22
MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

THIS SURVEY of judicial pronouncements reported during the year 2012 is an attempt to study the trends shown by the Supreme Court and several high courts in the field of Muslim personal law. The important issues dealt with by the courts during this year pertained to the concept of family among Muslims, prevalence of the custom of adoption, marriage, conversion and the procedure therefore, child marriage, bigamous marriage, dower, dissolution of marriage by *khula*, maintenance, land acquisition, zamindari abolition, mutation and *hiba*, succession and inheritance and false oath taken by a Muslim. The courts also decided the status of the conversion. A major chunk of cases wherein the courts were approached for relief related to the *waqf, waqf* property, allotment of *waqf* lands, legality of the *waqf* listed by the *waqf* board, power of the *mutawalis* to institute the suit, exclusion of jurisdiction of the civil courts and the distinction between *waqf* and trust. The judicial pronouncements on Muslim law covered in the survey will provide the reader a bird's eye view of rational and pragmatic development of Muslim law by the judiciary. The survey is divided in three parts namely, law of status, law relating to property and other significant issues. The issues relating to the law of status relate to marriage, dissolution of marriage, dower, maintenance, adoption and its relevance in Islam. The most important feature of marriage now-a-days, that is fictitious conversion for the sake of marriage, is also dealt herewith. Similarly, the law of property includes alienation of minor's property, mutation of the property on the ground of *hiba*, law of wills, inheritance as well as law of *waqf*. The important aspects of *waqf*s have been dealt with in various decisions of the apex court and various high courts. The survey includes this time an additional part covering the issues brought before the court in the newly emerging area like structure of the family, consciousness of witness, *etc*.

II LAW RELATING TO STATUS

***Nikah* (Muslim marriage)**

Marriage with unlawful conversion

In the multi-religious democratic society, matrimonial relations between the communities professing different religions may be established in the ordinary course

* Associate Professor, The Indian Law Institute, New Delhi.

of social relations. Some of these relations involve the conversion of faith of one spouse and marriage is performed in accordance with rites and customs of the religion to which one is converted. Apart from this, the marriage can be solemnized according to the secular marital conventions without going into the process of conversions. Many times inter-religious relations could not work smoothly and discord arose leading to a situation of conflict of law, more so when one party denies the *factum* of marriage. In *XYZ'* v. *Mohd Aslam Sheikh alias Raju*,[1] the issue was whether the marriage of the appellant wife with the respondent husband was ever entered into. The husband made a false document, namely marriage certificate issued under the Registration of Marriage Act, 1998. In the lower court, the respondent pleaded that the petitioner wife after embracing Islam got married to the respondent husband. The petitioner wife prayed the lower court to declare the proposed marriage as null and void because she never converted to Islam and thus, as per Muslim law, marriage between a Muslim male and Hindu female could not be legally solemnized. The lower court rejected the plea of the petitioner wife. The judge granted declaration in favour of the respondent husband and held that since the marriage between the wife petitioner and the respondent husband could not be declared as null and void and subsisted, The husband was entitled to his legal rights as legally wedded husband of the petitioner wife. The petitioner's appeal was admitted by the high court and the order of the trial court was stayed. It was submitted before the high court that no valid marriage could have taken place between a Muslim male and Hindu female as the appellant never converted to Islam, and further that it was an admitted fact that the purported marriage was not solemnized under the Special Marriage Act, 1954. The high court was of the view that "under Mohammadean Law, if one person is Muslim and other belongs to different religion then there can be no valid marriage unless the person from other religion gets converted to Islam and first there is a ceremony of conversion." The court further held that the conversion should not be a colourable exercise with an ulterior motive of getting married under Mohammadean law. The court explained that "it is a well known principle of civil law that a person born into or following one religion continues to belong to such religion subject to conversion to another religion. Conversion to another religion basically requires change of faith. To say the least it is matter of conviction". The court approvingly referred to the ruling of Calcutta High Court in *Rukeya Bibi* v. *Anil Kumar Mukherji*[2] wherein it was established that "such change must be made honestly and without any intent to commit fraud upon the law".

It may be submitted that such type of conversion and an immediate marriage between the parties after such conversion is no conversion at all and amounts to a mockery with the faith and conviction desired by *Islam* and thus such marriage should not have any effect as the division bench of Bombay High Court decided. The judgment is thus in conformity with the spirit of Islamic law.

Child marriage

The well known proposition of Muslim law is that a valid marriage can be solemnized between two adult Muslims of divergent sex with their free consent.

1 2013 (2) MHLJ 323.

2 ILR 1948 (2) CAL 119.

But the marriage of minors entered into by the legal guardians is permissible among the Muslims subject to the rectification, expressly or by conduct, by the couple on attaining the age of majority. The age of majority in Islamic law is 15 years. The solemnization of marriage was disputed in *Mrs. Tahira Begum* v. *State of Delhi*.[3] This was a case of kidnapping and abduction and the matter was dealt with under the law of crimes. The issue before the court was as to whether a girl of 15 years who had entered into contract of marriage, without the consent of her guardian, should be directed to return to her parental home. In this case, the petitioner had sought a writ of *habeas corpus* for the production of her daughter who was a minor when she was kidnapped by her purported spouse as the police did not take any action on the mother's request to rescue her minor daughter. It was submitted before the court that the age of her daughter at the time of kidnapping was 15 years. The police traced the girl and presented her before the court. The girl stated before the court that she had voluntarily gone with Mehtab and had married him. She further averred that they had been living as husband and wife since then. She also pleaded that she did not wish to go back to her parents and she prayed that she wanted to continue to stay with her husband. On her being produced before the child welfare committee, it was found that according to available records the age of the girl was above fifteen years. It was to be established before the court as to whether this marriage had been concluded by the observance of essential requirements for a valid marriage under Muslim law which was not asserted in the case. This court relied on *Md. Idris* v. *State of Bihar*[4] wherein *Tyabji's Muslim Law* and *Mulla's Principles of Mohammedan Law* were cited holding that the marriage will be presumed in the absence of direct proof, by mere fact of acknowledgement by the man of the woman as his wife. Reference was also made to section 3(1) of the Prohibition of Child Marriage Act, 2006. The court held that a child marriage even under the secular law was not void *ab-initio* but merely voidable at the instance of the contracting party who was a child at the time of solemnization of marriage. The court found it in consonance with principle of *Khayar-ul-bul-ugh* under Muslim law. The court observed that in view of the fact that the girl in this case clearly expressed her choice of residing with her husband, she was allowed to exercise her option.

The judgment is in conformity with the Islamic law according to which 15 years is the age of majority. If the age at the time of marriage is below 15, it can be ratified on attaining the age of puberty by the bride and such a marriage would be perfectly valid marriage.

Factum of marriage

In *Mohd. Iqbal* v. *Mst. Najma,*[5] the High Court of Delhi had to decide the matrimonial status of the widow, after the demise of her husband. In this case, the plaintiffs pleaded that the deceased Mohd. Ahmad did not formally contract any marriage with the defendant no.1 as claimed by her and, therefore, she could not be regarded to be his second wife after the death of the first wife of the deceased. The

3 2013 (1) RCR (Civil) 798.
4 1980 Cri LJ 764.
5 2013 II AD (Delhi) 743.

plaintiffs claimed that the defendant no. 1 was merely retained and employed for domestic work and it might be possible that the deceased had developed a *liaison* with her. But in the written statement, it was specifically stated that the defendant no.1 was the legally wedded wife of the deceased and she was his widow at the time of instituting the present suit. Defendant no.1 filed *nikhanama* to substantiate her claim of being legally wedded wife of the deceased Mohd. Ahmad which was contradicted by the plaintiffs. Too diminish the testimonial value of the *nikhanama*, the plaintiffs argued that the defendant no.1 herself did not enter into the witness box to identify her *nikahnama*, which was sought to be proved by her attorney. It was the case of plaintiffs that even the original *nikahnama* was not produced and the same had also not been proved in secondary evidence, and thus, they asserted that the same had no evidential value in the eyes of law. On behalf of the defendant no.1, the certified copy of the *wasiya* of her deceased husband was presented in the court wherein it was mentioned that the (late) Mohd. Ahmad married twice and in the original *iqrarnama* relating to payment of her dower which was submitted in the court, a specific statement had been made by the deceased that defendant no.1 was his second wife and he had to pay the *maher* settled at the time of *nikah*. The plaintiffs had neither challenged the signatures of the deceased in documents of will and agreement, nor summoned any witness to prove that the marriage was not solemnized between defendant no.1 and the deceased. It was also not proved by the plaintiffs that the copy of the *nikahnama* filed by the defendant was forged and fabricated. The court held that it was proved beyond any doubt that the defendant no.1 was legally wedded wife of the deceased.

