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MUSLIM LAW

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I INTRODUCTION

MUSLIM LAW in India has been vigorously debated and on certain vital issues this debate has reached the apex court of India, for instance the issue of triple *talaq*. It reminds me of a speech given by Upendra Baxi on the 100th anniversary of the great scholar A.A.A Fyzee. In this speech he remembered Fyzee for his scholarship and his prudence. But as far as the controversy of Muslim law reform is concerned, he in inimitable style rightly described the same as "politics of Muslim law reform" as both who are in favour or alternatively in opposition, know nothing about the real position. In this regard, he mentioned folklore and said:[1]

> The first element of the folklore refers to the idea that Islam is a conservative religion and thus pre modern and anti rational. Given this image, the second element of the folklore maintains that the Indian politicians are moved by narrow political considerations especially of electoral gains, in mantaining status quo, any reform measures would so affect religious sensibilities as be pernicious to the future viability of ruling coalitions. The third element of folklore has been assiduously propagated by friends like Fyzee, who are often referred to as modernists or progressives. They attribute stalemate on reform to the incorrigible obscurantism of the leaders of the orthodox or conservative Muslim opinion. A fourth element is provided by the morally offensive propaganda, even at the hands of many senior politicians in India, which wants us to believe that Indian Muslims do not wish the reform of their marriage law because the institution of polygamy is vital to them in their planned strategy to achieve, in course of decades, numerical superiority over the Hindus in India.

This surveyor finds that the decisions of Muslim law fall in the same quandary about which Baxi has spoken above. No serious debate is being initiated to deal with

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1 Upendra Baxi, "Islamization and Politics of Law Reform", 1 *ICLQ* 318-324 (1981).

those aspects of Muslim law which are indeed creating some problems for women and the strategy to be adopted for that. The proponents of reform do not even try to understand the nuances of Muslim law in totality. Islamic law in fact is a jurist made law and not judge made law. However, law had never been rigid and Islamic jurists according to the needs of time, modified the earlier position as per the Islamic principles. The major component of Muslim law has been overhauled during the recent past by jurists who are still bringing modifications in it according to the procedure prescribed in the jurisprudence itself, known as *takhyar* (eclectic choice) and *talfiq* (the derivation of rules from material of various schools of Islamic law). It may be noted that since it is not a judge-made law, therefore, the judges cannot do so. In India too there were many jurists in early 20th century who brought a revolution in the women's right to divorce through their juristic verdicts following the doctrine of *takhyar*. For example, the Dissolution of Muslim Marriages Act, 1939 was a very innovative legislation and a major change in the Indian law for Muslims. Those who brought this change actually wanted women to get rid of their undesired husbands and that is why they had to launch a movement for social reform before the legislation. Distinct from politics, their objective was to ameliorate the position of women and not merely to raise the slogan of political reform. Their thoughts, which are scattered in literature on the subject, especially in Urdu language, have the potential for further and fuller reform of Muslim law in India.

In this survey, the surveyor noted, Islam is misunderstood by most members of the Indian bar and bench, barring a few exceptions like Krishna Iyer, Behrul Islam and Basant JJ and their fellow brothers on the bench who did try to understand the Islamic law from its original sources and interpreted it according to its true spirit. In general, we find a pitiable state where the judgments are delivered without going through any elementary books of Muslim law on the subject. This survey comprises of law relating to status and property; cases are reported on marriage, divorce, maintenance, guardianship, custody of child and some other issues relating to status. Similarly significant issues on property law also form a part of this survey. For example, gift, will and *wakf etc*. One case on more peculiar aspect of Muslim law of property *Shufa* (pre-emption) has also been reported. Unfortunately, given the ignorance of our judges, some cases relating to dowry are also reported under the corpus of Muslim law even when dowry does not have even a distant relation with the Muslim law. Around 70 cases have been reported on different subjects relating to Muslim law which are discussed hereunder.

II LAW RELATING TO STATUS

***Nikah* (Marriage)**

It is a popular fallacy that marriage is a civil contract (for example it is compared to the Contract Act, 1972) and Muslim marriage is nothing but proposal, acceptance and consideration. In reality Muslim marriage has three essential ingredients: *ijaab* (consent of daughter), *qubul* (acceptance by the man) and *mehr* (dower) which is literally translated as consideration. Apart from the material needs of the parties, marriage is also treated as a form of *ibbadat* (half worship) in Islam. It may be an

agreement but it is a sacramental contract and to maintain this, the Holy Quran and the Prophet's saying are replete containing directions to ensure harmonious relationships between the parties. The parties' well wisher and even the state are directed not to leave any stone unturned to assist the marital ties. Also, being tolerant is prescribed beyond expectations. Parties are asked *libas* of each other, meaning their relationship is not only material but also spiritual; that is why their secrets should not be disclosed to anyone, not even to the court or the *qadi*. The daughter in Islam is given full liberty to select a life partner of her own choice and after marriage the parties are encouraged to live separately so that they can understand each other in a better way. In this background how can we say that the marriage under Muslim law is nothing but a civil contract?

In *Salma* v. *State of U.P.*,[2] the issues of genuineness of the marriage certificate issued by the *qadi* and marriageable age of the petitioners were discussed. The petitioners asked for police protection to avoid any interference in their peaceful married life. The court granted them the relief of police protection on the condition that they apply for registration of their marriage as per Uttar Pradesh Hindu Marriage Registration Rules, 1973 or the Special Marriage Act, 1954 within a period of one month, failing which the protection granted shall automatically cease to operate.

This surveyor could not understand the logic or even trace the law where *nikah* is not under the domain of *qadi* and how it should be registered under the Hindu Marriage Registration Rules where the parties must be Hindu. The *qadi* and his register for the record of the court are recognised throughout the country since a long time. Whether it has any legal sanctity or not may be open to separate debate but how can *nikah* be registered under the legislations mentioned by the judge of the high court is not clear. Of course, the registration of *nikah* must be provided by the legislature as it is in the interest of the parties and it is something that Supreme Court also has insisted for. The surveyor also appreciates the stand of the Supreme Court but this judgment *prima facie* seems perverse.

Bigamy

In *Khursheed Ahmad Khan* v. *State of U.P.*,[3] the long standing controversy of bigamous marriage among Muslims in India, once again appeared before the apex court. An appeal was filed in the Supreme Court against the final judgment and order of the High Court of Judicature at Allahabad. The appellant had filed a writ petition in the high court challenging the order dated June 17, 2008 removing the appellant from service for the misconduct of contracting another marriage during the existence of first marriage without permission of the government and in violation of rule 29(1) of the Uttar Pradesh Government Servant's Conduct Rules, 1956. The high court upheld the finding of the disciplinary authority and dismissed the petition. Aggrieved petitioner filed the appeal before the Supreme Court. The case was decided by the division bench of the Supreme Court. The appellant has raised the question of validity

2 2016(1) ADJ 448.

3 2015(2) SCALE 229.

of the impugned conduct rules as being violative of article 25 of the Constitution, since the Muslim personal law permits a man to have as many as four wives.

Keeping in view the facts and circumstances, the apex court upheld the high court's decision. The issue deliberated was: whether bigamy under Muslim law is a rule as well as part of religion and therefore withholding its permission is contrary to article 25 of the Constitution, *i.e*., freedom of religion. The court observed that it may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or a person belonging to any community or religion to procreate as many children as he likes but no religion in India dictates or mandates bigamy, polygamy or bearing more than one child as a mandate. What is permitted or prohibited by a religion does not in itself become a religious practice or a positive tenet of the religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice that is followed by a community or group of people. The same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform. This is what the impugned legislation does.

Accordingly, the court decided that the conduct rules do not in any manner violate article 25 of the Constitution. It is astonishing that the court debated on religion and faith which was clearly not needed in the present case. They should have decided the case according to the law of the land and in a socio-welfare spirit, like Krishna Iyer J who used to adopt this practice at many places. In a judgment he observed:[4]

> Religion is not amenable to reason and theological disputes cannot be decided by secular courts. So my duty is as embarrassing as my jurisdiction is limited. Even so, the laws of the land lay down norms of conduct and bind divine and commoners alike. The Indian Penal Code which prohibits bigamy cannot be evaded by pleading Islam unless founded on some exemption recognized by the law.

However, as far as bigamy is concerned the Islamic law itself does not recognise it. It is sufficient to reproduce the true law on bigamous marriage, as Krishna Iyer J pronounced:[5]

> The Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognized the difficulty of treating two or more wives with equal justice, and in such a situation, directed that an individual should have only one wife. In short the Koran enjoined monogamy upon Muslims and departure there from is an exception.

4 *S.I. Koya Thangal* v. *Ahammed Koya,* 1971 KLT 68.

5 *Shahulameeda* v. *Subaida Beevi,* 1970 KLT 4.

> This is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted.

After the above explanation of Islamic law on bigamous marriage and its application in Muslim countries nothing further remains to be explained. Even then it may be respectfully submitted that many socio-legal problems can be resolved with the help of far-sightedness as Krishna Iyer J had done. To decide a simple problem where established law on the subject can be found in the existing judicial precedents, it is not desirable to open many fronts in the same judgment.

In *Venugopal K*. v. *Union of India*,[6] the High Court of Kerala encountered the issue that whether section 494 of the IPC discriminates among offenders belonging to different religions. This writ petition which sought a direction to register cases under section 494 against citizens who commit the offence of bigamy, irrespective of their personal law. The court while dismissing the writ application held that section 494 does not discriminate between an offender belonging to Hindu/Muslim/Christian faith. Any male or female belonging to any religion, caste or creed can be proceeded with under section 494 of the IPC, provided ingredients of section 494 are met out.

In the view of the High Court of Kerala, where a Muslim male marries a fifth wife, he can very well be prosecuted under section 494 of the IPC since the fifth marriage will be void (personal law permits only four wives). Similarly, a Muslim female contracting a second marriage can be proceeded under section 494 of the IPC.

Child marriage / puberty

The High Court of Madhya Pradesh in *Abdul Khader* v. *K. Pechiammal*,[7] dismissed a criminal revision which claimed legality of marriage of Muslim girl upon puberty on the premise that such a practice has obtained legislative backing under the Shariat Act, 1937. The court held that such a practice would run counter to the objectives of Prohibition of Child Marriage Act, 2006. In *Rahul Amin Shek* v. *The State of West Bengal* a petition of *habeas corpus* sought production of missing girl (who appeared with her husband in the court) and attempted to detertermine whether the mariage between the parties was proper in the eyes of law (both were juveniles admittedly on the age of mariage) The custody of the girl was also sought as relief. The court held that the marriage is valid in the eyes of the law observing that a Muslim boy or girl who has attained puberty is at liberty to marry anyone he/she likes and it is a valid marriage.

In *M. Mohamed Abbas* v. *The Chief Secretary, Govt. of Tamil Nadu*,[9] a writ petition was filed to stop the respondents from interfering with the marriage solemnized

6 ILR 2015(2) Ker 197: 2015(1) KLT 838.
7 2015(2) MLJ (Cri) 210 F.
8 (2015)4CALLT168(HC)
9 [(2015) 6 MLJ 49]

according to Muslim personal law through the invocation of the provisions of Prohibition of Child Marriage Act 2006. The high court dismissing the petition held that the provisions of Prohibition of Child Marriage Act, 2006 are in no way against the religious rights guaranteed under articles 25 and 29 of the Constitution. In fact, the same is in favour of all the girl children so that they get proper education and equal status as that of men, as guaranteed under articles 14, 15, 16 and 21 of the Constitution.

