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MUSLIM LAW

*Furquan Ahmad**

I INTRODUCTION

DURING THE year 2017, only a few substantial judgments were delivered by the higher judiciary on Muslim law. However, the issues involved are very vital and have a deep impact both on the community as well as on the national interest. Justice Krishna Iyer long back observed that when judicial committee of downing street interprets Manu and Mohammad of India and Arabia marginal distortions are inevitable.[1] However, he was totally oblivious of about the fate of judicial decisions pertaining to Muslim law by the Indian judges themselves. Most of the cases in the survey here are related to the concepts such as dowry, etc. which are totally unknown to the *sharia* and they should have been reported under the heading of criminal law cases, instead of Muslim law. Some relevant cases which are reported in this year are either on marriage, divorce, maintenance and guardianship which may be covered under law relating to status. The cases are also reported on inheritance, gift, will and *waqf* which are under the cluster of law relating to property law. With few exceptions it may be submitted that most of the judgments are erroneous and reveal that judges and lawyers themselves misunderstand the law and thus the fate of the interpretation is now beyond the imagination of Justice Krishna Iyer, which he had opined long ago. About twenty cases are reported under law of status and about fifteen cases are covered under the law of property. All the substantive cases are being analysed under the shadow of *sharia* hereunder.

II LAW RELATING TO STATUS

Nikah (Marriage)

Muslim Marriage is commonly misunderstood as a civil contract. However, it is not a contract like Indian Contract Act, 1872. The essential ingredients of marriage are *ijab* (consent of the bride), *qubool* (acceptance by the groom) and *mehr* (token of

* Professor, The Indian Law Institute, New Delhi. The surveyor gratefully acknowledges the assistance extended by Mr. Rishi Raj Singh, student LLM (ILI).

1 *A. Yousuf Rawther* v. *Sowramma*, AIR 1971 Ker 261.

love and affection). Of course the elements of the marriage are almost similar to a civil contract but marriage has sacramental values attached to it and thus it is to be preserved. The parties, their well-wishers and the members of the society are directed that they should not leave any stone unturned to subsist the marital tie. Marriage is said to be the collection of *ibadat* (worship) and *muamlaat* (dealing)[2(A)]. Prophet himself says that marriage is his *sunnah* and asked his followers to marry as it is half of the *imaan* (faith)[2(B)]. With this brief background about the Islamic law of marriage the following cases are being discussed hereunder.

In *Gulista* v. *Jamshed* [2] the wife challenged the decree of restitution of conjugal rights before the Uttarakhand high court which was granted to the respondent-husband by the trial court. As per the records, both the parties to the appeal profess and practice Islam. The facts of the case are such that their marriage was solemnized and a child was born out of the wedlock. Wife's contention is that owing to the atrocities, misbehaviour, dowry demands, threat to life, etc. she got separated from her husband and has been living with her parents. She further submitted that the proceedings of restitution of conjugal rights have been initiated by the husband so as to overcome the probable proceedings which could be drawn by the wife on both civil and criminal side against the husband. The husband on the other hand alleged that despite all the efforts made by the family members of the respondent-husband to ensure that the wife continues to reside with the in-laws' family and discharge her matrimonial obligations she used to pressurize the husband to leave the village and start living in the township from where the wife belongs as *gharjamai*. And when he refused she deserted the husband.

The trial court observed that when the wife raises a defense by way of a reasoning to justify to live away from the husband and husband initiates the proceedings of restitution of conjugal rights then it is a heavy duty and the burden of proof which falls on the wife, to justify the reasons for desertion. If in these proceedings the wife fails to prove the reason, the husband is entitled for decree of divorce, because it would amount to be a situation where a wife without any valid reason had deprived the husband of her society and deprived him of matrimonial bliss of cohabitation. Learned family court has recorded a finding that when the wife had left the matrimonial home and had gone to her parent's home despite of the request being made by mother-in-law not to leave the matrimonial home, she contended that she can only come back to the home if she is brought with all respect. Thus, the court held that as a matter of fact there happens to be no dispute between them except the dispute of ego, as according to the statement recorded, they still cater the same emotional bondage and both were willing to join together in the matrimonial home. Thus, the court held that there is no such serious dispute prevailing between husband and the wife which could necessitate

2 MANU/UC/0503/2017; (2018) 126 ALR 161.

2(A) Abduri Rahim Muhammadan Jurisprudence 327 (All Pakistan Legal Decisions, Lahore, 1958).

2(B) Ibn Majah, Sunan, chapters on Marriage available at: https://sunnah.com/ibnmajah/9(asscessed on 11.02.2019).

dissolving the marriage, coupled with the fact that none of the incident justifying desertion by wife was proved, she was not entitled for living separately. Thus, the court held that a desertion cannot be permitted with the sanction of the court when it has come voluntarily from wife's own statement and pleadings that for no good reasons she is living separately hence she ought to have discharged matrimonial obligations.

The Uttarakhand high court on the basis of the evidences observed that the learned family court rightly decreed the proceedings of restitution of conjugal rights as filed by the husband. Hence, the appeal failed and wife was directed to join back the matrimonial home of the husband and to discharge her matrimonial obligations.

It is respectfully submitted that both Lower Court and the High Court confused the concept of marriage under Muslim law and Hindu law. The clear cut provision of the Islamic law states that wife has full right to live separately from her in-laws and it is the obligation of the husband to provide her with separate residence without interference of in-laws and any other family members. Therefore, one reason for desertion i.e., not providing separate residence was totally in agreement with Islamic law which remained unappreciated by all the courts.

In *Zameer Ahmed.* v. *State of J&K*[3] the petitioners Zameer Ahmed and Shaista Sidiq, had married each other vide *nikahnama* as per *sharia* in presence of witnesses. The petitioners produced photocopy of the same. Shaist Sidiq is daughter of respondent-mother. It is further their case that they have executed agreement of marriage with their free will and consent. It is further the case of petitioners that complainant pressurized Shaista Sidiq to marry some other person against her will and consent, that annoyed by marriage of Zameer Ahmed with Shaista Sidiq, the mother of Shaista lodged FIR at Police Station. Pursuant to FIR impugned, the police of police station Surankote i.e., respondent no. 4 produced Shaista Sidiq before the additional special mobile magistrate, Surankote for recording her statement. The Magistrate recorded the statement of Shaista Sidiq wherein she categorically stated that she was not kidnapped by any person but has out of her own free will and consent married with Zameer Ahmed under Muslim personal law and *shariat* law because her parents were pressurizing her to marry with a person whom she didn't like. So, on the basis of her statement (*supra*) she was handed over by the police to Zameer Ahmed in presence of learned magistrate Surankot. Further the matter was resolved by a local *panchayat* between the petitioners and parents of Shaista Sidiq in which an amount of Rs.10.00 lacs was fixed as dower (*mehr*) out of which Rs. 1.00 lakh was deposited in the bank in the name of Shaista Sidiq. It is further stated that the personal law board has given a *fatwa* that marriage of Zameer Ahmed with Shaista Sidiq is valid under Muslim law.