***Maher* (dower)**

The high court of Delhi in *Mohd. Iqbal* v. *Mst. Najma*[6] had to resolve another controversy relating to legality of the execution of an agreement entered into between the wife and the husband, wherein the husband had transferred his property, gifting the same to his wife in lieu of payment of *maher* which remained unpaid. It was mentioned in the *nikhanama* that the deceased husband had to pay Rs.10, 000/- as *maher* to his wife, the defendant no.1. *Maher* was not paid at the time of *nikah*. The deceased had executed an agreement for the payment of *maher.* In lieu of *maher,* the deceased gave the ownership of specific immovable property to his wife by the said agreement and handed over the possession of that property and declared in the agreement that she would have a right of possession as owner of the said immovable property. The said agreement was also signed by the wife, and she accepted it as *maher* paid by the deceased husband. The agreement relating to the transfer of one of the properties for the payment of unpaid *maher* was found a valid document.

The judgment is in conformity with various treatises of Islamic law as well as leading judgments of the Privy Council. However, *maher* should not be deferred and it should be paid immediately after marriage even before consummation. The deferred dower is permitted only in the circumstances where the husband is economically very weak and unable to pay the same immediately and if that is not done, the marriage may be deferred. Prompt dower is indeed the law of *maher*. This process avoids many disputes and litigation in future.

---

6 *Ibid.*

Dissolution of marriage

Khula

There are different modes of dissolution of marriage in Islamic legal system. The dissolution of Muslim marriage by *khula* is little known among the Muslims in India. Under the concept of *khula,* Muslim women enjoy the right to get their marriage dissolved of their own violation. The lack of literacy of Islamic legal notions leaves a wrong impression that Muslim legal system is patriarchal. Sometimes, illiteracy turns into a weapon of exploitation of the Muslim women by male partners in a marriage. This situation cropped up in *S. Basheria* v. *State of Tamil Nadu.*[7] After having lived a matrimonial life for twenty years, the husband contracted second marriage by the permission of the local community *panchayat*. The victim wife made enquiries and came to know that the third respondent, her husband, had obtained an authoritative verdict, which is *fatwa*, dissolving the marriage by the *qadi* appointed under the provision of the Kazi Act, 1880 on the basis of the purported *khulanama*, alleged to have been written by the wife, the first petitioner. It was only on the basis of the *khulanama* that the local community *panchayat* permitted the husband to marry another Muslim woman on the wrong belief that she had opted to get divorce from her husband. But the wife had denied giving any letter of *khulanama* to her husband. On the basis of this forged *khulanama*, the second respondent had given a *fatwa* holding that the marriage was dissolved by way of *khula* and the third respondent had ceased to be the husband of the first petitioner and was allowed to marry another Muslim lady according to *Sharia*. The conduct of the *qadi* was deemed highly objectionable. When the veracity of *khulanama* was judged, it was found forged and an act of fraud. An important stipulation of the *khula*, that is, the payment of *maher* or any property from the side of the wife was not mentioned. This is an essential ingredient of *khula*. This had not been given by the wife but in this case the *qadi* had taken it from the husband. The petitioner sought to challenge the *khulanama* and also sought compensation from the government for the wrongful act of the *qadi* appointed under the Kazi Act, 1880. The high court refused to interfere in the matter as the matter was pending before the trial court. The high court held that "at this stage, request for a document which was countersigned by the second respondent to be set aside by this court will not arise. The documents gathered by the investigation officer are to be put before the trial court and its assessment awaited". … Therefore, pending trial, this court is not inclined to entertain the writ petition.

It may be submitted that while in *talaq* (divorce from husband's side) *maher* is to be paid immediately, in *khula* (divorce at the instance of wife), *maher* is to be forgiven, to obtain speedy remedy (divorce). Any amount or bargain is illegal and contrary to *Sharia* in cases of *khula* as some writers of Muslim law and even Privy Council judges are misunderstood.

Divorce under Special Marriage Act, 1954

In a pluralistic society and cosmopolitan culture, marriages between persons professing different religions have become the order of the day. Such marriages are

7 (2012) 8 MLJ 542.

performed under the Special Marriage Act, 1954 (SMA) if the parties may agree to follow their own religions and are not inclined to adopt the religious traditions and practices of other spouse after the solemnization of such marriage under the SMA. The personal laws of the parties concerned cease to play any role in case of divorce proceedings between the married couple. They have to be governed by the provisions of the SMA in case of dissolution of marriage. The judiciary is bound to apply this Act instead of the personal law of the parties to the marriage.

The Karnataka High Court had to resolve the controversy in *Kalpana Sharum Rasin* v. *Abdul Khader*.[8] In this case, a Muslim boy married a Christian girl and the marriage was solemnized under the SMA. After some time when differences arose between the husband and wife, they started living separately. The wife was not interested in joining her husband. Later on, the wife filed a petition under section 27 of the SMA for dissolution of marriage which was dismissed by the lower court rejecting the contention of the petitioner that the husband had taken another wife and was living with her. The trial court held: "A Muslim can take maximum four wives provided he could maintain all of them and there is no prohibition for him to go with the second marriage". Being aggrieved by this reasoning and the order passed by the trial court, the petitioner wife went to the high court in appeal. The high court found that the trial court had committed an error in passing the said order. The polygamous marriage was not the case of either of the parties. The wife had filed a petition under section 27 of the SMA. The trial court paid no attention to the relevant provisions of the Act and passed the impugned order. The high court observed thus:

> We are (of the) considered view that, in view of not considering the provisions invoked by the wife and in view of not properly appreciating the oral and documentary evidence by the trial court, the order of the trial court is liable to be set aside.

And the matter was remitted back to the trial court for consideration afresh. Though this case as such does not come under the purview of Islamic law, such marriages are either void or irregular (as in the present case). However, the judge's opinion that *Islam* permits unconditional bigamous marriage is completely a misconception and not in accordance with the spirit of *Sharia* which allows bigamy in extremely exceptional cases with certain restrictions. This may be an exception but not the law as it is found in the books of modern writers and even the judgments given by the courts in British India. This misunderstanding is commonly prevalent in Indian Muslim society and even our ill-informed *moulvis* are giving *fatwas* in favour of second marriage without giving second thought to the circumstances of the spouses.

***Nafqa* (maintenance)**

In *Ibrahim* v. *Ayisha,*[9] the Kerala High Court was prayed to settle the amount of the maintenance allowance granted to the petitioner-wife by the family court.

8 MANU/KA/0485/20.

9 2012 Ind. law KER 816.

The wife and the husband lived together for a long time. But the husband contracted second marriage. Therefore, the wife started living separately with her three children from the husband. The wife filed a maintenance claim in the family court which granted Rs. 1500/- per month to her. The husband went in appeal in the high court against this decision of the family court. The high court found that the wife and the husband were residing separately for the last so many years and the husband had married another woman. A Muslim wife may refuse to live with her husband who had contracted a second wife. This was a justified ground for a Muslim wife to reside separately from the husband and the personal law of the parties did not debar the wife from claiming maintenance. Keeping in view the economic conditions of husband and wife, the high court felt unreasonable to interfere in the judgment and order delivered by the family court allowing Rs. 1500/- as monthly maintenance allowance to the wife. The high court rightly interpreted *nushuz* (disobedience) when the wife lost her right to maintenance but in this case she cannot be put under the category of *nashiza* (disobedient) as she was lawfully living separately from her husband in the circumstances given above and, therefore, the judgment of Kerala High Court is in conformity with *Sharia* and the wife was legally entitled to get the maintenance as awarded.

Adoption

Traditionally, Indian judiciary has upheld the notions of *Quran* relating to the adoption of the child. Nevertheless, Muslims in India sometimes seek the benefits of adoption and initiate litigation over it. Though Shariat Act, 1937 paves the way for the application of Muslim law in family relations and allowed the application of law of adoption based on the custom of certain localities. But generally, the judiciary did not recognize the fetal relationship among Muslims through the process of adoption. Similar line had been taken by the High Court of Madras in *S.Mala* v. *Commissioner of Police, Trichy.*[10] One Sheikh Dawood and his wife had been running a child home on payment for the care and protection of children. A Hindu working lady admitted her son in the child home. Later on, after some time, she went to the child home to take back her son from the child home. To her surprise, she found that the third respondent Sheikh Dawood had shifted the child home to some other place, without informing her. The petitioner contacted the third respondent on his cell phone, but he refused to return back her son and he also did not inform the petitioner about the new address of the child home. The petitioner approached the police and prayed for the recovery of her son but to no avail. Hence, she moved the court with the *habeas corpus* petition. The third respondent Sheikh Dawood appeared before the court and pleaded that he had taken the child in adoption and produced the adoption document. He stated that the boy was given in adoption by petitioner through the deed produced by him. The petitioner denied the story of adoption and prayed to have her son back to her. The court refused to sustain the contention of the third respondent as he was a Muslim and the petitioner was a Hindu. The court held, and rightly so, that "it is a well settled proposition of the law that creating a relationship of parentage by adoption is unknown to Mohammadean law as the same is forbidden by the Quran". The court referred to an old case of

10 (2012) 3 MLJ 553.