State v. *Raheem*,[10] is another case of a missing girl who disappeared with her lover and a case for abduction and rape was filed by the father. Later, the girl also supported the testimony of the father. This trend is witnessed in a number of cases. However, the trial court on examining the evidence dismissed the case of the prosecution which was later upheld by the appellate courts.

It may be mentioned that the Islamic law of puberty and Prohibition of Child Marriage Act, 2006 are not in contradiction with each other and the concept of puberty is already borrowed in other legal systems from the Muslim law. Then why the court strictly adhered to the exact age of 18 years. Certainly welfare of the parties is to be considered in the concept of puberty itself. The judgments therefore seem to be in agreement with the prevalent Muslim law in India. It is also not in the interest of the major couples to decide their own fate for their future life.

***Mehr* (dower)**

It is an incorrect view that under Islamic law there is deferred dower which may either be paid at the time of divorce or at the death of husband. Dower should be paid immediately after marriage. Deferred dower (*mehr muajjal*) is an exception and not the law. The Prophet said, "no Dower, no marriage." If a person is so economically weak that he is unable to manage his sustenance and is not in a position to pay immediately, then the marriage should not be postponed, in that case as soon as he becomes capable of paying dower it should be paid. This is known as *mehr muajjal*.

In *Beena* v. *B. Mohammed Khan*,[11] the revision petition was filed under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the same was rejected by the court of judicial magistrate first class, Thiruvananthpuram. The present revision petition was filed to challenge the order whereby only maintenance was fixed but the petitioner was denied the dower and other amounts which were paid to the respondent at the time of marriage. The issue before the High Court of Kerala was whether the petitioner was entitled to get dower and was maintenance adequate. The court allowed the revision petition in part and modified the order of the lower court setting aside the rejection of the claim for *mehr*. The order of the court was modified stating that the respondent was held liable to pay the prompt dower which had not been paid to the revision petitioner. The revision petitioner was held entitled

10 MANU/DE/1822/2015.

11 MANU/KE/0014/2015.

to Rs. 7,20,000/- as fair and reasonable provision instead of four lakhs fixed by the court below. It relied upon *Hussain Punathil* v. *Fathima*,[12] where it was observed that the amount must be fixed considering the status of the parties, period during which they have lived together, possibility of remarriage, their age and their status *etc*. It is a popular fallacy that dower is always deferred and not prompt. This misunderstanding is aptly removed by the court in this case.

It also referred to *Bibi Rehana Khatun* v. *Iqtidar Uddin Hasan*,[13] where the High Court of Allahabad held that prompt dower may be realised by the wife at any time before or after consummation. Proof of connubial intercourse between the parties is not necessary for the payment. It also mentioned the case of *Nawab Mirza Mohammed Sadiq Ali Khan* v. *Nawab Fakr Jahan Begam*,[14] where the Privy Council held that various amounts paid by the husband to the wife during the subsistence of marriage should not be presumed to have been paid in lieu of dower, if it is not proved that the dower agreed was paid at the time of marriage, either as a prompt dower or deferred dower.

The court also relied upon *Mst. Manihar Bibi* v. *Rakha Singh*,[15] where it was held that there is no authority for the view that the deferred dower agreed to be paid on death or divorce becomes prompt if demanded by the wife during the continuance of the marriage. On the basis of the precedent cited above the High Court of Allahabad concluded that prompt dower may be realised by the wife at any time before or after consummation. Proof of connubial intercourse between the parties is not necessary for the payment. The judgment is in total conformity with the Muslim law of dower.

***Talaq* (Divorce)**

It is a popular fallacy that a man has unbridled powers of divorce and he can exercise it at his caprice and whims. This wrong view is unfortunately given by British judges, writers like Mulla[16] and McNaughten[17] *etc*., who had never read an elementary book of Islamic law even in Urdu, leave alone Arabic. At the same time, the contribution of our ill-educated moulvis to this presumption cannot be overlooked who without any sufficient knowledge of *fiqh* (Islamic jurisprudence) give *fatwas* from small mosques on this issue. The Quranic law of divorce is very rational which

12 ILR 2013 (1) Ker 975.

13 AIR1943 All 184.

14 AIR 1932 PC 13.

15 AIR 1954 Mani 1.

16 Mulla announces, "any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he so desires without assigning any cause".D.F Mulla, *Principles of Mahomedan Law* 389 (2014).

17 McNaughten declared, "there is no excuse or any particular cause for divorce, mere whim is sufficient."

is recognised by Krishna Iyer J in ***Yousuf*** v. ***Suramma***[18]; totally contrary to the prevalent mode of divorce in the Indian Muslim society.

In *Husna Parveen* v. *Rashid Ahmad*,[19] the facts of the case were that the wife was depriving the husband from her matrimonial obligations, *etc.*, by staying at her parent's residence and away from her husband. The husband requested the wife to come back failing which she could treat herself to have been divorced. Since the wife did not return, another notice was served upon her by the husband that she has been divorced and is no more his wife. Thereafter, the husband filed a matrimonial case in family court, seeking a declaration that she is no more his wife having already been divorced and that she must be restrained from representing herself as such. The wife approached the trial court and the court made a finding in favour of the husband. Therefore, the case reached the high court which held that it cannot be said that divorce in the case has been granted by husband without any reasonable cause. Hence, the appeal was dismissed finding no justification to interfere with the judgment of the trial court.

In *Ashiyabegum* v. *Khayyum*,[20] the issue before the High Court of Bombay was that whether the divorce pronounced by the husband was according to all the requirements mentioned under the law. Since requirements of Quranic law of *talaq i.e.*, arbitration, conciliation and then prononcement of single divorce within specific time and then its revocation were not fulfilled in triple *talaq*, therefore according to the high court, the lower court committed a serious mistake in recording the finding that husband had given *talaq* to his wife. Therefore, the order passed by both the courts below holding that wife was entitled for maintenance from the date of application till the date of divorce was quashed and set aside, and the petition was allowed.

In *M. Mohamed Ibrahim* v. *M. Inul Marliya*,[21] the issue was whether sending of notices alone can be construed as amounting to *talaq*. The High Court of Madras referred to the judgment of the Supreme Court in the case of *Shamim Ara* v. *State of U.P.*,[22] where the conditions to be followed / proved for the purpose of proving triple-*talaq* were mentioned. It was observed that according to Quran, *talaq* must be given for a reasonable cause and it must be preceded by attempts at reconciliation between the husband and the wife.[23]

The court further referred to *Rukia Khatun's* case,[24] where the division bench of High Court of Gauhati stated that the correct law of *talaq*, as ordained by Holy Quran, is: (i) '*talaq*' must be for a reasonable cause; and (ii) it must be preceded by an

18 AIR 1971 Ker 261
19 MANU/UP/2668/2015
20 2015(4)BomCR(Cri)334.
21 MANU/TN/3111/2015
22 AIR 2002 SCW 4162.
23 Quran-IV:35.
24 2014(3) GLD 574 (Gau).

attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, then '*talaq*' may be effected.

Finally, after referring to the above judgments, the Madras High Court held that the evidence available did not show that there is valid *talaq*. Neither there was any evidence to show that there had been a reasonable cause nor was the *talaq* preceded by attempts for reconciliation.

It may be mentioned that the court has rightly explained the true procedure of *talaq* under Islam and in accordance with the Quranic injunctions. However, it may be noted that this exercise can neither be done by the courts nor on an isolated basis. Unfortunately, *talaq-ul-biddat* is prevalent among all the followers of *sunni* schools in India and therefore the only solution is that the Muslim jurists on a collective basis, after mobilising the public opinion, on the lines of Dissolution of Muslim Marriages Act, 1939 issue *a fatwa* regarding ineffectiveness of such type of *talaq* or treat it as single revocable divorce. Then only the problem can be resolved. Of course, this is the urgent need of the time and it is in the interest of Muslim women in India. Muslim jurists like Mavlana Ashraf Ali Thanavi must come forward to relieve women from victimisation.[25]

***Tabaiyana* (Adoption)**

Adoption is totally unknown under Islamic law; however, the Prophet of Islam was very much inclined toward the protection of orphans and their upbringing. That is why *kafala* system was itself introduced by Islamic law. The purpose of Juvenile Justice Act, 2000 in this regard is nothing but in consonance with the *kafala* system. But the changing of paternity or lineage is not admitted in Islam and is not a proper consideration to help the unattended children. Islam therefore, without any consideration, imposes responsibility on every affluent Muslim that he should protect the minor orphans like his own children. Prophet Mohammad says that even a person should not kiss his child in the presence of an orphan child or kiss both of them so that the orphan child is not disheartened. What more is required for the protection of orphan children than what is prescribed under Islamic law.

In *Jamir Sayed Saifoddin* v. *the Chief Officer, The Municipal Council, Jalna*,[26] the issue was whether the order of cancellation of compassionate appointment of the petitioner who was as adopted son, valid. The High Court of Bombay dismissed the petition and upheld the decision of the labour court and the industrial court holding that since Muslim law does not recognize adoption, it is evident that adopted son of a Muslim could not be recognised as the adopted son for compassionate appointment.

25 For details see, Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Socio-legal Aspects* (Regency Publications, Delhi, 1994).

26 2015(147) FLR 1005.

In this regard the court referred to *Md. Amin* v. *State of Bihar,*[27] where the High Court of Patna rejected the claim of the petitioner to be appointed on compassionate ground. The petitioner's claim, that he was the adopted son of the deceased constable Md. Kasim, was outrightly rejected by the court as Muslim law does not recognise adoption as a mode of sonship. In Muslim law the adopted son is not recognized unless proved in view of certain customs, if any, as per section 3 Shariat Act of 1937.

In *Mst. Bivi through L. Rs*. v. *Syed Ali,*[28] the single judge held that the adoption is not known to Muslim law, however, by virtue of custom, Muslims may also have the system of adoption, and that a Muslim, who alleges that by custom he is subject of adoption, must prove such custom and adoption. The court further noted that under Muslim personal law, Muslims may also have the system of adoption, if there exists any custom in this regards, and that a Muslim, who alleges that, by custom he is subject to a system of adoption, must prove such a custom and adoption.

In *Shaikh Jamir Sayed Saifoddin* v. *Chief Officer, The municipal Council,*[29] the brief facts were that Shri Sayed Saifoddin Yusufoddin was working as a fireman in the fire brigade division. Since he was suffering from tuberculosis, he stood medically retired on account of being unfit due to health reasons. An application was filed by the adopted son along with a notarised adoption deed, thereby projecting himself to be the adopted son of Sayed Saifoddin.

The High Court of Bombay held that since adoption is not recognized under Muslim law, therefore the cancellation of the adopted son's appointment on compassionate ground, cannot be faulted. The court referred to Mulla who says that "the Mahomedan law does not recognize adoption as a mode of filiation."[30] The court further held that in the Muslim law the adopted son is not recognised unless proved in view of certain customs, if any.

