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MUSLIM LAW

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I INTRODUCTION

V.R. KRISHNA IYER J in his famous judgment, *Yusuf* v. *Swarrommaa* [1] had observed that when judicial committee of Downing Street interpret Manu and Mohammad of India and Arabia, marginal distortions are inevitable. He had further observed that the view that the Muslim husband enjoys an arbitrary and unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. It is true that no other aspect of law is so distorted as law of Islam in India.

This distortion is not due to lay men alone but also due to lawmen, particularly leading lawyers and judges who have misunderstood the true essence of Islamic law. This misunderstanding is the legacy of British judge writers like *Mulla* and *McNaughten* who even without reading any primary book of Islamic law had delivered judgments on the subject with motivated intention and ulterior motive. At the same time, the shameful practice of some Muslims to treat their women as a commodity contrary to the teachings of the Prophet is also one of the root causes to create misunderstanding about the Islamic law. Our uneducated *moulvis* who delivered *fatwas* from local mosques without understanding the subject and the problem, but to please the affluent clients, also aggravate the problem. This survey comprises of cases which give a message towards this end. The survey contains both law of status as well as law of property. The cases covered under law of status are divorce, maintenance, guardianship, custody of child and adoption. The law of property comprises of cases relating to gift, will, inheritance and *waqf*.

II LAW RELATING TO STATUS

Nikah (Marriage)

Puberty vis-à-vis consent of daughter

The nature of marriage under Muslim law states that if the mature party wants to live together with *nikah*, they are enjoying the freedom for their choice and no

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1 AIR 1971 Ker 261.

interference from any side is advisable until it adversely affects social order of the community or society. No demarcation line is drawn in order to obtain puberty (majority) of the boy or girl, *i.e.* no fixed age is prescribed, as it depends on the physical growth of a boy or a girl according to the climatic situation of a place, and that is why attaining puberty is the essential condition for marriage and not any fixed age. If below puberty, a marriage is contracted by the guardian, the marriage can be revoked by girl after attaining puberty. In *Noor Saba* v. *State of Bihar*,[2] the question was whether a girl below 18 years age could marry without the consent of her parents. The girl eloped with the boy whom she loved and wanted to marry under apprehension of ill-treatment of her father, who did not allow her to marry the boy. While she remained with the boy, she married in presence of witness and *qazi*. A case was registered by bride's father asserting that his daughter had been evicted away by respondent (the girl's husband).The bride appeared before chief judicial magistrate (CJM) and recorded her statement that she eloped with respondent and stayed with his relatives till her marriage was solemnized with respondent. The medical examination assessed the girl's age between 19-21 years. The petitioner carried pregnancy of about 3 months.

Keeping in view the above facts, the case was dismissed by the CJM. On appeal, the division bench of Patna High Court referred to *Mullah's Principles of Mohammedan Law*[3] as well as *Tayabji's Muslim Law*[4] where it is stated that every Mohammedan of sound mind is permitted to enter into contract of marriage after attaining puberty. The explanation of puberty is given as completion of 15 years of age in the absence of evidence to contrary. Similarly, *Taybji* is also of opinion that a girl reaching the age of puberty can marry without consent of her guardian. Both *Mullah* and *Tayabji* are of the opinion that a marriage is to be presumed on acknowledgement of either party to the marriage. The court held that it was to be presumed that the girl out of her own free will married the boy, which fact had also been admitted not only by the husband but also the mother. The division bench referred to the decisions of the Supreme Court in *Naresh Shridhar*[5] and *Mrs. Tayara Begum*,[6] where *Mullah's Mohmdan Law* was relied upon.

Considering the facts, court held that in the instant case, the girl had attained puberty and married the boy as per her personal law and had even conceived. It was in best interest of parties to set the wife free so as to enable her to join her husband and mother in law.

Under the existing law, before puberty, a minor girl/boy cannot marry without the consent of their father/guardian. This is the reason why no water tight

2 2013 (3) PUR 460.

3 M. Hidyatullah (ed.) Mulla, *Principles of Mohammedan law* 282 (N.M. Tripathi PVt. Ltd. Bom. 15th edn., 1977)

4 Faiz Hassan Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims* (N.M. Tripathi Pvt. Ltd., 3rd edn., Mumbai, 1940).

5 *Naresh Shridhar Mirajkar* v. *State of Maharastra,* AIR 1967 SC 1.

6 *Mrs. Tahra Begum* v. *Sate of Delhi,* 2013(1) RCR (Civil) 798.

compartment is made regarding the age of puberty. Though generally, Islamic jurists presume that it completes at about 15 years of age, it however depends upon the growth of children generally depending upon the geographical and climatic conditions. The purpose of this principle is that decision regarding marriage should be taken after maturity and when the presumption of marriage is clear, the parties should be recognized as husband and wife without any interference.

Dissolution of Marriage

Khula- Wife's right to divorce

It is a misunderstood concept that under Muslim law husband can divorce his wife unilaterally without any justification and not only on the break down ground. This misunderstanding has been created by British judges. At the same time, the ordinary *mulvis* from local mosques have been giving *fatwa's* on *talaq* and *khula* with their rudimentary knowledge and therefore they have also been distorting the Muslim law in this continent. Under Islamic law, when a husband concluded that his marriage had irretrievably broken down and all measures of reconciliation or arbitration have failed, a husband is allowed to divorce his wife once within the period of purity and not under menses and during that period of purity he should not have intercourse with her. After this divorce, wife and husband will sleep under one roof till the expiry of *tuhr*. If husband consummated the marriage, the effect of divorce will automatically become void. Again, if a husband at any other time divorces his wife, divorce would be effective. However, there is no bar with the second *nikah* between the same parties and they can remarry each other. It was a common practice among pre-Islamic Arabs and unfortunately it is found in India that husbands generally divorce their wife then revoke the same and put the women in a very pitiable position. They leave the women neither as divorcee nor as married that is why *Quran* says that divorce is only twice after that a man cannot play more with his wife and torture her. He is either to retain her with honor or departs her with grace because a woman has also dignity. Similarly, a woman has also right of *khula* as *mutatis mutandis* to men's right of *talaq*. When a woman feels that her marital tie cannot subsist anymore and she is feeling hardships, she can get rid of her undesired husband. Cheshire says that instead of dragging forced partnership, it is better to wreck the unity of family than future happiness of spouses.[7] *Khula* is also independent right of divorce initiated by wife and it is not a bargain as generally misunderstood by British judges and some writers. In case of *talaq*, husband has to pay dower immediately, in case of *khula* wife is to forgive her dower but nothing more than that. Even whatever gift she receives from either side would not be returned at the time of *khula*. This women's right to divorce is already applicable in almost all the Muslim countries; however not in our country due to dominance of the traditional customary law which is based on *hanafi* law which does not recognize this right of divorce available to

7 G.C. Cheshire, "The International validity of divorces" 61 *Law Quarterly Review* 352 (1945).

women by Islam. Pakistan's Supreme Court in *Khurshid Bibi*[8] upheld this right and the Pakistani women are availing this privilege, but not in India where the courts are reluctant to apply this principle. It may also be mentioned that there is also one form of divorce by mutual consent (*mubarat*). Though *khula* and *mubarat* are two different forms of divorce but because of misunderstanding or confusion between the two generally courts interpret them as complementary and supplementary of each other or consider them as the same. This misunderstanding is also found in the decisions which are discussed below. There is also one form of divorce known as *faskh i.e.* judicial separation. Under Dissolution of Muslim Marriages Act, 1939, women can obtain divorce from her undesired husband on certain grounds and the last ground is "any other ground prescribed or valid by Muslim law".[9]

When *khula* is already an established ground under Islamic law through which a woman can get rid of her undesired husband and the history of the 1939 Act shows that this legislation was brought to provide relief to victimized women,[10] why, under clause (ix), the courts do not cover *khula* as a valid ground under Muslim Law for giving divorce initiated by women. In *Dr. Syeda Fatima Manzelat* v. *Mr. Syed Sirajuddin Ahmed Quadri*,[11] the issue before the Andhra Pradesh High Court was whether cruelty with wife and failure to provide maintenance to wife is sufficient ground for wife to obtain divorce from such undesired husband under Islamic law. In this case, after marriage, the husband and wife lived both in India and abroad for about two decades. A girl child was born through this wedlock. After sometime, wife filed a petition to obtain *khula* under section 2(i) and (viii) of the Dissolution of Muslim Marriages Act, 1939. She alleged that the husband and his close relatives had taken away all the gold ornaments and she was subjected to physical and mental harassment. A detailed account of the events that are said to have taken place for about 15 years, was furnished and on the breakdown ground wife prayed for a decree of divorce. The husband denied all the allegations.

The trial court framed five issues a) whether the respondent treated the petitioner with cruelty and failed to maintain the petitioner and her daughter and petitioner was entitled for dissolution of marriage; b) whether the petitioner was entitled for return of jewelry of 24 tulas; c) whether the petitioner was entitled for an amount of Rs. 2 lakhs which was spent by her parents for marriage; d) whether petitioner was entitled for an amount of Rs. 3 lakhs paid to the respondent towards *goda joda*; e) whether the petitioner was entitled for Rs. 6 lakhs towards permanent alimony. After examining the evidence on record, the court dismissed the petition. Consequently, the wife knocks the door of High Court of Andhra Pradesh.

The high court, after hearing the parties, observed that under Muslim Law, marriage was merely a contract. Even at the time of marriage, various contingencies

8 *Mst. Khurshid Bibi* v. *Muhammad Amin*, PLD 1967 SC 97.

9 Dissolution of Muslim Marriages Act, 1939, S. 2 (ix).

10 See Furqan Ahmad, "Role of Some Notable Indian Muslim Jurists towards the Development and Reform of Muslim Personal Law in India", 34 *JILI* 563 (1992).

11 2013(5) ALD 298; 2013(5) ALT675.

that would ensue, in the event of divorce, are required to be taken care of. The male spouses are given almost unbridled freedom to put an end to the marriage by pronouncing *talaq* successively for three times. However, similar freedom is not available to a woman spouse. In case the woman spouse intends to walk out of the marriage, she has to take recourse to the provisions of the Dissolution of Muslim Marriages Act, 1939. The court found that as the wife had initiated a case for divorce under the provisions of the section 2(ii) of the Act of 1939 for which she is entitled according to law. The appeal, therefore, was allowed and the order of family court was set aside.

The decision of the court is correct according to the facts and circumstances of the case. However, it may be submitted that the nature of Muslim marriage clearly shows that marriage is a combination of *ibddat* (worship) and *moamlat* (dealings). Marriage is not merely a civil contract because three essential ingredients of Muslim marriage are: *ijab*, *qubul* and *mehr* (offer acceptance and consideration). It may be said to be a sacramental contract. The parties, their well wishers and arbitrators as well as courts should not leave any stone unturned to save the marital tie. The dissolution of marriage is allowed as a last resort. Prophet himself denounces the use of *talaq* and says "the most detestable thing which is permitted in the eyes of god is divorce".[12] At another place, He says, "the divorce shakes throne of god".[13] *Quran* itself provides a very exhaustive, fair and detailed procedure for divorce which is based on break down theory of divorce now found in place in all contemporary civil laws. Therefore, the observation of the learned judge in this case that a man has an arbitrary power of divorce has no relevance under Islamic law of divorce. Similarly, women have not given right to separation parallel to men is also a misunderstood concept. Unfortunately, the learned judge in this case could not notice any judgment of Krishna Iyer J on the interpretation of Islamic law of divorce.[14]

As discussed above, wife has right of *khula* equal to man's right to *talaq* for that she has complete freedom equal to man with some procedural difference. It is not a bargain and it is misunderstood concept. The court in this case could not appreciate the differences between *khula* (wives independent right to divorce) and *mubarat* (divorce obtained by mutual consent of parties). The judge decided the case of judicial divorce under the spirit of Dissolution of Muslim Marriages Act, 1939, in favor of granting divorce to wife from her undesired husband and deviated from family court stand and, therefore, he should be appreciated for same. It may also be mentioned that under Islamic law, all the gifts, jewelry and cash and other customary gifts which were received by wife at the time of marriage or during subsistence of marriage whether they were gifted by her own parents or relatives and friends, or her husband's parents or relatives and friends, must be given back to wife as and when she demands whether they are kept with husband

12 Sulaiman-bin-al-Ashathashaisthanee Abu Daud, *Sunnan* 1:26 (1982).

13 Ahmad A. Galwash, *The Religion of Islam* 117 (1945).

14 *Supra* note 1.

or in laws or elsewhere. Such type of provision is made under the newly enacted legislation in India.[15] It may also be pointed out that divorce obtained in the form of *khula* is a recognized form of divorce under Islamic law as mentioned in section 2 of Shariat Act, 1937.[16] The Indian courts may have reluctance to uphold this right of Muslim wife in India but the Pakistan Supreme Court long back upheld this right of woman to obtain divorce in the form of *khula*. This decision got a momentum throughout the judicial fraternity of south and west Asia. However, the leaned judge of this case seems fully unaware of this important turn towards the history of Muslim wife's right of south Asia. Therefore, this decision does not touch the issue.

Maintenance

The Muslim law of maintenance relating to divorced wife in India has been debated since last century and now there are also several statutory provisions. The interpretation of these statutory provisions sometimes increases litigation along with the controversy as to what should be the final law of land. The decisions while interpreting the provisions of maintenance relating to Muslim wives are not uniform which makes some times the parties' position more pitiable and they are moving from here to there for getting justice.

Cr PC *vis-a-vis* Muslim Women Act, 1986

In *Qureshia bi* v. *Abdul Hameed*,[17] an application was filed against order of trial court which rejected wife's prayer under section 127 of Cr PC as not maintainable after the commencement of Muslim Women (Protection on Rights of Divorce) Act, 1986 (referred as ' the Act'). In this case, the husband divorced his wife. Consequently, the wife filed an application under 125 of Cr PC and a monthly allowance of Rs. 125 was awarded as maintenance. After lapse of more than 2 decades, the wife again filed an application under section 125 Cr PC seeking alteration in maintenance allowance on ground that husband had remarried and maintenance awarded long back was not sufficient to meet out the current expenses and thus, maintenance allowance be increased. The trail court found that the application filed by the petitioner under section 127 of Cr PC was not maintainable and thus the earlier order was upheld. Consequently, the petition was filed in the high court.

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15 See Muslim Women's Right to Divorce Act, 1986.

16 S. 2 in The Muslim Personal Law (Shariat) Application Act, 1937, which reads thus: Application of Personal law to Muslims -Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula and mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *waqfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

17 2014(2) MPLJ 137.

The issue before the Madhya Pradesh High Court was whether trial court rightly rejected applicant's application under 127 of Cr PC. The court observed that after commencement of the Act, the applicability of sections 125 to 128 Cr PC was not excluded and option was still with the parties to take recourse under these statutory provisions. The court observed that it was the option to the parties to take recourse under section 125 to 128 of Cr PC even on filing an application under section 3(2) of the Act. Bare reading of section 5 of the Act of 1986, showed that if divorced Muslim woman or husband, as the case may be, on notice on the first date of hearing opted to take recourse or wanted to proceed under sections 125 to 128 of Cr PC, the court cannot restrain them from the said recourse, and cannot direct them to take recourse only under the provisions of the Act. In addition, the high court also relied on the constitution bench judgment of *Danial Latifi*[18] which had held that the provisions of section 125 of Cr PC had been compared with reasonableness of the provisions of the said Act and concluded as under:[19]

i) A Muslim, husband is liable to make reasonable and fair provision for the future of the divorced wife, which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of section 3(1)(a) of the Act.

ii) Liability of a Muslim husband to his divorced wife arising under section 3(1)(a) of the Act to pay maintenance is not confined to the *iddat* period.

iii) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the *iddat* period can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced woman including her children and parents. If any of the relatives, being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance.

iv) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

The high court also pointed out that the law laid down in *Shah Bano Begum*[20] by the constitution bench has been approved while declaring the Act of 1986 as *intra vires*. In *Danial Latifi*[21] the Supreme Court concluded that under the Act of 1986 in section 3(1) (a), the words "reasonable and fair provision" and "maintenance" are having two distinct areas. Section 4 further offers a reasonable provision for maintaining a divorced Muslim wife by the family members or by the waqf board, as the case may be, in the circumstances so prevalent. The

18 (2001) 7 SCC 740.

19 *Ibid.*

20 (1985) 2 SCC 556.

21 *Supra* note 18.

> high court concluded that as per the precedents and in the light of the codified provisions of the Act of 1986, it was to be held that application filed by a divorced Muslim woman under section 3(2) of the Act would not debar her to take recourse of section 125 to 128 of Cr PC which is a secular provision irrespective of any religion or caste.
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> The court held that the applicant had filed an application under section 127 of Cr PC seeking alteration of the allowance awarded to her by the trial court about two decades before on an application under section 125 of Cr PC. According to courts finding that it was not brought on record that after service of notice, husband has submitted any option or declaration to opt for provisions of the Act. In such circumstances, since the wife herself opted to proceed as per section 125 to 128 of Cr PC then the court cannot direct that such application is not maintainable in view of commencement of the provisions of the Act.

The court was also of the view that after two and half decades if the application for alteration of the allowance was relegated for decision of the trial court, it would take some time for decision, which would not be justifiable for a divorced wife who is waiting for alteration of the amount for about half of her life span. Thus, the court opined that the amount of maintenance can be quantified by the high court itself and trial court should not decide on maintenance again. The court, therefore, directed that the amount of maintenance would be payable from the date of the order passed by the trial court. The petition filed by the wife was allowed and the orders passed by the trial court as well as the revisional court were set aside. The applicant was held entitled to receive an amount of Rs. 2000 per month towards maintenance from the date of the order passed by the trial court.