Muhammad Allahadad Khan v. *Muhammad Ismail Khan*[11] where it was held that "among the Muslims, the doctrine of acknowledgement of paternity is available and there is no question of adoption is Muslim Law" Moreover, the court observed that the third respondent, being Mohammadean, was not entitled to adopt the child under Hindu Adoption and Maintenance Act, 1956. The court held that the Act of 1956 permits adoption by a Hindu alone and who is of sound mind and who is not a minor. Therefore, the court reached the conclusion that it was not inclined to give any sanction to the alleged deed of adoption which was the basis of defense made by the third respondent.

III LAW RELATING TO PROPERTY

Hiba **(gift)**

Mutation on the basis of Hiba

The High Court of Madhya Pradesh had been called upon in appeal against the order of the board of revenue to decide as to whether the mutation process could be initiated on the basis of gift, *i.e., hiba* made in accordance with the provisions of Muslim law. In *Aslam Gani Patrawala* v. *Jasbeer Singh,*[12] the high court had to judge the validity of the *hiba* and *hibanama* on the basis of which mutation was sought as per the procedure for mutation laid down under sections 109 and 110 of the Madhya Pradesh Land Revenue Code, 1959. On a perusal of the records, it was found that after the death of one Usman Gani Patrawala in 1990, the respondents claimed that the land in question was given to them by way of gift by Usman Gani Patrawala through *hibanama* and the respondents sought the mutation of names in official records on the basis of *hiba* and *hibanama*. The *naib tehsildar* and the *patwari* of the village entered the names of the respondents as *bhuswami* and owners of the land in the land records. Complaints were received by the collector and officers of the economic offences wing. It was brought to the notice of the officers that the *patwari* and revenue officers had committed various manipulations in the record. Therefore, a request was made to all concerned to conduct an inquiry into the matter. The sub-divisional officer (SDO) after conducting inquiry submitted his report to the collector pointing out various irregularities committed by the revenue officers with regard to manipulation of the revenue records, particularly in the village where the land in dispute was situated. Having made examination of the report of the inquiry officer, orders of the collector and order of the board of revenue, the high court found that the entries in land record were made without there being any proof or evidence regarding the gift in question. The court was surprised to note that respondents claimed their right to the property on the basis of *hibanama* which was never proved. The high court held that where a property was under Muslim law, transfer of property by gift had to be proved by establishing three essential factors, namely (i) declaration of a gift by the doner, (ii) acceptance of the gift by the donee and (iii) delivery of possessions. The court held that in the present case, there was no evidence to show the execution of the *hibanama* by following the

11 (1888) ILR 10 AII 290.

12 MANU/MP/0207/2012.

aforesaid three procedural aspects. Even the original *hibanama* was not available on record and the entire transaction was doubtful. Hence, the collector and the additional commissioner had committed no error in interfering with the matter. The high court observed that the board of revenue had unnecessarily interfered with the matter. The high court was of the view that board of revenue had committed grave irregularity. As far as Islamic law of *hiba* is concerned, the court rightly pointed out that the above three essential requirements must be fulfilled before effectuating a *hiba*. Only a *hibanama* and mutation on its behalf alone cannot make the gift legal without the fulfillment of the three requirements as stressed by the court.

Waqf

Since pre-independence days, *waqf* properties have become vulnerable and destined to destruction and adverse occupation due to the lethargic lackluster role of the state and the executive played in the preservation of the *waqf* properties. Even the role played by management of *waqf* properties is not above board. The rays of hope are coming only from the judiciary in the enforcement of the *waqf* law enacted by the legislature directed to protect the *waqf* properties.

Vesting of Waqf Property in the State

The high Court of Allahabad had to settle the controversy regarding the matter of the property in dispute in *Shamsuddin* v. *State of U.P.*[13] A piece of land became the bone of contention between some Muslims and the *gaon samaj* and *gaon sabha, i.e.,* the state. A group of Muslims claimed the particular plot of land in the village of Jaunpur district in Uttar Pradesh as a burial ground and as such, the *waqf* by user. The state defended its stand asserting that disputed land was not a graveyard. It was *bheeta*, the land adjoining and surrounding a pond, with some scattered trees planted by the then *zamindar*. The state averred that it was vested in the state on 01.07.1952 and the transfer remained under the management of the *gaon samaj*, later *gaon sabha*. The state also claimed that even if there was any right of burial, it was extinguished by vesting under section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951(UPZA). After submission of the inquiry report by the *amin* and the oral evidence, the trial court found that a large number of graves existed in the land in dispute providing ground that the entire disputed land was graveyard of Muslims and they were entitled to bury their dead in it. The trial court observed that if the land was proved to be graveyard, it vested in God Almighty, where there was no discrimination of any section and, therefore, the trial court held that no single section of Muslims was entitled to bury their dead, it was the Muslim community as a whole which had right of burial of its dead. Therefore, the court held that the plaintiffs were no doubt entitled to use the graveyard as a member of Muslim community and not of any section of Muslim community. The trial court accepted the plea of the state that the graveyard was *waqf* property which was not exempted from the operation of section 4 of the UPZA and thus the land of graveyard also vested in the state. The trial court observed that "inspite of the vesting of the land, the defendants have recognized the right of Muslim residents of the village to bury dead bodies in the plot. The plaintiff should have, therefore, no

13 2012 (3) ADJ 258.

grievance on this ground". The trial court was of the view that even if the land was vested in the state, the presence of the graves continuously and also fresh burial would also vest the land in God Almighty. The trial court held that "under Muslim law the existence of grave on a parcel of land makes it sacred and it is vested in God by dedication". The trial court further held that even if the land notionally vested in the state and *gaon samaj*, the graves continued and more burials done. The land thus again was dedicated. On appeal, the appellate court confirmed the findings of the trial court that the land was a graveyard of Muslims. But the appellate court did not agree with the reasoning given by the trial court that after vesting of the *waqf* property of the graveyard in the state, the subsequent burial in the land would again revive the grant. On second appeal, the High Court of Allahabad shifted the reasoning and grounds on the basis of which the trial court and the first appellate court pronounced their judgments. The second appellate court came to the conclusion that the graveyard was a property dedicated to God Almighty, but the legislation did not think it advisable to create any special right in favour of the God Almighty regarding graveyards. The appellate court stated that there were a large number of tenures in erstwhile state. The legislature had to put in uniform tenures through out the state and it was just possible that there may be certain omissions in protecting a right and the right of God Almighty and graveyards might be one of them. The appellate court further held that the management of graveyards like other public land passed on to the *gaon samaj*, but this did not mean that *gaon samaj* got a right to use graveyard in anyway which was not in conformity with the Mohammadean law of *waqf*. The appellate court observed that the Mohammedan law is not in conflict with UPZA regarding the management of *waqf* property. While it might be true that the management of a *waqf* property under the Mohammadean law must be in the hands of Muslims but in view of section 117 read with section 4 of UPZA the management of graveyard was passed on the *gaon samaj*.

The high court, on second appeal, did not find itself in agreement with the trial court and appellate court and held that they erred in law in holding that the vesting of the land under section 4 of the UPZA will divest the right of burial of the Muslim community. The high court also disagreed with the trial court that the rights will revive against all other persons including the state and *gaon samaj*. The high court observed that once it was proved by oral and documentary evidence in a representative suit that the land in the plot in question was used from time immemorial for burial of the dead by the members of Muslim community, the land would be deemed to have been dedicated to God Almighty and had to be treated as *waqf*, which would not vest under section 4 of the UPZA. With regard to the status of trees in the land of the plot, the high court asserted that the trees attached to the earth which was dedicated to God Almighty for burial of the dead would continue to be retained as attached to the land which is a public graveyard and a *waqf* and to be used for the purpose connected with graveyard. The judgment is in agreement with Islamic law and also promotes the socio-economic welfare of the Indian Muslims. Since it is necessary to perform the burial ceremony after demise of a Muslim and it is the collective responsibility of the community, to ensure access of land for this purpose is the responsibility of the state and to a certain extent *waqf* property is contributing a lot towards this end, that is why the high court ensured

this right of Muslim community by ensuring access of certain lands in the form of graveyard even for the future also.