It may be mentioned that in all of the above decisions, Muslim law is narrowly interpreted, not in its spirit but letter only. However, as this surveyor mentioned above that though the adopted son cannot acquire the status of natural son under Islamic law (and therefore he cannot exclude or deprive natural heir), Islam emphasises the *kifalat* (maintenance) of orphaned children. What was wrong in letting these adopted children remain in the employment on compassionate ground in a socio-welfare state? It would not be against the Islamic law as it was not the case of inheritance. If someone looks after a boy or girl through his service income as a son/daughter, he should be entitled to get the employment on compassionate grounds as the Indian state is a secular state and not an Islamic state where the state is legally responsible to maintain these children as well.

27 2012 LAWS (Pat) 54.

28 [1997 (1) RLR 757]:

29 2016(5) ALL MR 310.

30 D.F. Mulla, *Principles of Mahomedan Law* 430 (Updated 20th Edition, 2014).

***Nafqa (*Maintenance)**

Under the Muslim personal law, maintenance is termed as *nafqa*, which literally means "what a person spends over his family", and shall include all those things which are necessary to the support of life such as food, clothing and lodging. It is a mandatory provision in Quran that a husband is bound to maintain his wife, children and parents. Holy Quran says that, "[a]nd for the divorced women, (is) a provision in a fair manner - a duty upon the righteous".[31]

The most popular case relating to this issue was *Md. Ahmed Khan* v. *Shah Bano Begum.*[32] The brief facts of the case were that Shah Bano begum was married to an affluent lawyer Mohd. Ahmad Khan in the year 1932. There was a matrimonial dispute, which resulted into irrevocable *talaq* by the husband in 1978. The husband paid maintenance to Shah Bano at the rate of Rs. 200 per month for about two years and deposited a sum of Rs. 3000 in the court by way of dower during the period the of *iddat*. Aggrieved by the meagre amount, Shah Bano filed a suit. The husband contended that he is only required to pay maintenance till *iddat* period and no more as per Muslim personal law and section 127(3)(b) of Code of Criminal Procedure, 1973. Thereby, Shah Bano Begum filed maintenance proceedings under section 125 of Cr PC. The main issue raised was whether the payment of *mehr* and the amount of maintenance paid till *iddat* period would absolve the husband from his duty of maintaining his wife beyond *iddat* period?

The two precedents where the court had ordered maintenance for wife even beyond *iddat* period were *Bai Tahira* v. *Ali Hussain*[33] and *Fuzluni* v. *K. Khader Cali*[34]. The five-judge bench[35] of the Supreme Court held that if the divorced Muslim woman is unable to maintain herself after the *iddat* period, maintenance may be ordered under section 125 of the Cr PC. in spite of *mehr* and maintenance being paid during *iddat*.

The aftermath of this judgment led to a political reaction. An uproar was caused by the representatives of Muslim community treating this decision as interference in their personal law. Later, Indian legislature passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. The provided: (i) a reasonable and fair provision and maintenance within the *iddat* period (ii) maintenance for children (iii) amount of *mehar* (iv) all properties given at or after marriage.

The above legislation negated the effect of Shah Bano judgment. The position post 1986 Act can be inferred from *Danial Latifi* v. *Union of India*[36], where the

31 Quran II:241

32 (1985) 2 SCC 556.

33 AIR 1979 SC 362.

34 AIR 1980 SC 1730.

35 Comprising Y.V. Chandrachud CJI and D.A. Desai, O. Chinnappa Reddy, E.S. Venkataramiah, Rangnath Misra JJ.

36 AIR 2001 SCW 3932.

constitutional validity of the act was challenged before the Supreme Court. The court declared the act *intra vires* while it reinterpreted section 3 of the act. While upholding the validity of the act, the constitutional bench of the apex court, concluded:[37]

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

This judgment has been reiterated in number of cases.[38] In *Shamima Farooqui* v. *Shahid Khan*,[39] once again within a year a case pertaining to Muslim law of maintenance was taken into account by a division bench of apex court comprising of Dipak Misra and Prafulla C. Pant JJ. In this case, the appellant and respondent were married on April 26, 1992. The wife was suffering with cruelty and torture by the husband regarding demands of dowry. To begin with the wife tried to compromise in order to continue the bond of marriage but due to constant atrocities she had no option but to quit the husband's house and live with her parents. The husband was not providing any maintenance to the wife and children and therefore she filed a case in the Family Court under section 125 of the CrPC for grant of maintenance. While the application was pending, divorce between the parties took place on June 18, 1997. During the proceedings, family judge did not accept the objection of the husband regarding maintainability under section 125 of Cr PC as the appellant was a Muslim woman and held that even after the divorce the application of the wife under the same section was maintainable. Thereafter, the family court on various considerations disposed the application of the wife by awarding her maintenance of Rs 25000/- per month as maintenance allowance from the date of submission of application till the date of judgment and thereafter Rs. 4000/- per month from the date of judgment till the date of marriage. The order of the family judge was challenged before the high court in criminal revision where high court considered the fact that the husband had retired and consequently it reduced the maintenance allowance to Rs. 2000/- from

37 *Id.,* para 37.

38 *Iqbal Bano* v. *State of U.P.* (2007) 6 SCC 785; *Sabra Shamim* v. *Maqsood Ansari* (2004) 9 SCC; *Shabana Bano* v. *Imran Khan* (2009) 14 SCALE 331; *Shamim Bano* v. *Asraf Khan* (2014) 2 ACR 1857; *Shamima Farooqui* v. *Shahid Khan* (2015) 3 SC 576.

39 2015(4) SCALE 522: (2015) SCC 705.

February 14, 2012 till re-marriage of the wife and accordingly the high court modified the order of family court. Hence the present appeal by special leave was initiated by the wife before the apex court. After considering the arguments on behalf of the husband and wife the Supreme Court referred to its earlier judgment as mentioned above.[40] The court further referred to *Daniel Latifi* case and quoted the relevant portion from the judgments mentioned above in the said case and accordingly it viewed that section 125 Cr PC had been rightly held to be applicable by the family court.

As far as the second issue which is related to enhancement and reduction of maintenance amount, the High Court of Allahabad was of opinion that the grant of maintenance has to be appropriately exercised according to the change in the of financial situation of the husband and that is why the high court reduced it. The apex court, though agreed with high court's affirmation of the family court judgment, expressed shock for not granting interim maintenance during the preceeding 14 years. The court also agreed with the view of the high court that the delay in disposal of the maintenance application is an unacceptable situation and a distressing phenomenon and it should have been disposed off at the earliest. In this regard, the apex court also referred to some precedents. However, on the issue of reduction of quantum of maintenance by the high court, the apex court viewed that the high court had shown immense sympathy to the husband by reducing the amount after his retirement without indicating any reason. Drawing true picture of the Indian society, the court opined that it is extremely difficult to manage with Rs. 2000/- per month in the present socio-economic conditions. The court further viewed that the reduction of the amount of maintenance by the high court from Rs. 4000/- to Rs. 2000/- is an interference of revisional court's order which would not be appropriate when the order of the family court is based on proper appreciation of evidence on record. Solely the husband's retirement ground considered by the high court was no justification to reduce the maintenance by 50 per cent. The judge of the apex court was so anguished that he stated "It is not a huge fortune that was showered on the wife that it deserved reduction, it only reflects the non-application of mind and therefore, we are unable to sustain the said order." In his support, the apex court asserted that the husband had taken voluntary retirement after the judgment of family court with the purpose of escaping the liability to pay the maintenance to his wife. The apex court was not in agreement with the high court as it did not consider post retirement benefits which includes pension and retirement dues which amount Rs. 16,01,455/-. Accordingly the appeals were allowed and the orders passed by the high court were set aside and the family court order was restored.

It may also be mentioned that the judges quoted Constitution bench decision of *Daniel Latifi* as if the Act of 1986 was declared ultra vires in these cases.

40 *Shamim Bano* case, *supra* note 38.

In *Mokhtar Ahmad* v. *State of Jharkhand*,[41] the lower court directed the petitioner to pay Rs. 2,000/- per month as maintenance to the wife and Rs. 1,000/- per month to her minor daughter. The related issue before the Jharkhand High Court was whether a Muslim woman is entitled for maintenance in case of *talaq* beyond the *iddat* period from her husband under section125 of the Code of Criminal Procedure in view of section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

The husband contended that after divorce, a Muslim wife cannot claim maintenance under section 125 of the Code and only remedy available for her is to claim maintenance under section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In his support he relied upon a judgment in the case of *Saheb Khan K. Malek* v. *Jamilasurun S. Malek*.[42] It was also submitted that the lower court without giving specific finding on the actual income of the husband had allowed the maintenance amount though the petitioner was a retired person. Therefore the maintenance order by the court below was not justified. The wife contended, that it is well settled law that even a Muslim divorcee is entitled for maintenance under section 125 of the CrPC.

The high court held that the provision of section 125 was rightly invoked by the court below for granting maintenance to the wife and her daughter. Since the amount of maintenance granted by the court below is very reasonable, the high court did not interfere in this matter and the revision application was accordingly dismissed. Later in a series of cases[43] the Jharkhand High Court adopted the similar view relating to maintenance. In *Noor Alam* v. *State of Bihar*[44] the Patna High Court's decision is also in agreement with the High Court of Jharkhand.[45]

The judgment of Kerala High Court in *Kunhimuhammad* v. *Ayishakkutty*,[46] wherein it was held that divorced Muslim wife's right to claim maintenance under section 125 of Cr PC is not extinguished by the enactment of Muslim Women (Protection of Rights on Divorce) Act. It was further held that stipulations in those enactment is can harmoniously co-exist with the provision for maintenance under section 125 of Cr PC. Virtually, it was held that when a petition under section 3 of the Act of 1986 was already discharged, then a petition claiming maintenance under section 125 of Cr PC would not lie. Similar view was adopted by Kerela High Court in *Thundiyil Nazeer* v. *Parambath Vysiambath Majina*.[47]

41 2015(3)J.L.J.R.523.

42 2002 (3) East Cr C 148 (SC).

43 *Ahmad Sheikh* v. *Asma Khatoon* 2015(3)AJR 765; *Shamshuddin* v. *State of Jharkhand* II(2015) DMC 763 Jhar; *Nasim Ansari* v .*State of Jharkhand* III(2015)DMC 447 Jhar.

44 III(2015)DMC 561Pat.

45 *Supra* note 36.

46 (2010 (2) KLT DMC 763.

47 MANU/KE/0743/2015.

In *Mohammad Yaseen* v. *Mehrajunnisha*[48] an application was filed before the judge family court, Moradabad, Uttar Pradesh where it was contended that application under section 3 of Act of 1986 is not admissible before the family court, as it is not attracted by virtue of section 7 of Family Court Act, 1984. The court observed that from the perusal of section 7 of Act, 1984 and in particular, sub-section (2), it cannot be doubted that application under Act, 1986 was not maintainable before the family court.

The court on this issue referred to the division bench of the High Court of Allahabad in *Anjum Hasan Siddiqui* v. *Smt. Salma B*,[49] where it was viewed that "neither under sub-section (1) nor under Sub-section (2) of Section 7 of Family Court Act has any jurisdiction to entertain an application of the nature contemplated by section 3 of 1986 Act". Having considered the matter, the high court held that an application under section 3 of 1986 Act can lie only before the magistrate concerned and the family court established under the 1984 Act cannot exercise jurisdiction unless the same had been specifically conferred upon the family court under the provisions of section 2(b). The family court in this case was therefore, not competent to deal with the application for want of jurisdiction.