It may be submitted here that the high court had rightly observed that the alteration of maintenance allowance from trial court was in order to save her from inconveniences and delay in justice which had already occurred. However, duality of reliefs under Cr PC and the Act should be avoided only due to drafting flaws in the latter legislation and a single recourse should be made available so as to grant finality to matters and reduce number and cost of litigation.

Farhan Haji Gafar Gudda v. *Rijwanaben Usmanbhai Patel*[22] further highlights the dual regime of Cr PC as well as the Act, through which a wife is entitled to get maintenance from her ex husband. In the instant case husband divorced his wife who was staying separately after divorce with her minor son born from the wedlock with the divorced husband. Unable to maintain herself and her minor son, she filed an application seeking maintenance for herself and her son under section125 of Cr PC. Maintenance was awarded both for wife and son. The aggrieved husband filed petition, against order of magistrate, before High Court of Gujarat. The issues before court were: (i) whether the divorced women was entitled to get maintenance

22 (2013) 3GLR 2007.

under section 125 Cr PC; (ii) whether the entitlement of maintenance of divorcee can be continued after period of *iddat*; (iii) whether the magistrate order was contrary to provisions of sections 3 and 4 of the Act; and (iv) whether there was a conflict between Cr PC and Muslim personal law on question of maintenance after period of *iddat*.

The high court observed that as far as maintenance under 125 Cr PC was concerned, the plain reading of the provision clarify that the section neither provides for, nor it even impliedly admits, that the applicability of the Act or the power of magistrate to direct the husband to provide for maintenance is to be guided by, or the said power is to be exercised having regard to, the religion professed and followed by the spouse. The high court also referred to the history if Muslim wives' right to divorce in the light of *Shah Bano*[23] judgment. As far as courts findings on provisions of the Act were concerned, after relying upon various significant precedents[24] while interpreting the concept of *mahr* as well as nature of maintenance under Muslim law, it interpreted section 3 of the Act thus:[25]

> By virtue of Sec. 3(1), a divorced Muslim woman is entitled for reasonable and fair maintenance from her husband which is to be made and paid within the *iddat* period and if the divorced husband has not paid her reasonable and fair provision and maintenance or *mahr* due to her or if he has not delivered the properties given to her before or at the time of marriage then a divorced Muslim woman can file an application before the Magistrate and the Magistrate can pass order under Sec. 3(3) directing the former husband to pay such reasonable and fair provision and maintenance to a divorced Muslim woman as the Magistrate may think fit and proper having regard to the needs of the divorced Muslim woman, the standard of life she enjoyed during her marriage and the means of her divorced husband.

While interpreting section 4, the court was of the view that the magistrate was empowered to issue order for payment of maintenance to a divorced Muslim woman against her relatives in cases where the divorced Muslim woman had not remarried and she was not able to maintain herself after the *iddat* period. While distinguishing between the sections 3 and 4 of Act, the court observed that sec. 3 of the Act deals with situation within the *iddat* period and section 4 makes provision after the *iddat* period. The court further stated that sub-section (2) of section 4 also provides that in cases where a divorced Muslim woman was unable to maintain herself after the *iddat* period and she had no relatives or the relatives did not have enough means to pay the maintenance, the magistrate may direct the state waqf board to pay maintenance to such divorced Muslim woman.

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23 *Supra* note 20.

24 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, 1985 AIR 945, 1985 SCR (3) 844; *Bai Tahira A* v. *Ali Hussain Fissalli Chothia*, 1979 AIR 362, 1979 SCR (2) 75.

25 *Supra* note 22 para 8.

Referring decision of *Shabana Bano* v *Imran Khan*[26] and after hearing the petitioner, the high court held that the order by the magistrate was no more *res integra* and apex court had settled the issue and clarified the legal position. The high court held that since the order of magistrate was in consonance with the observations made by and legal situation clarified by apex court, the petition was rejected.

In *Ilyas Haji Abdul Sattar Guruji* v. *Tahera Suleman Bhagat*,[27] the question was whether a divorced Muslim woman can claim maintenance from her husband for post-*iddat* period even if she had been paid *lump sum* maintenance earlier either in judicial proceedings or through settlements. The High Court of Gujarat relied upon the observation of *Sabana Bano*[28] in which it had been held that a divorced Muslim wife's maintenance petition against ex-husband filed under section 125 of Cr PC before the family court would be maintainable irrespective of absence of any application under section 5 of the Act, till she does not remarry. It was observed:

> Her entitlement to maintenance continues even for post *iddat* period as long as she does not remarry. It cannot be disputed that divorced wife is entitled fair and reasonable maintenance to ensure that she is not rendered destitute after divorce. She will be entitled to fair and reasonable maintenance for her future life till she re-marries. Under the circumstances, even if earlier some lump sum amount has been paid towards future maintenance and it is found to be not fair and reasonable and it is found that she is unable to maintain herself, still she can file the application for maintenance under Section 125 of the Code of Criminal Procedure.

The high court held that so far as the amount of maintenance to the minor daughter under section 125 of Cr PC was concerned, in view of the decision of the Supreme Court in *Noor Saba Khatoon* v. *Mohd. Quasim*,[29] the right of the minor children staying with their divorced mother to claim maintenance under section 125 of Cr PC from their father having sufficient means till they attain majority or in case of females till they get married by section 3(1) (b) of the Act was recognized. According to the facts and circumstances and reasons stated above, it was held that only a sum of Rs.2500/- had been awarded to wife and daughter towards their maintenance, which in these hard days and price rise seems to be unreasonable and, therefore, the court declined any interference with the order passed by the family court, in exercise of revisional jurisdiction. Thus, the application of the husband was dismissed. Unfortunately, the husband's plea that the amount already paid as lump sum should be adjusted towards settlement of maintenance dispute was also turned down.

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26 2010) 1 SCC 666.

27 LNIND (2013) Guj 960.

28 *Supra* note 26.

29 AIR 1997 SC 3280.

Another case pertaining to maintenance of wife came before Allahabad High Court in *Rafiquddin* v. *Kishwar Jehan*[30] in which it was contended that in divorcee's case why Cr PC is preferred in lieu of the special legislation. The Magistrate, after taking into consideration the provisions of the Act of 1986, ruled that despite the provisions of the Act there was no bar to the grant of maintenance under Cr PC, to Muslim divorced wife after relying upon *Denial Latifi*[31] case. The order was challenged in a criminal revision which was dismissed. The aggrieved husband approached the high court. The issues before the high court were: whether the Muslim women, after enactment of the Act, are entitled to claim maintenance from her husband under section 125 Cr PC after expiry of period of *iddat.* The high court was of the view that on the basis of the facts, the magistrate should have proceeded to decide the application in accordance with the provisions of the Act, even if the application was moved under section 125 Cr PC.

As the provision was available in section 3 of the Act to deal with maintenance of a Muslim woman divorced by her husband the order passed by the magistrate granting maintenance to wife in terms of section 125 Cr PC was not sustainable and was based on misinterpretation of provisions of the Act and the law laid down by apex court in *Denial Latifi*[32] case. Consequently, the order confirming the order of magistrate in revision to the extent of grant of maintenance to wife would also not be sustainable. Keeping in view the above facts and circumstances, the high court allowed the petition and the matter was remanded back to the magistrate concerned to decide the matter afresh in terms of provisions contained in the Act so far it relates to the question of grant of maintenance to wife as a divorcee.

It may be submitted that a judge of Allahabad high court beautifully resolved the controversy and long standing debate over scope of Cr PC and the Act, in case of maintenance of Muslim wife and closed two gates of entry which has become a source of exploitation of litigants and their relatives. The judgment indicates a sound understanding of the *ratio* given in *Daniel Latifi*[33] case *vis-a-vis* historical background of Muslim Women's Act, 1986 along with its object and reasons for the enactment.

Maintenance of unmarried daughter

In *Smt. Fousia Banu, Salma Banu Alias mumtaz Arshiya Sawar and Mohammed Shabaz* v. *Mohammed Saleem*,[34] the High Court of Karnataka had to decide the dispute regarding unmarried daughter's maintenance since the provision of Cr PC which deals with maintenance till attaining the majority. The Islamic law imposes liability on father to maintain his unmarried daughters even after attaining majority and similar provisions have been made in the Act. The family court had dismissed the unmarried daughter's claim for maintenance. The issue before high

30 2013(4) ADJ708 , 2013(5) ALJ 85.

31 *Supra* note 18.

32 *Ibid.*

33 *Ibid.*

34 ILR 2013 Kar 6009.

court was whether an unmarried daughter, who was unable to maintain herself but had attained the age of majority, was entitled to claim maintenance from her father under section 125 of Cr PC.

After referring the *Noor Saba Khatoon*[35] case, the high court observed that the Supreme Court had affirmed the order of maintenance awarded under section 125 of the Cr PC to an unmarried daughter who had attained the age of majority. The high court also referred to another three judge bench judgment of the Supreme Court in *Jagdish Jugtawat* v. *Manjulata*[36] and observed that an unmarried daughter, unable to maintain herself, was entitled to claim maintenance under section 125 of the Cr PC, notwithstanding her attaining the age of majority, and the court had the power to grant maintenance to her irrespective of whether she was a Hindu or a Muslim or of any other religion provided she was otherwise entitled for maintenance under any other law including personal law governing the parties. The court held that if an applicant was not entitled for maintenance under section 125 of the Cr PC but was entitled under any other law, the benefit of maintenance under the other law can be given in a proceeding under section 125 of the Cr PC. The court held that the facts of the present case clearly revealed that daughter was unmarried though major but unable to maintain herself and she was entitled for maintenance from her father, as under Muslim law, father's liability to provide maintenance to his unmarried daughter extends beyond her age of majority till she gets married. Therefore, she could be awarded maintenance in a proceeding under section 125 of the Cr PC.

The Karnataka High Court has held that where Cr PC was not sufficient to do justice with daughter, the provision of personal law can be taken into account and it would not be contrary to section 125 Cr PC and in this way the court avoided the predicament of some who sometimes were unable to impart justice due to strict adherence to the provisions of Cr PC. It may be submitted that under Islamic law father is mandatorily liable to pay his unmarried daughter, irrespective her age and the same is upheld by the learned judge in order to affirm the rule of natural justice.

Domestic violence, divorce and maintenance

In *Parvin Firoz Shaikh, Vasim Firoz Shaikh and Muskan Firoz Shaikh* v. *Firoz Sharfuddin Shaikh, Sahrfuddin Amin Shaikh, Ashabi Sharfuddin Shaikh and the State of Maharashtra*,[37] Praveen was married to Firoz who had applied to CJM for maintenance and consequential benefit under provision of the section 12 of Domestic Violence Act, 2005. The application was allowed and husband and his parents were directed not to indulge in domestic violence. The husband was also directed to pay an amount of Rs. 2000 to wife and Rs. 1000 per month to their children as maintenance. He was also directed to pay Rs. 1000 per month towards rental charges for their accommodation. The additional sessions judge (ASJ)

35 (1997) 6 SCC 233.

36 (2002) 5 SCC 422.

37 2013(4)ABR 67, 2013ALLMR(Cri)3103, 2013(3) Bom CR(Cri)388.

allowed the appeal against the order setting aside the order of maintenance on ground that *talaq* had been given by the husband to the wife, and therefore, the wife's application was not maintainable. The wife approached the High Court of Bombay. The court, after describing the relief provided under various provisions of the Domestic Violence Act, 2005 *vis-à-vis* other legislations, opined that cumulative effect of these provisions showed that if remedies were available under section 4 of the Act, it would not obliterate and defuse the provisions of section 12 of the Domestic Violence Act.

The high court was also of the view that if the husband intentionally divorced the wife, his liability to maintain the wife and children till her remarriage cannot collapse. At the same time, court stated that because in this case the judicial magistrate had already held that the divorce was not proved as the husband had extended single *talaq* to the wife by saying "*Parvin mai tujhe talaq deta huun*" which was disputed by the wife.

The high court referred the full bench decision in *Dagdu Chotu Pathan*[38] where the legal position of *talaq* had been explained. The bench, after considering the provisions of section 125 of Cr PC and the provisions of the Act, observed that for eligibility of entitlement of wife's claim to maintenance, the *factum* of *talaq* and stages it has preceded should also be proved before the court, if disputed by the wife. The mere intention of the husband cannot be accepted to be a valid *talaq*. The court further refereed to the apex court in *Shabana Bano*[39] and *Daniel Latifi*,[40] explaining the liability of the husband to maintain his wife. It further observed that *talaq* must be a reasonable cause and should not be at the whims and fancies of the husband and, therefore, the husband had to maintain two children and the whims of the husband would not be permitted to deflate the provisions of Domestic Violence Act which provides a room to claim maintenance notwithstanding the effect of section 4 of the Act. Accordingly, the high court held that the provisions of the Domestic Violence Act would operate for the divorced Muslim wife in terms of section 12 of the Domestic Violence Act. The court, however, showed its reluctance to accept the evidence of *talaq*. Consequently, the order of ASJ was set aside.

Since domestic violence nowadays has become a common phenomena, which is completely prohibited by Prophet of Islam through its precepts and precedents, any remedy provided to the victim women can never be considered against the spirit of Islamic law. However, the question here is that if divorce is already affected and admitted then husband and wife should not be advised to stay together for any purpose because they have no legal relationship at all and Islam does not like to leave unattended a poor wife on the charity of cruel husband who would time and again try to torture her. Therefore, Islamic law provides remedy to divorcee and that is why the Act came into being whose validity is accepted by the Supreme Court. As far as the children's maintenance is concerned, in all the circumstances,

38 2013 (3) Bom. CR (Cri) 388.

39 *Supra* note 26.

40 *Supra* note 18.

for boy till the age of majority and for the girl till her marriage the father is liable to maintain them irrespective of the fact whether the mother is influential and rich. It may be submitted that, without any bias and strict adherence to a particular law, paramount consideration should be the welfare of wife and children. Accordingly, the two legislations should be given harmonious construction. It may further be submitted that taking shelter under the law of divorce can never be in consonance with the spirit of Islamic law in order to avoid the responsibility to maintain wife and children and such type of divorces may be termed as abuse of law. Therefore, the courts reluctance to admit such flimsy divorces is in accord with the spirit of Islamic law.

Maintenance under bigamous marriages

In *Abdul Aziz* v. *Shajitha*,[41] the husband was directed to pay monthly maintenance allowance at the rate of Rs. 400/- to the wife and Rs. 300/- for each child. The husband married another woman in the presence of the first wife and children. Therefore, the first wife and her children claimed enhancement. The family court directed the husband to pay enhanced maintenance allowance at the rate of Rs. 5,000/- each per month to the respondents (wife and each child). In the revision petition filed by the husband, the question was whether the quantum of enhancement determined by the family court was justifiable. The court observed that the husband remarried when the earlier marriage was subsisting, that the husband was so confident of his income and that is why he married again and he was under an obligation to maintain his first wife and two children. It was true that the Muslim personal law permits marriage with more than one woman, two, or three, or four; while the earlier marriages are alive. But, under the guise of subsequent marriages, the husband cannot escape from the statutory liability to pay maintenance allowance to the wife and the children from the earlier marriage or he cannot treat them unequally. Certainly, the wife and the children of the earlier marriage have a right to live with the standard of life at par with the standard of life of the husband and the second wife and children. The court stressed that the children born in the earlier marriages were entitled to get the same standard of education as that of children born in the subsequent marriages and father was liable to provide it equally. The court referred to the Holy Quran reads thus:[42]

> In the Name of Allah,
>
> The Most Gracious, the Most Merciful.
>
> 1. O mankind!
>
> 2. .....

41 2013 (3) KLJ 546.

42 *Sural An-Nisa* (The Women) IV, (Ref: Translation of the meanings of The Noble *Quran* in the English language by Dr. Muhammad *Taqi-ud-Dinal-Hilali* (Formerly Professor of Islamic Faith and Teachings, Islamic University, *Al-Madinah Al-Munawwarah*) And Dr. Muhammad Muhsin Khan (Formerly Director, University Hospital, Islamic University, *Al-Madinah Al-Munawwarah*).

> 3. And if you fear that you shall not be able to deal justly with the orphan-girls, then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice.
>
> 4. And give to the women (whom you marry) their *mahr* (obligatory bridal-money given by the husband to his wife at the time of marriage) with a good heart; but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).
>
> 5. And give not to the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice.

As per the above Quranic commandment, the court considered the standard of life and the living cost of the respondents and the income of the husband, and found that the direction to pay Rs. 5,000 to the 1st wife was just and proper. The court further concluded that since daughter had attained majority she would not be entitled to get maintenance allowance from the father. The direction to pay maintenance to daughter was set aside. As far as minor daughter was concerned, the court held that she was entitled to get maintenance.

It may be submitted that it is a popular fallacy (as per Krishna Iyer J) about the Muslim law that a Muslim male can have four wives. In an inevitable circumstances Muslim law permits 2nd marriage as a last resort in order to rescue the 1st wife during her bad days with the condition that 1st wife must be treated equally in all the ways including love and affection which is not generally possible. That is why the restriction imposed by the Holy Quran on polygamy in one way allows it and takes back the other way the permission by imposing a condition of complete equality among the wives including love and affection. The learned judge interpreted the spirit of the law of polygamy very appropriately and, accordingly, provided maintenance to each wife and her children on equal footing including standard of education. However, while granting maintenance to daughters, the court allowed maintenance to the daughters till their majority. Though Islamic law imposes liability on father to maintain the children till their majority, in case of daughter she will be maintained till her marriage and even marriage expenses would be borne out by the father which is included under maintenance of daughter.[43]

Maintenance of minor daughters

In *Arashad* v. *Addl. Family Judge*,[44] maintenance was claimed by two minor daughters though their mother had already compromised about their maintenance out of court. In this case, two daughters moved an application, through their

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43 See Furqan Ahmad, "Muslim Law", XLVIII *ASIL* (2012).