The respondent-mother has been alleging that her daughter has been kidnapped and placed State Board of School Education certificate to show that she was minor. The Jammu and Kashmir High Court referred to *Gulshan Bano* v. *U.T. Chandigarh*[4]

3 2017 SCC Online J & K 456.

4 CRM No. M13537 of 2010.

and *Mrs. Tahra Begum* v. *State of Delhi*[5] where it was held that as per Muslim law a Muslim girl is capable of giving in marriage if she attained the age of puberty under both *sunni* and *shia* law even if she is below eighteen years of age.

The Jammu and Kashmir High Court referred to another case *Md. Idris* v. *State of Bihar*[6] where the respondent was below eighteen years of age and Mulla's *Principles of Mahomedan Law*[7] and Tyabji's *Muslim Law*[8] were cited to show that every mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage and a girl, who has reached the age of puberty can marry without the consent of her guardian.

Therefore, in the light of the above the Jammu and Kashmir High Court in the present case held that no case is made against the petitioners and quashed the FIR against Zameer Ahmad and disposed the petition. The judgement is in total conformity with Islamic law which provides *ijab* (consent of daughter) as an essential ingredient of marriage. A similar view has been reiterated by the Jammu & Kashmir High Court in the case of *Zubida Akhter.* v. *State of J&K*.[9]

In *Amna Begum* v. *State of UP*[10] the petitioners submitted that they are major and have solemnized their marriage with each other according to Muslim Law, but they were being threatened and harassed. By means of present writ petition, the petitioners have prayed for direction in the nature of *mandamus* directing the respondents not to interfere in their peaceful matrimonial life.

The Allahabad high Court referred to the case of *Lata Singh* v. *State of UP*[11] wherein also the married couple was facing harassment by their respective parents as they had entered into inter-caste marriage. In that case the Supreme Court observed that "this is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or interreligious marriage".

In view of the above, the writ petition was finally disposed of by the Allahabad high court with the direction that the petitioners are at liberty to live together and no person shall be permitted to interfere in their peaceful living. In case any disturbance is caused in the peaceful living of the petitioners, the petitioners shall approach the concerned senior superintendent of police or superintendent of police with a certified copy of this order, who shall provide immediate protection to the petitioners.

5 WP (CRL) 446/2012.

6 1984 AIR 1826.

7 M. Hidayatullah (ed.) *Mulla's Principles of Mahomedan Law* 262 (N.M Tripathi, 16th edn., Bombay, 1968).

8 Faiz Badruddin Tyabji, *Muslim Law* 94 (N.M Tripathi, 4th edn., Bombay, 1968).

9 MANU/JK/0415/2017.

10 MANU/UP/1987/2017

11 AIR 2006 SC 2522.

Both the petitioners were also directed to appear before the Registrar, the Special Marriage Act, 1954, district Allahabad for registration of their marriage within two months from today.

This surveyor is unable to understand as to why the parties should register their marriage under The Special Marriage Act because consequentially they would be deprived of availing their personal in the future matrimonial matters. However, under Islam there's no bar on marriage on the basis of caste and tribe. Even the parents have no right to sever their relationship on this ground. The judgement in so far as registration of marriage under the Special Marriage Act is concerned frustrates the purpose of *nikah*. The direction for registration of marriage is commendable but why not under Muslim law itself. And it is now applicable in the state of Uttar Pradesh.

In *Kothar Beevi* v. *K. Aminudee*[12] the case before the Madras High Court was that the marriage between the parties was solemnized according to Muslim rights and customs. Out of the marriage a boy was born and thereafter their two daughters were born. The husband filed a suit before the learned principal district munsif, Tirunelveli, for the relief of restitution of conjugal rights against the wife on the ground that she voluntarily withdrew from the matrimonial home and hence he sought for a decree of restitution of conjugal rights. The wife filed a written statement, denied the various allegations and resisted the claim for restitution of conjugal rights on multiple grounds. She contended that after the marriage she was subjected to physical torture and it was due to the fear of her death that she had left the husband's house after 18 years of their marriage. Subsequently, the husband filed for the custody of their youngest daughter and when the wife returned the house articles, in lieu thereof the youngest daughter was returned to the mother. This was followed by the present suit for restitution of conjugal rights. During pendency of the suit for restitution of conjugal rights, the husband did not wait for the result and went on to contract a second marriage.

On analysis of the evidence, the trial court came to the conclusion that the husband is not entitled to the reliefs sought for and the dismissed the suit. On appeal, the lower appellate court allowed the appeal and decreed the suit. Hence, the second appeal was filed.

The Madras High Court observed that when the husband proceeds against wife for restitution of conjugal rights and also contracts second marriage during the pendency of the suit for restitution of conjugal rights and when the wife also complained of physical cruelty to extract money, after 18 years of matrimonial life then the burden proof is on the plaintiff-husband who takes a second wife to explain his action and to prove that his taking of a second wife involves no cruelty to the first wife. For instance, he may rebut the presumption of cruelty by proving that his second marriage took place on the suggestion of first wife otherwise the court will presume that under modern social conditions that the action of the husband in taking second wife, during pendency of the suit for restitution of conjugal rights involves cruelty to the first wife.

12 MANU/TN/2252/2017; AIR 2018 Mad 60.

The Madras High Court observed that there is no law or a rule which compel the court to always pass a decree in a suit for restitution of conjugal rights in favour of the husband. A duty is cast upon the court to find out whether it could be just and reasonable for the court to deny the said relief to the plaintiff Muslim husband if the proved circumstances are such that it could be inequitable to do so for a Muslim woman.

On consideration of the evidence and the pleadings the court found that the action of the plaintiff-husband is not *bona fide* and the fact that the plaintiff-husband has taken the second wife during the pendency of the suit also lead to the irresistible conclusion that he is disqualified for a decree of restitution of conjugal rights and reasoning given by the lower appellate court is not sustainable in law. Accordingly, the same was set aside and the court ruled in favour of the wife.