Exclusion of court jurisdiction

Government of India took legislative measures to preserve and protect the *waqf* property. It was thought proper that for speedy trial the litigation relating to *waqf* be tried in specially created *waqf* tribunal created by law. Sometimes, conflict arose relating to the jurisdiction of civil court under the CPC and the *waqf* tribunal created under the *Waqf* Act, 1995. The High Court of Himachal Pradesh had to resolve this conflict in *Himachal Pradesh Wakf Board etc.* v. *Shri Rajiv Dutta.*[14] One Kailash Dutta had filed three representative petitions against her tenants. The tenants denied the tenancy relationship and challenged the title and ownership of the landlady. The stand of the landlady was that the original owner of the building (late) Kamarudin had made a will in her favour and as such through this will he bequeathed his entire property in her favour. The rent controller could not have decided the question of title. It was held that even if the title of the petitioner was defective, she could still be treated to be a land lady. Thereafter, the execution petitions were filed by the landlady for execution of the eviction orders. The Punjab *Waqf* Board as predecessor-in-interest of Himachal Pradesh *Waqf* Board, filed objection petitions in these execution petitions. It was submitted that S J Dutta, the predecessor-in-interest of Kailash Dutta, used to reside in a portion of the property and was managing the property as attorney/agent of Kamarudin till his death. The existence of the will was denied as no valid will had been prepared and, thus, the same property was not bequeathed in the absence of a valid will. This was contested by the petitioner and it was pleaded that *waqf* board had no right to approach the court under order 21, rule 97 of the CPC. The execution court, holding that the *waqf* board had no *locus standi*, dismissed the petition. The *waqf* board appealed in the court of district judge, Shimla who allowed the appeals. The appellate court directed the executing court to consider and dispose of the objections after settling the issues. The aggrieved party, the successors of Kailash Dutta, filed FAO. These appeals were dismissed by the division bench of the high court and the impugned matter went back to the executing court. At this stage, an application was filed on behalf of the waqf board that the property was included in the list of waqf properties and the waqf tribunal had been constituted under the provisions of the Waqf Act, 1995 and, therefore, the tribunal alone had jurisdiction to hear the matter. The wakf board prayed that the execution petition and the objections may be sent for trial to the wakf tribunal at Shimla for adjudication.

The civil judge accepted the plea of the wakf board and referred the matter to the wakf tribunal, Shimla which had turned down the decision of the civil judge and held that the tribunal did not have jurisdiction to decide the execution petitions. This was why the wakf board preferred appeal against this order. The high court was of the view that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter, relating to any waqf property which under the Act is required to be determined by the tribunal. But if any proceedings had been started in the civil court before the commencement of the Wakf Act,

14 2012 Ind Law HP 39.

1995, the wakf tribunal would not have jurisdiction to decide such dispute. The high court held that the Wakf Act, 1995 came into force in the state of Himachal Pradesh after the rent proceeding had commenced. It may be submitted that in order to secure waqf properties, retrospective effect should be given to the provisions of the Wakf Act, 1995 as revealed from the intention of the legislature. The retrospective effect given to this legislation would prove to be more beneficial to save destruction of waqf properties which is the only economic asset of a very backward community.

Exclusion of the jurisdiction of the civil court

After the enactment of the Wakf Act, 1995, the civil courts have no jurisdiction to try the suits relating to *waqf, waqf* property and other *waqf* related issues. Provisions have been made for effective and speedy trials thereby making the way for the wakf tribunal constituted for this particular purpose under the Wakf Act, 1995. The higher judiciary handed down important judgments resolving the controversy relating to the jurisdiction of wakf tribunal and exclusion of the jurisdiction of the civil court. *Nagore Andavar Sambiranichatty Dhoopam Family Trust, Nagopattinam* v. *S. Jegabar Ali*[15] decided by the high court of Madras related to the issue of jurisdiction of the civil court. The stand of the plaintiffs taken before the trial court was that the trust was in existence from the time of plaintiff's ancestors. The suit property was in possession and enjoyment of the plaintiff. The house adjacent to the northern side of the suit property was in possession of the defendant. The defendant trespassed into the suit property and constructed a water tank and lavatory. Hence, the plaintiff filed the suit. The defendant contested the averments of the plaintiff and submitted that the suit property was in his possession and enjoyment over a period of 20 years. It was further contended that the ancestors of the defendant also enjoyed the suit property. It was denied that the suit property belonged to the plaintiff trust. It was further submitted that because the right of the plaintiff trust was denied, the suit was not maintainable before the civil court. The trial court approved the evidence adduced by the contesting parties and came to the conclusion that the civil court had no jurisdiction. The first appellate court confirmed the findings of the trial court. Aggrieved by the said judgment and decree passed by the first appellate court, the plaintiff had preferred second appeal before the high court.

The appellants submitted that the trial court having come to the conclusion that the suit was not maintainable for want of jurisdiction, it ought not to have decided the other issues but could have ordered return of the plaint for being presented before the wakf tribunal. It was also the case of the plaintiff that the first appellate court ought to have vacated the findings reached on the other issues. The contention was that both the courts erred in coming to the conclusion that the civil court had no jurisdiction. The high court held that the trial court ought to have desisted from rendering findings in respect of the proprietary rights over the property when it had come to the conclusion that the civil court had no jurisdiction as per section 85 of the Wakf Act, 1995. It was further held that such error committed by the trial court ought to have been corrected by the first appellate court.

15 2012 (i) LW 1028.

Incorporation of the wakf board

The Supreme Court in *Maharashtra State Board of Waqf* v. *Shaikh Yusuf Bhai Chawla*[16] had to resolve the controversy relating the incorporation of the Maharashtra Board of Wakfs and its impact on the waqfs created by persons professing Islam but belonging to different sects. In the state of Maharashtra, there are two types of trust entities, one is *waqf* and the other is trust. The former is governed by Muslim Wakf Act, 1954 while the later is to be registered as a public trust under the Bombay Trust Act. The Muslims of Mumbai adopted both devices to dedicate their property for the benefit of mankind. After the enactment of the Wakf Act, 1995, the public trust ceased to be governed by the provisions of the Bombay Trust Act. The government of Maharashtra constituted a state board of wakf which conducted a survey of the waqfs in the state. It had issued a notification publishing the list of the waqfs in the State of Maharashtra. Both the notifications published by the state government and the board of wakfs had been challenged in the Bombay High Court. The high court gave orders setting aside both the notification and the list. The direction, which became the bone of contention before the apex court, was that until a new board was incorporated under the Wakf Act, 1995 and the board started functioning in accordance with the provisions of that Act, the provisions of Bombay Public Trusts Act would apply to such Muslim public trusts as were registered under the Bombay Act. It was also made clear that although the notification dated 04.01.2002 had been set aside, yet none of the actions taken or orders passed by the wakf board under the said notification were challenged nor set aside. The state of Maharashtra was also given liberty to make interim arrangements to monitor and supervise the waqf properties. Against the aforesaid directions of the Bombay High Court, special leave petitions were filed before the apex court.

In the Supreme Court, it was argued that the only thing required to be considered was whether a *prima facie* case had been made out for grant of *interim* injunction to preserve the *status quo* which prevailed before the coming into force of the Wakf Act, 1995. The solicitor general submitted that the provisions of the Act of 1954 and the Public Trust Act in relation to *waqf* properties stood repealed by virtue of section 112 of the new Act of 1995 and urged that with the repeal of the provisions, it was for the board of wakfs established under the Wakf Act, 1995 to continue the management of the waqf properties. It was further submitted that the judgment of the Bombay High Court setting aside the establishment of the wakf board could not resurrect the authority of the charity commissioner over such properties. It was also submitted that after the promulgation of the Wakf Act, 1995 the charity commissioner ceased to have any control over the Muslim *waqfs* even if they had been registered with the charity commissioner as public trusts.