Keeping in view the precedents mentioned above the High Court of Allahabad in the instant case, declined to take a different view and held that since the power was possessed by magistrate and not family court, the order passed by principal judge, family court lacked patent jurisdiction, hence it was illegal and void *ab initio*.

It may be mentioned that the purpose of the court is to understand the spirit of the law and accordingly it is to be interpreted. Mere technicalities in no way should be allowed to frustrate justice itself.

In *Anwar Hussein Mohammad Rafiq Sheikh* v. *State of Gujarat*,[50] the issue before the Gujarat High Court was whether the proceedings initiated in the family court by wife under section 125 of Cr PC were liable to be set aside allowing the instant petition. The High Court of Gujarat held that the proceedings under section 125 can be initiated by the divorced Muslim wife and she can claim monthly maintenance after *iddat* period from her divorced husband as long as she does not remarry. Similarly, she can also initiate the proceedings under section 3 of the Act of 1986, which provides for grant of reasonable and fair maintenance within the *iddat* period. Since in this case no maintenance was granted to the wife till initiative under Cr PC was taken, the court did not accept the application of the husband to quash the application of wife under Cr PC since it had already been initiated under the Act. Thus, the high court rejected the petition of the husband.

48 2015 (9) ADJ 574.

49 AIR 1992 All 322; also referred to Bombay High Court in *Noor Jamaal* v. *Haseena* (1992) 2 Crimes 46 and Orissa High Court in *Sk. Allauddin* v. *Shamima Akhtari*, 1995 Cri.L.J. 228.

50 MANU/GJ/0373/2015

Once again it is respectfully submitted that till what time is the I-Spy game of taking recourse of dual regime (Cr PC and the Act of 1986) would be continued by the courts in the same matter, as it would definitely increase the burden of the courts which are already over burdened. During the debate the legislature did not leave any stone unturned to provide all possible remedies to a Muslim divorcee under various provisions of the Act, provided that they are interpreted consciencely. It is therefore humbly submitted that the divorcee has been fully secured through the provisions of *mata* (fair provision) of the act and the similar provision is found in various legislations of some Muslim countries to secure the women in advance before going through any sufferings. The apex court has also given concurrence to this view and some judges of various high courts too gave weightage to this consideration, immediately after enforcement of this Act while deciding the cases under wife's right to maintenance. At the same time it is also humbly requested that the personal law board should try to get the legislation amended to remove its flaws so that the courts have no confusion in deciding the maintenance of Muslim women. Unnecessary hue and cry is not the solution of the problem.

Maintenace of unmmaried daughter

In *Mustakim* v. *State of U.P.*[51] a revision petition was filed against the ruling of principal judge (family court), wherein objections filed by the father as to the maintenance of major unmarried daughter were dismissed by the court. Revision was filed against the said order of the family court, which was dismissed by the High Court of Allahabad, keeping in view the Supreme Court decision in *Noor Saba Khatoon* v. *Mohd. Quasim*[52] where it was observed that a Muslim father is liable to maintain his major daughter till she is not married.

It may be mentioned that under Islamic law, a father is liable to maintain his son during minority only but as far is the daughter is concerned the father's liability to maintain his unmarried daughter remains even after she attains majority. Thus, the judgment is in consonance with Islamic law.

***Wilayat* (Gurdianship)/*Hizanat* (Custody of a Child)**

Sometimes it appears that even lawmen are unclear about the two aspects of Islamic law *i.e., wilayat* and *hizanat*. A father may be the guardian of the minor child even when the latter is under the custody of the mother. The law of *hizanat* is a unique aspect of Islamic law according to which a mother is entitled to have the custody of her son till seven years and in case of daughter till her marriage. This is a welfare law in order to bring up the child in an orderly manner with love and affection and that is why in the absence of mother, mother's mother or some other mother's or fathers'

51 2015(2)ACR 1389 ; 2015(3)ADJ693; 2015(4) ALJ 468; 2015 (89) ALLCC 495; 2015 (110) ALR 689 ;2015(4)Crimes 58(All.).

52 AIR1997 SC 3280.

female relatives are entitled to the custody of the child. However, this special right of mother does not affect the right of father to remain the guardian and therefore, he is responsible to bear the expenses of the child while he or she is under the custody of mother. Following are some judgments reproduced in this survey where these two different aspects of law are reflected.

In *Ahmed Mohiuddin* v. *Shabana Yasmeen*,[53] the issue before the High Court of Andhra Pradesh was whether the impugned order of the judge of the family court, negating the custody of father in lieu of mother of the minor boy and only providing visiting rights to father, is sustainable or not. The high court while allowing the appeal in part confirmed the order of the lower court to the extent of visiting rights of father once in a month and during summer vacation while conferring the special right to *hizanat* of the mother. In *Navas* v. *Surumi*[54] the High Court of Kerela adopted the same view confirming the right of *hizanat*.

The courts have rightly interpreted the right to custody of minor child under Islamic law and showed their prudence to differentiate between the two concepts of *wilayat* and *hizanat*.

III LAWS RELATING TO PROPERTY

It is important to note that unlike Islamic law of status, Islamic law of property is secular in nature in comparison to other legal systems and law of status of Muslim itself. A Muslim can transfer his property to any non-Muslim. Similarly, he can make any non-Muslim a trustee to look after the property. It may also be noted that in order to understand the efficacy of property law of Islam it is necessary to read all the institutions of property put together and not in isolation. For example, law of gift, will and inheritance if studied in reference to each other, then many objections raised by some ill informed persons would have no meaning. As per the doctrine of representation, if an heir (particularly orphaned grand children) is deprived of the property of the deceased he has to be compensated through law of will and gift. That's why in certain Muslim countries the law of obligatory bequest finds place in their statute books in order to compensate the orphaned grandchildren. In this survey law of property has been discussed comprises of *hiba* (gift), *wasiya* (will), *wirathat* (succession & inheritance), *waqf* and *shufa* (pre-emption).

***Hiba* (Gift) and *wasiya* (Will).**

It may be noted that a Muslim can gift his entire property whether it is self-acquired, inherited or found from any other source to anyone irrespective of caste, creed, and religion, be it relatives or strangers, provided the properties must be dispossessed by the owner. Similarly the provision of 1/3rd will is also only provided to compensate the relatives and friends to whom, according to the wisdom of a person,

53 2015(4) ALD 526; 2015(4) ALT 202; III(2015) DMC 576 AP.

54 MANU/KE/1942/2015.

his heirs will not take care of. Otherwise, even 1/3rd will is not permitted in favor of one heir without the permission of other heirs. Following are the few cases in this survey on the law related to gift and will.

In *Mohammed Yusuf Mohammed Ibrahim* v. *State of Maharashtra*,[55] a writ petition challenged the oral gift deed when the same was reduced into writing on stamp paper and mutated in the concerned record. The issue was whether stamp duty can be levied on a oral gift made by a Muslim. The High Court of Bombay held that the provisions of sections 122 to 129 of Transfer of Property Act, 1882 are not applicable to such *hiba*. Therefore, the stamp duty levied by respondent for the transfer of the orally gifted property in favour of petitioner was held illegal and unsustainable. Hence, the petition by the court observing that the oral gift under Islamic law is in order.

In *Gul Bibi* v. *Zakia Begum*[56] an appeal arose from a suit for partition as well as *mesne profit*, which was instituted by the original-plaintiff Zakia Begum. The court relied upon *Mohd. Abdul Ghani Khan* v. *Mt. Fakhr Jahan Begum*,[57] where it was held that three conditions are necessary for valid gift under Muslim law. They are: the manifest wish to give on the part of the donor; acceptance of the donee (either impliedly or expressly) and taking of possession of the subject-matter of the gift by the donee (either actually or constructively). The high court referred to Mulla, where three essential conditions to make a valid gift are mentioned.[58] The High Court of Karnataka [59] as well as the High Court of Gauhati [60] adopted the view taken above on the law of gift, particularly its essential requirements of a valid *hiba.*

In *Sukur Ali* v. *Jarina Bibi*,[61] the trial court held that the plaintiffs have no right, title and interest over the suit land as they failed to prove the oral gift as pleaded in the plaint. One of the essentials of the oral gift, namely, delivery of possession, was lacking in the instant case. The concept of symbolic delivery of possession, on which the impugned judgment of the first appellate court was based, was not applicable in the facts and circumstances of the case. Therefore, the impugned judgment of the first appellate court was set aside. The second appeal was allowed.

In *Nisar Ahmed* v. *Taukir Ahmed*,[62] the issue before the High Court of Rajasthan was the validity of the will under Muslim law. Taking into account the facts that Mohd. Ibrahim was not survived by any male issue, water & electricity bills were also

55 2015(1) Bom CR740; 2015(3)Mh LJ 470.

56 MANU/RH/1757/2015.

57 (1922) 24 BOMLR 1268

58 *Supra* note 16 at 149.

59 *Syed Asadulla* v. *Khaleelulla Khan* MANU/KA/1960/2015.

60 *Imtiaz Rasul* v. *Ataur Rasul* MANU/GH/0499/2015.

61 MANU/GH/0443/2015.

62 MANU/RH/1464/2015.

not in the name of the appellant and the sale-deed, by which Mohd. Ibrahim purchased the property and original *patta* of the property, as well as execution of will by Mohd. Ibrahim in favour of respondent, it was held that the appellant was a mere licensee and the respondent had acquired a valid title of the suit property. Moreover, the court while examining the appellant's right to challenge the validity of will executed by Mohd. Ibrahim observed that he did not even fall within the ambit of legal heirs of Mohd. Ibrahim in the pedigree according to Muslim law. Therefore, the objection of a stranger who was simply allowed to stay in the premises gratuitously to challenge the will could not be accepted. The high court here referred to the apex court in *Maraia Margarida Sequeria Fernandes & Ors.* v. *Erasmo Jack de Sequeria (Dead) through L.Rs.*[63]where the court examined the status of a friend, relative, caretaker or a servant, who was allowed to live in the premises for some time and declined to grant any protection to such a person by recording a definite finding that he acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession. It further referred to High Court of Patna in *Abdul Manan Khan* v. *Mirtuza Khan,*[64] where it was observed that under Muslim law, no formality or a particular form is required in law for the purpose of creating a valid will. It was held that any Muslim having a sound mind and not a minor, may make a valid will to dispose of the property. An unequivocal expression by the testator serves the purpose. The court referred to Mulla[65] who observed that Muslim cannot bequeath his property beyond 1/3 without the consent of legal heirs.

In *Niaz Deen* v. *Bir Deen*[66] where the issue before the High Court of Himachal Pradesh was related to the quantum of the will. The high court held that mutation would not confer any title on the defendants because the mutation was made only for the fiscal purposes and was not the criteria for the validity of the will. Relying on the precedent in *Damodar Kashinath Rasane* v. *Smt. Shahajadibi* [67] where it was observed that a Muslim cannot bequeath more than 1/3 of his property whether in favour of a stranger or his heir, as the case may be. It may be submitted that the law of will relating to the permission of the heirs as well as limitation of 1/3 bequeath of the property has been rightly interpreted by the court.

Waqf and _Waqf_ administration

The important institution of *waqf* in Islam indeed provides economic protection of families and stops delinquents from ruining the property of their ancestors. It is an

63 (2012) 2 SCC 344.

64 AIR 1991 Patna 154.

65 *Supra* note at 54 at 104 Sec.118: "Limit of testamentary power:- A Mohomedan 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."