Here the taking a second wife is cruelty to the first wife if done so without the first wife's permission. This view is also in agreement with the sayings of some Muslim jurists. For instance Maulana Ashraf Ali Thanvi was not in favour of the second marriage without any reasonable cause and justification which includes the consent of the first wife also.[13]

Dissolution of Marriage

Under Islamic law marriage can be dissolved only when it fails to serve its purpose. Cheshire observed:[14]

> ……Divorce, since it distinguishes the family unity, is of course, a social evil in itself, but it is a necessary evil, it is better to wreck the unit of family than to wreck the future happiness of the parties by binding them to companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children…

When the initiative of dissolution is taken by the husband it is known as *talaq*, when it is proceeded by the wife it is known as *khula,* when it is through a mutual consent it is known as *mubarat,* in some cases the *qadi* or court may also dissolve the marriage and in that case it is known as *faskh* (judicial separation). The best illustration of *faskh* in India is the Dissolution of Muslim Marriage Act, 1939. With these words following cases on various forms of dissolution are being discussed:

Talaq

Shayra Bano v. *Union of India*[15] the judgment on triple *talaq* reflects some confused thinking and expresses its wishes for the law reform so that it should not be

13 Furqan Ahmad, *Towards the Renaissance: Shibli and Maulana Thanvi on Sharia* (ILI, New Delhi, 2018).

14 G.C Cheshire, 'The International Validity of Divorce' 61 *Law Quarterly Review,* 352 (1945).

15 2017 SCC OnLine SC 963.

used as a weapon against the women. The apex court has rightly described *talaq-al-bidda* and its position in various schools but they could only pose the problem without any proper solution. However, the solution is already prescribed in the Islamic Jurisprudence and even *Hanafi* law itself.

Though the judgement has many facets, however, the discussion is confined to the validity of triple *talaq* in *sharia* only and Kurian J. mentions in detail the position of all the schools as well as the sources of Islamic law which talks about the validity of the triple *talaq*. However, he could not recognise that everything which is bad in theology is not bad in law and he further could not appreciate that everything which is not clearly mentioned in Quran can still be held as part of Islamic law because Islamic law has four primary sources apart from secondary sources that is Quran*, hadith, ijma* and *qiyas*. For example, one third ceiling in law of will does not find mention in the Holy Quran and Prophet *sunna* is not expressly referred in this regard. However, all the Muslim jurists including *shia* and *sunni* are in agreement about one third restriction of the will. It is admitted that here we find rationale in law unlike triple *talaq*.

Whether triple *talaq* has been coming down from the times of Prophet or is it the innovation of the second Caliph is still debatable. Though it has always remained controversial but at the same time, it has been recognised by some jurists and therefore not only *Hanafi* school but all the *sunni* schools (*Shafai, Hanbali* and *Maliki*) have unanimously approved this form of *talaq* and that's why apart from Quran other three sources of Islamic law are replete with the permissibility of this type of *talaq,* though with certain differences based on intention of the person who pronounces the *talaq*.

It is astonishing to note that our learned judges highlighted the problem trying to give relief to the women but could not provide any proper device for their emancipation and failed to refer the doctrine of *takhayar* based on which all the Muslim countries initiated their reforms.

The miserable situation was faced by Muslim women during early 19th century also because they had no recourse to get rid of their undesired husbands as the *Hanafi* law was followed rigidly in India which had an effect of considerably restricting women's right to seek dissolution of marriage by *qadi* or a judge. After her marriage the woman facing situations like disappearance of her husband, his lunacy, his impotence and his refusal to provide maintenance in spite of his ability to do so was left with virtually no remedy for the dissolution of their marriage. It was at this juncture that Maulana Thanvi wrote his monumental book "*Al-Hilat al-Naizaah*" (lawful device for disabled women). A bill was prepared based on the suggestions and recommendations of Maulana Thanvi which was introduced in the Central Legislature by Mohd. Ahmed Kazmi in 1936 and was eventually enacted in 1939. Maulana Thanvi opines "it is likely that *Hanafi* School may be questioned on the grounds of adequacy. The answer of this would be that this school does also allow with certain conditions subscription to the views of other *mujtahid* in the event of some dire need". This is known as *takhayar* (eclectic choice) .

Apart from the above, the jurisprudence of *istihsaan* is also provided in *Hanafi* law. The regard of custom, propriety and suitability of circumstances which have been observed in *Hanafi* legal system is scarcely to be found anywhere else. *Hanafi*

jurists interpret the word *istihsaan* as meaning the seeking of the best course for general welfare. The general spirit of Islamic law and its widespread purpose is to avoid hardship and considering the needs and circumstances of the people. Hence according to suitability, another practical method was adopted which was denoted by the word *istihsaan.* That's why the renowned *Hanafi* scholars like Mufti Kifayat Uallah and Maulana Abdul Hai etc. were of the opinion that the three *talaqs* in the same sitting should be treated as only one *rajai* (revocable t*alaq*) according to views of *Ahle Hadith*. And the same is reported by leading companions like Ibne Abbas, Taus, Akrama, Ibne Ash etc.

The rules of *Ahl-e-Hadith* and *shia* schools are indeed path breaking step in law of *talaq* in India and its opposition by some Hanafi *ulema* is unfortunate. If Quran, *hadith* and other Islamic legal treaties will be interpreted by the legislature and the courts, they can never be without pitfalls as Krishna Iyer J. says "when judicial committee of Downing Street interprets Manu and Mohammed of India and Arabia, marginal distortions are inevitable" and this saying of Krishna Iyer is also visible in the present day judgements.

The court directed the legislature to make the law in this regard. A woman activist few days' back was lamenting that had the same thing been done by our *ulema*, we would have enjoyed better fruits. Aftermath of judgment a Bill is initiated and passed by the *Lok Sabha* against *talaq-e-biddah* which provided three years imprisonment for a divorcer. The surveyor has already commented upon the judgment as well as the bill at length.[16]

Mubarat

In *Manmadh Rebba* v. *Sharanya Rebba*[17] due to certain disputes in their married life, the wife had filed a suit against the husband which had been referred to mediation and in view of the settlement reached between the parties, a memorandum of settlement in terms of section 89 of the Civil Procedure Code was drawn out and was sent to the court below under which the parties had agreed that they would seek for dissolution of their marriage by mutual consent. In lieu of the same memorandum, the husband, who is a resident of United States of America, had presented an application on executing a general power of attorney in favour of his father, so that his father could be permitted to represent him. The family court did not allow the plea.

In the instant case, two aspects arose for consideration before the Karnataka High Court, namely, as to whether the personal appearance of the husband should be dispensed and as to whether the very joint petition is to be taken up for consideration to its logical conclusion at this point in time, notwithstanding the fact that period of 18 months has elapsed from the date of filing the petition.

The court along with the legal aspect also kept in view the factual aspect of the matter that the husband is presently residing in USA and there is impediment for him

16 See, LII *ASIL* (2016), Muslim Law.

17 MANU/KA/2044/2017.

to physically appear, which is not disputed even by the wife. For this aspect, the court relying on *Krishna Veni Nagam* v. *Harish Nagam*[18] in which the apex court had also relied on the hardship being faced by the husband and stated that "One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video conferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the high courts ought to issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person. In several cases, this court has directed recording of evidence by videoconferencing.