44 2014 (1) ALJ 712, 2013 (2) N.C.C. 426

guardian-mother for awarding maintenance against father. The lower court, after considering the pleadings of the parties and the evidence, came to the conclusion that minor daughters were entitled to maintenance from their father. Aggrieved father initiated criminal revision. The question before the High Court of Uttarakhand was whether the out of court settlement entered into between the wife and husband will also bind their daughters so far as the payment of maintenance allowance to them was concerned.

The court referred to the judgment of Supreme Court in *Nagendrappa Natikar*,[45] where it was observed:

> Section 125 Cr PC is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the CrPC and the order made under Section 125 CrPC is tentative and is subject to final determination of the rights in a civil court.
>
> Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful, any order passed under Section125 CrPC by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act.

The court observed that although the remedy available to the daughters was not available under section 18 of the Hindu Adoptions and Maintenance Act, 1956 in as much as they were governed by the Muslim law, nevertheless the principle underlying will govern their destiny. The court referred to *Mahesh Chandra Dwivedi*[46] case where it was held that wife was not debarred from claiming maintenance under section 125Cr PC even if the husband had made lump sum payment to his wife in the proceedings of divorce by mutual agreement. It also referred to *Ram Narayan Gupta*,[47] where maintenance was granted in terms of compromise between the parties.

After referring the various high court decisions and statutory provisions, the court held that children were not party to the earlier proceedings between the husband and wife and, therefore, the wife's subsequent claim for maintenance allowance of her daughters from her husband, allowed by the family court was valid. It was further held that if the husband and wife entered into an out of court settlement between them, the same will not stop the daughters from claiming maintenance allowance from their father as the basic principle of law states that no compromise can be done which is adverse to the interest of a minor. The court

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45 *Nagendrappa Natikar* v. *Neelamma*, AIR 2014 SC 2875.

46 *Mahesh Chandra Dwivedi* v. *State of Uttar Pradesh* (2009) CrLJ 139, (2008) ILR 3 All 695.

47 *Ram Narayan Gupta* v. *Smt. Laxmi Devi* 2007 (7) ADJ 266.

observed that "If a compromise has taken place on behalf of minor daughters, the same carries no meaning, if the compromise is prejudicial to their interest."[48] The court finally laid down that minor daughters were entitled to claim maintenance from their father in their own rights. The criminal revision filed by the father had, therefore, no meaning and the same was dismissed.

Maintenance of daughter in all the cases till her marriage is the legal liability of father under Islamic law and in no case he can get rid of this liability. However, a settlement out of court between the mother and father even about their minor daughters is recognized though not appreciated under Islamic law. In this case, when mother had received the money for maintenance of daughters, this consideration should have not been completely ignored to encourage the judicial proceedings further. In any case, the interest of minor daughters is above all and it should not be compromised and, to this extent, the court's view may be appreciated, but the Islamic law has ample scope to protect and maintain the daughters by their fathers, not only till attaining majority but till their marriage.

Wilayat* and *Hizanat

Under the Islamic law, father is a natural guardian and, in his absence, the grandfather, and in his absence, the paternal uncle are natural guardians and then only mother may be guardian of a minor child. However, one thing is clear: that in Islamic law *wilayat* (guardianship) and *hizanat* (custody of child) are two different concepts which are at times misunderstood and are taken to be the same. Father or any other person as per the list of guardians prescribed under Muslim law may be the guardian but at same time mother and mother's mother and some female relatives as prescribed under Muslim law have the right to custody of the child which is a very peculiar concept of Islamic law known as *hizanat*. The lawmen should not get confused while interpreting these two concepts and mix them together.

Custody of minors

In *Aisha Rahman Ali* v. *Inspector of Police*,[49] the issue of custody of child and guardianship was involved under section 9 of the Guardians and Wards Act, 1890, as well as personal laws of the parties. The brief facts were that marriage between the parties was solemnized at Dubai. After marriage, the couple was living jointly at Australia. Two children were born out of their wedlock. They got separated after some time. The wife sought the custody of daughters who were under the custody of the husband. In her support, she referred to *Gohar Begam* v. *Suggi alias Nazma Begam*,[50] wherein the apex court had permitted custody of the child in the hands of the mother, informing that though the mother had a right under the Guardians and Wards Act to seek the custody of the child, the same would not be justification for denying her the right of custody of the child under section 491 Cr PC.

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48 *Supra* note 44 para 7.

49 2013(4) MLJ (Crl) 28.

50 AIR 1960 SC 93, 1960 (1) SCR 597.

Keeping in view the facts and circumstances and hearing both sides, the high court held that no reasonable cause was shown by the mother to have a right of custody for her children and the custody was continued with the father who was the natural guardian. The decision relied on by the wife was one wherein it was found that the appellant before the Supreme Court was mother of an illegitimate child and it was held that under Muslim law she was entitled to custody.

The learned judge could not appreciate the distinction between *hizanat* and *wilayat*. The learned judge could not appreciate the spirit of the judgment of apex court.[51] The apex court had upheld the established right of the mother *i.e. hizanat* and it had nothing to do with the legitimacy of the child.

In another case, *J. Sadiq Batcha and Fathima Jon* v. *A. Mohamed Kasim and Beejan Beevi*,[52] the same issue of custody of child was considered by the High Court of Madras. The appellants in this case were the father and paternal grandmother of a minor girl. The trial court directed the appellants to hand over custody of the minor to the respondents who were the maternal grandparents of the child. The trial court, after considering the oral and documentary evidence, found that guardianship could not be handed over to the father since he was not living in the country and was abroad and further, his mother had also to look after the other grandchildren as well as the family members; therefore, it was just and proper to order custody of granddaughter-Selina, in favour of the maternal grandparents for whom, after the demise of their sole daughter, the only aspiration in life was to raise up the grand-daughter and for such purpose, they had sufficient financial means in the form of income through pension and immovable properties. Therefore, the trial court turned down the application filed by the father.

On appeal, the question before the high court was whether grant of custody with the maternal grandparents against the father/guardian was justified. The court was of the view that a close reading of section 17 of the Guardians and Wards Act, 1890, made it clear that while appointing or declaring the guardian of a minor, the court shall be guided by the law to which the minor is subject. Sub-clause (2) of the section further makes it clear that the court shall give prime importance to the welfare of the minor by taking into account the age, sex and religion of the minor. Therefore, when the provision contained in the general law was vividly clear, the court shall apply the law to which the minor is subjected, *i.e*., Mohammedan law. The court further observed that principles exported by personal law and the provisions contained therein cannot be read in isolation with the provisions of the Guardians and Wards Act, 1890 for the personal law would yield to the provisions of the Guardians and Wards Act,1890.

The court observed that there was no dispute over the position that a father, under Mohammedan law, was entitled to the custody of the child - in the case of son, after he has completed the age of seven years and of daughter, after she has

51 *Ibid.*

52 2014 (1) CTC 459.

attained the age of puberty. However, at the same time, there was no rule of Mohammedan law that he was entitled to that custody though he was unfit for the same. Therefore, the court had the power to appoint the mother or any other person whom it thought proper, guardian of the person of the minor, if the father, in its opinion, was unfit to be such guardian. As the paramount consideration in granting custody and guardianship was the welfare of the minor. The trial court had closely examined the issue, and had arrived at a conclusion that father was living abroad with the second wife and the child born through her, and the paternal grandmother also had to look after other grandchildren and family members were unfit to claim custody of the minor. Consequently, the appeal was dismissed.

It may be submitted that the decision is the replete with provisions of *hizanat* pertaining to Muslim law and the learned judge interpreted it with clear understanding of the law on subject without any confusion between the law of *hizanat* (custody) and *wilayat* (guardianship) provided under Islamic law.

Another case of custody of child was decided by Andhra Pradesh High Court in *Md. Fayaz and Smt. Amthullah Bee* v. *Smt. R. Sabiha Begum.*[53] In this case, an appeal was filed to seek custody of minor child by father as being natural guardian. The father of the child was married to the sister of the respondent and a child was born to them. The mother of the child met with an untimely death. A complaint was lodged alleging that the father, his parents and brother murdered the mother of the child. The respondent (sister of the deceased mother) demanded the custody of child under the provisions related to the custody of child under Islamic law. She pleaded that not only the father, but all his family members were facing trial for the offence of murder of her sister and, therefore, the minor child would not be safe in their custody.

The major issue for consideration before high court was whether the respondent was entitled to seek the custody of the child. After considering the facts and circumstances of the case as well as the Muslim law, the court observed that Muslim law governing the subject was not codified and the same was mostly in the form of commentaries of the jurists. Whether one goes by the general codified law or by customary law, the father, no doubt, was the natural guardian of the child, particularly, when the mother was no more. However, there were exceptions to this rule. If the father was facing the charge of causing the death of his wife, *i.e.* mother of the minor child, it was not at all safe to keep the custody of such child with him, at least, till the charge of his involvement in the death of his wife was removed. The court thus held that the maternal aunt of minor child was entitled for custody; however, the custody could not be unconditional or permanent and could extend only till the prosecution launched against father was finally decided. If he was acquitted, he would be entitled to get back the custody of child. On the other hand, if he was convicted, the maternal aunt would continue to act as guardian of child till she attained the age of majority. Even then, the father should be entitled to visit the child depending upon the nature of sentence which he may be required to serve.

53 2014(1) ALD 474.

It is submitted that the court did not appreciate the difference between *hizanat* (custody) and *wilayat* (guardianship). The most part of the Islamic law is not codified but it is drawn from the sources of Islamic law as the judges themselves admitted that it was found through commentaries of Holy *Quran* and Prophet's traditions. Thus, before pronouncing the judgment, the legal literature on the subject should have been consulted to arrive at the correct conclusions according to personal laws of the parties. As noted above, there is a distinction between *hizanat* and *wilayat*. The custody of child in the absence of mother is given to other female relatives of the child as discussed earlier. Even in the absence of the reasoning given by the court with regard to father's/ husband's culpability for mother's murder, the custody or *hizanat* of the child would have anyway gone to the other female relatives.[54]

Another case *Irshad Alam* v. *Isma Alam*[55] decided by Allahabad High Court also pertains to the issue of custody of male child, where because of strained relationship between husband and wife, and out of fear and apprehension, the wife left matrimonial home along with her 6 year child. The husband divorced the wife and filed petition under section 25 of the Guardians and Wards Act, 1890 seeking custody of the male child. The respondent wife objected to this claim of custody of the male child by filing objections and simultaneously she also filed a petition. The question in appeal before the court was as to whether the father or mother should have the custody of the child.

The court, after considering the personal law as well as some provisions of Guardians and Wards Act, 1890, observed:[56]

> The custody of a minor child in *Islam* is called *hizanat*, which literally means the care of the infant (custody). As per the Shariat law that applies to Muslims, the father is considered to be the natural guardian of his children irrespective of sex, but the mother is entitled to the custody of her son till the age of 7 years and of her daughter till she attains puberty. Thus, under the Muslim law a male would attain majority when he reaches the age of 7 years and a female would attain majority on attaining puberty. Mulla, a well known author, in his commentary on *Mohammedan Law* has specified the grounds when a female becomes disqualified for the custody of a child under Section 354.

The court further observed that section 6 of Guardians and Wards Act leaves scope for the application of the personal law to which the minor is subject. Further,

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54 In case of boy upto 7 years and in case of girl upto age of puberty, the list of these female heirs as their preference are found in every book of Muslim law as well as many judicial decisions reproduced it. Even in this survey here the Madras High court through his judge T. Raja reproduced and discussed it at length while deciding a case on custody of minor girl aged about 4 years. This is astonishing that one high court is fully conversant about the law and the other is full unknown.

55 2013(6) ADJ 8; 2013(5) ALJ 248; 2013 4 AWC3877All.

56 *Id.*, para 18.

section 17 of the Act also stipulates that a guardian has to be appointed in consonance with the personal law by which the parties are governed. The court observed;[57]

> (T)he personal law of the parties is to be taken into consideration while deciding the custody of the child, the welfare of the child is of paramount importance and must be the deciding factor. At the same time the personal law cannot be completely sidelined as the personal law would be an important facet of the welfare of the child and must also be taken into consideration

Keeping in view the paramount consideration of the welfare of the children, the division bench held that children's interest and welfare will be best served if they were in the custody of the mother and it was not desirable to disturb the custody of the male child. However, it was desirable that the custody of the female child be given to her mother. Therefore, exclusive custody of the male child and female child in favour of the mother deserves to be maintained.

It is submitted that the learned judges beautifully summarized the law of *hizanat* under Islam and established a harmony between the law of *hizanat vis-a-vis* Guardians and Wards Act, keeping in view the welfare of minor. Their clear understanding on the subject deserves appreciation.

Another case of custody of minor daughter aged about 8 years *vis-a-vis* the issue of divorce came before the Andhra Pradesh High Court.[58] In this case, a female child was born out of wedlock. The wife filed a petition for divorce and the same was allowed. It was pleaded by the husband that the wife after obtaining divorce, remarried and, therefore, she had lost her right to have the custody of her daughter and he being the father and natural guardian, was entitled to the custody of his minor daughter as per Muslim law. The trial court found that the minor daughter never resided with appellant father after her birth and he had not spent any amount for education of his minor daughter. Therefore, in the interest of minor, the custody could not be given to the husband as the welfare of the minor would be better served in the hands of her natural mother. The court dismissed the prayer of the husband. On appeal, the issue before the court was whether under the Muslim law, father or mother had right to custody of the child.

The appellant claimed the custody of the minor child mainly on the ground that as the mother had married again, the father was entitled to the custody.[59] The court clarified that mother was entitled to the custody of her male child until he

57 *Id.*, para 29.

58 *Saif-ul Ismal Habeeb Ali* v. *Asma Begum*, 2013(6) ALT 641.

59 *Supra* note 3, S. 352 Right of mother to custody of infant children: The mother is entitled to the custody (*hizanat)* of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

completes the age of seven years and of her female child until she attains puberty, and such right will continue though she is divorced by the father of the child unless she marries a second time, in which case custody belongs to the father. But, only on the ground that the mother had married second husband, without mentioning the age of the girl child, the husband could not claim for custody. The high court opined that the daughter may not recognize her father since she was staying continuously with the mother from her birth. Though the wife had remarried after obtaining divorce from the appellant but, at the same time, the husband also remarried and he was having children through second marriage. Even child expressed her desire to stay with the mother only. Relying on *Mullah's Mohammedan Law*,[60] the court held that the mother was entitled to the custody of the minor female child with an absolute right till she attains puberty and continuation of such right thereafter would depend on whether the mother of the child had remarried or not. The court observed that merely on the ground that wife had remarried; she had not lost the right to claim custody of child. But, solely on the basis of personal law, the father cannot claim custody of the child since it is well settled that in the event of conflict between the personal law on one hand and the considerations for the welfare of the child on the other hand, the latter would prevail. The court held that as far as custody of the child is concerned, it may be considered with reference to the facts of each case and evidence on record.

It is submitted that the court harmoniously construed the provisions of Islamic law and welfare of child. However, the confusion of word *wilayat* (guardianship) with the concept of *hizanat i.e*. custody of child is found in this case also. Under Islamic law, mother can never be natural guardian in the presence of father. Her right to *hizanat* (custody of child), however, may be extended further according to the facts and circumstances of this case and that is in consonance with Muslim law.

Adoption

After the Supreme Court decision in *Shabnum Bano*,[61] this issue has been debated in media and among the academics. As far as orphan children and their care is concerned, no law is as serious as Islamic law. However, the *kafil* (who protects the orphaned children) can never be put at par with the biological father because Islamic law has not permitted the adoption where the adopted boy or girl has severed all links from his/her original family and created a new relationship with the family he/she joins. This assumed relationship has not been recognized in Islam and the Islamic law does not confer any right on the child and impose any duty on the parents. The Supreme Court in the above case while dealing with Juvenile Justice Act, with an intention to protect orphans, allowed adoption without any caste and religion barriers and treated it as optional law like the Special Marriage Act. Hindu law, though permits the adoption, the adoption permitted by the Supreme Court finds no place in Hindu Adoptions and Maintenance Act. The

60 *Ibid.*

61 AIR 1985 All 217.

Shariat Act, 1937 expressly prohibits adoption but it also provides exception that if the custom of a particular tribe permits the same, adoption may be valid.

In *Sunder Shaekhar* v. *Shamshad Abdul Wahid Supariwala*,[62] one Haji Mastan Mirza was very close to a boy and treated him as son. According to the boy, he was orally adopted by the deceased Haji Mastan in 1994. The deceased expired leaving behind daughters who were respondents in this case. It was stated that his final rites were performed by the appellant as his son though under Islamic law there is no such obligation even on the natural son and it is devoid of any legal sanction.

The issue before the high court was whether such type of adoption under Mohammedan law was valid. It was contended that the concept of adoption had not been statutorily recognized in India amongst Muslim community. The question whether a Muslim can adopt any person and it was legally permissible was considered by the division bench of Allahabad High Court in a decision of *Mohd. Atiq Khan* v. *Union of India*.[63] The division bench relied on the full bench decision of the Allahabad High Court in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*[64] wherein it was held that among the Muslims, the doctrine of acknowledgment of paternity was available and there was no question of adoption in Muslim law. The division bench also relied on the view expressed in *Mulla's Principles of Mohammedan Law*[65] and *Ameer Ali's Mohammedan Law*.[66] The Patna high court, in *Md. Amin* v. *State of Bihar*,[67] referred by the high court of Bombay where it was observed that the Mohammedan law does not recognize adoption as a mode of affiliation.[68] Thus, a person can be the child of the woman who has given birth to that child and of the man who has or is believed or legally recognized to have begotten that child and none else. The court observed that the claim of the petitioner to be appointed on compassionate ground had rightly been rejected as he would not have claimed such appointment on the plea that he was the adopted son of the deceased as the Mohammedan law does not recognize adoption as a mode of sonship and adoption does not create a parent and child relationship.

