunal *vis-a-vis* civil courts

In *Rubab Begum* v. *Hazarth Imam Hussain Wakf, rep. By its Muthavalli, Mirza Parvez Ali*,[45] the High Court of Madras had to resolve the controversy relating to jurisdiction of the civil court and Wakf tribunal to hear the original suit for eviction of a lessee as the licence was cancelled. The original suit was filed before the civil court by the respondent/plaintiff, that is to say, a Public Religious Muslim Wakf registered with the Tamil Nadu Wakf Board. This Muslim Wakf was owner of the property under litigation alongwith Chhota Naqsha Charities, another public religious Muslim Wakf. The land in dispute was given on lease and the defendant was allowed to live there as a lessee. After cancelling the licence, the plaintiff directed the defendant to vacate the premises and hand over the possession which was refused by the defendant. Therefore, suit was filed for recovery of possession of the property in dispute. The defendant disputed the *waqf* character of the property and asserted that she was neither a tenant nor a licensee. It was pointed out by the

45 S.A Nos. 817, 818 of 2006, decided on 11.8.2011.

defendant that as the property in dispute was not the wakf property, the building was not exempt from the provisions of the Tamil Nadu Buildings (Lease and Rent) Control Act, 1960. The trial court did not sustain the contentions of the defendant and held the property in dispute as a *waqf* and, therefore, Act of 1960 would not apply. The defendants were held liable to be evicted, directing them to vacate and hand over the possession to the plaintiff wakf. The appeal was also dismissed. Feeling aggrieved, present appeal was field by the defendants. The high court found that property in litigation belonged to the *waqf* and the defendant were licensees. The court was inclined to accept the contention of the counsel for the first respondent that the original suit was filed in the year 1989/90 and, at that time, there was no tribunal and the same had been constituted under the Wakf Act, 1995. Moreover, the plea of jurisdiction had not been raised during pendency of the suit and after the constitution of tribunal and both the parties contested the suit and let the decree to be passed. The high court also took notice of the fact that even in the first appeal, the jurisdiction issue was not raised. Hence the high court held that the civil court had jurisdiction and suit filed by the first respondent/plaintiff for eviction of the appellants was maintainable and, as such, the high court confirmed the judgments and decrees of the court below.

Trust v. *waqf*

The High Court of Madras had to consider whether the property of an association registered under Tamil Nadu Societies Registration Act, 1995 amounted to wakf property. There were two separate petitions, namely *Islamic Welfare Association, rep. by its President Mr. Abdul Khader* v. *The Wakf Tribunal* and *Managing Committee, rep. by its president Abdul Khader* v. *S. Abbas Mandri*[46] involving same moot point for determination. There was a mosque which was built and managed by the managing committee of the Islamic welfare association which was registered under the Tamil Nadu Societies Registration Act, 1975. The association purchased various lands under different documents and constructed the mosque by raising funds. It was expanded from time to time and the corporation of Chennai granted exemption from paying property tax. Respondent no 4 filed a petition before wakf tribunal under section 83(1) and (2) of the Wakf Act 1995 stating that the said mosque and property were wakf. The respondent prayed for permanent injunction restraining the writ petitioners association and its men from demolishing, constructing, altering the nature or dealing in any manner in this regard with the property of the said mosque and *madarsa waqf*. A mandatory injunction was also prayed directing the writ petitioners which were respondent in the petition before wakf tribunal to make good the loss replacing the illegally removed doors and windows and repairing the building at their cost. A prayer was also made to appoint receiver to maintain and administer the said mosque and wakf. The wakf tribunal held that the property in dispute was wakf property and section 2 of the Wakf Act 1995 was applicable. It was further asserted that under section 83(1) and (2), all disputes arising out and relating to *waqf* could be decided only by the wakf tribunal. In its order, the wakf tribunal issued direction that an application submitted to the wakf board should register the property in dispute as wakf within a week of the

46 (2012) 1 MLJ 259.

order. In revision petition, the order was challenged on the ground that the direction given to register the *waqf* was without reference to any prayer made in the I.A. and, therefore, the tribunal exceeded its jurisdiction and, consequently, the order had to be set aside. However, in pursuance of the direction of the wakf tribunal, the property in dispute was registered as *waqf* without issuing notice to the association writ petitioner. This registration of the *waqf* was challenged in the writ petition before high court. It was contended on behalf of the petitioner association that property in dispute belonged to the association. The day to day affairs of the association and mosque were managed by the managing committee which was elected by way of election at regular intervals and the association was maintaining all accounts and the same had been audited annually. It had been submitted by the petitioner that the construction was undertaken in pursuance of a resolution passed by its executive committee. It was also submitted that the order registering the wakf was given in contravention of the procedure established for the registration of the wakf.