The High Court of Karnataka further observed that every district court must have at least one e-mail id. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the court. A designated officer/manager of a district court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every district court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the high courts.

The High Court of Karnataka therefore, directed that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice.

Therefore, the Supreme Court of India had directed that the advancement of technology is to be utilized for service of the parties or for receiving communication from the parties. In the instant case too, when the parties had entered into a memorandum and the husband had showed his intention to divorce at every stage clearly, all that is necessary to be ascertained by the court, at this point is whether, both the husband and wife still reiterate their consent and whether, on accepting such consent, dissolution by mutual consent could be granted.

18 (2017) 4 SCC 150.

With regard to the second question, the court stated that when the petition which had been filed before the court below was being actively proceeded even though the period of 18 months has elapsed there would be no bar for the court below to record the consent of the parties in the very petition and arrive at a conclusion thereto. Hence, the lower court could use available electronic mode and fix an appropriate date of hearing.

The surveyor is only concerned that why in the instant case where both the parties are Muslims and if the marriage was solemnized according to Muslim law then why from lower court to high court were reluctant to mention the Islamic provision of mutual consent of divorce which is known as *mubarat.* Besides how much emphasis is given for mediation in the holy Quran to subsist the marital ties is unparalleled but the courts could not appreciate these provisions. However, the modern technology for mediation is suggested by the court is in no way against the matrimonial laws of Islam.

In *Aslam Siddique* v. *Samreen Khan*[19] the brief facts of the case were that Samreen Khan filed a suit for dissolution of marriage performed between the appellant and respondent. She had pleaded that the two were married in accordance with Muslim rituals and sufficient dowry was given. After few days of marriage, the husband left for Mumbai and used to come for some 2-4 days in a month or two. The wife further claimed that the husband and his family members tortured her and made demands of dowry; she was also not provided proper care in the in-laws house. In due course of time, the wife shifted to Mumbai with her husband, however, the torture and beating continued. Then an abortion was effected and she finally left Mumbai with her parents. The wife also claimed that she was not given any maintenance or the amount of *mehr* fixed at the time of marriage. The husband, on the other hand, denied all the claims made by the wife and stated that he was willing to live with her.

The trial court framed three issues namely, whether the husband had neglected the wife in regard to payment of maintenance and whether the husband without any reasonable cause deprived the wife of matrimonial pleasure and whether the husband had practiced cruelty with the wife. The trial court had answered the latter two issues in negative and the first issue in favour of the wife. Thus, the trial court reached the conclusion that the husband had in fact neglected his wife and had failed to provide maintenance to her for a period of two years. The court thus, relying on section 2(i)(ii) of Dissolution of Muslim Marriage Act, 1939, held that the respondent is entitled to a decree of dissolution of marriage.

In an appeal, the husband pleaded that there was no evidence before the trial court to conclude that the husband neglected the wife and failed to provide her maintenance. The High Court of Madhya Pradesh however appreciated the fact that the husband himself had admitted that he has not paid the maintenance as well as the amount of *mehr* to the wife. Thus, the high court opined that the trial court had rightly

19 MANU/MP/0897/2017; 1(2018) DMC 427 MP.

held the husband guilty as he has neglected and failed to provide maintenance for a period of two years to the respondent-wife and rightly granted decree declaring the marriage as dissolved. They further stated that since respondent-wife is the only daughter of her parents, hence, it cannot be ruled out that the husband wants to get property of the parents of the wife and dismissed the appeal.

The High Court has rightly decided the case in accordance with the provisions of Dissolution of Muslim Marriage Act, 1939.[20]

***Faskh* (Judicial separation)**

In *Vakkal Haji Attaur Raheman* v. *Mariam*[21] the case before the Karnataka High Court was that the wife in her suit which was filed under section 2(viii) (a) (d) & (e) of the Dissolution of the Muslim Marriage Act, 1939 was that, she was legally wedded wife of 'the husband' (appellant herein), whose marriage was solemnized as per the Muslim Law at Qatar. Her parents had spent huge amount to perform their marriage and a substantial quantum of gold and cash in the form of dowry was also given to her husband. For about 6 months after their marriage, they were leading happy marital life and thereafter, 'the husband' started ill-treating and manhandling her. He was joined in such acts by his family members also. He also sold golden ornaments worth ₹ 8,00,000/- given to her at the time of her marriage to fulfil his luxurious life. He was treating her as a maid servant. He further demanded an additional dowry of ₹ 10,00,000/- and in that regard to blackmail her, he took away their two children with him, whose custody she had to ultimately get through the intervention of the police. He was also not permitting her to practice her religious rights therefore she suffered by the cruelty of her husband.

The husband on the other hand denied the allegation of his wife that her parents had spent huge amount to perform their marriage and that he was also given with huge amount of cash and gold in the form of dowry. He specifically denied that he had treated his wife with cruelty and that he had prevented her from practicing her religious rights. On the other hand, he alleged that his wife was not interested to reside jointly with his other family members and was always creating difference of opinion among the family members. She was also insisting him to establish a separate residence for them. Therefore, he had prayed for an order of restitution of conjugal rights against his wife.

The family court held that the husband has subjected the wife to cruelty, that he disposed off the ornaments given to the wife at the time of marriage and that the husband had failed to prove that the wife ceased to cohabit with him without a lawful cause and denied that the husband is entitled for a decree of restitution of conjugal rights.

In the present petition before the Karnataka High Court it the aforementioned decision of the family court was challenged. In the family court both the husband and

20 For detailed provisions of grounds for dissolution of marriage for not providing the maintenance see chapter 7 *supra* note 13.

21 MANU/KA/2475/2017.

wife were cross-examined. It was in the cross-examination it was elicited in the form of admission of a suggestion that the husband had not written any letters to his wife or children expressing his best wishes to them on their birthdays. In the very same cross-examination, he specifically stated that "I have no love and affection towards my wife and children". Even after making such a statement, 'the husband' has not volunteered to give any explanation as to what made him to say so. As such, it remains that his denial of the allegation that he was not taking care of his wife and children is only a lip sympathy, but in fact he was not loving his wife and children and was not affectionate to them. In the very same cross-examination, he further admitted a suggestion as true that his wife has been looking after the children and their education for the last four years. This also goes on to show that he was not giving attention to 'the wife' and children though was expected of him.

After the careful consideration of all the evidence the Karnataka High Court held that the family court has rightly come to a conclusion that the wife was subjected to cruelty by her husband. Secondly, in order to avoid such cruelty, if the said wife is living with her parents and away from her husband for some time by that itself, it cannot be called that for no valid reason she has denied or deprived her husband, the conjugal rights for which he is entitled to. Therefore, the family court has rightly come to a conclusion in decreeing the suit filed by the wife for dissolution of the marriage solemnized between the petitioner-wife and the respondent- husband and dismissing the suit of the husband filed for seeking the relief of restitution of conjugal rights.