According to the high court, there was no direct material and/or evidence placed on record by the appellant to show that he was adopted by the deceased by following any particular custom and/or usage. As per the Shariat Act, 1937, except the alleged custom of a particular community, the adoption of son is not recognized. The burden, therefore, lay upon the appellant to prove the same. The appellant

62 2014(1) ABR 181.

63 2003 (3) AWC 1818.

64 (1888) ILR 10 All 290.

65 *Supra* note 3 at 363-64.

66 Ameer Ali, II Mahommedan Law 218-19 (Himalayan Books 5th edn., New Delhi 1985).

67 MANU/BH/0435/2012.

68 Tahir Mahmood, *The Muslim Law of India* 137 (Lexis Nexis Butterworth's, New Delhi, 3rd edn., 2002).

stated that the deceased declared him as son orally and treated him like the same. The court opined that treating any person like son and/or daughter even though having close relationship and association, itself was not sufficient to treat him/her as the son and/or daughter unless recognized and/or validly proved under the Islamic law.

The learned judge did not deviate from the established norms adopted by the courts as per Shariat Act about adoption in case where parties were Muslim. However, the court only wanted to fulfil its moral obligation to uphold the long relationship between the deceased and his so-called son.

III LAW RELATING TO PROPERTY

The Muslim law of property has its peculiar features unlike the properties belonging to the members of other religions. Under Islam, when a person has exclusive ownership of his whole property whether it is self-acquired, gifted to the person by someone else, ancestral property or any other property received by any other source, it is treated as only one property and a person has exclusive ownership right over his whole property keeping aside whether they are parents, children or wife. There is no joint property system in Islam. A husband has his own property while wife is sole owner of her own property without interference of each other. Similar is the position of father and daughter. They also have their own property without interference of each other. It is a different thing in case of minor - he cannot dispose of property and at the same time enjoys the property with the consent of guardian until guardian is acting as a well wisher and exercising his rights for the welfare of the minor relating to his or her property. A person has exclusive right to enjoy his/her own property as per his/her wisdom. There is no limited state under Islamic law of property. Similarly, no survivorship principle is found there. A person can transfer his property as he wishes without any hindrance of his children, parents or wife and other relatives. The law of property in Islam is of secular rather liberal nature. A person can dispose of his property to any stranger irrespective of caste, creed and religion, keeping aside all the children and relatives during his lifetime. As soon as a person takes last breath, he loses every right related to his property and these rights automatically vest among the heirs according to the shares decided by the *Quran.* Therefore, the misconception about property law of Islam is only because various components of property law of Islam are sometimes studied in isolation, for example gift, will, inheritance and *waqf*. During life time, a person has exclusive right over his property. He can dedicate his whole property to anyone whether he is a Muslim or a non-Muslim, through gift but the condition is that the donor has to dispossess himself from the property by providing possession to the donee. The basic rule for *hiba* is that there is 'no *hiba* without delivery of possession'. Gift is made during the life time of the concerned person and in his life he can dispose of his property to anyone irrespective of religion and caste provided the possession will immediately be handed over to donee and donor will disown himself. Since he looses all rights in this material world, after his death, he has no right to dispose of others property which, according to Muslim law, belongs to his heirs immediately after taking the last breath. As an exception,

he is allowed to will but only 1/3rd of his property if there is a dire need, for example in favour of children of his deceased son or daughter. However, this 1/3rd share cannot be disposed of through will to his one heir without the consent of other heirs. The purpose is to avoid conflict and tension amongst the heirs. This 1/3rd permission is permitted only in those conditions where a person feels that after his demise his heirs will not take care of some of his relatives who could not get share in inheritance as per law. The best illustration is that Islamic law of inheritance strictly follows doctrine of representation. Suppose any child passes away during the lifetime of the deceased, his/her grandchildren would not get share as an heir in the property of deceased. According to rule 'nearer excludes the remoter', if grandchildren are excluded then the grandparents can bequest 1/3rd of their property in favor of grandchildren as they are fully aware of the fact that after their demise these poor children would be nowhere. Such type of law of obligatory bequest is found in Kuwait and some other Muslim countries.[69]

There is another method of disposing of property under Islamic law known as *waqf* where the *corpus* of property is intact and the *usufruct* is given for a charitable purpose. It means that now the property should belong to Allah and benefits be enjoyed by his poor fellows. However, these benefits cannot be used for a purpose which is immoral and contrary to Islamic law. As far as succession is concerned, this part is not in the hands of man and no Muslim has any right to interfere in this matter and the property of deceased would devolve amongst his heirs immediately after his demise as per shares fixed in Islamic law of inheritance. It may also be mentioned that the entire disposition whether through gift or will may be made orally and they are perfectly valid. Everything is based on intention and if intention is fair and clear to dispose of the property, writing is not necessary and, therefore, this type of disposition is exempted from the provisions of the Transfer of Property Act, 1882 (TPA) as well as the Registration Act, 1908.

Keeping the above background it would be easy to understand the simplicity as well as significance of Islamic law of property in which property is disposed of in the form of *hiba* (gift), will and *waqf*.

***Hiba* (Gift)**

Under Islamic law of *hiba*, a person can gift his/her whole property to any one as mentioned above. The essential ingredients of *hiba* are: (i) there is clear intention of donor to gift his movable or immovable property; (ii) proof of acceptance of the *hiba* by donee; and (iii) delivery of possession. It means that the donor must disown and dispossess and the donee immediately acquires the possession and ownership. Possession does not mean that in all the cases it must be physical; it could even be constructive possession. This view is already upheld in many decisions of the Privy Council, Supreme Court and various high courts. For valid *hiba* under the Muslim law no other restriction is imposed like writing or registration, etc. Even oral gift is also complete gift where the intention of

69 See, for example, Kuwait's Law on Obligatory Bequest (Law No. IX of 1982).

donor and donee is clear, and not disputed, to donate and receive the gift article or property and delivery of possession has been made.

In *Asgar Ali* v. *Tahir Ali*,[70] the petitioner/plaintiff instituted a suit for eviction. During pendency of the suit, the respondents/defendants preferred an application before the trial court stating that the gift deed was inadmissible in evidence for want of its registration under section 17 of the Registration Act. In this case, a declaration of donor was reduced in writing; it was accepted by the donee and then possession was handed over. The donors were real brothers. The partition between them took place long back. A shop/basement in question came in possession of the donor and thereafter donor had the ownership and possession on the shop. Since donor was issueless, it was declared by him that in future the legal heirs of his brother should not create any dispute. The donor's brother also joined the gift document as a donor. The possession was accepted by the donees.

The trial court opined that gift cannot be taken into consideration in the absence of registration under the Registration Act. Consequently, a petition was filed challenging the order. The issue before the Madhya Pradesh high court was whether application under section 17 of Registration Act was rightly allowed by the trial court which was contrary to Muslim law.

The high court held that under Muslim Law, *hiba* requires three essential ingredients, namely (i) declaration of gift by the donor, (ii) acceptance of gift by the donee, and (iii) delivery of possession. According to the court, if this litmus test was applied on the instrument in question, it would become crystal clear that aforesaid three ingredients were present in the said document. The donor had given a specific declaration regarding gift, it was accepted by the donee and the possession was handed over to the donee. Thus, the said tests were fully satisfied in the present matter. The court then raised a basic question as to whether in such a situation, the document/instrument was required to be registered under the Registration Act and whether in its absence it cannot be taken into account for any purpose including for the purpose of evidence. In this regard, the court referred to the following observations made in *Hafeeza Bibi*:[71]

> ….[T]he distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammedan Law.

The court further referred to this judgment where it was mentioned that section 129 of TPA preserves the rule of Mohammedan law and excludes the applicability of section 123 of TPA to a gift of an immovable property by a Mohammedan.[72] The Supreme Court approved the statement of law reproduced in the said judgment

70 AIR 2013 MP 151, 2013 (3) MPHT 110, 2013 (3) MPLJ 160.

71 *Hafeeza Bibi* v. *Sk. Farid*, (2011) 5 SCC 654.

72 *Id.* at 662.

from *Mulla's Principles of Mohammedan Law*.[73] The court relied upon *Hafeeza Bibi's*[74] case, where the Supreme Court had made it clear that in all cases where the gift deed is contemporaneous to making of gift then such gift must be registered under Registration Act. However as per apex court it cannot be treated a rule of thumb. According to the court, each case is to be decided according to its circumstances. Accordingly, it was decided that registration in the instant case was not compulsory.

The learned judge of Madhya Pradesh High Court, after referring to the written text on *hiba* under Islamic law and leading decisions of various high courts and apex court, rightly upheld the Islamic law of *hiba* in its oral form.

In another case, the question of registration in case of *hiba* was raised before the high court of Allahabad. In *Smt. Fatima* v. *Zaker Husain*,[75] the plaintiff/ respondent initiated a case for declaration of disputed house owned by him. The trial court framed various issues, the relevant amongst them were: whether the plaintiff was the owner of property in the disputed land belonging to the donor which she had gifted before 1905 to the donee and heirs, making them owner of the entire disputed house. The trial court held that defendants failed to prove gift in favour of donee by the donor. Consequently, it answered both the aforesaid issues in favour of the plaintiff.

The lower appellate court was in agreement with trial court in holding that letter postcard communication did not prove the requisites of gift. The plaintiff's evidence to prove his share in property was clear, more credible and trustworthy. The decision of the trial court was affirmed and appeal was dismissed. The question before the High Court of Allahabad was whether the case set up by defendants about gift could be said to have been proved. The court quoted extensively from various leading books of Islamic jurisprudence as well as the precedents of the Privy Council, Supreme Court and the high courts. The court then stated that the statutory provisions relating to gift contained in section 122 to 129 of Transfer of Property Act, 1882 (TPA). The general definition of gift[76] is given under section 122. It is stated that acceptance of gift must be during lifetime of donor and also when he is still capable of giving. Similarly, if the donee dies before acceptance, the gift would be void. The court declined to go into other provisions of TPA dealing with gift for the reason that section 129 provides that the chapter relating to gift shall not affect any rule of Mohammedan law.[77]

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73 *Supra* note 3 at 120.

74 *Supra* note 71.

75 2013(7) ADJ 389.

76 S. 122, Transfer of Property Act,1882, it runs as "transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called donor to another person called donee accepted by or on behalf of done".

77 S. 129, Transfer of Property Act, 1882, it runs as "Saving of donations *mortis causa* and Mohammedan Law-Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohammedan Law.

The court referred to *Abid Husain* v. *Ram Nidh*,[78] where a division bench had held that when there was no rule of Mohammedan law inconsistent with any of the provisions of the chapter, those provisions will directly apply even where the transaction is between Mohammedans. It also referred to *Ranee Khajooroonnissa* v. *Rowshan Jehan*,[79] where it was observed that in Mohammedan law, a holder of property may in his life-time give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest him *in presaenti* of the property and to confer it upon the donee must also be proved. This statement of law was also followed in *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*.[80]

In *Sadik Husain Khan* v. *Hashim Ali Khan*,[81] the Privy Council considered the meaning of gift in the context of Oudh Laws Act[82] and observed that delivery and acceptance of subject of gift is a necessary ingredient of a gift. In *Karam Ilahi* v. *Sharf-ud-din*,[83] the division bench of Allahabad High Court ruled that the provisions of section 123 of TPA are inapplicable to gifts made under Mohammedan law. Construing the aforesaid provision in *Babu Lal* v. *Ghansham Das*,[84] it was held, following earlier decisions of Allahabad high court and Bombay High Court, that incidents of a gift between two Mohammedan would be governed by Mohammedan law and not by TPA, 1882.[85] The court further referred to the division bench of Patna High Court which took the same view.[86] Further, the court referred to *Musa Miya Muhamad Shaffi* v. *Kadar Bax Khaj Bax*,[87] where it was held that nothing in chapter VII relating to gift contained in TPA shall apply to gifts by Mohammedans.

The High Court of Allahabad further quoted from a Division Bench of Oudh Chief Court where it was observed:[88]

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78 AIR 1930 Oudh 268 at 270.

79 (1876) LR 3 IA 291.

80 (1905) ILR 28 All 439.

81 1916 ILR 38 All 627.

82 Act No. 18 of 1876.

83 AIR 1916 All 351.

84 1922 ILR (44) All 633(DB).

85 *Abdul Karim Khan* v. *Abdul Qayum Khan*, 1906 ILR (28) 342: *Nizam-ud-din Ghulam* v. *Abdul Ghafur*, 1888 ILR (13) Bom 264.

86 *Aft. Bibi Maniran* v. *Mohammad Ishaque* AIR 1963 Pat 229.

87 AIR 1928 PC 108.

88 *Harihar Dutt* v. *Kapurthala Estate* AIR 1934 Oudh 163 at 165.

> One of the rules of Mohammedan law is that an oral gift is valid. Section 129 T.P. Act provides that nothing in Chapter 7 of that Act which relates to gifts shall be deemed to affect any rule of Mohammedan Law. The gift in question (oral) must therefore be held to be valid unless it can be treated as a sale under Section 54 of the T.P. Act.

Similarly, the high court Allahabad referred to various decision of Privy Council as well as Supreme Court and high courts highlighting the nature of gift under Muslim law, validity of oral gift *vis-a-vis* the provisions of TPA and the Registration Act and observed that no provision of registration and other formalities under TPA would affect the nature of Muslim law gift. The high court opinioned that there are three essentials, as noted above, for the validity of a gift under Mohammedan law.[89]

The court also discussed at length the law of gift from various leading books of Islamic jurisprudence.[90] The court also referred to *Ghulam Ahmad Sofi* v. *Mohd. Sidiq Daree*[91] and *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam*,[92] where Privy Council in its support relied upon *Ameer Ali's Mohammedan law*[93] as under:

> For a valid gift *inter vivos* under the Mohammedan law applicable in this case, the three conditions are necessary, which their Lordships consider have been correctly stated thus: (a) Manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (e) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

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89 See for example *Musammat Tabera* v. *Ajodhya Prasad* AIR 1929 Pat 417: *Mt. Kulsum Bibi* v. *Shiam Sunder Lal* AIR 1936 All 600, *Jaitunbi Fatrubhai* v. *Fatrubhai Kasambhai* AIR 1948 Bom 114 Lokur, J, *Ghulam Ahmad Sofi* v. *Mohd. Sidiq Dareel* AIR 1974 J&K 59, *Raton Lal Bora* v. *Mohd. Nabiuddin,* AIR 1984 AP 344.

90 Illustratively, *Macnaghten's Principles and Precedents of Mohammedan Law, published in 1825, Chapter V*, the relevant considerations for a gift in Mohammedan law were enumerated as:

(i) A gift is defined to be the conferring of property without a consideration.

(ii) Acceptance and seize, on the part of the donee, are as necessary as relinquishment on the part of the donor.

(iii) It is necessary that a gift should be accompanied by delivery of possession and that seize in should take effect immediately or at a subsequent period by desire of the donor.

(iv) A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

(v) The case of a house given to a husband by a wife and of property given by a father to his minor child form exceptions to the above rule.

(vi) Formal delivery and seize in are not; necessary in the ease of a gift of (sic) trustee having the custody of the article given, nor in the case of a gift to a minor.

91 *Ghulam Ahmad Sofi, supra* note 89.

92 AIR 1922 PC 281.

93 Ameer Ali, I Mohammedan Law 39-41 (Himalayan Books) New Delhi, 1983).

The court discussed various pros & cons related to gift. It relied on a leading case of gift by father or guardian as well as the possession thereof where it was observed:[94]

> Where there is on the part of a father or other guardian a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

The court further discussed the case of gift by father to his minor son and again referred the Privy Council judgment where *Hidaya*, a leading book of Islamic Jurisprudence, was quoted:[95]

> If a father makes a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided, the thing given be at the time, in the possession at thereof the futher of his trustee; because the possession of the father is capable of becoming possession in virtue of gift & the possession of the trustee is equivalent to tht of the father.... The same rule holds when a mother gives something to her infant son, whom she maintains and of whom the father is dead and no guardian provided, and so also, with respect to the gift of other person maintaining a child under these circumstances.

The court clarified that if the father is alive, possession of gifted property must be to father and if he is not alive it should be to his mother and so on and no one else. In the matter regarding life estate in the property, the court referred to *Amjad Khan* v. *Ashraf Khan*[96] where Privy Council had observed that necessary constituents of a valid gift under Mohammedan law noticed in *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam*[97] were reiterated and having said so it was held that conferment of a life estate in the property would not amount to a gift. It said that the condition that on the death of donee the entire property shall revert back to donor's collaterals would show that it was a transfer of life estate and not a gift with absolute rights.

The high court referred a division bench judgment by M. Hidayatullah J, who was considered to be a scholar of Muslim law. In *Munni Bai* v. *Abdul Gani*,[98] three conditions necessary to constitute a valid gift were reiterated and the same was upheld in *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam.*[99] As far as oral gift and the position of the gift in absence of registration is concerned, the court referred to *Mt. Kulsum Bibi* v. *Shiam Sunder Lal*[100] where Allahabad High Court

94 *Ameeroonissa Khatoon* v. *A. Bedoonissa Khatoon,* (1875) LR 2 IA 87.

95 Charles Hamilton, *The Hedaya* 484 (English Translation) New Book Company 2nd CD Lahore 1957.

96 AIR 1929 PC 149.

97 (1922) 24 BOMLR 1268.

98 AIR 1959 MP 225.

99 *Supra* note 92.