On behalf of the respondents it was urged that the circular issued by the charity commissioner relinquishing its authority over the trusts created by Muslims did not alter the provisions of the Act of 1995. This Act dealt with *waqf* properties only and as such was not entrusted with the jurisdiction of such *waqfs* trusts. The respondents asserted that since the wakf board had not been constituted duly and fully, the list of *waqfs* prepared and published by it could not be accepted and relied upon. It was

16 (2012) 6 SCC 328.

submitted that the *interim* order passed by the high court did not require any interference in these proceedings. The thrust of the arguments on behalf of the respondents was that in the absence of validly constituted board of waqfs, the Wakf Act, 1995 could not be said to have come into force in Maharashtra. Therefore, the system of management prevailing prior to the enactment of the Wakf Act, 1995 would continue to remain in operation. The apex court held that difference between trusts and *waqfs* appeared to have been overlooked by the high court which passed orders without taking into account the fact that the charity commissioner would not ordinarily have any jurisdiction to manage the *waqf* properties. The Supreme Court decided that it would be in the interest of all concerned to maintain the *status quo* during the pendency of the proceedings before the court.

Status of Mutwall

The Wakf Act, 1995 embodies the principle that no suit for the enforcement of any right on behalf of any *waqf* which has not been registered in accordance with the provisions of the Act of 1995 shall be instituted under section 87. Therefore, the first issue that arose for consideration in *Sayed Mustajab Husain, Mutwalli* v. *ADJ, Agra*[17] was whether the plaintiff *waqf* was a *waqf* registered in accordance with the Wakf Act, 1995. The second was whether the suit for ejectment and recovery of arrears of rent could be failed by the *mutwalli* of the *waqf* on behalf of the *waqf*. The trial court, the court of small causes, decided that the plaintiff could institute the suit as a *mutwalli* of the *waqf*. It was further decided that on the *waqf* property or the *waqf*, the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 was not applicable as the *waqf* building was exempt from the operation of the Act.

The trial court held that the tenancy of the defendant stood terminated on the expiry of the period mentioned in the notice sent by the plaintiff which was duly served on the defendant. The trial court held that the plaintiff was entitled for the relief of ejectment of the defendant. The defendants preferred a revision under section 25 of the Provincial Small Causes Act, 1887 and raised the plea that the suit was barred by section 87 of the Wakf Act, 1995 because the *waqf* was not registered under the provisions of the Act. The revision was allowed and the suit for the ejectment was dismissed. The revision court also held that a *mutawalli* of the *waqf* could not have instituted the suit without having the permission of the *wakf* board.

The *mutawalli* went to the high court in a writ petition against the revision. The high court framed the issue as to whether the suit could have been instituted on behalf of the *waqf masjid* because it was contended by the defendant that the said *waqf* was not registered and the *mutawalli* had not filed any document to prove that it was registered with the wakf board. The high court perused the provisions as contained in CPC and reached the conclusion that if a fact had been averred by defendant in his written statement beyond doubt, it shall be deemed as not denied. This shall amount to admission of the fact and admitted fact need not be proved in view of the provisions of section 58 of the Evidence Act. The high court was of the view that on the perusal of the petition filed on behalf of the *waqf* and written statement it could be concluded that there was no legal need to adduce the certificate

17 2012 (8) ADJ 726 2012 6 AWC 6413.

of registration of the *waqf*. Therefore, the high court held that the revision court committed an illegality and its findings could not be sustained. The high court held that the *waqf* was a registered *waqf* and it could have instituted the suit. Regarding the second issue whether a *mutawalli* could maintain a suit on behalf of the *waqf*, the high court placed reliance on the judgment of High Court of Andhra Pradesh in *A. S. Abdul Khader Waqf for Deeni Talim* v. *Suber Mian*[18] and of the Allahabad High Court in *Mohammad Zafar* v. *State of UP.*[19] In view of the decision in the above mentioned cases, the High Court of Allahabad came to the conclusion that the *mutawalli* could file the suit in the interest of the *waqf* and permission of the wakf board was not required to be taken by the plaintiff for instituting the suit. Moreover, the high court observed that the defendant had averred that he had been given the shop on rent in the building belonging to *waqf* by the plaintiff and the plaintiff realised the rent from the defendant claiming himself to be *mutawalli* of the *waqf*. Therefore, the *mutawalli* was entitled to file the suit against the defendant.

Waqf Board as a Competent Authority

In *Hazrat H. Hussain Basha Khadri* v. *The Competent Officer-Cum- Municipal Commissioner, City Municipal Council Tumkur,*[20] the High Court of Karnataka had to decide the question of competence of the officer under the Karnataka Public Premises (Eviction of Unauthorized Occupants) Act, 1974; The Karnataka Municipalities Act 1964 and the Wakf Act, 1954. The municipal commissioner, competent officer under the Karnataka Public Premises Act, 1974, issued a notice calling upon 1st petitioner to show cause as to why it should not be treated as an unauthorized occupant and evicted from the municipal property. The first petitioner asserted that by notification the state government had declared the property in question as a *waqf* wherein the mortal remains of two Muslim saints were buried. It was further stated that the said notification was issued in the Mysore *gazette* by exercising jurisdiction under the provisions of the Mysore Wakf Act, 1954. The competent officer under section 5(1) of the Karnataka Public Premises Act held the 1st petitioner to be an unauthorized occupant and directed the petitioner to vacate the said premises. This order of the competent officer was questioned in two appeals preferred separately by the petitioners. The additional district judge declined to accept the plea of the petitioners and observed that the village map which was 100 years old, did not show the existence of the *dargah* and the same as set out in the Mysore *gazette* was not entered in the concerned municipal records, as belonging to wakf board and, thus, the publication in official *gazette* was not acted upon. Aggrieved by it, the petitioners went to the high court in writ petition.

It was stated in the writ petition that after a full-fledged enquiry under the Wakf Act 1995, the property was notified as a *waqf* property and the same was published in the official *gazette* of Mysore. The notification, having become final, was binding on the respondent. The writ petition was opposed denying that the scheduled premises were not the *waqf* property. It was an illegal encroachment over the road,

18 AIR 2003 AP 528.
19 2008 1 AWC 17.
20 MANU/KA/1795/2012.

a public premise. It was submitted that the competent officer under the Karnataka Public Premises (Eviction of Unauthorized Occupants Act) 1974 was fully justified in directing its removal and eviction. The high court took the view that *"*The declaration of a property as a Wakf by inclusion in the notification in the Gazette under the Wakf Act, 1954, is not conclusive evidence of the fact that it is Wakf property against the stranger who claims title to the property, while it is for the Wakf Board to adduce evidence to establish the factum of enquiry under the Act, to prove the existence of Wakf*"*.

Legality of wakf board declaration

In *D. Venkata Krishna Rao* v. *Government of Andhra Pradesh*,[21] the high court had to decide as to whether the notification issued by Andhra Pradesh State *Waqf* Board declaring certain lands as *waqf* property was illegal. In case the notification was legal, what would be its impact on the allotment of those lands by the government of Andhra Pradesh to some industrial corporation and further allotment by the latter to third party industries. The subject matter in this case covered wide ranging moot points with reference to Islamic law of *waqf*, *jagir* and land tenures and *enam* tenures. The main controversy related to maintainability of the writ petition in view of the provisions of the Wakf Act, 1995 granting the jurisdiction to decide all disputes regarding *waqfs* to a specially constituted wakf tribunal and the provisions of the Wakf Act which expressly barred the jurisdiction of the civil courts. Certain lands were endowed by the *Nizam* of Hyderabad state to the *dargah* as service *enam* lands. These were recorded as conditional grants under the Andhra Pradesh (Telangana Area) Atiyat Enquiries Act, 1952. The *wakf* board enjoying powers under the Wakf Act, 1995, published an *addendum* correcting its earlier notification. Consequently, the service *enam* lands attached to the *waqf*, which were not notified, were included in the list of *waqf*. The government claimed that the particular property situated at Manikonda village was *jagir* land which was attached to *dargah* and after abolition of *jagirs* under the Hyderabad (Abolition of *Jagirs*) Regulations, 1358 fasli, it had taken over the land itself by duly paying commutation amount to the legal heirs of the *mutawalli*. It was contended on behalf of the government that those lands were vested in the government. It was further pleaded that even as per orders of *Nizam-e-Atiyat*; there was no permanent dedication to the *waqf* property. It was also argued that in the absence of any permanent dedication, it could not be treated as *waqf* property. And, therefore, ownership of the land always remained with the ruler, *i.e.,* state. The high court held that the property in dispute was vested in the government. And the government, rightfully, enjoyed the authority to allot the land to anyone. In the present case, the government allotted the lands to Andhra Pradesh Industrial Infrastructure Corporation, they in turn, allotted it to various companies through public auction. These companies developed the land by investing huge money. The high court held that notification issued by Andhra Pradesh State *Waqf* Board was not legal and as such the allotment of the Manikonda land was not illegal.