Both the courts indeed decided the case in the spirit of Islamic law. Here the surveyor wants to mention that there is no concept of dowry under Islam and it is a serious crime in the name of sacred contract and therefore the money which the husband used should be returned to wife. As far as wife's demand for separate residence is concerned it must be mentioned that is totally in agreement with Islamic law and is also her exclusive right.

In *Naushad Hussain* v. *Razia*[22] a case was filed in the Uttarakhand High Court by the respondent wife invoking section 2 of the Dissolution of Muslim Marriages Act, 1939, seeking dissolution of marriage.

It is the case of the wife that the family members of the wife visited her at her in-laws place and they requested to send the respondent wife with them and that after staying for some time with the parents, she would be returning back. This aggravated the attitude of family members of the husband so much so that they tried to assault the family members of the wife. Therefore, the wife's family lodged a complaint with the police, because in the said case of altercation, the mother as well as the brother of the wife suffered injuries. While deciding upon it the trial court observed that no doubt the burden of proof lies on the person who claims a happening of certain events. But in the instant case, the incident has been almost practically admitted by the husband,

22 MANU/UC/0560/2017; 2018 (2) UC 1242.

wherein, he has admitted that on 19th June, 2005 they were residing together in Badaun and also that the mother and brother and brother-in-law of the wife had visited Badaun and stayed in a hotel thereafter his wife was abducted by his in-laws.

In additional plea the husband has submitted that it is in the habit of the family members of wife to create such situation and extract money because in the earlier marriage, too, which was solemnized by the plaintiff with the son of her *buwa* (*Phuphi*), there was the same attitude of the family members of wife to create pressure on the husband side to extract money and then to give divorce and thereby make it as a source of earning. To this the family court held that when the husband raises an allegation against the family members of the wife to the effect that the family members of the wife are in the habit of using the wife as a commodity for the purposes of earning money by getting married, getting divorce and to earn money by adopting the said process, itself, will amount to cruelty, but it also amounts to be an allegation about the conduct of each family members and would be character assassination. The court further held that when an allegation is raised to the extent by the husband that the family members of the wife have abducted the wife, there cannot be any worse humiliation than this. The family court further observed that the evidence revealed that the husband has also pleaded in his correspondences while lodging complaints that wife had escaped from the home of her earlier husband Salim, after taking Rs. 1,00,000/- and other valuables. The court held that even such type of an allegation to the effect that the wife has committed a theft, in her own home, amounts to cruelty.

On the overall scrutiny of the dispute, the family court observed that the wife succeeded in establishing that there was cruelty exercised by the husband and thus the marriage stands dissolved. The husband filed the present appeal against the said judgment.

The appellate court while deciding the appeal at hand filed by the husband against the order of the family court, took note of the apex court judgment in *N.K. Somani* v. *Poonam Somani*[23] in which it was held that in order to hold that the allegations made in the pleadings by the opposite party constitute cruelty, those allegations must be disproved by showing them to be false or wild or baseless. Unless the allegations are disproved mere fact that allegations are not proved cannot be taken to say the allegations levelled against a person in the pleadings amount to mental cruelty.

The high court further held that where either party to the marriage has caused physical harm it should be such harm which manifests hostility and only this will amount to be a cruelty. In the instant case, the cruelty was extended to such an extent that there had been a criminal case alleged, not denied by the appellant. Thus the decree of divorce as granted by the court below was just and proper. In that view of the matter, the decree rendered by the Family Court, Dehradun, decreeing the dissolution of marriage under section 2 of the Dissolution of Muslim Marriages Act,

23 AIR 1999 AP 1.

does not suffer from any error or mistake apparent on record. Thus, the appeal was dismissed.

The surveyor submits that in Islamic society this type of events have no place and the parties are liable to be punished for social crimes. Marriage in Islam is a social contract where husband and wife are equal partners (*libas* of each other). The purpose of marriage is peaceful living and enjoyment of the parties rather existing in a hostile atmosphere. Therefore, the court has rightly interpreted Dissolution of Muslim Marriages Act in its true spirit.

In *P.P. Sameema* v. *Raffeeq*[24] the marriage of the appellant, Sameena, and respondent was solemnized as per Muslim law and practices and a child was born thereafter. She alleged that she was treated with cruelty and the husband had deserted her. Owing to this, she also filed a petition for dissolution of marriage under section 2(viii)(a) of the Dissolution of Muslim Marriages Act. It was contended that she was presented with 30 sovereigns of gold ornaments by her parents at the time of her marriage and about 2 months later, her husband started misappropriating the gold ornaments and he had appropriated 8 sovereigns of gold ornaments. The contention also claimed that he had demanded money which was paid by her father. He further demanded more money and also wanted more gold ornaments. Soon after the demands he started torturing and threatening her even when she was 5 months pregnant at that time.

Upon being unable to bear the sufferings, she was taken back to her parental house where she delivered a son. The husband, however, came and enquired about the child only after six months of his birth. Two months later, mediation took place and the wife was taken back to the husband's house. A few days later she was again sent back to her parental house. Another mediation took place wherein the husband demanded more gold ornaments and some furniture. The wife preferred a complaint before the police station against the husband under section 498A of the I.P.C. Ultimately, a compromise was struck between the parties under which few more items of gold were given and she went to the husband's house. However, the entire gold ornaments were appropriated and the demand for more sovereign gold was raised for starting a business and again money was given. The business did not run well. She was left again only to be later informed that he had married another girl. Attempts towards mediation were made but did not fructify. This suit was coupled with a maintenance claim filed by the petitioner and minor child. The husband denied the allegations and filed a petition for restitution of conjugal rights.

The Family Court, Kozhikode, however, dismissed all her pleas and allowed restitution of conjugal rights along with allowing for maintenance of the child. The appeal before the High Court of Kerala at Ernakulam was filed by the wife claiming realisation of money as the value of gold ornaments and the amount paid to the husband. Hence, the only question to be considered in appeal was whether the petitioner was entitled to recover the amount.

24 MANU/KE/0878/2017.

The family court, while considering the above claim, observed that there is no pleading as to when the wife's father had paid the said amount as alleged in the petition and that nowhere in the petition it is stated that there was such a demand by the husband. Further, it was held that there is no clarity in the pleadings with reference to the availability of the sovereigns of gold ornaments when the petitioner returned back after delivery.