100 AIR 1936 All 600.

had held that according to Mohammedan law an oral gift was complete as soon as a declaration of gift by donor, acceptance by the donee and delivery of possession was given by the donor to the donee. When these essential conditions were complied with, the gift becomes perfectly valid and if a written deed was executed afterwards, the deed may not be admissible in evidence for want of registration, but the oral gift would be valid notwithstanding. Thus, the court opined that writing was not essential to the validity of gift either of moveable or immoveable property in Mohammedan law. As per the court, the first condition was declaration of gift and to establish it, it must be shown that donor either in the presence of witnesses or otherwise made a public statement that he gifted the property in favour of donee and divested himself of the ownership of property by delivery of such possession as the property is capable of to the donee, who accepted the gift. It is inconceivable that a declaration of gift can be made unilaterally by a Muslim without making public statement of gift or within the precincts of his house in the absence of any third party. The court also discussed various parameter of constituting gift and referred to various leading judgment in this regard to explain the distinction between will, gift of moveable and immovable property.[101]

The court further highlighted another important ingredient of gift that the donor should divest himself completely of all ownership and dominion over the subject under gift. In this regard, *Bibi Bilkis* v. *Sk. Wahid Ali*[102] was referred to where the reliance was placed on *Ameer Ali's Mohammedan Law*.[103] As far as the test of validity of gift of *Mushaa*, the court referred to the comments of *Faiz Badruddin Tyabji*.[104] While considering the requirements of delivery of possession,

101 *Ratan Lal Bora* v. *Mohd. Nabiuddin. Supra* note 89; *Abdul Sattar* v. *Vth Additional District Judge, Lucknow*1978 ALJ 543: *Rajeshwar Misser* v. *Sukhdeo Missir* AIR 1947 Pat 449.

102 AIR 1928 Pat 183.

103 It runs thus : It is clear, therefore, that according to the doctrines actually in force the original strictness of the technical rule relating to *mushaa* has been considerably cut down ,e.g.:

(i) Although a gift of property capable of division or partition to two or more persons is not valid, yet if they take possession under the authority of the donor it vests in them the right of property.

(ii) Authority to take possession or placing the donees in a position to take possession is equivalent to delivery of possession.

(iii) Partition by the donees themselves after possession is sufficient to validate the gift.

104 Faiz Badruddin Tyabji, *Principles of Mohammadan law* 423 (N. M. Tripathi, 2nd edn., 1940), stating that the validity of a gift of *mushaa* must be tested in the same way as of any other gift; there must be as complete a transfer of the possession of the subject of gift as the circumstances permit; and the donee is not entitled to claim anything to be done in his favour that the donor has not done; the Courts are inclined to uphold a gift of *mushaa*, i.e., of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which the donor would have completed by partition, had he intended to complete the gift.

the high court referred to Garth, CJ in *Mullick Abdool Guffoor* v. *Muleka*,[105] where it was observed:

> In dealing with these points we must not forget that the Mohammedan law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad and other Mohammedan countries, under a very different state of laws and society from that which now prevails in India; and that, although we do our best here in suits between Mohammedan to follow the rules of Mohammedan law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arise between the great expounders of the Mohammedan law ordinarily current in India, namely, Abu Haniffa and his two disciples. We must endeavor, so far as we can, to ascertain the true principles upon which that law was founded and to administer it with a due regard to the rules of equity and good conscience as well as to the laws and state of society and circumstances which now prevail in this country.....what is usually called possession, in this country is not actual or *khas* possession, but the receipt of the rents and profits, and if lands let on leases could not be made the subject of gift-many thousands of gifts which have been made over and over again of *zamindari* properties would be invalidated.

The court also held that properties which were the subject matter of gift, if not capable of division, the law of *mushaa* would not apply. It further observed that if the donor reserves himself right to be in possession of *corpus* and right to enjoy the same, there cannot be a valid gift in law. In this regard the court referred to Privy Council decision in *Mohd. Aslam Khan* v. *Khalilul Rehman Khan.*[106] The court then discussed a gift with a reservation of possession of property by donor during his/her life and held that such gift is void.[107] The court also opined that a gift cannot be implied; it must be express and unequivocal. The intention of donor must be demonstrated by his entire relinquishment of the thing given. The gift is null and void when donor continued to exercise any act of ownership over it. In this regard, the court referred to the apex court decision in *Mahboob Sahab* v. *Syed Ismail*,[108] where it was observed that in order to make a gift valid and complete there should be a declaration of gift by donor, acceptance of gift, express or implied, by or on behalf of donee and delivery of possession of property, *i.e.* the subject matter of gift by donor to donee. Such a gift is not required to be in writing and, consequently, there is no need for registration.

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105 1884 (10) Cal 1112.

106 AIR 1947 PC 97.

107 See also *Musa Miya Muhamad Shaffi* v. *Kadar Box Khaj Box* and *Beepathumma* v. *Mohamed Nakoor Meera Rowther* AIR 1977 Ker 54.

108 1995(3) SCC 693.

The high court also referred to the apex court decision in *Gulamhussain Kutubuddin Maner* v. *Abdulrashid Abdulrajak Maner*,[109] where it was held that under Mohammedan law gift is a donation conferring right of property without exchange. It is in the nature of a contract where there must be a tender of property, acceptance of property by donee and delivery of possession of property. It is only when these ingredients would be satisfied a gift would be complete. The object behind compliance of these three ingredients is that there may not be any future dispute in respect of property, *i.e.* gift. The high court further examined the nature of property under Mohammedan law and observed that the source from which property has been acquired by donor has not been given much importance. There is no distinction between ancestral and self-acquired property. The rights possessed for the time being by the owner are recognized to the extent that he has absolute domain over all property, whether he has acquired it by himself or the same has devolved upon him by inheritance.[110] The court discussed the capacity of donor for making a gift which includes - majority, understanding, freedom and ownership of the subject matter of disposition. Every Muslim who has attained majority and is of sound mind can make a gift. A woman has also a right to make gift as a man and marriage does not entail any disability. Further, the general presumption is that a person making a gift understands what he is doing. In other words, the requirement to make a contract valid is also a requirement to be present for a gift under Mohammedan law.

The court further opined that the donor made a gift to donee but it did not mention in what manner this gift was made and how possession was handed over. Though the court below did not raise the question of genuineness of the letter sent from Baghdad, more than 30 years ago received by the donee, informing that " I gave you my land (for no consideration) and authorized you to use it in whatsoever way you like." The antiquity and authenticity of the letter could not be doubted. The finding of the lower court that it could not be proved as to who had written this letter and if the gift was made before going to Iraq it ought to have been stated in the earlier letter also. However, it was mentioned that the land and house be made ready so that whenever Zamin Ali and Johra Begum come back, they may not find any inconvenience. An oral gift was already made before 1905 and it was reiterated in the letter of 1908 addressed to donee and received by him. The court further held that a careful perusal of entire record revealed that neither all the requisite ingredients of a valid gift as contemplated in Mohammedan law were proved in this case in respect of property nor it was clear that the donor herself was competent to make such gift. Since the concurrent findings on this issue by the lower courts did not seem to be erroneous, the high court declined to take a contrary view.

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109 2000(8) SCC 507.

110 *Rani Khujoorunnissa* v. *Mussamut Roushan Jehan* 1981 LR (3) Indian Appeal 291, where the Privy Council observed: the policy of the Mohammedan Law appears to be prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms.

Moreover, the facts discussed by courts below clearly showed that neither declaration of gift was proved nor possession given to the defendants at that time was found proved and hence it could not be said that essentials of a valid gift, *i.e.* an oral gift of property in favour of donee had been proved. In making valid gift, writing is not essential and an oral gift is duly recognized, whether of moveable or immoveable property. Therefore, if such a gift is made and there is no written document, the question of its registration would not arise and, therefore, to make a gift in Muslim law valid, it cannot be said that there must be a written document duly registered under Act. The court opined that mere fact that provisions relating to gift contained in TPA are not applicable to gifts under Muslim law by virtue of section 129 thereof, that *ipso facto* did not exclude the provisions of the Registration Act unless there is some provision under that Act itself to exclude such written document in respect of gift of immoveable property between Muslims. It further opined that the gift governed by Muslim law shall not be valid or invalid by virtue of its being registered or unregistered but a document not registered can still be admitted in evidence though not permitted by the statute. A document that needs to be registered under section 17 of Registration Act, if not registered, is bound to face the consequences provided in section 49. The only effect would be that whenever a dispute with respect to a valid gift arises, evidence will have to be adduced but by excluding the document in question.[111] The high court, however, was not in agreement with a decision in *Nasib Ali* v. *Wajed Ali*[112] where the division bench had taken a different view.[113]

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111 As per courts observation- A deed of gift of immoveable property executed by a Muslim is not an instrument affecting, creating or making a gift but a mere piece of evidence. If the transaction of gift has already taken place and this transaction is only pen down on a paper. However, this by itself would not make the provision of registration under s.17(1)(a) inadmissible to a document said to be a gift for the reason that Section 17 and 49 are for the purpose of registration of document and not for conferment of title as such and the admissibility of document in evidence. It is always open to the parties to prove factum of gift without recourse to written document if does not registered by adducing other evidence. But if a document said to be a gift-deed sought to be relied on in evidence, the court can entertain evidence only if its admissibility is not prohibited or barred under some statutory provisions. The alleged gift was required to be registered if it was sought to be admitted as evidence and not otherwise.

112 AIR 1927 Cal 197.

113 Quoting the different view court held that- A similar question was considered as to whether a document executed by a Mohammedan donor after he made a gift to show that he had made it in favour of donee is compulsorily registrable under the Registration Act. The court observed that s.17 of Registration Act provides that an instrument of gift must be registered. The expression instrument of gift of immovable property' the court thereof construed as to mean an instrument or deed which creates, makes or completes the gift and thereby transferring the ownership of property from executant to the person in whose favour it is executed. In other words the court read the aforesaid expression as if it should be a document to affect the immovable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration

According to the high court of Allahabad, a careful reading of the judgment shows that the court then left the question open by referring to section 49 of the Registration Act, 1908 observing that same made an unregistered document inadmissible in evidence and thus proceeded to observe that besides the piece of evidence in the case before the court, there was no other evidence to prove a valid gift under Mohammedan law and that being so, the non-registrability of document was of no use. Therefore, court's observation in the above judgment does not constitute a law regarding registrability of documents and the observations are merely *obiter*. As far as the question of mandatory registration of gift is concerned, it was held that the instrument has to be compulsorily registrable otherwise it was inadmissible in evidence. The appeal is accordingly dismissed.

Like Krishna Iyer and Behrul Islam JJ, the learned judge in the above case did not leave any stone unturned to do justice with the law of Indian Muslims. For his understanding and knowledge and showing seriousness he must be appreciated. Though the case was not decided in favor of validity of oral gift but the facts and circumstances of this case did not leave any option to the court but to dismiss the appeal in absence of clarity of essentials of valid gift under Muslim law.

***Wasiyat* and *Wirasat* (Will and Inheritence)**

The law of bequest in Islam is that a person can only bequeath 1/3rd of his property in favour of stranger and not in favour of heirs. So far as heirs are concerned this 1/3rd of the property is, it cannot be bequeathed to heirs without permission or concurrence of other heirs. *Wasiyat* can also be made orally and there is no need of registration or any formalities in Islamic law as mentioned above. In *Rijia Bibi* v. *Md. Abdul Kachem*,[114] the dispute comprised of will and inheritance under Muslim law. One Abdul Khalaque died, leaving behind 3.25 acres of land. After his death, respondent no. 1, claiming to be the first wife of the deceased and respondent nos. 2 and 3, claiming to be sons of Abdul Khalaque through his first wife, claimed their share to the property left by Abdul Khalaque but the defendants, *i.e.* appellant no. 1 (being the second wife) and appellant nos. 2 to 6 (being the sons of Abdul Khalaque through second wife) and appellant nos. 7 and 8 (being the daughters of Abdul Khalaque through the said second wife), denied the right of the respondents and refused to make a partition according to the Mohammedan law of inheritance and, therefore, the respondents as plaintiffs instituted a suit in

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Act. Since the formalities under Mohammedan law for making gift were already complete; the document subsequently executed did not affect the immoveable property, the subject matter of gift. It did not result in transfer of immoveable property from donor to donee; the document was executed only so as to create an evidence of the fact that donor has observed formalities under Mohammedan law in making the gift to the donee. The court thus held that such a document is not compulsorily registrable under the Registration Act or the Registration Act does not apply to such so called deed of gift executed by a Muslim.

114 AIR 2013 Gau 34, 2013(2) GLD 625 (Gau).

the trial court, claiming partition of the land. The trial court decided all the issues in favour of the plaintiffs and also determined the share of the plaintiffs and the defendants. The defendants/appellants filed appeal before the district judge challenging the judgment, who upheld the judgment passed by the trial court but re-determined the share of the plaintiffs and defendants according to the Mohammedan law holding that the determination of share by trial court was not correct. On second appeal before the high court, the question of law was whether the lower court committed any error by holding that the 'Will' executed by late Abdul Khalaque was void and inoperative, being opposed to Muslim personal law.

After perusal of trial court's judgment, the high court found that the trial court had arrived at a conclusion that the will was a forged one, and that the plaintiffs and the defendants all were legal heirs of deceased. However, the first appellate court had upheld the decision of the trial court that the plaintiffs and the defendants were all legal heirs of the deceased, disagreeing with the finding that the alleged will was a forged one. The court also re-determined the share of the plaintiffs and the defendants.

According to Muslim personal law, no writing is required to make a will valid. Besides, it is not required to be signed or attested, if signed. In the present case, the defendants/appellants exclusively relied on the deed of the will to have their right and title on the suit land. Thus the onus was upon them to prove that the will was written by the testator during his life time in sound mind. The appellate court was not in agreement with trial court that the will was a forged one. However, the will was found to be invalid because testator bequeathed his entire properties in favour of some of the heirs while a Mohammedan cannot by will dispose of more than 1/3rd of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess cannot take effect unless the heirs sign thereto after the death of the testator. In the present case, the plaintiffs/respondents did not consent to the bequest made by testator in favour of the defendants/appellants depriving the plaintiffs/respondents. Besides the testator, out of 312 acres of land bequeathed, 40 acres of land to his wife and 80 acres to his son and thereafter the other defendants/appellants were to share the remaining area of land according to Mohammedan law of inheritance. Since the will executed by testator did not fulfill the conditions and limitations of Mohammedan will, it was held to be invalid and, therefore, the defendants/appellants could not acquire any right, title and interest over the land on the basis of the will. Accordingly, the court held that the will, although not forged, was invalid and, therefore, void and inoperative.

The court referred to part of *Mulla's Principles of Mohamedan Law* dealing with restriction on the testamentary power.[115] According to the high court, the findings of the first appellate court were in agreement with *Mullah's Principles of Mohamedan Law* which prescribed the rule in respect of will under Islamic law.

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115 *Supra* note 3, S. 118- Limit of testamentary power- A Mohamedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator(e).

Therefore, the high court described further certain basic principles of *wasiyaat*, quoting from the *Mullah's Principles of Mohammedan Law.*[116] After deliberating Muslim law on the subject at length, the court held that the will executed by the deceased was invalid and inoperative. The share of the plaintiffs and the defendants as determined by appellate court was correct according to the Mohammedan law of inheritance and the appeal was dismissed.

The Guahati High Court in this case strictly adhered to the established rule of Muslim law of will and tried to understand all pros and cons of the subject in its letter and spirit. At the same time, the court did not allow the trick through which usually people ignore the female heirs from inheritance which is an essential ingredient of Islamic law. However due to patriarchal society the practice is continuing in various parts of the country by means of forge will even after Shariat Act, 1937, which aimed at to root down the evils to deprive the heirs particularly daughters and sisters from getting their due share in inheritance. The Prophet says that inheritance is half of the relevant education; learn and teach it.[117] But the Indian Muslims since long, because of feudal mentality and male dominance do

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116 Under Muslim law, a will or "*wasiyaat*" is a legal declaration of the intention of a Muslim, in respect of his property he intends, to be made effective after his death. Every adult Muslim of sound mind can make a *wasiyaat*. Such a will may either orally or in writing, and though in writing, it does not require to be signed or attested. No particular form is necessary for making *wasiyaat* if the intention of the testator is sufficiently ascertained. Though oral will is possible, the burden to establish an oral will is very heavy and the will should be proved by the person who asserts it with utmost precision and with every circumstance considering time and place. The person making will, must be competent to make such will. The legatee must be competent to take the legacy or bequest. The subject and object of the will must be valid one under the purview of the Muslim Law and the bequest must be within the prescribed limit. The property bequeathed should be in existence at the time of death of the testator, even if it was not in existence at the time of execution of the will. The limitation to exercise the testamentary power under Muslim Law is strictly restricted upto one third of the total property so that the legal heirs are not deprived of their lawful right of inheritance. A Muslim cannot bequest his property in favour of his own heir, unless the other heirs consent to the bequest after the death of the testator. The person should be legal heir at the time of the death of the testator. The consent by the heirs can be given either expressly or impliedly. If the heirs attest a will and acquiesce in the legatee taking possession of the property bequeathed, this is considered as sufficient consent. Any consent given during life time of the testator is not valid consent. It must be given after the death of the testator. If the heirs do not question the will for a very long time and the legatees take and enjoy the property, the conduct of heirs will amount to consent. If some heirs give their consent, the shares of the consenting heirs will be bound and the legacy in excess is payable out of the shares of the consenting heirs. When the heir gives his consent to the bequest, he cannot rescind it later on.*(See ibid)*

117 The Prophet says "learn the laws of Inheritance and teach them to the people; for they are one half of the useful knowledge", *Sirajiyyah* (English trans.) by A. Rumsey, 11(Calcutta, 2nd edn., 1890).

not want to give women their share and in this way openly deny to follow the commandment of Allah and teaching of the Prophet.