21 2012 (6) ALT 379.

Another case relating to the same subject was *M/s. Lanco Hills Technology Park Pvt. Ltd.* v. *Mehboob Alam Khan*,[22] where the issue was regarding the allotment of land of Manikonda village to the industrial units which land had been stated to be *waqf* property. This property, being *waqf*, could not be alienated by allotment by the government because the government was not the owner of the property. The appellants denied the *waqf* status of the property at the village Manikonda. The suit property was declared *waqf* property by the wakf board through notification and later by an *addendum* after having made due inquiry by a competent person and was listed as *waqf* property attached to *dargah*. An *interim* order was sought from wakf tribunal against the government and allottee industries to restrain them from alienating the disputed property and constructing buildings on it. The wakf tribunal ordered *status quo* till further orders. It was contended by the respondent companies that wakf tribunal had jurisdiction to determine the character of the *waqf* property if it was disputed. They vehemently contended that the land shown in schedule was not a *waqf* property. The high court held that "the finding of prime facie case in favour of *dargah* by the Wakf Tribunal, therefore, does not warrant any interference". The high court further held thus: "[t]he issue can be finally decided by the Wakf Tribunal in the suit. The petitioner, who entered into the development agreement with the land owner, may have to approach the Wakf Tribunal for necessary clarification in this regard, with reference to the relevant section of the Transfer of Property Act, 1882."

***Wasiya* (will)**

In *Mohd. Iqbal* v. *Mst. Najma*[23] the issue related to the devolution of property of the deceased by way of *wasiya*. The deceased widow, the defendant no. 1 asserted that (late) Mohd. Ahmad had executed his last will and testament in her favour and her children's favour. By virtue of the said will, the entire estate of the deceased was bequeathed to her and her children and they became exclusive owners of the deceased's estate. She contended that the said will was duly registered before the sub-registrar of Delhi. The widow also claimed that the plaintiff had been excluded from the succession of the property of the deceased. The fact of the subsistence of will was proved, but the legality of the contents and substance was disputed under Muslim law since the bequest was in excess of one-third of the estate and the same cannot be given effect unless such bequest is consented by the heirs after the death of testator. The alienation of whole of the estate was permitted through testamentary disposition by the custom which was recognized among Kutchi Memons and Khojas. A Muslim was entitled to dispose of his property by way of will even in excess of 1/3rd where it was permitted by the custom. This testamentary disposition of the whole estate in accordance with the custom was abrogated by the Shariat Act, 1937, the West Punjab and N.W.F. (Shariat Act) and the Kutchi Memons Act, 1938. The present position of law is that no Muslim can dispose of his entire estate by way of his *wasiya*. He can do it within prescribed limits of 1/3rd without the consent of his heirs to any strange person and with the consent of heirs to any heirs. However, in

22 2012 (4) ALD 385 2012 (4) ALT 136.

23 *Supra* note 5.

the instant case, the court did not take into consideration this ingredient of the law of *wasiya*. The court was of the view that there was no evidence placed on record that the heirs have consented to such a bequest, expressly or impliedly, which could not be inferred from the conduct of the heirs. Therefore, the court pronounced that the claim of the widow under the will "must fail". Though the court reached at the correct decision, it was based on wrongful reasoning as the court lost sight of the other main ingredient of the law of will under Islam where one cannot alienate his even 1/3rd of asset to his heirs through testament even if it is with the consent of other heirs. If one transfers his estate to the extent of more than 1/3rd to any strange person, in such a case consent of the heirs is required.

Wirathat (inheritance)

Succession or inheritance may be enforced against the estate of deceased of which he/she was owner at the time his/her demise. In *Mohd. Iqbal* v. *Mst. Najma*[24] the issue involved the division of the estate of the deceased among his heirs when the deceased had several properties situated at different places. Some of the properties were alienated by or under various compromises and settlement, though claim was made by the appellant-plaintiff over entire assets of the deceased Mohd. Ahmad. The late Mohd. Ahmad had entered into two marriages one after another and had children by both wives. First wife had died during the life time of the deceased leaving behind the appellant-plaintiff born out of the marriage with the deceased Mohd. Ahmad. The deceased contracted second marriage with defendant no. 1 (Mst. Najma) who gave birth to two children. After the death of Mohd. Ahmad, the question of succession had come up. The plaintiff claimed that Mohd. Ahmad did not contract any second marriage, and no *nikah* was performed between Mohd. Ahmad and defendant no. 1 she was supposed to be merely retained and employed as a domestic help. The plaintiff conceded that it might be possible that Mohd. Ahmad had developed a *liaison* with her. Therefore, plaintiffs pleaded that in the absence of a valid *nikah* the defendant no. 1 and her two sons had no claim to the property of deceased Mohd. Ahmad. The plaintiff contended that on the death of Mohd. Ahmad they and defendant no. 4 and 5 inherited his estate, both movable and immovable, in accordance with Muslim law of inheritance. They further argued that defendant nos. 2 and 3 were not legal heirs of the late Mohd. Ahmad because they were born out of an illegitimate relationship. The respondent-defendants denied the averments of the appellants and specifically stated that defendant no. 1 was legally wedded wife of the deceased and was his widow. The defendant nos. 2 & 3 were daughter and son respectively of the deceased from defendant no. 1 who was his legally wedded wife. The court had to decide whether defendant no. 1 was or was not the legally wedded wife of Mohd. Ahmad and defendants nos .2 and 3 were born out of any such wedlock. The court held that the plaintiff failed to show that there was no performance of a *nikah*. It was also not proved by the plaintiffs that the copy of *nikhanama* filed by the defendants was forged and fabricated. The court was of the view that it was proved beyond doubt that the defendant no. 1 was legally wedded wife of the deceased and defendant nos. 2 and 3 were legitimate

24 *Ibid.*

children of deceased Mohd. Ahmad. The court decreed the suit of the plaintiff to the extent that a preliminary decree had been passed by declaring that plaintiff and defendants were legal heirs of the deceased except defendant no. 1 and they were entitled to succeed to the property left by the deceased without any encumbrances in accordance with the fact of lawful wedding between Mohd. Ahmad and defendant no.1. However, it did not include the wife *i.e.* defendant no. 1 in the list of heirs while issuing the preliminary decree.

Some other issues pertaining to Property

Alienation of minor's property

Protection of property rights is one of the main functions of law. The individual has been empowered to dispose of his property with his free consent to the person of his choice. Minors, being incapable to make mature decisions so as to protect their interests, have been provided with safety valves for the protection of their property. Neither the minor nor his guardian can alienate minor's property without being subject to the stipulations evolved by the legislature and judiciary. The High Court of Allahabad in *Smt. Kaneeza Khatoon* v. *Iqbal Ahmad*[25] had to decide as to whether under Muslim law a widow could alienate the property of her minor sons and daughters. The court had to decide further whether the sale deed executed by the mother in respect of the shares of her minor sons and daughters was void or voidable. One Rahmatullah was the owner of the house in dispute. He died leaving behind his widow, sons and daughters. In 1968, redemption of the property was done. However, during the pendency of the suit Fatima Bibi, the widow, sold the property/mortgagor's right to the appellant Kaneez Khatoon through a registered deed in 1964 in respect of her own share ($1/8^{th}$) in the house in dispute and the share of her minor children acting as their guardian. Further, the minor sons and daughter of Rahmatullah after becoming major, Fatima Bibi sold their 14/16 share in the house in dispute to Mohd. Mustafa through different sale deeds on different dates. In its attempt to resolve the conflict, the high court of Allahabad sought help from *Mahboob Shah* v. *Syed Ismail*[26] and *Meethiyan Sidique* v. *Mohammad Kunju Pareeth Kutty.*[27] The cumulative effect of the decision of apex court in both the cases was that under Muslim law, after the death of the father; mother was not the guardian of the property of her minor sons. The high court quoted the last sentence of para 5 of the first authority (of 1995) "Equally in Mohammadean Law mother cannot act nor be appointed as property's guardian for the minor. She equally cannot act as legal guardian". The high court after referring the works of Mullah (revised by M. Hidiayatullah, and Arshad Hidayatullah) Tyabji and Syed Ameer Ali cases and like *Imam Bandi* v. *Mutsaddi*[28] held that the sale deed by mother Fatima Bibi of the 14/16 shares of her minor children was void and not voidable. The high court also held that a void document could be avoided even if the same was not cancelled. The high court further held that the mother sold the property and received the sale

25 2012 (10) ADJ 17; 2012 (6)AWC 6172.
26 AIR 1995 SC 1205.
27 AIR 1996 SC 1003.
28 (1918) 45 Ind. App. 73 : AIR 1918 PC 11.

consideration for the entire property. The whole of such amount must have been spent by her mainly on her minor children. The sale was not binding upon the minor children but they had to return the amount to the purchaser-appellant.