The Kerala High Court re-examined the evidences produced at the lower court wherein the wife's father deposed that at the time of marriage, he had given 30 sovereigns of gold and Rs. 30000. The court noted that there is substantial dispute between the parties regarding the quantum of gold ornaments. The court further noted that the wife has a definite case that, after the understanding between the parties, she was sent back to the matrimonial home with 30 sovereigns of gold which was appropriated by him in a few months for the purpose of starting a business. This fact is not denied. He had only stated in the objection that he had not misappropriated sovereigns of gold ornaments belonging to the petitioner. But the fact that she had 30 sovereigns of gold ornaments when she came back from the parental house and resided with him is not denied. With regard to the question of refund of cash money the appellate court stated that the family court rightly observed that there is no proof for payment of the said amount.

Setting aside the order of the family court, the appellate court held that petitioner shall be entitled to recover from the respondent a sum of Rs. 1,23,698/- with interest @ 6% per annum.

Taking any money or jewellery or else in marriage and post marriage periods is a social crime under Islam and is totally unknown under Islamic law of marriage. And husband has no right even to use the goods of daily use if received from the wife's family without her permission. Leave aside the misappropriation of money and gold for which husband should be penalised. Under Islamic law she was entitled to divorce and in such cruel circumstances husband has no right to force the wife to reside with him. And she is entitled to get the judicial separation in the spirit of Dissolution of Muslim Marriages Act.

In *Rashhed M.V*. v. *Haseena*[25] the facts of the instant case were that *nikah* was solemnized between the parties. The wife contended that at the time of marriage, she had 147 sovereigns of gold ornaments. She also claimed that when a further demand was made, her father had given an amount of 1 lakh along with 10 sovereigns of gold.

The husband denied any demand for any amount and stated that some of the ornaments which were worn by her were either imitation or borrowed from relatives which were returned on the next day of the marriage itself. The husband also claimed that she didn't entrust all her gold ornaments to him and also that she failed to show that the ornaments were in any way appropriated by him.

On the basis of the evidence Family Court, Malappuram found truth in the contention of the wife that she had entrusted the husband's family with the gold

25 MANU/KE/1079/2017.

ornaments and the court relied on cash memos, invoice, photographs etc. showing purchase of gold for the same. The court also found the case for giving 1 lakh probable. A petition had been filed for return of gold ornaments and money along with maintenance claim before Family Court, Malappuram which the court allowed.

The short question to be considered in the appeal before High Court of Kerala was whether the family court was justified in granting a decree as sought for. In regard to the existence of gold ornaments, there cannot be any dispute that the petitioner wife was having sufficient quantity of gold ornaments. Even the family court had believed the version of the wife, hence the appellate court proceeded on the basis that she was having some gold ornaments. However, the exhibits produced were the bills issued by foreign concerns and no attempt had been made to prove that the said bills were in lieu of gold purchased. With regard to other gold ornaments and payment of 1 lakh, other than the oral testimony of parties and witnesses, there is no other evidence. So, the question arises as to which party should be believed in order to grant a decree as sought for.

Although it is contended by the wife that the gold ornaments were entrusted to husband and his family during her stay at the matrimonial home, what happened to the gold ornaments after she left the matrimonial home has not been stated anywhere in the petition. She came back after some time and even then she did not make any enquiries regarding the gold ornaments and nothing is seen stated in the petition about the existence of the gold ornaments or the appropriation thereof even after the claim that there had been issues between the couple and that the relatives of the husband started harassing her. In such an event, the court questioned that should she not be more cautious as far as her gold ornaments are concerned. Further, she has a contention that when the respondent husband had come back from abroad, he stayed with her for two days and he had taken two gold chains from her. If the other gold ornaments were kept in the custody of the husband, there is no reason why the husband should collect two gold chains from the wife.

With regard to the decree passed for payment of 1 lakh, the family court granted the decree merely on the basis that the claim was probable and there was no rebuttal evidence. Moreover, the entrustment was also not proved by witness on behalf of the wife.

The high court came down heavily on the lower court stating that the court below has committed serious perversity in passing a decree and allowed the appeal, thus dismissing lower court's order to this effect.

Additionally, the High Court of Kerala also considered the issue of *talaq* pronounced by the husband while staying abroad. The wife contended that they separated in 2008 and thereafter the husband has not maintained her. The husband, however, claimed that he had divorced the petitioner wife in 2008. However, no witnesses were examined to prove that the *talaq* was pronounced in the presence of any witness, and no document had been produced to prove the said fact. Therefore, the family court regarded the *talaq* as improper and directed the husband to pay maintenance @ 5,000/- per month. The high court didn't consider it fit to interfere with the said finding and decision of the family court.

To this surveyor the only issue in this case which pertains to Muslim law concerned the pronouncement of *talaq* and in absence of the proof for the same the court didn't go much beyond the spirit of Islamic law. And if the wife is not divorced she is entitled for maintenance. As far as taking jewellery or any other item in the form of dowry is concerned is totally unknown in Islamic law and society and therefore this is beyond the scope of survey of Muslim law and such cases should not have been reported under Muslim family law.

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 support 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 "and for the divorced women, (is) a provision in a fair manner- a duty upon the righteous".[26]

The most popular case relating to this issue was *Md. Ahmed Khan* v. *Shah Bano Begum*.[27] 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 1932. 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 *(Mehr)* during the period 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 filed maintenance proceedings under section 125 of CrPC. The main issue raised was whether the payment of *mehr* and 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*[28] and *Fuzlunbi* v. *K. Khader Cali*.[29] The five judge bench 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 CrPC, in spite of *mehar* and maintenance being paid during *iddat.*

The aftermath of this judgment led to a social reaction. An uproar was caused by the representatives of Muslim community treating this decision as interference with their personal laws. Later Indian legislature passed the Muslim Women (Protection of Rights on Divorce) Act, 1986, that provided: (i) a reasonable and fair provision

26 Quran II: 241.
27 AIR 1985 SC 945.
28 AIR 1979 SC 362.
29 AIR 1980 SC 1730.

and maintenance within the *iddat* period; (ii) maintenance for children; (iii) amount of *mehr* (iv) all properties given at or after marriage.

The above legislation negated the effect of *Shah Bano* judgement. The position post 1986 Act can be inferred from *Danial Latifi* v. *Union of India,*[30] where the constitutional validity of the Act was challenged before the Supreme Court. The Court declared the Act *ultra vires* while it reinterpreted section 3 of the Act, the constitutional bench of the apex court, concluded:

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

This story opens the door of dualism to settle the dispute relating to maintenance. Sometimes it happens that when a party exhausts one remedy that is under CrPC she with the courtesy of advocate further approaches the court for another relief under Muslim Women (Protection of Rights on Divorce) Act, 1986. Now it has become a common feature and found in most of the decisions decided by the high courts and Supreme Court of India. With this background following decisions of this survey year are being discussed hereunder:

In *Muhammed Sajid P.* v. *Suhada P.*[31] a matrimonial dispute came before the Kerala high court. The couple got married as per Muslim Law and they don't have any children. Shortly thereafter issues arose between husband and wife and the wife started living at her parental home. Several litigations followed. The wife filed a criminal case under section 498A and 406 read with section 34 of The Indian Penal Code against the husband and his parents, a suit for return of 115 sovereigns of gold ornaments or its value and for claiming maintenance and a petition was filed for divorce. The husband on the other hand filed a petition for restitution of conjugal rights.