In another case, *Sajid Ismail* v. *Sairabi Abdul Gaffar Shaikh*,[118] the trial court passed decree in favour of original plaintiffs/respondents, declaring them as owners of 3/4th share of suit property and defendant nos.1 to 4 were restrained permanently from carrying out any construction and defendant nos.5 to 7 were restrained from sanctioning any plan for construction. On appeal, the Bombay High Court upheld the decision of the lower court. In this case, suit was instituted by the plaintiff's real sisters. They had a real brother, Mohammed Ali. According to the plaintiffs, their mother owned house property along with another house, both in Pune. The brother with the consent of sisters sold old property and purchased the suit property. However, the property was purchased and registered in the name of the brother and his wife, Zulekhabi. The brother died issueless on 23.03.1984 and later his wife also died on 13.06.1990. The plaintiff's sisters had filed an application for partition of the property. The wife of the deceased brother of the plaintiff was restrained on 01.08.1984 from transferring the suit property to any third person. A temporary injunction was granted in the case. While the suit against brother's wife was pending, she died. However, the defendant claimed share in the property being legal representatives of Zulekhabi and claimed that the property was bequeathed to them under the last will by Zulekhabi. Later, Raffique also claimed that he was son of Mohd. Ali through another wife Mariambi in addition to the plea as legatee under the alleged will by Zulekhabi. The suit was not admitted and the plaintiffs had informed Pune Municipal Corporation (PMC) not to sanction building plan of the suit property. The city engineer had informed the plaintiffs that the PMC had temporarily stopped the process of sanctioning the building plan. A writ Petition was filed to challenge the abatement of the suit which got dismissed. The plaintiffs were joint owners with their late brother Mohammed Ali, they along with their brother Mohammed Ali and Zulekhabi had undivided interest of 3/4th and 1/6th +1/6th in the suit property. After death of Mohammed Ali, Zulekhabi as a legal heir was entitled to 1/4th of his 1/6th share and the plaintiffs were entitled to remaining 3/4th share of Mohammed Ali by inheritance. Since Mohammed Ali died issueless, Zulekhabi was entitled to the 1/4th share of Mohammed Ali's undivided share in the suit property and the plaintiffs were entitled to the remaining undivided 3/4th share by inheritance. The plaintiffs in addition to their 3/4th share were entitled to 3/4th of 1/6th of Mohammed Ali's share after his demise. Thus, the share of Zulekhabi's undivided share was 1/12th and she was not competent to bequeath it by the testamentary disposition under the general law, and 1/3rd of 1/12th according to Muslim personal law as it permits disposition of 1/3rd only and remaining 3/4th devolves as per personal law of inheritance. Thus, assuming the validity of the bequest, it would operate to the extent of 1/36th undivided share only. Raffique claimed as adopted son of Zulekhabi. However, the concept of adoption is not recognized under Muslim law.

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118 2014(1) ABR 597, 2014(1) Bom CR 339, 2014(1)MhLj182.

After the perusal of facts, the court opined that under Muslim personal law, Zulekhabi could not have bequeathed more than 1/3rd of her own share in the property. It further held that merely because the defendant no. 2 told the Tahasildar, Pune, that he was accepting Zulekhabi as his mother, it could not be legally acceptable evidence to establish disposition by *wasiyaat* without proper proof according to law or the legal validity of the document. There was no acceptable real evidence to prove Zulekhabi's joint legal ownership of suit property in the absence of proof of separate source of her income and her contribution to the purchase of the property.

Accordingly, the court arrived at the finding that for want of legal evidence, defendant nos. 1 and 2 were not entitled to any share as they were legal heirs of neither Mohammed Ali nor Zulekhabi. Both defendants who claimed to have purchased the immovable property on the basis of revenue mutation entry could not have legal rights, title and interest in the property.

According to the lower cour, there was no concept of adoption in Muslim personal law so as to accept the claim that Zulekhabi adopted defendant no. 2 as her Son. The court referred to the *Mullah's Principles of Mohamedan Law*[119] where it was observed that Islamic law does not recognize adoption as a mode of affiliation. It, however, stated that where a special family or tribal custom of adoption was proved, adoption could be done. However, no such custom had been established in this case. The court further stated that if purchase of the suit property was accepted, even then since Mohammed Ali died issueless, his widow Zulekhabi was entitled to 1/8th share of the property and the rest went to the plaintiffs' sisters. Since, Zulekhabi also died issueless, in the absence of other legal heirs, the plaintiffs were entitled to inherit the property to claim their shares. The trial court did not accept Raffique as son of Mohammed Ali through his alleged wife Mariambi because the claim was based on irrational and non-convincing grounds, and such manipulation could not vest the right or title in respect of the property. The court further opined that merely because Zulekhabi's name was shown as joint purchaser by Mohammed Ali, it could not be concluded that she was the only surviving co-owner in her own right with right to dispose of the property to the exclusion of the original plaintiffs who were residuary co-sharers under Muslim personal law, *i.e*. Hanafi law of inheritance. The trial court in its discussion did consider that Mohammed Ali and his Wife Zulekhabi were joint purchasers of the suit property having considered the ostensible title of Zulekhabi. Further, the affidavit, which was sought to be relied upon as far as the marriage between Mohd. Ali and Mariambi, was not examined and, therefore, the court opined that mere affidavit could not be legal evidence since it was not offered for cross examination of the contesting parties, as the original *nikahnama* was not produced to prove marriage.

The high court gave its concurrence to the findings of the trial court that had examined the facts in details with reference to well established principles of Muslim personal law to arrive at logical and correct conclusions. The appeal was dismissed observing that the mutation entry was not real evidence of legal title as it resulted

119 *Supra* note 3 at

in merely a fiscal enquiry by revenue officer to *prima facie* find out or discover the person by whom revenue was regularly payable.

As per prevalent customs, generally women are deprived of inheritance and people take shelter under the provisions of fake will and adoption, though these evils were rooted down under section 2 of Shariat Act, 1937. By an amendment, Mohd. Ali Jinnah, who was leader of Muslim landlords, it continued if the parties could establish that their customary law provides for the same and sometimes due to the lack of examination of the facts in detail by the courts these tricks have become successful.

Waqf

As discussed above, *waqf* is one of the methods prescribed to dispose of property under Muslim law. In this form of disposal, the *corpus* remains intact and the *usufruct* is dedicated for the benefits of the poor and other charitable purpose permitted under Muslim law. In *Rameshwar Ram Gopal* v. *Xth Addl. District Judge*,[120] the Allahabad High Court considered the waqf property dispute relating to the status of *mutavalii* and the nature of *waqf*. In this case, the property in dispute was a *waqf* property, *i.e.* Waqf Nawab Mohammad Muzaffar Ali Khan and its *mutawalli* was Nawab Mohammad Murtaza Ali Khan. The applicants/ respondents purchased the property with the alleged permission of the waqf board. It was pleaded that the property was required for personal use by purchaser-landlords and, therefore, they sought its release.

The appellate court, referred to *Ram Dhani* v. *Janki Rai Singh*[121] and held that even if property of *waqf* had been transferred by sale without any permission of the board, such transfer was not *per se* illegal or nullity, and, so long as such transfer was not set aside, it would be valid and, therefore, the appeal was allowed. In a writ petition filed before the high court, court examined the nature of *waqf* and the status and authority of *mutawalli vis-a-vis* an immoveable property constituting *waqf*.

The court observed that the Prophet not only declared such *waqfs* to be valid and lawful but also encouraged their creation by dedicating property. This rule was laid down by Prophet himself and handed down in succession by Ibn Abu Nafe and Ibn Omar. Omar got a piece of land in Khaiber whereupon he came to the Prophet and sought his counsel to make its most pious use. The Prophet said "if you like you may make a *waqf* of it, as it is, and bestow it in beneficiation". Omar thereupon bestowed it in charity on his relatives, the poor and slaves and in the path of God, and travelers in a way that the land itself might not be sold, nor conveyed by gift or inherited.[122] It is said that *waqf* continued in existence for several centuries until the land became waste. Referring to a leading judgment of

120 2013(4) ALJ 398; 2013 (97) ALR 855; 2013 119 RD 496.

121 AIR 1972 All 553.

122 Shaffi, *Al-Umm* III, as cited in A. A. A. Fyzee, *Outlines of Muhammadan Law*275 (4th edn., 1974).

Calcutta High Court in *Meer Mahomed Israil Khan* v. *Sashti Churn Chose*,[123] observed that there must be a substantial dedication for charitable or pious purpose. It was further observed:[124]

> In the Mussalman system, law and religion are almost synonymous expressions, and are so intermixed with each other that it is wholly impossible to dissociate the one from the other: in other words, what is religious is lawful; what is lawful is religious. The notions derived from other systems of law or religion form no index to the understanding or administration of the Mussalman law. The words piety and charity have a much wider signification in Mussalman law and religion than perhaps in any other. Every good purpose, *wujuh-ul-khair* (to use the language of the Kiafaya), which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful waqf. A provision for one's children, for one's relations, and under the Hanafi Sunni law for one's self, is as good and pious an act as a dedication for the support of the general body of the poor.

The court held that the legal meaning of *waqf* according to Abu Hanifa, was the detention of a specific thing in the ownership of the *waqif* or appropriator, and devoting or appropriating its profits or usufruct in charity on the poor or other good objects. According to two disciples, Abu Yusuf and Muhammad, *waqf* signifies the extinction of appropriator's ownership in the thing dedicated and detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind". The court also referred to the definition of the term *waqf* as given in section 2(1) of Mussalman Walf Validating Act 1913.[125] The court referred to various other definitions such as the one given under the UP Muslim Waqfs Act 1960.[126]

The court also looked to the authority, power and status of *mutawalli*, referring to *Shanker Das* v. *Said Ahmad*,[127] where Lahore High Court had considered the rights of *mutawalli* of a mosque and observed that the mosque as an institution had practically proprietary rights exercised through the guardian, and that one of the rights was to claim, on the ground of vicinage, a right of pre-emption in the case of sale of adjoining properties. This has been followed in *Jindu Ram* v. *Hussain Baksh*.[128] In *Wahid Ali* v. *Mahboob ali Khan*,[129] the court had held that a Muslim

123 19 ILR (Calcutta) (1892) 412.

124 Justice Ameer Ali in *Meer Mahomed Israil Khan* v. *Sashti Churn Chose and others*, 19 ILR (Calcutta) (1892) 412.

125 *Waqf* means the permanent dedication by a person professing the *mussalman* faith of any property for any purpose, recognized by the *mussalman* law as religious, pious or charitable.

126 (U.P. Act No. XVI of 1960). Section 3(1), (2), (5), (11) and (12) defines "beneficiary", "Board", "*Mutawalli*", "*Waqf*"" and "Waqf property".

127 (1884) PRNO 153 of 1884.

128 AIR 1914 Lah 444.

129 AIR 1935 Oud 425.

waqf was not a trust and a *mutawalli* could not be said to be a trustee. The court relied on two judgments of Privy Council in this regard namely, *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[129] and *Abdur Rahim* v. *Narayan Das Aurora*[131] and also referred to the contrary view taken by the Bombay High Court in *Dattagiri* v. *Dattatraya*,[132] Allahabad High Court in *Behari Lal v. Muhammad Muttaki*[133] and Calcutta High Court in *Nilmony Singh* v. *Jagabandhu Roy*[134] wherein the persons holding properties generally for Hindu or Mohammaden religious purposes were treated as trustee. It held that a Muslim *waqf* in which the property was vested in God, the *mutwalli* had no power of alienation and he could not be compared with a *mahant* of a Hindu religious endowment.

With respect to position of *mutawalli* and *sajjadanashin*, the high court also referred to the apex court decision in *Faqruddin:*[135]

> It is beyond any doubt or dispute that a *mutawalli* is the temporal head. He is the manager of the property. Office of *sajjadanashin*, however, is a spiritual office. It has to be held by a wise person. He must be fit for holding the office.

On the basis of the above, the high court opined that a *mutawalli* was not owner of the property and had no power of alienation. The power of getting the property back if transferred in contravention of section 49-A was conferred upon board. A *mutawalli*, not being owner was not competent to alienate a property constituting *waqf* except in respect of a limited category of *waqf*s. The court further observed that decision of *Ram Dhani* v. *Janki Rai Singh*,[136] relied by lower appellate court showed that same had no application to the issue which had arisen in the present case and reliance thereon was totally misplaced and misconceived. There was no question of application of section 49A, which came to be substituted in 1960 Act.[137] The second appeal had come up for consideration before the court only in 1964. Moreover, observations made by court itself shows that *mutwalli* had no right to execute a lease of permanent character unless permission of waqf board was obtained.

The High Court of Allahabad held that the document granting permission was not proved. Only photocopy was furnished and a photocopy *per se* was not admissible evidence unless proved. That being so, it could not be said that property in dispute stood transferred to respondents-applicants at any point of time in accordance with law so as to confer any right of ownership upon them. Thus, the court held that it could not be doubted that if previous permission was not obtained

130 AIR 1922 PC 123.

131 AIR 1923 PC 44.

132 (1904) ILR 27 Bom 236.

133 (1898) 20 All 482.

134 (1896) 23 Cal 536.

135 *Faqruddin* v. *Tajuddin* 2008 (8) SCC 12.

136 AIR 1972 All 553.

137 See UP (Act No. 200f 1971).

as contemplated in section 49-A read in the light of consequences provided in section 49-B of Act, the document was void *ab initio* and nullity in the eyes of law. Therefore, the court held that since the matter had not been considered by appellate court in the light of discussions made above, the impugned judgment could not be sustained and the matter was remanded to the lower court. The court had thoroughly reviewed the text and sources of Muslim law relating to *waqf* and gave a detailed exposition while referring to leading judgments of the Privy Council, Supreme Court and various high courts, highlighting the correct position of nature of *waqf* and its essential ingredients under the Islamic law.[138]

> In another case, *Muslim Welfare Organization* v. *Delhi Waqf Board*,[139] a writ petition was filed before the Delhi high court stating that, *waqf* land measuring 2.5 acre situated at New Delhi had been encroached by various persons and despite representations, no action was being taken by the respondents for removal of the aforesaid encroachment from the *waqf* land. The petitioner had placed on record a copy of the information supplied to it by waqf board under the RTI Act, 2005. The information showdd that there were more than 500 families residing at the above referred waqf property. Out of those, 249 families were paying damage to Delhi waqf board whereas 16 persons were paying rent to it. 350 families were stated to be in unauthorized occupation of the said land. The court observed that section 32(1) of the Waqf Act, 1995, *inter alia*, provides that it shall be the duty of the waqf board to ensure that the *waqfs* under its superintendence were properly maintained, controlled and administered. For this purposes, power had been conferred upon the board under section 54 of the Act.[140]

The division bench of high court ordered that the Delhi waqf board shall take steps in accordance with law, particularly the provisions of the Waqf Act, in respect of all encroachments on *waqf* land, within a period of three months. The court further directed to approach SDM by the CEO of Delhi waqf board,[141] who was required to take action on such application of the Delhi waqf board. Further, if required, the waqf board was entitled to police aid. The court rightly issued directions to save *waqf* properties and improve the *waqf* administration.

> In *Sheikh Mumtaz Ahmed* v. *Rana Khursheed*,[142] the issue of family waqf was involved. One Rana Khursheed filed a suit pleading that her

138 See for example *Debendra Nath Mitra Majumdar* v. *Sheik Safatulla* AIR 1927 Cal 130; B.R. Verma, *Islamic Personal Law* 630-31(6th edn., 1986) in which a *waqf* is distinct from *Sadaqah, Hiba* and trust has been discussed.

139 MANU/DE/2804/2013.

140 S. (54) it provides that whenever the Chief Executive Officer (CEO) considers, on receipt of any complaint or on his own motion shall serve a notice upon the encroacher, for purpose of securing property under s. 54 (3), under s. 55 can apply to SDM of concerned jurisdiction, further can take help of police.

141 S. 55, Waqf Act 1995.

142 MANU/DE/2462/2013.

> grandfather had created a *waqf-al-alaulad*. The dedicator Sheikh Abdul Ahad was to remain *mutawalli* of the *waqf* during his lifetime and after his death, if his sons were minor, his wife was to become the *mutawalli* and after attaining majority, his sons were to act jointly as *mutawallis* and to realize rent of the *waqf* property and to manage the same and divide the rents/benefits to the beneficiaries/co-sharers/co-owners as per the shares fixed according to Shariat. Sheikh Abdul Ahad, had five sons but three of them migrated to Pakistan and thus the remaining two sons, namely Sheikh Abdul Karim and Sheikh Mohd. Abid (father of the Rana Khursheed) became *mutawallis*. After the death of Sheikh Abdul Karim, his son Sheikh Mohd. Nasim started acting as a *mutawalli* in place of his father. Sheikh Mohd. Abid, father of the Rana Khursheed, died leaving behind five sons and two daughters including the Rana Khursheed as his legal heirs and she became entitled to the benefits of the waqf property though as per the waqf deed, only sons were entitled to act as *mutawallis* but the Rana Khursheed and her sister were also entitled to share in the benefits of the waqf property and which had been denied to them.

The additional district judge (ADJ), decreeing suit against appellant, held that *waqf* was for benefit of all heirs of deceased *waqif* and thus Rana Khursheed and her sisters were also entitled to share in rent/income of waqf property. The main issue before the high court was whether female heirs were excluded from benefit of waqf property. The court held that on reading of translation of *waqf* deed indicated that though *waqif* in recitals had recited having five minor sons but while mentioning objective of *waqf*, the word sons was not used but used words 'heirs' and 'successors'. The operative part of the *waqf* deed dedicated and declared property as w*aqf-ul-aulad* which would include all children and not only sons. During hearing, the court was informed that at time when *waqf* deed was executed, *waqif,* besides having minor sons, also had daughters. It was thus not as if *waqif* while using words 'heirs' or '*aulad*' would be said to have referred to his sons alone. There was nothing at all in *waqf* deed to show any intent to exclude daughters or female progeny of his sons or sons of sons from benefit of *waqf*. The decision of ADJ was, therefore, upheld, observing that *waqf* to be for benefit of all heirs of deceased *waqif* and rejected claim of the appellant of female heirs being excluded from benefit of *waqf*. The Mussalman Waqf Validating Act, 1913, also declares that it is lawful for a person professing the Mussalman faith to create a *waqf* for the maintenance and support wholly or partially of his family, children or descendants. Thus *waqf-ul-aulad* is not necessarily for the benefit of the sons only. In *Beli Ram* v. *Mohammad Afzal*,[143] it was held that it was not illegal to make a *waqf* deliberately to deprive an heir of the share of his inheritance. The time when the *waqf* deed was executed, the *waqif* besides having the minor sons also had daughters. Thus, even though the Rana Khursheed had chosen not to appear or to oppose the appeal but the high court held that the dedication was made for

143 (1949) Lah. 1.

the benefit of all heirs of the deceased *waqif*, not excluding female heirs. The appeal is accordingly dismissed.