Relinquishment of the share by purported heir

The issue of relinquishment of the share by purported heir has been settled by Delhi high court in *Mohd. Iqbal* v. *Mst Najma.*[29] The father, Mohd. Ahmad and the son Mohd. Akhlaq, plaintiff no. 2, were running a business of printing press, named and styled as "Labour Printing Press", at Wazirabad Industrial Area, Delhi. Differences and disputes arose between the partners, that is to say, father and son. The partnership was dissolved and the matter was referred to the arbitrators who pronounced their award. In pursuance of the award delivered by the arbitrators, premises situated at Ghas Mandi, Pahar Ganj, Delhi had been give to the son, the plaintiff no. 2 and the plaintiff no. 1 had surrendered all his rights, title and interest in the property situated in Wazirpur Industrial Area, Delhi along with the property situated in Quresh Nagar which came to the share of the deceased Mohd. Ahmad. This award was acted upon by the parties, that is the deceased father and son, the plaintiff no. 2. The award was not challenged by any of the plaintiffs and became final. Paintiff no. 2 in lieu of the said settlement relinquished his right in respect of the property situated at, Wazirpur in the office of sub-registrar, Delhi. The court held that plaintiff no. 2 had no right in the property situated at Wazirpur Industrial Area, because it was proved beyond doubt that the plaintiff no. 2 had relinquished all the rights and titles to the said plots. Thus, the claim for the ½ of the shop of the printing press was rejected and it was held that after relinquishment, the deceased Mohd. Ahmad became exclusive and sole owner of the plot along with the goodwill of the firm M/s. Labour Printing Press.

IV OTHER SIGNIFICANT ISSUES

Family structure

In Islamic system of social relationship, the nuclear family has been implicitly recognized by the sociological theocratic frame work. In this social set up, the grandson, in the presence of major sons, is not reckoned with the members of the family of grandparents. Judiciary always extended helping hand in the dispossession of family justice. In such cases, the judges are necessarily given discretion. The High Court of Rajasthan countenances this type of social problem when it decided *Prakashmal @ Prakash Chandra* v. *LRs of Lt.smt. Rehmat.*[30] Primarily this case concerned with litigation relating to eviction of a shop let out by the grandmother on the ground of *bonafide* need of her grandson for starting his petty business and trade. This case was instituted under the Rajasthan Rent Control Act, 1950. The issue for consideration before the high court was "whether an eviction decree can be granted to the landlord/land lady, who is governed by Islamic law for the *bonafide* need of her grandson and whether such grandson is a member of family as stipulated in section 13(1)(h) of the Rent Control Act, 1950."

29 *Supra* note 5.

30 2013 (3) WLN 507.

It would be of interest to go into the submission of rival parties relating to the meaning of 'family'. The pleaders of both sides tried to ascertain the meaning of 'family' inserted in section 13(1)(h) but not defined anywhere in the Rajasthan Rent Control Act, 1950. The counsel for the appellant – defendant (tenant) assailed the findings of the lower court and contended that the courts below had wrongly held that grandson was the member of the family of the land lady, namely, Rehmat. The counsel relied on the norm that in the presence of his father, the grandson could not succeed to the property of Rehmat under Muslim law during the pendency of the present appeal since her another son (uncle of the grandson for whose need, the suit shop was sought to be vacated) was brought on record as L.R. on the basis of a will purportedly executed by Rehmat in his favour. Thus, the counsel for the tenant averred that the grandson of Rehmat could not fall within the ambit of the family of her son who was her legal representative particular when the father of the grandson of Rehmat was alive. The tenant vehemently asserted that for the construction of the term 'family' it was not necessary that the grandson had to be dependent on the landlady to become the family. He urged that in Muslim law so long a person is alive, he/she is the absolute owner of his/her property. Nobody else including a son has a right whatsoever in it much less the grandson. It is only when the owner dies (and not before) that the legal rights of heirs accrue. It was his contention that the suit property in question - the suit shop - could not have devolved upon the grandson. He further urged that his need could not furnish a ground of eviction.

The counsel for the landlady – respondent-plaintiff - strongly refuted the contentions of the opponent and asserted that the word 'family' had been construed to be a term of wide import. He relied on various decisions and opined that the word "family" used in section 3(vii) of the Rajasthan Rent Control Act, 1950 had wide definition and could not be restricted to her, "successor" and "descended" only. It was their argument that the word "family" had been used in the Act of 1950 in a sense of common parlance and not in a technical sense. He said that the *bona fide* need of the grandson of the land lady, who lived with her and separate from his father, must be established as the member of the family and the eviction decree be upheld.

The High Court of Rajasthan accepted the contention of the respondent-plaintiff and held that the question of title was neither relevant and nor it could be decided in rent control and eviction matters under the Act of 1950. The court observed that the grandson of the deceased land lady was the nephew of the present landlord and he "may not be his direct descendent, but he would continue to be a member of the family qua the deceased grand mother and also qua his uncle who get the right to save and take the eviction suit to the logical end". The court categorically held thus:

> The Rent Control Act, 1950 does not make any distinction between Muslim law and Hindu law, nor can the application of personal law for succession adversely affect the operation of this special law, namely Rent Control Act, 1950. This court does not find anything in Muslim Law either to hold that a grandson cannot be held to be member of "family" of the grandmother.

The court found present appeal liable to be dismissed and expressed its opinion thus: "this court finds no reason to hold in the present case that grand son Mohd. Rafique would not be covered by the term "Family" under section 13(1)(h) of the Act of 1950 qua her grandmother Mst. Rehmat and even his uncle Mohd. Salim, as his nephew". The present nuclear family concept is much akin to Islamic law and the court has deviated a bit from the Islamic social concept while interpreting the family. However, such interpretation, keeping in view the circumstances of the time and the developments in the business era, does not seem contrary to the basic injunctions of *Sharia* and such type of permissions have always been given by Islamic jurists in order to interpret liberally the complex issues which is the need of the hour. Thus, the judgment finds its support from socio-legal literature of Islam as well as socio-legal provisions of some Muslim countries of the modern times.

Contradiction of statement on oath

If a party to the suit makes two different statements – one before the court on oath and another made in the mosque by taking oath before the Holy Quran – which one should be relied upon? In case the statement made on oath before the court is found not to be true, what the court should do? Should it start the proceedings of contempt of court? This situation had been faced by a trial court in Delhi in *Mohd. Shamim* v. *Shahnawaz Khan*.[31] A settlement had been concluded between the decree holder and judgment debtor in the suit of execution of the decree for the eviction of the shop. The high court started the proceedings for contempt of court against the decree holder, who deliberately lowered the dignity of the court by making a wrong and false statement on oath in the court in contradistinction of the statement made by him in the mosque by swearing by the Quran. The facts of this case are significant and the high court had to decide the consequences of false statement made on oath under the Oath Act, 1969.

In pursuance of the notice of the proceeding of execution petition, the judgment debtor appeared before the court and submitted that the assigned matter had already been compromised between him and the decree holder. In accordance with the terms of the compromise, the decree holder had received a portion of the amount agreed to be paid to him. On the other hand, the decree holder refuted it. Hence, in view of the contradictory stands taken by both the parties before the court, the court directed both of them to give their statements on oath on the said compromise. Accordingly, their statements were recorded in the court. The judgment debtor deposed that the compromise was arrived at between them and a sum of money was paid by the judgment debtor which was received and acknowledged through receipt by the decree holder. The judgment debtor offered to swear upon the holy "Quran Sharif" that the said compromise was entered into between him and Mohd. Shamim (the decree holder). On the contrary, Mohd. Shamim made statement on oath before the court and stoutly denied any such compromise and receipt of the amount. The decree holder also stated that he could also swear upon holy book of Muslims, the "Quran Sharif" to say that the said compromise was not entered into between him and the judgment debtor. The court faced a piquant situation and it directed both the parties to go to the nearby mosque and take the holy book in hands and swear

31 193 (2012) DLT 520.

by it taking stand about the said compromise. The court nominated two persons as commissioners, one DCP and another a senior advocate and directed them to be present in the mosque to witness the oath taking on the holy book. Both officers submitted their report to the court and observed that the decree holder, Mr. Mohd. Shamim had admitted the compromise between the parties and also the execution of the receipt. They apprised that the statement of the decree holder in the mosque during the oath upon "Quran Sharif" was totally contrary to the statement made by him before the court.