It was contended on behalf of the Tamil Nadu Wakf Board that though the *waqf* was situated in the property belonging to the petitioner association, it could not claim that the property in dispute belonged only to the petitioner association. The petitioner association could not separate the land and *waqf* as there was a permanent dedication of mosque for the purpose of pious, religious worship, recognised by the Muslim law. There was no dispute regarding the status as a mosque being a public mosque. Therefore, registration of *waqf* was mandatory under section 36 of the Wakf Act, 1995. The *mutawalli* failed to register the *waqf* and as per sub-section (6) of section 36 of the Act, on receipt of application for registration , the *waqf* board after adopting the procedure, can issue order to register the wakf. It was further stated by the wakf board that the mosque and property in dispute were in existence prior to the enactment of the Wakf Act, 1995 and, as such, it had to comply with section 36(8) of the Act. But no application for registration was filed by the petitioner association. An application was, however, moved by a *jamathdar*. The contention of the wakf board was that the mosque, a public mosque, created for religious purpose of Muslim community, the law applicable was Wakf Act and not the Society Registration Act. It was also submitted that the Wakf Act, being a special enactment, would prevail over the general law, namely Societies Registration Act. This was why the petitioner association could not object to the registration of the *waqf*. After reviewing the law relating to the *waqf* and several judicial decisions, the high court reached the conclusion that the mosque under litigation was dedicated for the prayers offered in congregation and there was no dispute regarding the dedication of the mosque, even though the property was claimed to be purchased by the petitioner association. The high court held that as the *waqf* was created, the control over the property by the association would not continue.

In another case,[47] the same high court, reiterated it's the same view. In this case, the association was registered under Societies Registration Act but it received

47 *Haji B. Pakkir Mohammed, President Madarsha-E Merajul-Uloom@Islamia Kalvi Sangham* v. *The Secretary to Government, Department Of Backward, Most Backward Classes, and Minority Welfare, Govt. of Tamil Nadu And Madarse-e-Mazahiral-ul-Uloom @ Islamic Kalvi Sangam Society, rep. by its Secretary D.S Khalander* v. *I. Basheer Ahamed,* 2011 (6) CTC 485: (2011) 8 MLJ 158.

the landed property of *waqf* on lease which developed, constructed and built certain structures to impart religious education, found *madarsa*, help the needy to pursue studies in medicine and engineering and to take part in cultural activities. In order to achieve these objectives, the association collected funds from the general public. The high court reiterated that on such land and properties, the Wakf Act, 1995 shall be applicable being a particular piece of legislation rather than general law contained in the Societies Registration Act.

Adjudicatory status of the *wakf* board

The High Court of Kerala had to decide as to whether the wakf board had powers to issue directions to the association registered under the Societies Registration Act, established for the purposed of administering the *waqf*. That issue was raised in *A.P.A. Rasheed* v. *N.N. Khalid Haji*.[48] There was a *waqf* in the name of Thalassacervi Phazia Jummat Palli which owned properties. It was regarded as an ancient wakf whose affairs were managed from time to time by responsible *mutawallis*. A society was formed under the Society Registration Act which discharged the functions of the *mutawallis* in respect of the *waqf*. Enquiries under section 70 of the Wakf Act were pending before wakf board which related to the administration of the wakf. Grievences were raised that persons eligible according to bye-laws for membership in the society not been granted membership. Keeping the claimers away from the society, the society was planning to conduct election. The claimers approached the wakf board against the arbitrary proceeding to conduct election to the governing body. An *interim* order was sought by the petitioner and the same was passed by the wakf board restraining the society from conducting the election until further order. While that order was in force, an attempt was made to commence a general body meeting. The wakf board passed a second order restraining the society from convening general body meeting. Both of these orders had been challenged before the wakf tribunal. The wakf tribunal took the view that wakf board had no powers to pass *interim* orders. It was further held by the wakf tribunal that at any rate the impugned directions could not have been issued to a society registered under Societies Registration Act. The wakf tribunal negativated the argument that in passing the impugned order, the wakf board had power under section 39 of the Code of Civil Procedure, 1908. Initially, that contention was submitted before the high court and an attempt was made to support the theory that the wakf board was an adjudicatory authority and in exercise of powers of adjudication, *interim* orders could also be passed. The high court took note of provisions of section 32 along with sections 70 and 71 of the Wakf Act. The powers contained in section 32 were in the nature of powers of superintendence and were to be invoked to ensure that the wakfs "properly maintained, controlled and administered". These powers were not adjudicatory in nature. The high court was declined to accept the submission that section 71(2) confers the wakf board certain powers of civil court for the purpose of attendance of witnesses and production of documents. The high court further observed that "in this context, the nature of relief which a person can claim is also of crucial nature". The same is available to