In *S.Sait Basha* v. *The Chief Executive Officer*,[144] the issue related to the jurisdiction of the tribunal in the appointment. The brief facts were that the chief executive officer (CEO), Tamil Nadu Waqf Board, Chennai, had passed an order through which nine members for the Interim Committee for the Jahir Asara Maqboora Waqf of Valikandapuram were appointed for a period of one year. Challenging the order of the CEO in appointing interim committee and further praying for issuance of a direction by the high court to the respondent in approving his election as *mutavalli* for the *waqf*, the petitioner had pleaded that the order appointing the interim committee was not provided in the Waqf Act, 1995 and the action was without jurisdiction. The question was whether the petition related to *waqf* was maintainable in the court.

The court observed that the waqf board instead of superseding the committee may remove any member of the committee if he had abused his position as a member or had acted in a manner prejudicial to the interest of the *waqf*, after providing him reasonable opportunity of being heard against the proposed removal. The aggrieved member had the right of appeal to the tribunal and the order of the tribunal was made final in this regard. The court had a cursory look at the ingredients of section 32 of the Waqf Act, 1995 which clearly pointed out that the waqf board had been enjoined with wide powers. The waqf board had general superintendence of all *waqfs* in a state. The primordial duty of the waqf board was to monitor that the *waqfs* under its superintendence were properly controlled, maintained, administered and more importantly, the income derived there from is duly applied to the aim for which such *waqfs* are established.

The court while examining the nature of trust and *waqf* held that the power vested in the waqf board under the Act was in the manner of trust. It stated that in order to avoid and prevent misapplication and misappropriation of the income from the waqf properties, the waqf board had to oversee the income and expenditure of every *waqf* with due care. Undoubtedly, the waqf board was empowered to issue appropriate directions to the *mutawalli* for proper administration of *waqf*, but the directions of the waqf board ought to be legal and must fit within the competence of the board being the supervisory authority of the *waqfs*. It is to be borne in mind that section 69(5) of the Act enjoins the waqf board with duty to appoint suitable person to perform all or any of the functions of *mutawalli* and to exercise the powers and duties of *mutawalli* pending the framing of the scheme. The board, while exercising power under section 69 of the Act, must consider the necessity or desirability of framing a scheme for proper administration of the *waqf* in question. If the board is administered effectively, properly and satisfactorily, there is no scope for the waqf board to exercise its powers under section 69 of the Act.

144 (2013)5MLJ854.

The high court referred to the decisions justifying the above observations, including Supreme Court decision in *I. Salam Khan* v. *The Tamil Nadu Waqf Board, Chennai represented by its Chairman,*[145] where it was observed:

> Under Section 83(5) of the Waqf Act, 1995, the Tribunal has all powers of a Civil Court under the 'Code of Civil Procedure'. Availability of alternative remedy is not an absolute bar to the filing of a writ petition. But at the same time it is well settled that writ jurisdiction is discretionary jurisdiction and when there is an alternative remedy the party must first avail of that remedy before invoking the writ jurisdiction.

In *S.A.K. Ibrahim* v. *Tamil Nadu Waqf Board, represented by its Chair Person, Chennai,*[146] it was held that as per section 32 of the Waqf Act, 1995, which stipulates that parties affected by the directions of waqf board shall be given an opportunity of being heard. The court further referred to the decision *Maulvi Abdul Rahman Siyai* v. *Sardar Maqbool Hasan,*[147] in which it was observed:

> The expression 'other matter relating to a waqf or waqf property is very comprehensive and is of wide import or amplitude which may embrace in its sweep any matter relating to the management of waqf and waqf property, therefore, the appointment of the *mutawalli* or the Committee for management of the waqf in my considered opinion, would fall within the ambit of expression other matter relating to a waqf or waqf property and can be decided by the Waqf Tribunals.

The court also referred to *A.M. Ali Akbar* v. *Keelakarai South Street Jamath Masjid Paripalana Committee represented by its Secretary S.M. Mohaideen Sadakathul Lahidkhan, Keelakarai*,[148] where it was laid down as follows:

> The Waqf Act is a complete Code by itself. The Tribunal is constituted under the Act by the State Government under notification. The powers of the Tribunal are restricted only to the disputes specifically referred in Sec. 83(1) of the Act to be adjudicated. Under Sec. 83(1) of the Act, the Tribunal is empowered to determine the dispute, question or other matters relating to Waqf or Waqf property and not in respect of an application for permanent injunction as has been filed by the 1st respondent in W.O.P. No. 2 of 2001. In this context, the words "or other matter which is required by or under the Act to be determined by the Tribunal" shall be referable only to Secs. 6, 7, 76(4), 70(1) & (2) and Sec. 94. None of the provisions of the Act either expressly or impliedly empowers the Tribunal to entertain, adjudicate upon and decide a petition for permanent injunction. Sec. 85 of the Act also does not specifically bar the jurisdiction of Civil Court to entertain a suit for

145 (2005) 1 M.L.J. 646 at 647.

146 (2007) 6 MLJ 783.

147 AIR 2009 All. 62, at 68.

148 (2001) M.L.J. 126.

> injunction. Sec. 94 of the Act also empowers the Tribunal to issue direction to mutawalli to pay to the Board or to any person authorised by the Board the amount necessary for the performance of such Act where mutawalli who is under an obligation to perform any act which is recognised by Muslim law as pious, religious or charitable and the mutawalli fails to perform such Act. Therefore, the submission of the learned counsel for the respondents that the word used "any dispute" shall also mean a dispute relating to the managing committee of the Jamath and the word "any" used in Sec. 83(1) of the act shall mean every and whatever the dispute relating to a Waqf and the said word Waqf does relate to the managing committee cannot be accepted. It is also to be noted that the power to order injunction shall vest with the Civil Court by virtue of Secs. 39 and 41 of the Specific Relief Act, 1963.

The court referred to *Intazamiya Committee Id Gah, Morar* v. *M.P. Waqf Board, Bhopal*,[149] in which it had been held that the civil court cannot overcome jurisdiction of the tribunal in the matter of administration of *waqf*.[150] In *K.P. Zainulabdeen* v. *Tamil Nadu Waqf Board, Madras*,[151] it was observed that, where various acts of mismanagement were alleged and if in the course of enquiry the details regarding the same including the unlawful cutting of trees are ascertained and found out, the *muthawallis* cannot escape liability from the consequences.

The court referred to *Kadhar Sheriff* v. *Tamil Nadu State Waqf Board*,[152] where the board had appointed an executive officer to administer certain *waqfs*

149 AIR 1996 MP 47 at 48 & 49.

150 A careful perusal of the aforesaid principle shows that the present case is covered within the four corners of this principle. S. 43 of the Waqf Act provides for removal of mutawallies. Sub-clause (4A) thereof is important. Under this provision, a Mutawalli who is aggrieved by an order passed under any of the clauses (d) to (l) of sub-sec. (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final. Now, if we peruse the provisions of s. 55C, it specifically provides exclusion bar to the jurisdiction of Civil Court in respect of matters to be determined by the Tribunal. Thus, if we read s. 43(4A) and s. 55C together, it is crystal clear that the Act has provided a remedy against the order passed by the Board removing Mutawalli from the office on the grounds mentioned under s. 43, clauses (d) to (1) and in view of S. 55C, if any dispute or question relating to any waqf, waqf property or other matter is required by or under the Act is to be determined by a tribunal, then the suit or other legal proceedings in Civil Court is barred. Thus, in this light, if we peruse the aforesaid principle laid down by the Hon'ble Supreme Court, there does not remain any doubt that there is an express exclusion of the jurisdiction of the Civil Court under the Waqf Act. The claim of the defendant under these circumstances that the Civil Court had no jurisdiction is correct. The Civil Court has got no jurisdiction with respect to any matter, which is required by or under the Act of 1995, has to be determined by a tribunal and if under s. 43(4A) an appeal lies against the order of removal to the tribunal.

151 AIR 1992 Mad. 298 at 299, in para 11.

152 AIR 1987 Mad. 40.

and in one case the board chose to appoint a committee. A batch of writ petitions were filed and by a common Judgment, all the writ petitions were dismissed holding that the board had power to appoint an executive officer or a committee to function along with the *mutawalli* for proper and better administration of the waqfs. On appeal, the division bench referred to the decision of High Court of Andhra Pradesh in *Andhra Pradesh Waqf Board* v. *Mohamed Hidayatullah*[153] and held that, if the board finds that the *mutawalli* was not fit to continue in management, it could take appropriate proceedings against him.[154]

The court observed that one cannot take offense that alternative remedy of approaching the tribunal was only a rule of policy, convenience and discretion and not the rule of law. In this regard, the court referred to the decision of the Supreme Court in *I. Salam Khan* v. *The Tamil Nadu Waqf Board, Chennai*.[155] Besides these, generally a litigant is to avail the remedy provided to him under the Tamil Nadu Waqf Act, 1995 before invoking the jurisdiction of the writ court at the first instance. When the waqf tribunal, being the designated court, has the necessary jurisdiction to decide all disputes, questions or other allied matters pertaining to *waqf* property, the court has no option but to arrive at the conclusion that the writ petition was not maintainable.

In *Haryana Waqf Board* v. *Mahesh Kumar*,[156] the brief facts were that the petitioner *waqf* board was original plaintiff in a civil suit filed in the court of civil judge in the year 2000 seeking possession of property admeasuring 21 square yards which was allegedly given on rent by the waqf board to one Major Ram Prakash. The petitioner claimed that the entire land was a Muslim graveyard and hence the same was *waqf* property. The entire *khasra* measures 800 square yards was given on lease to different persons by different allotment letters. 21 square yards out of this land was given to Major Ram Prakash on a monthly rent. The petitioner also claims that the suit property was formally notified under section 5(2) Waqf Act, 1954 as *waqf* property.

After the death of Major Ram Prakash, his son Gurcharan Singh and his widow Smt. Savitri Kadyan executed a long term lease in favour of the present defendant/respondent Mahesh Kumar in the year 1991 and put him in possession. The petitioner came to know about this alleged illegal creation of lease deed in favour of the respondent in the year 1996 and treated it as illegal encroachment by the respondent and, therefore, requested the respondent to vacate the premises.

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153 AIR 1974 AP 287.

154 When the Board finds that there is no case for the removal of the *mutawalli*, then it cannot resort to a procedure by which he becomes *nonest*. Such a procedure cannot be brought in even with the aid of the doctrine of implied powers. We hold that the order of the Waqf Board appointing Executive Officers and appointing managing committee in these cases are *ultra vires* the powers of the Board and null and void as they cannot be supported by any of the provisions of the Act.

155 (2005) 1 M.L.J. 646.

156 2013(14) SCALE 199.

On his refusal to do so, the respondent filed suit in the court of civil judge for possession of the property. The following issues were framed by trial court: (i) whether the plaintiff was entitled to decree of possession, as prayed for; (ii) whether the suit of the plaintiff was not maintainable in its present form; (iii) whether the suit was bad for mis-joinder and non-joinder of necessary parties; (iv) whether the plaintiff had no *locus standi* to file the present suit; (v) whether the suit was time barred.

The trial court decreed the suit holding that the lease agreement executed by Savitri Devi in favour of Nirmala Devi for a period of 99 years was bad in law in as much as Savitri Devi was predecessor in interest of Major Ram Prakash as his widow to whom the property was rented out by the petitioner. Therefore, she was not capable of executing such lease deed in favour of Nirmala Devi and in turn Nirmala Devi had no right to put the respondent in possession by executing any lease in his favour. The trial court also found that waqf board had proved its title over the land and it was the waqf board which was the actual owner of the suit property. The respondent challenged the aforesaid judgment. The additional district judge (ADJ) on appeal held that the question whether the suit property was *waqf* property or not could be decided only by the tribunal constituted under the Waqf Act. The ADJ, therefore, returned the plaint to the petitioner for presentation to the court of competent jurisdiction, namely the tribunal. The result was that the decree passed by the trial court was set aside and the plaint returned.

The petitioner, thereupon, approached the high court. The high court dismissed the appeal *in limine* observing that the appellate court had taken the right view in the matter. Before the Supreme Court, the issue was whether the civil court had jurisdiction to entertain the suit. It was held that the issue depended on the interpretation of section 7 read with section 85 of the Haryana Waqf Act, 1995. As per sub-section (1) and section 7 of the Act, if a question arises as to whether a particular property specified as waqf property in a list of waqfs is waqf property or not, it is the tribunal which has to decide the question and the decision of the tribunal is final. When such a question is covered under sub-section (1) of section 7, obviously the jurisdiction of the civil court stands excluded in view of specific bar contained in section 85. The apex court observed:

> It would be pertinent to mention that, as per Sub-section (5) of Section 7, if a suit or proceeding is already pending in a Civil Court before the commencement of the Act in question, then such proceedings before the Civil Court would continue and the Tribunal would not have any jurisdiction.

The court summed up the legal position after reading of sections 7 and 85 of the Haryana Waqf Act, 1995 as follows;

> i) In respect of the questions/disputes mentioned in Sub-section (1) of Section 7, exclusive jurisdiction vests with the tribunal, having jurisdiction in relation to such property.

(ii) Decision of the tribunal thereon is made final.

(iii) The jurisdiction of the Civil Court is barred in respect of any dispute/ question or other matter relating to any waqf, waqf property for other matter, which is required by or under this Act, to be determined by a tribunal

(iv) There is however an exception made under Section 7(5) viz., those matters which are already pending before the Civil Court, even if the subject matter is covered under Sub-section (1) of Section 6, the Civil Court would not continue and the tribunal shall have the jurisdiction to determine those matters.

The apex court, therefore, held that the suit was instituted in the year 2000, *i.e.* after the Waqf Act, 1985 came into force. Therefore, the case was not covered by exception to section 7(5) of the Waqf Act. Thus, a plain reading of section 7 read with section 85 of the Act, reveals that wherever there is a dispute regarding the nature of the property, namely whether the suit property is *waqf* property or not, it is the tribunal constituted under the Waqf Act which has the exclusive jurisdiction to decide the same. In this regard, various judgments of apex court were referred to.[157] The apex court did not find any fault with the view taken by the high court in its judgment and special leave petition was dismissed.

In *Babu* v.*Khudial Qayum*,[158] the question of adverse possession in waqf property was involved. In this case, a suit was filed by two plaintiffs, namely *Khuda Wand Tala Hayyu Qayyum* through its *mutawalli* and himself *Mutawalli.* The property in dispute was owned and possessed by Mohd. Rafiquddin, father of plaintiff-respondent no. 2. A waqf deed was executed and a lot of property owned by Mohd. Rafiquddin Khan was made waqf, of which possession was given to plaintiff no. 2 who was made *mutawalli* of the said waqf. Plaintiff no. 2 since then was managing waqf property as its *mutawalli.* Defendant, in an unauthorized manner, trespassed on the property in dispute. It was contended that since possession of defendant-appellant was wholly illegal and unauthorized, he should be dispossessed therefrom and vacant possession of property be handed over to the plaintiffs. The defendant be also restrained from interfering in any manner with property in dispute.

The trial court framed eight issues and relevant issues among them were 2, 3, 4 and 5. Issue no. 2 was whether the plaintiff no. 1 was not a juristic person; issue no. 3 was whether the plaintiff no. 1 was the owner of the suit property; issue no. 4 was whether the defendant had perfected his title by adverse possession and the issue no. 5 was whether the plaintiff no. 2 was not the *mutwalli* of the plaintiff no. 1? If so, its effects? The trial court held that the plaintiffs exhibited registered *waqf* deed, showing mention of property in dispute as a part of aforesaid *waqf*

157 See *Bhanwar Lal* v. *Rajasthan Board of Muslim Waqf* (2013) 11 SCALE 210*; Sardar Khan* v. *Syed Nazmul Hasan (Seth)*, 2007 (10) SCC 727*; Ramesh Gobindram (D) through L.Rs* v. *Sugra Hamayun Mirza Waqf*, 2010 (8) SCC 726*; Akkode Jumayath Palli Paripalana Committee* v. *P.V. Ibrahim Haji*, 2013 (9) SCALE 622.

158 2013(8) ADJ 259, 2014(1) ALJ 488., 2013 (99) ALR 123.

while defendant adduced no evidence to support his claim of ownership except pleading that he, and earlier, his brother, was in possession of property in dispute since very long time but in this regard also he could adduce no evidence All issues were decided in favour of plaintiff by trial court and the first appellate court dismissed the appeal and affirmed trial court's judgment.

On appeal, the High Court of Allahabad observed that creation of waqf was one of the most important branches of Islamic jurisprudence and for its maintenance and management; *mutawalli* is also an established fact and truth. The court observed that the person responsible for maintaining *waqf* can bring an action if the property of *waqf* was being taken away by a miscreant or trespasser, etc. On the question whether *waqf* was a legal person or not, no authority had been placed before the court taking a view in either way but in the context of a mosque, the issue had come up for consideration in some of the cases. The court referred the decision of Rajasthan High Court in *Mohamed Shafindeen* v. *Chatur Bhaj*,[159] where the court had held that mosque was not a juristic person.[160] However, it has been held in the matter relating to waqf that a suit can lawfully be brought by *mutawalli* or *shajjade-nashin*.