The court again gave him a further chance to speak truth before the court of law and was called upon to the witness box. The decree holder again denied the said compromise entered into with the judgment debtor. The decree holder, however, admitted the fact that in the mosque he had admitted the execution of the receipt which was signed by him. After the perusal of the entire gamut of facts, the court reached the conclusion that the decree holder did not uphold dignity of the court of law and showed scant respect for it. The court shockingly observed that "Deposing before the court, the decree holder took one stand and that too by stating that he was willing to swear upon holy book 'Quran Sharif' and when he was sent to mosque and held the 'Quran Sharif" in his hand he took an absolutely different stand by stating that compromise was entered into between him and the judgment debtor …. Although later on he changed his statement and then admitted the compromise". The court held that there was shifting of stands taken by the decree holder and the court was of the considered view that contempt proceedings should be initiated against the decree holder. Having made the survey of tradition and practice of taking oath in accordance with religious command and legislations like the Indian Oath Act, 1873, the Act of 1840 and the Oath Act, 1969, the court observed that Hindu scriptures contain narrations as to how the conscience of a man pricks him, what rewards await the truthful witness here and in the next world and what sin and terrible torments in hell are in store for an untruthful witness. The court quoted Quran to substantiate its stand, Quran says, "violate not your oaths since ye have made God a Witness over you". The court again explained the narration in the Quran.[32]

> Verily those who plight their fealty to thee do no less than plight their fealty to Allah: the Hand of Allah is over their hands then anyone who violates his oath, does so to the harm of his own soul and anyone who fulfils what he has covenanted with Allah, Allah soon grants him a great reward.

The court also opined that Indian culture and ethos embodies the cardinal principle of "*Satyameva Jayate*" provided in the ancient scripture *Mundaka* Upanishad. The court opined that "Justice System will acquire stability only when people will be convinced that justice is based on the foundation of truth". The same notion of justice has been adopted by Islamic justice system as Quran holds in *Sura Baqar*. "And cover not truth with falsehood, nor cancel the truth when ye know

32 *Id*. at 527.

(what it is)". The court lamented that the decree holder being a follower of Islam, worships the Quran but did not follow the above said feeling of Allah and spoke untruth shamelessly. The court held that "what pricks the conscience of this court is that the decree holder differentiates between the court and the mosque as if God is present only in the mosque and not in the court". The court was of the view that "the decree holder while swearing in the name of God in the court room not once but twice spoke untruth but while in the mosque he spoke the truth which has not only perverted the course of justice but also questioned the sanctity of the oath administered in the court". It may be added that such type of conduct by parties frustrates the administration of justice and Kailash Gambhir J will always be remembered in justice delivery system in Islam for delivering this novel decision. Honesty, while deposing on oath in court, is the mandatory requirement of procedural law in Islam.

Presumption of joint family

In *Shaik Mohd. Ali Ansari and Fatima Bee* v. *Shaik Abdul Samad,*[33] the High Court of Andhra Pradesh had to resolve the dispute as to whether there was a concept and principle of joint family property among Muslims. In this case, a partition suit was instituted before the trial court. One Mohd. Abbas Ali owned considerable landed property. His eldest son died in his life time. Sometime after the death of his eldest son, Mohd. Abbas Ali settled his properties in favour of his surviving sons and grandsons under a registered gift deed. After some time of the settlement, the said Mohd. Abbas Ali expired and defendant no.1 being the only educated member in the family and also the eldest assumed the management of all the properties. Defendant no. l purchased the suit property from the income of the joint properties; by raising loans on the security of these properties and also by selling some of them. Due to some differences, a suit was filed for partition of the suit properties claiming that defendant no.1 was entitled to only one-third share of the joint properties. These contentions were denied by defendant no. 1. It was also denied that late Mohd. Abbas Ali had considerable properties. It was averred by defendant no. 1that suit properties never belonged to the estate of (late) Mohd. Abbas Ali. It was further stated by the defendant no. 1 that as the parties were governed by Muslim law they were not entitled to import the principles of Hindu law of joint properties to support their claim. He said that defendant no. 1 never acted or purported to act on behalf of the plaintiffs at any time. The trial court held that the suit properties were never treated as the joint property of the plaintiffs and defendant no.1.

The trial court held that no presumption could be drawn in favour of jointness of ownership over the suit property in the absence of legal proof that defendant no. 1had acquired the same in a fiduciary capacity. Aggrieved by this judgment, the plaintiff filed an appeal under section 96 of the CPC. The judge concluded that part of the properties were purchased from out of the income of the disputed property held by the defendant with plaintiffs and found that the parties were living jointly and there was no severance among them. The judge took note of the fact that there

33 2012 (5) ALT 325.

was no evidence to show any other separate source of income for defendant no.1 so that defendant no.1 could independently pay as consideration for the purchase of the properties. The judge decided the suit by dividing the properties into equal shares and two such shares be given to the plaintiff. Challenging this judgment, the appeal was filed before the High Court of Andhra Pradesh.

The high court was of the opinion that the personal law governing the disputing parties had relevance to this appeal and this could not be ignored. The court mentioned the provisions of Muslim law of inheritance and asserted that "the position of Muslim law is that at the moment of death of a Mohammedan his estate devolves on his heirs and they take the estate as tenants in common in specific shares. Muslim law does not recognize the theory of representation and the interest of each heir is separate and distinct". Therefore, the high court held that there could be no presumption that acquisition of a property by one or more members of the family would be for the benefit of the entire family, unless there was proof to the contrary.

The high court took cognizance of the socio-economic scenario prevailing in certain areas of Andhra Pradesh relating to the tendency of the descendant Mohammedans to live and trade jointly and acquire property together. In such a situation, when an adult male member holds assets and carries on business on behalf of all the persons interested therein, he stands in a fiduciary relationship to such other persons. The high court admitted that the concept of a joint family had been foreign to Muslim law. But it was established by the high court that "… it is only if a Mohammedan makes out a case of partnership, agency or fiduciary relationship that he can contend that property purchased in the name of one was for the benefit of all."

The high court found that in the case in hand "the defendant no.1 stood under a fiduciary obligation to the other members of the family, akin to the *karta* of a Hindu joint family and property acquired by him with the aid even in part, of the joint funds would invariably have to be treated as joint property". Hence, the high court concurred with the view took by the first appellate court and held that the plaintiffs were entitled to a 2/3rd share in the suit schedule property.

V CONCLUSION

It has emerged from the survey of the judicial rulings of the year 2012 in the area of Muslim law that the courts gave a series of decisions on various conflicting issues such as the double standards of Muslims in making statements on oath in courts and in the mosque. The survey reveals that the court reiterated and relied upon the established legal status of the institution of adoption among the Muslims. The surveyed year witnessed discernible ruling relating to the position of the grandson to a Muslim family which is nuclear. The grandmother filed a suit for the eviction of a shop given on rent. The grandmother wanted that her grandson who was living with her should start his business in the shop and so on the ground of personal need, the grandmother instituted the suit which was contested asserting that grandson was not the member of the Muslim family which was not a joint family in the eye of the law. The court rejected this logic and allowed the petition for eviction. It is also to be noted that in the year under survey, a high court had to

decide on the legality of *khulanama*. The court used this opportunity to throw light on the concept and utility of the *khula*, an instrument for the dissolution of marriage at the instance of wife though the court did not find the *khulanama* in the matter to be genuine as the husband played fraud to get rid of the wife. The judiciary also had to give attention to the problem of mutation in the official records on the basis of *hiba* and rightly it held invalid such *hiba* because of absence of essential ingredients of a valid hiba before writing *hibanama* and its mutation. It was also noticed during the discussion that the judicial decisions and interpretations therein have reiterated earlier judicial principles. Though they have provided conceptual clarity to some extent on many aspects of Muslim law; it was found that the courts have given purposeful, rational and pragmatic interpretation in few cases.

Astonishingly it was also found in some of the cases under survey that the lower courts gave perplexing decisions which displayed utter lack of knowledge of Muslim law particularly with regard to matrimonial matters and also a tendency to judge matters without proper application of mind which necessitated action by high courts which then remanded the matter back for proper consideration by the courts below. This unfortunately leads to increase in litigation and consumption of time of litigants and courts. By and large, the judicial pronouncements under survey have made significant contribution to the development of Muslim law in the context of new social transformation due to the process of acculturation in an urbanized society.