66 MANU/HP/0856/2015.

67 AIR 1989 Bom. 1.

institution under which a property can be tied up in such a manner that the *corpus* should remain intact and the *usufruct* can be utilized for the benefits of the poor and for other religious and charitable purposes. According to Imam Abu Hanifa, the legal meaning of "*waqf*" is the detention of a specific thing in the ownership of *waqf* and the devoting of its profit or products "in charity of poor or other good objects".[68] A *waqf* is basically a contract and the objects of *waqf* should fulfill the requirements of a valid contract. There should not be any illegal purpose behind it. When a person gives his property into *waqf,* he should have the title of the property and must be of sound mind. The *waqf* property can only be used for public purpose. *Waqf* is basically administered by a person known as *mutawalli*. He is not the owner, but basically the care taker of the *waqf*. He administers the *waqf* property and disposes it off as per the will of the founder. A *waqf* is created for perpetuity and can not be sold off by the administrator.

The law provides various measures to protect the *waqf* properties and therefore its administration is also detailed out by the Islamic law which is now translated into various legislations in this country. The cases produced in this survey on the substantive and procedural law on *waqf* may be reproduced with their analysis as under.

In *Magnum Developers* v. *Lal Shah Baba Dargah Trust*,[69] the issue that was raised before Bombay High Court was whether the civil court or tribunal have jurisdiction to try the suit in respect of the suit properties? It was held that, amended section 83(4) of Wakf Act, 1995 lays down that tribunal should consist of chairman and two members as specified. However, state government had not constituted tribunal as contemplated under amended section 83(4) of Act, 1995. If tribunal was not constituted, the aggrieved person had right to proceed in ordinary civil court. The court further referred to the Sachar committee which in its report considered the aforementioned issue and suggested certain amendments to the act. It recommended, among other things, to amend the act so that the *waqf* tribunal will be manned by a full time presiding officer appointed exclusively for *waqf* properties.

The high court referred to *N.V. Ali Akbar,*[70] wherein the division bench of Kerala High Court held that, "it is clear legislative material to infer that the constitution of the tribunal by notifications under the parent act (principal act) shall continue to be in vigor, notwithstanding the amendments, and, modifications if any, to the constitution of tribunal in terms of the amendments to the parent act by the amending Act, would become operational only if and when such compositions are notified in conformity with the amended section 83(4)." The full bench also referred to the decisions in *Tulsiram* v. *Ramsingh* [71] and *Paika* v. *Rajeshwar*[72] where it was held that if an issue

68 Tahir Mahmood, *The Muslim Law of India* 269 (Allahabad 1980).

69 2016(1) Bom CR 752.

70 *N.V. Ali Akbar* v. *Abdul Azeez Mannisseri,* I.L.R. 2014(3) Ker 603.

71 (1961) 64 B.L.R. 41.

72 (1957) N.L.J. 344.

arises between the parties whether there was a transaction which resulted in one of the parties becoming a lessee and the lease is a lease which falls within the act, then that issue could only be tried by the revenue officer and not by the civil court.

In *Baba Bangal Dargah & Masjid Waqf Committee* v. *Sayad Hamid Abdul Latif*[73] the petitioners had made application under section 36 of the Wakf Act, 1995 (hereinafter referred to as "the Wakf Act") for registration of religious institution by name "Baba Bangal *Dargah* and Masjid" having its properties. The wakf board informed the petitioners that the institution was already registered and published under Wakf Act 1995 and so there was no necessity of making fresh application. It was informed that there was no need of fresh registration under section 43 of the Wakf Act. This so called correspondence made by the wakf board to the present petitioners was challenged before wakf tribunal by presuming that it was an order indicating that religious institution and its property are registered under Wakf Act. The wakf tribunal set aside the order by observing that proper procedure was not followed under the Wakf Act. It is also observed that opportunity ought to have been given to certain parties who became respondents in subsequent appeal and who were applicants of the proceeding filed under section 83(2) of the Wakf Act to have their say. These respondents had claimed to be owner of the disputed property and thus contested the registration application by the petitioners *Baba Bangal Dargah*. The respondents alleged that the petitioners were only tenants on some portions of the property and were facing eviction proceedings. They only sought to register the property to show ostensibly that the property belongs to the trust, a religious institution. The issue before Bombay High Court (Aurangabad bench) was regarding the nature of property *i.e.*, whether it was private property of the ancestors of the respondents or was it *waqf* property?

The court has held that the tribunal had not considered this record in proper perspective and very casual approach was adopted due to which the tribunal had committed grave error. The respondents were relying only on private record, record of *vasiyat* (will) and record of partition. The record of the cantonment board, revenue record, was not at all supporting the case of the respondents. At the outset, it needs to be mentioned that the *vasiyat* and the record of partition are private documents and so more weight needs to be given to revenue record.

The court further observed that action for commission of crime of creation of false *vasiyat* and for using false record in tribunal (which has powers of civil court) can be taken in this regard. These important circumstances were not at all touched by the tribunal. In any case, due to non compliance of requirements of valid *vasiyat*, no reliance could have been placed on this document. The disputed property was in possession of ancestor of respondents as *inamdar* and in view of the purpose for which it was given, rendering service to the mosque and *dargah*, it was a service *inam* and so the *waqf* property. The ancestors of the respondents were also receiving

73 MANU/MH/2718/2015.

cash grant from the then rulers, then from the British rulers and then from the present government. In spite of such record they stopped rendering service and the intention behind it was only to grab the disputed property. The record is sufficient to infer that it was permanent dedication made more than few 100 years ago for religious purpose and the ancestors of the respondents were expected to act as *mutawallis.* They fall under the definition of *mutawalli* given in section 3(i) of the *Wakf* Act. In view of nature of the *inam*, there was no question of abolition of the *inam* and it was never abolished. Even at present in the cantonment board record the property is shown as *inam* land. The ancestors of the respondents and the respondents have created some false record and they have acted against the interests of the *waqf*, but things have not changed and the nature of the property is not changed. It is settled law that once a *waqf*, always a *waqf*. Even the decision of the aforesaid nature of the courts given in the execution proceedings cannot change the character of *waqf*. Reliance was placed on *Chhedi Lal Misra* v. *Civil Judge, Lucknow.*[74] Thus, if at all the *wakf* board wanted to register this trust under the *wakf* Act, notice ought to have been given to the present applicant, trustee and there was no right of the present respondent in any case of such notice. Further, under section 43 of the *Wakf* Act, the *waqf* which was already registered under the Bombay Public Trust Act, 1950 could have been treated as registered due to deemed registration under this provision. In *Gopal* v. *Mohammad,*[75] the apex court has laid down that entry of the name of occupant as "khatedar", in the revenue record, is not relevant if there is evidence to show that the property belongs to the *dargah*, religious institution. It is further laid down that in such a case it can be said that person in possession was in fiduciary position of a manager of *dargah* and he was in possession in that capacity. There cannot be any dispute over this proposition. Thus, the ancestors of present respondents were in possession but their possession was as manager and they could not have claimed ownership of the disputed property. Therefore, the court observed that the decision given by the tribunal is not correct, legal and proper. The decision of the *wakf* tribunal was set aside.

In *Nizamul Hai* v. *Mohammad*[76] the Allahabad High Court inferred that from the scheme of the Wakf Act, it is apparent that all disputed questions, arising out of *waqf* as specified in section 6, as to whether a property in the list of *waqf* is a property of the *waqf* or not, or whether a *waqf* specified in the list is a *shia* or a *sunni waqf*, would have to be resolved by the tribunal under section 6 of the act by instituting a suit before the tribunal. Similarly, the power to appoint or remove a *mutawalli* of a *waqf*, which is included in the list of *auqaf* falls exclusively with the board and such decision, is subject to appellate/supervisory jurisdiction of the tribunal.

74 2007 AIR SCW 7300.

75 AIR 1968 SC 1413.

76 2015(7)ADJ 783.

In *Nisar Shah* v. *State of M.P*,[77] the applicant preferred an application under section 83(2) of the Wakf Act, 1995 stating that he was the *bhumiswami* of the agricultural land which had been mutated in the name of his great grandfather and grandfather and the same property was registered and published as *waqf* property in the list of *waqf* without any notice being issued to him. Therefore, the applicant filed a suit before the *wakf* tribunal which was dismissed by the tribunal on the ground that the suit was filed after the lapse of statutory period of one year as mentioned in the Wakf Act, 1995. Hence the applicant preferred application before the High Court of Madhya Pradesh and the court held that since no notice was served on the applicant before the property was registered as *waqf* property, therefore the *waqf* tribunal has erred in law by dismissing the suit of the applicant only on the ground that the suit was filed after a lapse of 20 years from the publication of list of *waqf*. The same issues were also discussed under the *Punjab Waqf Board* v. *Gram Panchayat alias Gram Sabh*[78] and *Muslim Waqf, Rajasthan* v. *Radhakishan.*[79]

In *Mohsin Raza* v. *Shia Central Board of Waqfs U.P.*[80] there were two *wakfs* registered separately with the Central Board of Waqfs but by the order of the board were decided to be administered by the same *mutawali*. However, by the later order of the board, it was stated that since the two *waqfs* were registered separately, they should be administered separately. The later order of the board came for consideration before the Allahabad High Court. The court observed that the issue as to whether both the *waqfs* have a separate and independent existence and whether there were sufficient reasons for the board to invoke it's earlier order were matters which should have been considered by the board before revoking its earlier order. The court held that there was no consideration of the welfare of *waqfs* by the board and quashed the later order passed by the board.

In *Intizamia Committee* v. *Uttrakhand Waqf Board* [81] certain *waqfs* were being administered by a revisionist. On expiry of the period of the revisionist, he filed an application for renewal of his term, however, the application was kept pending. The issue arose when the board constituted another committee to look after the said *waqf* properties and the high court was presented with the question whether the appointment of a new *mutawalli* was valid in light of section 64 of the Wakf Act. The revisionist contended that since there was no specific allegation of any kind against the revisionist, therefore the appointment of a new *mutawalli* in his place by the board is in utter violation of the provisions contained under section 64 of the Wakf Act, 1995. The court rejected the contention of the revisionist since the question was not of removal

77 MANU/MP/0097/2015.
78 AIR 200 SC 3488.
79 2 SCC 468(1979).
80 2015(10)ADJ 643.
81 MANU/UC/0296/2015.

of the *mutawalli* as envisaged under section 64 of the Act and held that wakf board was well within its powers to appoint a new *mutwalli* under section 63 of the said act, if the vacancy has arisen.

In another case *Madurai Yagappanagar Muslim Jamaat* v. *Sub Register Theppakulam,*[82] a society was formed and registered under the Societies Registration Act for the welfare of the Muslim community. The society purchased a land to use it as a graveyard, however it decided to sell it later. The dispute arose when the superintendent of the *waqf* intervened in the sale of the said property by the registered society. Therefore, the issue in this case was whether a property bought by a society registered under the Societies Registration Act, 1960 can also be monitored by the *waqf* board as *waqf* property?