The high court further discussed the concepts of acquisitive possession and extinctive possession with the doctrine of limitation and prescription and also possession and ownership concept of adverse possession which contemplates a hostile possession, i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge of other's right and in fact denies the same. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, *i.e.* trustees, guardians, bailiffs or agents, such person cannot set up the plea of adverse possession. After a detailed discussion of *waqf* and *mutawalli*, the high court held that the plaintiffs/respondents could not be said to be in adverse possession and the suit was not maintainable since it was instituted through *mutawalli* and *mutawalli* himself was also one of the plaintiffs in his capacity as *mutawalli*. As to question no. 2, considering the fact that both the courts below had found that property in dispute was part of *waqf* property as was clearly discernible from the registered *waqf* deed, it could not be doubted that once a property becomes a waqf property, vested in Almighty God, it was the property of *waqf*, *i.e.* the God's property. In a very vague and cryptic manner, the plea of adverse possession had been taken in the written statement. The defendant himself was not aware as to against whom he or his ancestors, as claimed, were holding property in dispute as alleged hostile possession. The exact time was also not there. The understanding of defendant was that mere long period of time of possession, if pleaded, would satisfy the requirement of adverse possession, if above period was more than 12 years. This was apparently against the well established legal requirement. The court opined that there could be no manner of doubt that defendant-appellant had

159 AIR 1958 Raj LW 461.

160 A similar view was taken by Madras High Court in *Sunnath Jamath Mosque Committee, Puliampatti* v. *Land Administration Commissioner* which is also referred in this case.

not been able to make out the case of adverse possession, either in pleadings, or by evidence, or even otherwise. Therefore, the courts below rightly non-suited the defendant-appellant by rejecting his plea of maturing rights over property in dispute so as to confer upon him title on account of adverse possession.

As far as question no. 5 was concerned, the court was of the view that a bare reading of sub-section (5) of section 7 indicated that creation of forum of disputes regarding *waqf*s i.e. tribunal does not affect any pending suit or appeal. Tribunals were created under section 83 of Act of 1995 and such matters, which can be determined by Tribunal, the jurisdiction of civil court is barred by section 85. The court undoubtedly expressed its opinion that suit in question having been filed in 1974, was not barred by section 85 of the Act. The court further held that section 87 suggested that proceedings including suit, appeal, etc., if any, shall abate in respect of *waqf* which were not registered in accordance with provisions of Act and there was a complete bar for hearing and decision of legal proceedings of such *waqf*s. This section was not applicable for the reason that there was not even a whisper in the written statement that *waqf* in question was not a registered *waqf*. Further, the court found that issue regarding section 85 of Act had been set at rest by apex court in *Sardar Khan* v. *Syed Najmul Hasan*[161] which clinches the issue. It had been held there that provisions were prospective and did not apply to legal proceedings already pending before enforcement of Act.

In *T.A. Mohamed Moideen (died)* v. *T.A. Haja Hussain*,[162] the brief facts were that the property described in the schedule to the plaint was purchased by T.A. Assan Kader Rowther and his four sons, *viz.* defendants 1 to 3 and the deceased Abdul Jabbar registered in the office of the SRO, Coimbatore. The properties belonged to agricultural lands, which were in their joint possession and enjoyment. The defendants were managing the said properties after the death of the plaintiffs' father Abdul Jabbar. In fact, plaintiffs were minors at the time of death of their father. Taking undue advantage of the same, the defendants neglected the plaintiffs' right over the property and failed to allot their aliquot shares. The plaintiffs claimed 1/5th share in the said entire property purchased jointly. Therefore, they prayed for partition. Contrary to it, the defendants' filed the written statement stating that T.A. Assan Kader Rowther bequeathed in favour of the plaintiffs, land and building and, accordingly, they prayed for the dismissal of the suit.

The trial court dismissed the suit but the first appellate court reversed the judgment of the trial court. Consequently, the defendants went for second appeal.

The high court held that in the context of present facts and circumstances, the question of adverse possession did not arise in view of the decision of the apex court in *P.T. Munichikkanna Reddy*,[163] where it was held that adverse possession in one sense was based on the theory or presumption that the owner has abandoned

161 2007(10) SCC 727.

162 (2013)8MLJ116.

163 *P.T. Munichikkanna Reddy* v. *Revamma* AIR 2007 SC 1753.

the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.[164]

According to the court, to assess a claim of adverse possession, two pronged enquiry is required namely: (i). Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner is established. Successful application in this regard distances the title of the land from the paper-owner; and (ii). Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

The court also referred to *JA Pye (Oxford) Ltd.* v. *United Kingdom*,[165] wherein the European Court of Human Rights, while referring to the Court of Appeal judgment *JA Pye (Oxford) Ltd.* v. *Graham*,[166] had held:

> Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol.

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164 The court observed: Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

165 [2002] UKHL 30.

166 [2003] 1 AC 419.

The high court further referred to another case where it was observed that a peaceful, open and continuous possession as engraved in the maxim *nec vi, nec clam, nec precario* had been noticed by the court.[167] The court stressed on the question of intention as it would have appeared to the paper-owner. The issue was that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner. The court was of the view that according to articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit he had title and possession of the land, whereas in terms of articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. In this regard, the high court referred to the decision of same court in *S.M. Karim* v. *Bibi Sakina*[168] where it was held that adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

The court concluded its observation holding that the first appellate court being the last court of facts rendered its findings that the defendants, for the first time in their reply notice, asserted title adverse to the plaintiffs and well within twelve years thereafter, the suit itself was filed by the plaintiffs. Therefore, as discussed earlier, the enjoyment by some of the co-owners should be taken as enjoyment of all the co-owners and there was nothing to exemplify and demonstrate that there was ouster of the plaintiff's right. The court ordered that the suit was not barred by limitation and the mother who was not competent as per Muslim law to represent the minors, could not have legally transferred the suit property in favour of any one and for that matter even she had no competence to surrender the rights of the minor in favour of the defendants, who were the brothers of her deceased husband.

The court further emphasised an important point, *i.e*. in the 1/5th share in the deceased Abdul Jabbar's share, the mother of the plaintiffs' had 1/8th share as per Islamic law.[169] The fact remains that the deceased defendant left behind his children

167 See for example in *Karnataka Board of Waqf* v. *Govt. of India* 2004 (4) SCALE 856; (2004) 10 SCC 779 in which it was held that, Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

168 AIR 1964 SCC 1254.

169 *Supra* note 3 at 48-A.

along with his widow. As such, widow's normal share in this case was 1/8 of 1/5 of her husband's share in the suit property, and to that extent, the release would be binding on the plaintiffs and the plaintiff's cannot challenge that the mother had no right to release her 1/8th share in the 1/5th share of her deceased husband validly in favour of the other co-sharers and that too for consideration which she received. As such, what remains is that, out of the 1/5th share of Abdul Jabbar, the remaining 7/8th share would devolve upon the plaintiffs and they would be entitled to get partitioned their shares. The High Court left open this aspect.

The substantial question of law nos. 1 and 3 were decided to the effect that the question of pressing into service ouster did not arise in this case as the release deed executed by the mother on behalf of her minor sons' share had to be treated as *non-est* in the eyes of law and in the wake of the decision of the apex court in *P.T. Munichikkanna Reddy* v. *Revamma*[170] referred in judgment under comment. It cannot, in the facts and circumstances of this case, claim adverse right as against the plaintiffs. The substantial question of law no. 2 did not arise in view of lack of pleadings in the written statement. Accordingly, the second appeal was partly allowed.

The case of *The A.P. State Waqf Board, rep. by its Chief Executive officer* v. *G. Prakasha Reddy,*[171] related to *waqf* land in Kurnool district. The brief facts of the case were that on a revision petition, the A.P. State Waqf Board issued notices to the respondents under section 51 of the Waqf Act calling for explanation stating that the land in question situated at Sirugupuram Village, Halaharvi Mandal of Kurnool District was waqf land. The respondents submitted a detailed reply. The collector and district magistrate, Kurnool issued proceedings, calling upon the respondents to deliver possession of the said land. Aggrieved by the said proceedings, the respondents stated before the A.P. State Waqf Tribunal that respondent no. 1 and ancestors of respondent nos. 2 to 9 had purchased the land situated at Kurnool district under a registered sale deed. Prior to purchase, the 1st respondent and ancestors of other respondents were the tenants. From the date of purchase, they had become absolute owners and possessors of the land. It was also stated by the respondents that the said land was also mutated in the name of the respondents under the provisions of A.P. Rights in Land and Pattadar Pass Books Act, 1971 and the pattedar pass books were also in their favour. The revision was filed for declaration of title and recovery of possession against the respondents. The 1st respondent and the ancestral respondents contested the suit which was dismissed holding that the said land was not waqf land. Aggrieved by the same, revision petition was filed by the A.P. State Waqf Board.

The main issue to be decided by AP high court was whether the suit property was *waqf* property or not. The disputed property was shown as waqf property in the A.P. official *gazette* and no suit had been filed challenging the waqf property, the entries in the official *gazette* describing the property as waqf became final and

170 *Supra* note 163.

171 2013(6) ALD 506.

conclusive. Under section 3 of the Inams Act, tahsildar may *suo motu* make an enquiry for the purpose of grant of *patta* on three points, one of them being, whether *inam* land was held by any institution. The high court held that the finding of the tahsildar that the property was not waqf was wholly erroneous and beyond his jurisdiction. Consequently, the finding of the tahsildar did not constitute *res judicata* in the subsequent suit filed by the waqf board. The court observed:[172]

> It is well settled that if a decision of a court or a tribunal is without jurisdiction, such a decision or finding cannot operate as *res judicata* in any subsequent proceedings. The plea of *res judicata* presupposes that there is inexistence a decree or judgment which is legal but when the judgment is *non est* in law, no plea of *res judicata* can be founded on such a judgment.

The court, after finding that the property was a service inam granted to individuals burdened with service, which answered the description of all the ingredients of *waqf*, the tahsildar under section 3 of the Inams Act was not required to adjudicate as to whether it was a waqf property or not. Thus his decision holding that the property was not a waqf property was not within his domain and the decision could not be said to have been passed under the Inams Act. The high court referred *M. Nagabhushana*,[173] in which it was held:

> The principles of *Res Judicata* are of universal application as it is based on two age old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.

The court was of the view that the plea of *res judicata* was not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. It seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of access to the court for agitating issues which have become final between the parties. The court further referred to *Vithal Yeshwant Jatha*,[174] where it was held "that it is well settled that if the final decision in a, matter at issue between the parties is based by a Court on its decisions on more than one point each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as *res judicata* between the parties." The court finally stressed that the above judgment squarely applied to the facts of the present case. The waqf tribunal relied on judgments and came to correct conclusion and the court did not find any error in the order of the Tribunal. The revision petition was dismissed.

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172 *Id.* at 509.

173 *M. Nagabhushana* v. *State of Karnataka* (2011) 3 SCC 408.

174 *Vithal Yeshwant Jatha* v. *Shikandarkhan Makhtu*mkhan, AIR 1963 SC 385.

IV CONCLUSION

The foregoing discussion reveals that judicial trend in Muslim law is sometimes creating confusion rather than providing clarity in certain areas. There is lack of uniformity in the judicial decisions on almost all the subjects covered under survey, barring few exceptions. Few judgments describe the law in one way while other judgments describe the law in another way on the same subject. In many cases relating to law of status and law of property, the exposition of law seems inadequate and full of inconsistency. Illustratively, in some cases, guardianship and custody of child, which are two different aspects of Muslim law, have been mixed together. *Hizanat* (custody of child) is a peculiar system of Islamic law according to which mother and some other female relatives have a right to be custody of child. According to the list furnished in the books of the Islamic jurisprudence, they are entitled to have the custody of child in the case of boy, till seven years of age and in the case of girl, till her marriage. At the same time, father and some other male relations would be guardian who has to maintain the child though the child is residing with her mother or any woman relative under her custody.

Some judgments under survey highlight that courts could not distinguish between the *wilayat* (guardianship) and *hizanat* (custody of child) which is a peculiar feature of Islamic Law. However, some judges harmoniously construed the two different provisions of Muslim law and they have successfully made a balance between the welfare of the child and the Islamic law.

Similarly, some decisions relating to maintenance of daughter also create confusion. As far as maintenance of daughter is concerned, the decisions show that father is responsible to maintain his daughter till majority. However, Islamic law clearly states that every unmarried daughter even after attaining majority is entitled to get maintenance from her father**.** On the other hand, some decisions provide clarity on the subject as they have interpreted the law within the parameters of Islamic law, with clear vision.[175] In a case pertaining to maintenance of daughter, however, the court's view appears to be confusing and does not accord with the principles of Islamic law.[176] It is held the daughters are entitled to maintenance till the age of majority while Islamic law imposes the liability on the father to maintain his daughters till their marriage. It is observed that the Islamic law on the maintenance of daughter is not settled. Though Hindu Law should not be applied in case of Muslims but the poor girl cannot be left on the mercy of others. The Islamic legal treatises are replete with the provisions of maintenance of daughters and the precedents are already found in this regard. One such illustration is found in the present survey also.[177]

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175 *Supra* note 34.

176 *Ibid.*

177 *Supra* note 44.

As far as maintenance of divorcee is concerned, the survey on the basis of the above cases reveals a different story. Instead of deciding the cases under one legal regime, the dual legal regime of Cr PC and Muslim Women Right to Divorce Act have been applied simultaneously and in this way the game of Ice Pice has been continuing since the enactment of new legislation of 1986. Some judgments relied on Cr PC and the rest on the Act of 1986. The interesting thing is that when the party exhausted one remedy in the same case it is further allowed to avail another remedy and from the high courts to the Supreme Court, no consistency and uniformity is found in the decisions. Even in a case when the wife had exhausted all the remedies including the one under the Act of 1986 through fair provision, wife was allowed to avail the remedy under Cr PC again and the request of the husband, that the amount already paid by him should at least be deducted from the amount payable to her now, was turned down.[178] Though the intention of the legislature is clear and *Danial Latifi*[179]judgment puts the stamp on its constitutional validity, why the judges are not allowing the parties to exhaust the remedy under this law and still allow the remedy under Cr PC. It is astonishing as to why the courts allow dual regime and increase burden on court which are already over burdened.

It is respectfully submitted that Islamic law does not allow polygamy as of right; it is an exception; it is allowed subject to conditions such as equal treatment including love and affection amongst all wives irrespective of their socio-economic status. In one case, the court observed that a Muslim is permitted to marry with four women without any restriction.[180] Leaving aside the study of books and sources of Islamic law, had the learned judges read the judgments of judges such as Krishna Iyer, Behrul Islam and Basant, they would not have made such sweeping remarks.

Similarly, sometimes the courts seem blank about the nature of Islamic law on the dissolution of marriage under Muslim Law. Thus, in one case,[181] it was observed that the wife's right to divorce is not subjected to independent right like man's right to *talaq* contrary to what was observed by Krishna Iyer J in *Yousuf* v. *Swarrommaa*.[182] The learned judge did not take the pain to consult a leading judgment of Pakistan Supreme court about right to *khula* (wife's right to divorce) in *Khurshid Bibi*[183] to acquaint himself with the correct position of law on the subject.

The law of puberty in Islam has been correctly interpreted by the courts and the right of a daughter to choose life partner of her choice despite opposition of her parents have been recognized and protected by the court.[184] Similarly, the law of adoption is also decided under the established parameters of Islamic law.

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178 *Supra* note 27.
179 *Supra* note 18.
180 *Supra* note 41.
181 *Supra* note 11.
182 *Supra* note 1.
183 *Supra* note 8.
184 *Supra* note 2.

In so far as the law of property is concerned, it may be admitted that the decisions discussed in the present survey have indicated clarity about the law of property in Islam. Whether it is the law of gift, will and or inheritance, the courts look well informed about the proposition of Islamic law, for instance in one case oral gift was interpreted by profusely quoting from the sources of Islamic law and upheld its validity without any restriction like registration, *etc*. as provided in TPA and the Registration Act. It is a different matter that the court could not arrive at the conclusion that the oral gift fulfills all the essential requirements of *hiba* and it did not uphold the validity of such type of gift.[185] But the understanding of the judges is clear about the law on the subject. Similarly, the judicial trend in this survey explains the law of will in its true spirit which is limited up to 1/3 of total property and in favour of a heir even this 1/3rd is not permitted without permission of other heirs. The significant part of this survey is that the judiciary rejected the plea of fake will and adoption with an intention to deprive a woman to her share in inheritance. The feudal lords under the leadership of Mohd. Ali Jinnah attacked on the citadel of inheritance in order to exploit the woman which is contrary to Shariat. Though the Islamic law of inheritance is little complex and comprises of various categories of heirs, the division of property and calculation of shares is little difficult task but the survey shows that the judges divided the shares among heirs accurately as sharer and residuary. The judges have done really commendable job and the judgment in this regard must be applauded.

The nature of *waqf* and its administration find place in this survey. While interpreting various aspects in this regard, the courts have beautifully interpreted the law of *waqf* and tried to maintain the wealth of a community which is economically very backward. The judicial trend also emphasized gender equality in the administration of *waqf*. In one case of *waqf al-al-aulad* (family *waqf*) discussed in this survey, it was highlighted that the *waqf* property beneficiary can be a woman and it can be administered by a daughter.

The problem of different interpretation of Muslim law in the survey also lies due to lack of any codified law of Islam in India. If a codification of Muslim personal law on the lines of Muslim countries is initiated by the Indian *ulema* and the law is codified, the problem of confusion and conflict of judicial interpretation would automatically be resolved. At the same time, the women will get their due under true law of Islam which she has unfortunately not been getting. Muslim law relating to woman as Krishna Iyar J had rightly pointed out would indeed become superb law of the land to ameliorate the condition of women and they may become torch bearers for their non-Muslim sisters also.

185 *Supra* note 70.