48 CRP No. 613 of 2010, decided on 30.06.2011.

the aggrieved party not in the form of appeal against the order of the wakf board. This is an option given to challenge the order by filing an application under section 83(2). The court laid down that "we are unable to find any incidents of the powers of an adjudicatory in powers of the Board u/s32 of the Act". But this section empowers the board to issue *interim* orders as well as final orders. The significant impact of this decision is that a natural person and a corporate person both can become *mutawalli*. If the primary purpose of the society registered in accordance with the law is to maintain manage, administer and superintendence a wakf, the powers under section 32 would be extended to the affairs of the society. The court was not inclined to uphold the contention that the wakf board could not question the constitution of the body administering the wakf. The court held:[49]

> Going by the nature of the grievance and nature of the object sought to be achieved, we are of the opinion that the board certainly has powers under section 32 to insist that eligible members are admitted to membership and a proper election is conducted in the society to elect the managing committee.

The court was of the view that the *interim* order that "no election should be held," placing embargo on the conduct of the election, could not be justified.

Constitution of the *wakf* board

The High Court of Bombay in *Shaikh Yusuf Bhai Chawala* v. *State of Maharashtra*[50] had to decide the question as to whether the lists of wakfs prepared and published by the wakf board, which was not constituted in accordance with the provisions of sections 4(6) and 43 of the Wakf Act, 1995, are liable to be set aside. In the present writ petition, the petitioners had challenged the notification dated 04.01.2002 issued by the Govt. of Maharashtra. The petitioner also sought direction to the Govt. of Maharashtra to conduct a fresh survey of wakfs in the State of Maharashtra. They also challenged notification dated 13.11.2003 issued by the wakf board, whereby the list of wakf was published. In another petition, circular 24.07.2002 issued by the charity commissioner of the State of Maharashtra was challenged. It was stated that in view of the provisions of section 43 of the Wakf Act, the wakfs which are registered as public trust would cease to be governed by the provision of Public Trust Act. It was contended by the petitioner that because the incorporation of the wakfs board by notification dated 04.01.2002 was itself invalid, the trusts were not wakf within the meaning of the Wakf Act and, as such, they continued to be governed by the provisions of Bombay Public Trust Act.

After perusal of the provision of the section 14 of the Wakf Act, 1995 relating to the nomination and election of the members of the state wakf board, the high court found that there were only two members of the board while detailed analysis of the provisions embodied in section 14 revealed that a wakf board having only two members could not be said to be properly constituted and, therefore, the high court held that the constitution of the wakf board of Maharastra was not in accordance

49 *Id*. para 20.
50 2011 (6) Mh LJ 691.

with law. The court held that "in our opinion, the notification dated 4.1. 2002 containing the Wakf Board is contrary to the scheme of the Act and is therefore liable to be set aside". Another significant question to be considered was whether the list of wakf prepared and published by such wakf board was valid which was prepared and published under sub-section (1) of section 5 of the Wakf Act. The court held that it was clear from provisions of section 4 of the Act that for the proper working of the scheme of the Wakf Act, conducting of proper and thorough survey was absolutely necessary. The court took note of the findings of joint parliamentary committee and approvingly held "as the survey plays a very important role in implementation of the provisions of the Act, therefore, the survey should be conducted carefully and in a transparent manner". The court expressed its opinion that the survey officers who were conducting the survey under section 4 were under a duty to take into consideration all relevant materials including any material that was to be placed before them by the petitioners and other similarly situated persons who were connected with the Muslim charities.