The Chennai High Court referred to section 3(r) of the Wakf Act, and held that Wakf Act applies to all the *waqfs,* irrespective of the fact whether it is registered *waqf* under the Wakf Act or unregistered *waqf*, since all the *waqfs* in the state shall vest in the board. In this regard, a reference could be placed in the judgment of *Andhra Pradesh Waqf Board, Hyderabad* v. *S. Syed Ali Mulla*.[83]

In *H. Mohamed Ghouse* v. *The Chief Executive Officer,Tamil Nadu Waqf Board* [84] the *waqf* in question was being governed by the scheme framed by the Kerala High Court in 1948 *i.e*., before the enactment of the Wakf Act in 1954.However, after the establishment of wakf boards under the act, the power to appoint the *mutawallis* got transferred to the aforesaid boards. So the issue before the Kerala High Court was that whether the *wakf* board is empowered to appoint *mutawallis* irrespective of the scheme of the court? The high court held that the *wakf* board has got the power to appoint a *mutawalli*, yet, it would be appropriate for the *wakf* board to appoint a *mutawalli* in accordance with the scheme decree framed by this court.

In *Nagoor Kaniammal* v. *Tenkasi Vangaru Muthu Meeran Sahib Thailka Pallivasal,*[85] the issue was whether the *wakf* board has the right of declaration of any property as the property of *wakf* board, irrespective of the scheme formulated in respect of the property? The Supreme Court has held that the *wakf* board has no right to institute a suit for declaration that any property is a *wakf* property unless the requirements under sections 4, 5, 6 and 27 of the *Wakf* Act are complied with.

In *Abrar Ahmad* v. *The Delhi Waqf Board,*[86] the issue before the court was that whether the Delhi *wakf* board could, after having constituted the managing committee to manage the affairs of the *waqf* appoint another managing committee of the same *waqf* property. It was held that the *waqf* at its *ipse dixit* cannot appoint another managing committee of the same *wakf* property. The court held that the scheme of section 67 of the Wakf Act indicates that managing committee once constituted can not be removed

82 (2016) 1MLJ 467.
83 AIR 1985 AP 127.
84 2015(4) CTC 736.
85 2015(4) CTC 34.

/ superseded, except in accordance with the manner prescribed therein and as per the wisdom of the court. However, such manner was not complied with in constituting a new managing committee. The court referred to the judgement of the High Court of Karnataka in *Managing Committee, Masjid-E- Idgah, Mysore* v. *State of Karnataka*[87] in which it was held that once a managing committee is constituted, under the legislative mandate, it can be superseded only in compliance with the requirements as envisaged under section 67 of the Act.[88]

In *Gram Panchayat Village Uncha Samana* v. *Haryana Waqf Board Ambala Cantt;*[89] the issue was to deteremine the rightful owner of the suit property. The Punjab and Haryana High Court held that the property in dispute vests in Haryana *wakf* board and the gram panchayat is in illegal possession of the suit property and the court below has rightly decreed the suit, whereby, *wakf* board has been held to obtain possession of the property in dispute. Moreover, the panchayat has no right to the land in dispute.

In *Saber* v. *Rafiunnisa Begum*[90] the defendant was a tenant in the property by the plaintiff. However, the defendant's default in paying the rent compelled the plaintiff to file a suit for eviction under the Transfer of Property Act, 1882 Later the defendant made claims that upon enquiry the said property turned out to be *waqf* property and he accepted the demands of Andhra Pradesh *wakf* board and became a tenant of the *wakf* board. The court held that except a claim by the defendant that the *wakf* board is the owner, no other evidence was adduced to show that the plaintiff had lost her title to the disputed properties. As regards the question whether a property is *waqf* property or not, the Wakf Act contemplates that only the interested party can institute a suit regarding the nature of the property. In the instant case, the court observed that since the defendant-tenant is stopped from questioning the title of the landlord during the continuance of such tenancy, he is not an interested party within the scope of the Wakf Act and as such cannot raise objections over any property being *waqf* property or not. Therefore, the court directed the defendant to vacate the said property.

86 2015(153) DRJ 190.

87 MANU/KA/0520/1997

88 The counsel for the petitioner in this respect has relied on the judgment of High Court of Andhra Pradesh in *Sk. Abdul Saleem* v. *A.P. State Waqf Board* 2006 (2) ALT 76, where the court held that the *wakf* board, while passing an order of supersession, is bound to record reasons and the satisfaction of the *waqf* board under section 67(2). It was further held that an order of supersession of managing committee, which is devoid of reasons, is in violation of the principles of natural justice and constitutes a valid ground for exercising judicial review under art. 226 of the Constitution of India. Reliance in this regard is also placed by the petitioner on *Mohd. Izhar* v. *Delhi Waqf Board* 106 (2003) DLT 514 also holding that since the statutory provisions of s. 67 (2) clearly provide for a minimum period of one month notice, that ought to have been followed. Not following of such a clear statutory provision creates a doubt in the minds of the people that principles of natural justice have been violated.

89 MANU/PH/2962/2015.

90 MANU/AP/0781/201.

In *Nawab Wallajah Sahib Pallivasal* v. *The Commissioner of Land Administration/Board of Revenue*[91] the contention of the petitioner was that the impugned property was dedicated for the support and maintenance of the *waqf*. However, the subject properties were taken away by the government under Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948 and the said properties vested only with the government. The said notification was not challenged by the petitioner at the relevant point of time. Further, the government issued *ryotwari pattas* to various persons. The question arose whether the transactions that had subsequently taken place between the third parties will be binding on the *waqf*, since *waqf* property cannot be taken away. The petitioner in the present case challenged the grant of the said *pattas* by filing a writ in 2015. The Tamil Nadu High Court observed that the possession of the impugned property was not with the petitioner from the year 1905 onwards. In addition the property automatically vested with the government under the Ryotwari Act, 1948. Further the petitioner kept quiet about the grant of the *pattas* for 54 years, and hence cannot question it now, due to delay and laches.

In *Nisar Ahmed* v. *Agyapal Singh*[92] the issue before the Delhi High Court was that whether landlord as the *mutawalli* could sue for eviction of the tenant from the tenanted premises. The court held that it is for the *mutawalli* to determine the best user and optimum utilisation of the *waqf* properties. The *waqf* was created for the *aulad* (children/decendents) of the *waqif*/settler. It was surely not created for the perpetual benefit of a tenant, who may be or had been inducted in the *waqf* property. The *mutawalli* is also a beneficiary under the *waqf* and he surely can move an eviction petition. The court further observed that although the property vests in the Almighty, it has to be managed so as to optimize the use and *usufruct* from the *waqf* property for the benefit of the beneficiaries contemplated in the *waqf* deed.

In *the Muslim Welfare Committee Takia* v. *Punjab Waqf Board*[93] the matter was regarding a Muslim graveyard situated in the village Kumbra, a *waqf* property. The residents in the adjoining areas objected to the burials in the impugned property, and hence a Muslim had to wait for some days for the last rites of his loved ones. The Muslim Welfare Committee (a registered society comprising of the Muslim population of the village), filed a case before the *wakf* tribunal. The issue raised in the present case was whether the suit instituted by petitioners is triable exclusively by *wakf* tribunal or by an ordinary civil court. The court first took a note of section 6,[94] 7 and 85[95] of

91 MANU/TN/3720/2015.

92 MANU/DE/0494/2015.

93 MANU/PH/0250/2015.

94 S.6 provides:

(1) If any question arises whether a particular property specified as *Waqf* property in the list of *Waqf*s is '*Waqf* property' or not or whether a *Waqf* specified in such list is a Shia *Waqf* or Sunni *Waqf*, the Board or the *mutawalli* of the *Waqf* or any person aggrieved may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no suit shall be instituted before the Tribunal in respect of such properties

the Wakf Act, 1995. Thereafter, some important Supreme Court cases were considered, such as *Board of Waqf, West Bengal* v. *Anis Fatma Begum*[96] in which it was held that the wakf tribunal can decide all disputes, questions or other matters relating to a *waqf* or *waqf* property. The words "any dispute, question or other matters relating to a *waqf* or *waqf* property" are words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner relating to a *waqf* or *waqf* property can be decided by the *wakf* tribunal.

In *Ashraf Kokkur* v. *K.V. Abdul Khader*,[97] the issue was whether the defendant was holding an office of profit as chairperson of the *wakf* board. The court held that since the defendant was entitled to and was drawing financial perquisites and allowances and other pecuniary benefits from the state of Kerala as the chairperson of the Kerala state *wakf* board, the defendant was holding an office of profit which was a disqualification under article 191 of the Constitution of India. Thus, he was disqualified to contest the election to the Kerala legislative assembly under article 191(1)(a) of the Constitution of India, as holding of an office of profit.

***Wirathat* (Succession and Inheritance)**

Muslim law of inheritance is very complex. It is a combination of Quranic law as well as the law of succession prevalent amongst the *Arabs* at the time when Prophet was framing the law relating to inheritance. And therefore Islamic jurists in their codification have put all the aspects of law of inheritance practiced since pre-Islamic *Arabs*. There is a famous saying of the Prophet that "learned the laws of inheritance, and teach them to the pupil; for these are half of the useful knowledge."[98] Therefore,

notified in a second or subsequent survey pursuant to the provisions contained in Sub-section (6) of Section 4.

(2) Notwithstanding anything contained in Sub-section (1), no proceeding under this Act in respect of any *Waqf* shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of *Waqf*s shall, unless it is modified in pursuance of a decision of the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in Sub-section (1)."

95 S. 85 of the Act brings a bar to the jurisdiction of civil court, revenue court and any other authority. It says that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter relating to any *waqf*, *waqf* property or other matter which is required by or under this act to be determined by tribunal.

96 2010(14) SCC 588.

97 MANU/SC/0739/2014.

98 *Sirajiyyaah* (trn. A. Rusey, (2nd edn. Cal,1890) as cited in A.A.A. Fyzee, *Outlines of Muhammadan Law* 387 (Oxford University Press, Delhi, 4th edn., 1974).

the complexities of inheritance law are not known to everyone and in our country it is already eclipsed under the shadow of other legal systems. Not only others but Muslim feudal mentality is also responsible for confusion. Some Muslims do not want to divide their property according to *sharia;* rather their will is to dispose it on their own by fictitious adoption and legacies. The main purpose behind this was to deprive the women from inheritance. Under Islamic law women are given the right to inherit the property of their children, husband and parents. It may be surprising to note that according to Islamic law, women as a daughter, mother and wife is a Quranic heir and the sons or some other male heirs are treated as residuary. No other system can claim giving of such high stature to women which existed in Islam more than 1400 years ago. The confusion of the court is obvious because of ignorant Muslim scholars and the practices of a few ignorant Muslims to devolve the inherited property contrary to the true principles of Islam. Following are the cases reproduced in this survey pertaining to succession and inheritance.

In *Ab. Gani* v. *Financial Commr.*[99] the estate holder died and left behind the petitioners and respondent as his legal heirs. It is stated that after the death of the estate holder, the attesting authorities attested the mutation of the landed property of the deceased in presence of his legal heirs, including the respondent. The issue in the case was whether the mutation order was valid or not. The Jammu and Kashmir High Court held that, it is well settled that succession to the estate of a Muslim estate holder, upon his death, opens the moment he dies and immediately vests in his legal heirs, according to the law of succession governing inheritance. Such vesting in no circumstances gets postponed. Therefore, the estate of deceased immediately vested in successors who survived him, *viz*. petitioners and respondent. However, from the mutation order it emerged that the respondent had surrendered her share in favour of the petitioners. The mutation order bore her thumb impression. There is also an undertaking of respondent on record where she has relinquished her claim to a share in her deceased father's estate in lieu of some money. Therefore, she was estopped from asserting her claim to a share of her deceased father as the mutation order operated as estoppel. The only issue pertaining to Muslim law involved in this case is that of the relinquishment of the share by the parties. It may be mentioned to note that no such principle is provided under the Muslim law of inheritance as the property would devolve only after demise of the deceased and therefore in his lifetime question of devolution and mutation is of no meaning under the law. The parties can not be deprived of the inheriance only by saying that they relinquished the inherited property. The simple issue is that what they are relinquishing is not theirs to relinquish in the first place. And if the share of the property is already devolved upon a shareholder, he can only tranfer the property to anyone whom he wants and this surveyor knows only two modes of transfer *viz*., by gift or by sale. This instant means of relinquishment is totally unknown to Islamic law.