All these cases were decided by the family court wherein the petition filed by the husband was dismissed and the ones filed by the wife were allowed, direction was given to the respondent-husband to return 105 sovereigns of gold ornaments or its value with 6% interest from the date of filing petition, the respondent to pay maintenance @ 7,000/- per month and the petition regarding dissolution of marriage was allowed and the same was granted by a decree of divorce.

The present petition was filed by the husband challenging the aforementioned decisions of the family court. It is the case of the wife that at the time of marriage, her

30 AIR 2001 SC 3958.
31 MANU/KE/1787/2017.

father has given her 105 sovereigns of gold ornaments. On the date of marriage itself, all the gold ornaments were entrusted to her in-laws at the instance of her husband. She further alleges that the respondents were behaving in a cruel manner against her since her in-laws thought that her parents might give more gold ornaments at the time of marriage. She asked for the gold ornaments after a month of marriage. They told her that she has no right to demand and that she has no right in respect of the gold ornaments. However, according to her, she was permitted to wear the gold ornaments during important functions and the gold ornaments were returned to them immediately after the function. She further contended that after a few days of the marriage, all her gold ornaments were sold and appropriated. The 1st respondent/husband purchased laptop and paid his MBA fees with the said amount. They also utilized the amount for luxurious tour and other activities. She further contended that demands were being made for car and money and she was asked to remain at her parental house for about two months. It is further contended that on account of the physical and mental cruelty, she was not keeping well and on 16/8/2009, she was sent to her parental house. Thereafter, at the instance of her father, various mediations took place but on account of the attitude of the respondents, compromise did not take place.

The respondents denied various allegations and stated that the *mehr* as well as the gold ornaments were in the custody of the petitioner herself. They also denied the allegation of physical and mental torture.

The Kerala High Court observed that a wife living separately from her husband with reasonable cause is entitled for maintenance until they are separated by a decree of divorce. After divorce, she will be entitled for reasonable and fair provision and maintenance and other amount as contemplated under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Therefore, the Kerala High Court after perusing the materials placed before it found no error in family court's decision regarding maintenance as the court felt that conditions were such that the wife was forced to go to her parental home. As regards the husband's claim that he was not aware of the gold ornaments kept by the wife, the high court stated that the couple had lived together for about an year and if the respondent states that he does not know where she was keeping her gold ornaments, it is not believable.

The high court observed that when the parties approach a court of law, true and correct facts are to be mentioned. The respondent-husband has failed to bring forward a case which could be believed. Their witnesses are all parties who have absolutely no connection whatsoever with the issue involved and it is rather clear that they had given false evidence before court. In a matrimonial case, the dispute between the parties is decided on the basis of preponderance of probabilities.

The high court held that the petitioner-wife has a definite case that her entire gold ornaments were appropriated by the respondents for the husband's study and for luxurious tour etc. Therefore, taking into account all the facts the court was of the view that the petitioner is entitled to get back 80 sovereigns of gold ornaments or its equivalent price. To that extent, the order passed by the family court stood modified. As regards the divorce granted in the case, the petitioner/wife had filed the divorce petition under the Dissolution of Muslim Marriages Act, 1939. One of the grounds

stated is that he had treated her with cruelty. The marriage was found to have been irretrievably broken and the parties have virtually been separated for the last 9 years, therefore there is no reason to weld the relationship between the parties at this stage of the proceedings. Under such circumstances, the high court did not think it necessary to interfere with the decree for divorce granted by the family court.

Undoubtedly the learned court is fully conversant with the principles of Muslim law pertaining to marriage and divorce and therefore the court has beautifully resolved the dispute in the spirit of *sharia.* Such type of illustrations are rarely seen in the court decisions regarding Muslim law and for that the court must be appreciated.

In *Aneesh Ahmad* v. *Ruhi*[32] an instant petition was preferred by the petitioner Aneesh Ahmad for setting aside the trial court's order for interim maintenance under section 125 CrPC. The brief facts of the case are that the marriage between the petitioner- Aneesh Ahmad and the respondent- Ruhi was solemnized according to Muslim rites and customs. From the said wedlock a male child was born. It is alleged that all the in-laws and the petitioner pressurized the respondent to bring Rs. 5,00,000/- in cash, one house in the name of petitioner at Delhi and a luxurious car and due to the failure to meet these demands the in-laws used to beat the respondent mercilessly. Since the respondent was unable to fulfil their demands as mentioned above, she was forced to leave the matrimonial home by the petitioner. It is further stated that the respondent has no source of income as she is a housewife and dependent upon her parents and all the expenses are being born by her parents. It is further alleged that the petitioner is a man of means as he is a businessman and is running a business having many properties in his name at different places, but the petitioner did not pay a single penny towards maintenance nor paid any compensation or money for rent for residence for the respondent and the petitioner has no other liabilities except to maintain the respondent. It is pertinent to mention here that the marriage between the petitioner and the respondents has been dissolved according to Muslim law by pronouncing *talaq*. Consequently, the family court directed the petitioner husband to pay to the respondent wife ad interim maintenance till the disposal of the application. Subsequently the petitioner husband filed the present petition challenging the same.

The Delhi High Court observed that the object of section 125 CrPC is to provide speedy remedy to women and children who are unable to support themselves and are in distress. It is intended to achieve a social purpose and maintenance cannot be denied to the children on the premise that their mother is employed or has enough means to maintain them or that they are in the custody of their mother. Therefore, the court held that since the petitioner is under legal obligation to maintain the respondent and his minor son, the petitioner cannot shy away from his statutory obligation of maintaining the respondent and has to render the maintenance amount granted by the trial court which is without prejudice to the rights and contentions of the parties and without any infirmities.

32 244 (2017) DLT 663.

As far as dowry and giving and taking of articles in marriage is concerned, these social evils used to be totally unknown to Islamic society and Islamic law. However, if divorce and marriage was done under Muslim law then for divorcee's maintenance a new legislation has already been enforced in 1986 known as the Muslim Women (Protection of Rights on Divorce) Act and its constitutional validity is already being upheld by the Supreme Court of India. There is a lot of scope to secure the woman from economic destitution like fair provisions etc. Then why the courts are not applying that law and are insistent upon the CrPC. Sometimes it gives birth to dual regime and becomes a source of exploitation of the clients by the advocates and also increases the burden of the courts which are already burdened.