Right to offer prayer

In *Pudhu Palli Vassal* v. *S.I. Dastgir and Tamilnadu Wakf Board*,[51] the High Court of Madras had to determine the nature of the places of worship as a wakf and the application of law as contained in Wakf Act, 1995 or the Places of Worship (Special Provisions) Act, 1991. In the present case, the first respondent, whose denomination was different from that of the members of the management of the mosque and burial ground, instituted proceedings under section 32 of the Wakf Act before the wakf board, seeking a direction to the petitioners management not to prevent him and other persons having particular faith from entering and offering prayers in the mosque individually and in the back of congregation. They also submitted that order be passed to entitle them to be buried and bury the family members according to the tenets of their own as being a fundamental right enshrined under article 25 of the Constitution of India. The application was dismissed by the wakf board referring to section 3 of the Places of Worship (Special Provisions) Act, 1991. Aggrieved by the dismissal, the first respondent preferred an original application before the wakf tribunal. These proceedings were challenged under article 227 of the Constitution of India as it was a violation of the provisions of Places of Worship (Special Provisions) Act, 1991. It was submitted by the petitioner that when the wakf board categorically rejected the first respondent's claim, the first respondent could not file proceedings before the wakf tribunal. It was contended that the continuation of the proceedings before the wakf tribunal was in violation of Places of Worship (Special Provisions) Act, 1991 as the first respondent was trying to change the manner of worship. The court found that the mosque always acquires the character of wakf and the Wakf Act, 1995 provides for better administration of the wakf and for matters connected therewith. In the present case, the wakf board passed the order under section 32 of the Act. If any party was aggrieved by the order passed under that section, that person has remedy before the tribunal under section 83 of the Act. The court held that when such remedy was available, the aggrieved party was at liberty to avail it and that had been availed in this case. The

51 MANU/TN/4409/2011: (2012) 3 MLJ 77.

court further expressed that, having followed the provisions of the Act of 1995, no body could find fault with and said proceedings could not be challenged before the high court under article 227 of the Constitution of India. The court observed that "if the respondent without availing alternative remedy, approaches this court, this court would have rejected the said proceeding on the ground of availability of the alternative remedy". The court further observed that the first respondent had rightly availed the statutory appeal by way of filing original application before the tribunal. The court was of the view that the proceedings before the wakf tribunal could not be struck off under article 277 of the Constitution of India. The court held that it had been seen that the first respondent had only sought possession for offering prayer in his own way. He had not changed the character of the place of worship. Thus, it was within the powers of wakf board to decide about the matter and it did so; the aggrieved party could initiate proceedings before the wakf tribunal. The court further held that section 4 of Places of Worship (Special Provisions) Act, 1991 could not be pressed into service. Assuming that the proceeding was in violation of the Act, the petitioner had got a right to contend the same before the tribunal.

X CONCLUSION

This survey reveals that the Supreme Court explicitly made it clear that gift in writing by a Muslim need not to be registered under the Indian Registration Act. The Supreme Court discerned that the registration of a deed relating to a gift is not essential ingredient of the gift under Muslim law. The Supreme Court also threw light on the application of principles of inheritance and particularly so in case of Muslim inheritors. The Supreme Court held that when on heir expectant receives reasonable consideration/price for his probable share and relinquishes his right of probable inheritance, he cannot take the help of the principle of *spes successionis* and the principle of estoppels shall come into operation. It is a piece of evidence and not a piece of title. The High Court of Delhi has removed clouds over the principle of victimology. The high court held that heir of victim shall step in the shoes of the victim in case of his death. It was further decided by the high court that the seller of a prepositus would be regarded as no existent devising scheme for the distribution of properties of the deceased among his heirs. In another case, the High Court of Jharkhand made distinction between the contractual liability of a deceased and debt borrowed by him. The court decided that one heir by acknowledging the contractual liability of the deceased cannot bind the other heirs. On the other hand all heirs are bound to repay the debts of the deceased in the ratio of their inheriting shares. Dealing with the issue of Letters of Administration for the implementation of a will, the High Court of Delhi made it clear that the will has been properly executed and proved to the satisfaction beyond reasonable doubt. The High Court of Madras has dealt with an interesting matter relating to the *mutawalli* of a *waqf*. The high court held that a juristic person, that is to say, an association incorporated in accordance with provisions of existing law shall become the *mutawalli* to administer, manage and look after the *waqf* property and the *Wakf* Board can issue directions to such corporate body for better management of the *waqf*.

As far as law of status is concerned, all the cases viz., on marriage, dissolution of marriage, maintenance, guardianship etc. have been decided, almost in conformity with *sharia,* except a judgement of Kerala High Court regarding maintenance of unmarried daughters which includes her 'marriage expenses'. It is respectfully submitted that such expenses are not in conformity with Islamic law. No doubt, like in every civilised society, in Islam too a father is also responsible for the marriage of his daughter but it may be kept in mind that there are no direct expenses in marriage imposed on brides or her parents under Islamic law, and only groom is responsible to bear all the expenses on marriage like dower, *walima* among others, while performing this pious ceremony as mentioned by *amicus curie* during the arguments of the case.[52] Therefore, this distorted view which may create a new door for dowry, a growing social evil, is totally contrary to *sharia* and also not in the interest of the Muslim society or any society, where due to the poor socio-economic conditions marriage of a girl has become a liability.

52 *Supra* note 15.