99 2015 (4) JKJ 486.

In *Imran Hussain* v. *Rulina Begum*,[100] the estate holder died leaving behind her widower and daughters as plaintiffs and the son as defendant. The defendant did not raise any objection as to the mutation of the plaintiffs in the records of rights. However, it is to be noted that mutation itself cannot confer any title to anyone. Title flows in accordance with the principle of inheritance or by any of the means of transfer of property as prescribed under the law. In this case, both the sides claimed inheritance to the property. Both the parties are Muslim and so inheritance has to be guided by the principles of Muslim law as mentioned in Mullah's book.[101] Accordingly husband inherits 1/4th of the property when there is son and daughter. So, when the estate holder died, her husband inherited 1/4th of the property and remaining 3/4th was inherited by her sons and daughters in ratio. The son got 2/3 rd of the property whereas 1/3 rd went to the share of the two daughters jointly and severally. After her husband died, similarly his property devolved on the plaintiffs and the defendant in the same ratio. This is because even if it is assumed for the time being that the plaintiff no. 1 was married to a Hindu, in that event her marriage would be merely irregular and not void. If a Muslim marries a non-*kitabia* that marriage is merely an irregular and not void. There is no provision in the Muslim law to show that if a lady undergoes irregular marriage, her claim to ancestral property would be forfeited. Property is inherited by provision of law and divestment of property must also be by a provision of law. Both the plaintiffs and defendant shall get right of inheritance to the property of estate holder. There is nothing in law, prescribing that plaintiff /daughter would have forfeited her right because of her irregular marriage. This being the position, whether the plaintiff / daughter has proved her marriage with her husband as per Muslim rituals or not, she cannot forfeit her claim into property. Under such circumstances, even after the death of the father, the plaintiff / daughters will get 1/3rd of that part. The defendant got 1/3rd of that part which was inherited by the father, after death of estate holder. Thus, it is held that the plaintiff / daughters got 1/3rd of the property jointly and the defendant got 2/3rd thereof alone. The share of the plaintiff daughters therefore, would be 1/6th each. Accordingly, the appeal was disposed of. Here, it may be mentioned that if a person ceases to be a Muslim he cannot inherit the property of a Muslim, under the law of inheritance.

In *Krishna Dash Choudhury* v. *Parbin Rahman Hazarika*,[102] Samir Ranjan Choudhury was initially a Muslim and while following Islam, he married Parbin Rahman Hazarika whereupon one daughter and a son were born to him. But before his marriage with opposite party Krishna Das Choudhury, he got converted to Hinduism and thereafter solemnized marriage with the opposite party and thus as on the date, of marriage with the opposite party, Saydur Rahman Hazarika alias Samir Ranjan Choudhury was a Hindu. As on that date, he had another wife, namely, Parbin Rahman Hazarika alive, therefore the second marriage with Krishna Das Choudhury was not

100 MANU/GH/0773/2015.

101 For detailed description of quantum of shares and residuaries, see *supra* note 66-78.

102 MANU/GH/0825/2015 (Gauhati High Court).

valid because by that time he was governed by Hindu law. The two daughters born out of the wedlock with Krishna Das Choudhury, though illegitimate, became legal heirs of the deceased and so they are entitled to get succession certificate to the extent of 1/5th of the total amount. The lower court applied the principle of Hindu Succession Act, 1956 and held that five persons were legal heirs of the deceased Samir Ranjan Choudhury and were entitled to get equal shares *i.e.,* 1/5th each with respect to the schedule properties. This judgment and order has been challenged by Krishna Das Choudhury and her two daughters before Gauhati High Court under section 384 of the Indian Succession Act, 1925. The issues in this case were: i) whether Muslim marriage subsists after a Muslim becomes an apostate? and (ii) whether off-springs born out of a Muslim marriage would inherit property of their father on death, if he became a Hindu before death.

The court on first issue held that conversion of a Muslim into any other faith is called apostasy. As observed by Ameer Ali,[103] among the *Hanafis* whose views are reflected in *Hedaya,* the *Fatwa-i-Alamgiri* and other works, that on apostasy from Islam of either husband or wife whether it takes place before or after consummation, *ipso facto* dissolves the marriage tie. It is held that in modern times the practice has been considerably modified and it is generally recognized that when the husband renounces Islam but his wife continues to remain a Muslim, their connection becomes unlawful. However, if the husband returns to the faith before completion of her *iddat* there would be no need for remarriage between them. This means that if he returns after expiry of *iddat* period in that moment they have to get remarried. According to the view of the court, the effect of conversion to Islam is the same as that of conversion to Christianity or Hinduism - the marriage is not dissolved as well as the effect of conversion of a wife from Islam is the same as that from Christianity or Hinduism. The marriage subsists notwithstanding the conversion, but it may be dissolved on the grounds stated in section 2 of the Dissolution of Muslim Marriages Act, 1939. Further, the effect of conversion of the husband from Islam is, that the marriage stands dissolved by reason of such conversion, and it is only in this particular issue the Muslim law differs from other system. One may be of opinion that this difference is not so substantial as to require the exclusion of conversion from Islam from the purview of the proposed legislation. It is to be noted in this connection that even the Dissolution of Muslim Marriages Act, 1939, insofar as it enacted that by conversion the marriage of a Muslim wife was not dissolved, was a modification of the pre-existing law on the subject, and the proposed legislation only seeks to extend the principle of that enactment to conversion of husbands as well.[104] The Gauhati High Court then observed

103 Ameer Ali, *Mahommedan Law* 390 (1985).

104 *Supra* note 16 .D.F. Mullah considered this aspect of the matter in his commentary on Muslim Law and thereupon inserted a complete paragraph under section 321 with a separate and a distinct title "Apostasy from Islam". He has also considered the effect of section 4 of the Dissolution of Muslim Marriages Act, 1939. Various case laws including *Abdul Ghani* v.

that the moment a Muslim commits apostasy, he ceases to be a Muslim and all his rights, interests, status and relations get automatically extinguished. His marital tie with his Muslim wife automatically gets snapped and his Muslim wife becomes free to remarry at least after completion of the *iddat* period. Applying this law, the court held that Saydur Rahman Hazarika became guilty of apostasy and so his marriage with Parbin Rahman Hazarika became automatically dissolved. Her *iddat* period expired after three months and so even if he had returned to Islam after that period, he ought to have remarried her. The undisputed findings in this case were that Saydur had become a Hindu and thereafter he married Krishna Das. He got two daughters from the second marriage and ultimately he died without returning to Islam. His dissolution of marriage with Parbin Rahman Hazarika, therefore, was final and not revoked. Consequently, Parbin Rahman Hazarika cannot be widow of Saydur Rahman Hazarika *alias* Samir Ranjan Choudhury and so she cannot be his legal heir under law. The court further quoted the Quranic verse: "Allah commands you regarding your children. For the male a share equivalent to that of two females."[105] The court viewed that from the stand point of Muslim law, a Muslim cannot be heir of a non-believer.

The court along with Quran also quoted some other primary sources in this regard that is *Hadith* like *Sahih Al-Bukheri* as well as *Fatwa-e-Alamgiri* which prescribe that a Muslim cannot be heir of a disbeliever or non Muslim. Even Hindu law does not permit inheritance to a son who renounces Hinduism during life time of his father. The crux of the court's view is that in both predominant legal systems of India *i.e*. Muslim law of succession as well as the Hindu law of succession, inheritance does not take place beyond the periphery of religion. Here, there are two off springs of Saydur Rahman Hazarika *alias* Samir Ranjan Choudhury from his Muslim wife, Parbin Rahman Hazarika who admittedly continue pursuing Islamic faith after their

Azizul Huk ; *Karan Singh* v. *Emperor* were considered in the notes under this paragraph of the commentary and observed that when a Mohammedan husband gets converted to Christianity and his wife then married another man before the expiration of *iddat* period, she is not guilty of bigamy under section 494, IPC because apostasy operates as an immediate dissolution of marriage. S. 321 of Mullah's *Principles of Mahomedan Law* is relevant for the present purpose and accordingly the same is quoted below for ready reference:

(1) Before the Dissolution of Muslim Marriages Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage.

(2) Under S. 4 of the dissolution of Muslim Marriages Act, 1939, however, mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution of any of the grounds mentioned in S. 2 of the Act. Under this Act, therefore, the decisions mentioned below are no longer good law.

(3) S. 4 only applies to the case of apostasy from Islam of a married Muslim woman, and apostasy of the Muslim husband would still operate as a complete and immediate dissolution of the marriage.

105 Al Quran 4:11.

father renounced Islam. The court further discussed that whether doctrine of representation would apply to make them entitled to inherit properties of their grand-father. Though this issue did not arise in the present case but what is clear is that the properties apparently acquired by their father after his conversion to Hinduism would remain beyond the reach of offsprings as they cannot be heirs of a disbeliever.[106] The second point for determination accordingly stands answered holding that the two offsprings not being legal heirs of (late) Samir Ranjan Choudhury shall not be entitled to succession certificate as prayed for. Thus, the judgment is totally in consonance with the Islamic law of inheritance.

In *K. Mohammed Muzamil Ahmed* v. *K. Mohammed Illiyas*[107] this second appeal has been preferred by unsuccessful plaintiffs questioning the correctness and legality of judgment and decree passed by lower appellate court where it had dismissed the appeal and affirmed the judgment passed by trial court where under suit filed by plaintiffs for partition and separate possession came to be dismissed. The Karnataka High Court observed that trial court and lower appellate court have rightly held that the son cannot maintain a suit under Muslim law against his father during the life time of his father, since there is no concept of joint family and suviorship in Muslim law and in fact son does not get a right to file a suit for partition in respect of a property belonging to his father during his life time. The court referred to Mulla in this regard.[108]

In *Iliyas* v. *Akbari Bibi*.[109] the plaintiff filed a suit against her brothers for partition and separate possession in respect of property belonging to their father. It was stated that the mother of the plaintiff and defendants died before the suit was filed. So after her death, the property had devolved according to the Muslim inheritance to the sister (the plaintiff) and the brothers (the defendants). It was further stated that the property though inherited was stealthily taken by the brothers exclusively in their name which subsequently came to the knowledge of the plaintiff. The trial court passed a decree in favor of the plaintiff which was set aside by the first appellate court. Hence, the present appeal. The Chhattisgarh High Court held that the plaintiff being a sister has an implicit and specific share according to Muslim law which cannot be disputed. It further held that since the parties to the suit are *sunni* Muslims, therefore as such are

106 *Fatwa-e-Alamgiri*, Vol VI, P. 631 and *Sahih Al-Bukheri*.

107 MANU/KA/3832/2015.

108 *Supra* note 54. S. 41 of *Mahomedan Law*. It runs thus the father is the sole owner of his property. As soon as he takes his last breath, the property is devolved among the heirs as per Islamic law of 103/102 speeches. However the devolution is not suspended by repaying of the debts being due from the deceased.

Devolution of Inheritance - Subject to the provisions of ss. 39 and 40, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s.118), devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased (k). The heirs succeed to the estate as tenants-in-common in specific shares (l).

109 2015(3) CGLJ 401.

governed by *Hanafi* school of law of succession. Hence, the plaintiff being daughter having two brothers, according to the law of succession, brother being residuary son takes double the share than daughter. The court further observed that according to *Hanafi* school, the sisters get a share in the property by inheritance. Therefore, even if property is recorded in the sole and exclusive name of the others, the concept of adverse possession will not be applicable.

In *Wali Mohammad Bhat* v. *Gh. Nabi Ganaie* [110] one Muhammad Abdul Ganaie died issueless leaving behind some securities. His nephews and the widow of the brother of the deceased filed an application before the trial court seeking issuance of succession certificates in their favour. The appellant contested the claims of the applicants on the ground that he is the adopted son of the deceased. However, the trial court disallowed the contention raised by the appellant and held the applicants be entitled to the said securities. The issue in this case was whether the impugned order is against the Muslim personal law. The court upheld the decision of the trial court and further held that the impugned order is well reasoned and in accordance with the law holding the field. It also stated that under the Muslim personal laws an adopted son does not become an heir nor can he inherit. The court also referred to the sources of Muslim law according to which adopted son does not become an heir.[111] Hence, the appeal was dismissed.

***Shufa* (Pre-emption)**

This is a unique feature of Islamic law which ensures the economic security of the neighbour whether he is a Muslim or non-Muslim. It states that a Muslim can not sell his property to a stranger without giving a first right to his neighbour, provided the neighbour is ready to purchase the property on the same terms and conditions. This law is almost obsolete in India but fortunately in this survey year a case is reported on this issue also.

In *Nannibu* v. *Gudusab* [112] there was *a* deed of partition between the plaintiff and first defendant where a clause ensuring *shufa* (the right of pre-emption) was incorporated. Accordingly, property can only be sold to third party when the first option of the purchase is already given to the other member.

110 MANU/JK/0372/2015

111 Ameer Ali, *Commentaries on Mohammedan Law* 1021 (5th edn., 2004). Adopted heir or heir by acknowledgment, 'a person in whose favour the deceased had made a declaration of nasab, or descent, as against another, but not such as to establish his descent and has persisted in such declaration to his death. In this three conditions are implied: the declaration of descent must be as against another, as, for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son; the declaration must be such as not to establish the descent of the person acknowledged, as when it is not acquiesced in by the father; and the acknowledger must die without restricting his acknowledgement' (Hedaya).

112 MANU/KA/1441/2015.

When the plaintiff came to know about first defendant's intention to sell the suit property in favour of third parties, he approached the first defendant and offered to purchase the suit property by exercising his right of pre-emption. When the first defendant did not heed the request of the plaintiff, the latter approached the civil court restraining him from selling the suit property in favour of the third parties contrary to his right of pre-emption.

To make matters more complex, the first four defendants during the suit's pendency sold the property to defendants five to seven. All of them were eventually made parties in the main case by the plaintiff. The defendants unsurprisingly contended that plaintiff had infact refused to respond when he was first approached to buy the property at the price paid by defendents five to seven. These being the allegations and counter-allegations, issues that arose before the court were (i) whether the procedure that was required to be followed for the right of pre-emption under Muslim law was strictly adhered to by the parties before filing the suit and (ii) whether the defendants proved that before sale of suit property, plaintiff had expressed his inability to purchase and thus gave oral consent for the sale and as such sale deed executed by the defendants one to four in favour of defendants five to seven is valid? The first appellate court answered the first question in affirmative and second point in negative.

The second appellate court held that in this case it must be seen that the person who is trying to enforce his right of '*shufa*' (the Arabic word, with synonym as right of pre-emption) in Muslim law has meticulously followed the procedure that he was required to follow. What is required to be looked into is strict adherence to the procedure by the preemptor. The procedure that is required to be followed is in two stages. One is defined as *talab-i-mowasibat* which means the person exercising pre-emption right has to declare his intention to assert his right of pre-emption immediately on receiving the information of the same. The second stage is invoking the formality of *talab-i-ishhad* which is a demand for invocation of his right in the presence of two witnesses which are essential. Though it is a formality, the formality is required to be followed in its strict sense.

The appellant contended that there is failure on the part of the plaintiff in not following the procedure with reference to the *talab-i-ishhad i.e.,* raising the demand in the presence of two witnesses. However, respondents contended that no procedure is fixed to consider the basic principles of *talab-i-mowasibat* and *talab-i-ishhad* and the court will have to decide according to the circumstances of the facts in each case.

The Karnataka High Court opined that the crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. Therefore, the high court was of the view that plaintiff in the instant case has failed to adhere to the procedure which is prescribed, in not making a demand in the presence of two witnesses before filing the suit for pre-emption.

According to the high court, the first appellate court was wrong to reverse the well reasoned judgment passed by the trial court and this mistake was made under the presumption that merely because the plaintiff had secured the order of permanent

injunction, that by itself would give him a right of pre-emption without meticulously following the procedure. It was an erroneous finding. Thus, the second appeal was allowed.

It may be mentioned that the learned court has rightly interpreted a unique principle of Islamic law. It did so by referring to authoritative Muslim texts as, it is a principle about which generally, both lawmen and laymen know nothing.

IV CONCLUSION

The judicial trend of the cases produced in this survey year reveals that certain aspects of Muslim law are misinterpreted or rather deliberately deviated from the true spirit of Muslim law, a law where no gender discrimination is involved. For instance, if the marriage is performed by the will of the parties and the parents and the couple have no objection, the marriage is not held valid only on the ground that it is contrary to Child Marriage Restraint Act, 2006. Since this is a special law for welfare, it will prevail over Muslim law. It is astonishing to note that the concept of puberty in Islam has been borrowed by other legal systems of India. This noble provision provides for the welfare of the parties since they should not be exploited in the state of minority and if they are exploited they are given right to annul their marriage after reaching puberty (majority). If the purpose of both the laws is to sustain the welfare of parties and restraint from any type of exploitation, the unnecessary interference is beyond understanding. Puberty depends upon the respective geographical and socio economic conditions. It is absurd that the framers of Child Marriage Act can decide the exact time and date of majority even though puberty case be determind by factors outlined above. Muslims jurists themselves are having different views on the majority and place it somewhere between 15 to 17 years of age. Therefore, it is humbly requested that the sentiments of the people who have been adopting a logical principle since long should not be hurt without any reason.

Another issue that finds place in this survey is that for the validity of marriage, *qazi*'s certificate is not sufficient and the parties should get their registration either under Special Marriage Act, 1954 or Hindu Marriage Act, 1955. How the *nikah* will be registered under Hindu Marriage Act, is only known to the court which suggested it. Under Special Marriage Act, 1954 there are so many concessions which are given to a group or community that it is not to be called a uniform law and registration under this act will have many repercussions on the parties and their descendants in future. The long established institution of *qazi* is still prevalent throughout the country for registration of marriage and moreover the courts have been recognising registration of Muslim marriage recorded in the *qazi's* register. The *qazi's* position for judgment under the Qazi's Act[113] maybe controversial but the jurisdiction of *nikah* and its registration has never been countered, rather it is suggested from every corner that

113 *Qadi* comes from a verb meaning to "judge" or to "decide" he is the magistrate or judge of the *sharia* court, who also exercised extrajudicial functions, such as mediation, guardianship over orphans and minors, and supervision and auditing of public works.

law of registration of Muslims under the Qazi's Act should be made so that problems cropped up after the marriage maybe easily resolved.

One of the very interesting trends witnessed in this survey is that by efforts of the Muslim personal law board as well as the awareness generated amongst the Muslims, the number of divorces has reduced. Out of 28 high courts and apex court, only few cases of divorce are reported in this survey year. It is astonishing to note how this problem is labeled as a grave problem of the country and the judiciary as well as the legislature are busy solving this, where *prima facie* there is no problem. Of course, a number of cases on maintenance have been reported in this survey year but it shows that divorcees do not want to challenge the effectiveness of divorce or to continue with their cruel husbands rather they seck maintenance to punish those who misuse the divorce which is already provided under Islamic law.[114] One more reason maybe that Muslim women are ready to settle their marriage disputes particularly with the effectiveness of divorce from their *ulemas* and therefore they are reluctant to put the matter before the court. This also gives the message that no initiative should be forced and reforms should come from within. At the same time the decision on maintenance in *Daniel Latifi* case restored the constitutional validity of the Muslim Women Act, 1986. However in this regard it maybe respectfully submitted that the dual regime (under the Act and Cr PC) to obtain the remedy should not be encouraged in the interest of lawyers and the burden of the court. However, as far as law of *hizanat i.e.*, special right of the mother to have the custody of child is concerned, recognized by the court and harmoniously construed with the father's right of *wilayat.*

As far as the law of the property is concerned the survey covers the cases relating to gift, will, inheritance and *waqf*. However, a case of pre-emption also finds place in this survey year. The general trend relating to the law of property does not deviate much from the Islamic legal point of view and the decisions are in the spirit of *sharia*. And in certain places the courts must be appreciated for their understanding about property law of Islam.

This surveyor is unable to understand that how Krishna Iyer J and some other judges though in minority have better understanding of Islamic law, and why their brother judges are reluctant to follow that line but always harping the same old tune that Muslim law is discriminatory for the female kind. Many rights under Islamic law are secured to women for about more than 1400 years ago and this still find place in the legislative book of many Muslim countries but this does not come in the sight of the Indian courts. It is also astonishing as to why Muslim scholars are reluctant to take any stand in order to remove the discriminatory practices prevalent in the Indian Muslim society and come forward with a code themselves according to the spirit of Islamic law following the doctrines of *takhyer* and *talfiq*. All schools of Muslim law

114 See for details, *Supra* note 25.

have equal significance as far as Islamic jurisprudence is concerned, then why unnecessary adherence towards a particular school of law can not be done away with on the lines of Dissolution of Muslim Marriage Act, 1939? Muslim law is a jurist-made law and not a judge made law then why, like the jurists of other Muslim countries, Indian Muslim jurists are not taking a stand to evolve the law according to the needs of the time and circumstances under the sphere of *sharia?* Why do they allow the opponents of Muslim law to raise their fingers? If they will not correct the misunderstood law and show the true picture of *sharia* then judiciary must step in. This role of the present Indian Muslim jurists like their predecessors will be appreciated by unbiased Muslim brothers also as it will be a step forward to make a common code which will not be discriminatory against the womenfolk. Lastly, it is very humbly submitted to the legislature and judiciary that any step towards reformation of Muslim law should be initiated by the community itself otherwise its enforcement will be very difficult and it will have the same fate as many other social legislations.

Last, but not the least, it is important to mention that the manner in which Mulla's *Principles of Mahomedan Law*[115] has been quoted (as if it were a codified law), may give a wrong impression to those who are not familiar with the Muslim legal system. Therefore it is humbly requested that our judges take precautions while writing their judgments particularly in Muslim law.

115 *Supra* note 16.