In *Afzal* v. *State of UP and Others*[33] one Afzal preferred a criminal revision in the Allahabad High Court against the judgment and order passed by the learned additional chief judicial magistrate. Brief facts which give rise to this revision are that the wife moved an application under section 125 CrPC with the averment that her marriage was contracted with Afzal according to Muslim Law and out of wedlock one female issue was born. The husband and in-laws were not satisfied with the dowry given at the time of marriage and by raising demand of motorcycle, washing machine, cash money, they used to torture her. On non-fulfilment of the aforesaid demand she was ousted from the house. She is unable to maintain herself whereas the husband is an employee of *Nagar Palika*, Bareilly as operator.

The main point of determination is that whether the husband despite having sufficient means has neglected to maintain his wife.

The Allahabad High Court observed that sometimes, a plea is advanced by the husband that he does not have the means to pay as he does not have a job or his business. These are only bad excuses and in fact they have no acceptability in laws. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife.

The case of *Shamima Farooqui* v. *Shahid Khan*[34] was referred to by the Allahabad High Court wherein the apex court observed that "a woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar".

The court further observed that the principle is that when prima facie marriage is established, maintenance should be awarded because section 125 CrPC is intended

33 MANU/UP/3052/2017.
34 AIR 2015 SC 2025.

to curtail destitution and also to ameliorate orphancy. The object is to achieve social purpose and to prevent vagrancy and destitution.

After going through the record, the Allahabad High Court observed that it is clear that the wife has been ousted from the house of her husband on being harassed and tortured for demand of dowry. Therefore, the impugned Judgment and order passed by the learned additional chief judicial magistrate, was held to be justified in the view of the Allahabad High Court.

It is astonishing to note that the court did not mention the provisions of Muslim law in the instant case regarding maintaining of the wife. If the wife is not *nashiza* (disobedient) and is forced to live separately then the husband is entitled to maintain her even if the wife is financially strong and the husband has no means because among the pre-conditions of Muslim marriage, one of the conditions is that the husband must be capable of maintaining his wife. Only then the marriage is permitted. If the wife is not giving company to her husband she may lose this right but if she is living separately because of reasonable cause she is entitled to get the maintenance.

In *Hashir* v. *Shermily*[35] a petition was filed in the Kerala High Court by the respondent divorcee, Shermily, seeking the return of gold ornaments given at the time of marriage as well as cash which had also been offered at the same time. She also filed a maintenance suit against the former husband in the judicial magistrate court, under section 3(1) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the 1986 Act') claiming Rs.75,000 maintenance towards the *iddat* period and 10 lakhs as lumpsum maintenance towards reasonable and fair provision along with the gold ornaments or its equivalent value.

The learned magistrate, after due enquiry, directed payment of maintenance during the *iddat* period at 5,000/- for 3 months and also 3,00,000/- towards reasonable and fair provision. Due to absence of any evidence to that tune, the magistrate rejected the claim for return of gold. Following this, the wife filed a criminal revision petition in the Additional Sessions Court, Kottayam in order to challenge the rejection of claim for gold ornaments.

While the said criminal revision petition was pending for consideration, husband filed an interim appeal challenging the maintainability of the original petition, arguing that when a finding had been entered into stating that there is no evidence to support the contentions urged, the very same contention cannot be urged in a criminal proceeding.

The wife, however, contended that the exercise of criminal jurisdiction by a magistrate does not stand in the way of a person claiming right under the civil law. Both the jurisdictions are separate and distinct and merely for the reason that a finding is entered into by the magistrate observing that there is no evidence, that by itself will not preclude the respondent herein from agitating the claim before the family court.

35 MANU/KE/0660/2017.

During the pendency of the original petition, the husband produced the order passed by the Sessions Court, Kottayam wherein the claim for gold ornaments had been rejected, however, the maintenance amount was enhanced to 6 lakhs.

Having regard to the principles enunciated above, the first question the court considered is whether the original petition filed by the respondent was maintainable. The court noted that it is apparent from the facts of the case that the proceedings under section 3 of the Act was taken up before the magistrate only after filing of the above original petition. Therefore, the original petition as on the date of filing of the same was indeed maintainable.

The next question was that the wife having approached the magistrate under section 3 of the Act wherein the same relief was claimed, whether the present original petition can be dismissed on the ground of *res judicata*.

The Kerala High Court noted that as far as the general principle regarding acceptability of the judgment of a criminal court before a civil court is rather well settled. A criminal case is generally filed for taking penal action against an offender whereas civil case is filed for establishing the civil rights of the parties. Both can go parallelly. But in the facts of the present case, especially matrimonial matters when different forum had been provided for making different claims, or even same claim can be raised before different forums, the question is whether one of the parties to the case can have an option or is their right concurrent.

In the present set of facts, the wife filed a case under section 3 of the 1986 Act before the magistrate and claimed return of gold ornaments or its value which was rejected by the magistrate. A revision petition filed against the said order was also dismissed. Under such circumstances, the question is whether such an issue can be re-agitated in the pending original petition filed under section 7 of the Family Courts Act, 1984.

Going by section 3 of the Act, the magistrate has absolute powers to direct return of gold ornaments or its value thereof. The said direction is in consonance with the powers vested with the family court to adjudicate on a dispute under explanation (c) to section 7(1).

The court opined that though the principle of *res judicata* may not apply in the present facts of the case, still, it is worthwhile to consider whether parallel proceedings can be initiated by a person with respect to the same subject matter. This aspect of the matter requires consideration. The question would be when a person had elected to approach a forum having jurisdiction knowing fully well the nature of consideration of matter before the said forum and suffers an order, can the very same person make a claim in a different forum following a different procedure. This aspect of the matter has not been considered by the family court, since this original petition is filed only on the ground that the principle of *res judicata* applies to the fact situation and since we have decided that it does not apply, as far as other legal arguments are concerned, it is open for the petitioners to agitate the same at the appropriate stage. The court refused to express any opinion regarding the same. In the result, this original petition is dismissed, however, reserving liberty to the petitioners to agitate all other contentions before the family court at the appropriate time.

It may be submitted that the high court as far as the issue related to Muslim family law is concerned is decided according to the provisions of the statute initiated in 1986 for maintenance of Muslim wife. The issue of *res judicata* et.al. are related to Civil Procedure Code and other general laws which are not under the purview of the said surveyor's comments.

In *Jamsheena* v *Naushad*[36] the case before the Kerala High Court was that the couple got married as per Muslim Law. It was alleged that at the time of marriage, she was given cash money and gold ornaments along with a motorcycle. She became pregnant and was taken to her house for the delivery where she gave birth. It was alleged that the husband was not interested to take her back. Even after he took her back to his house, she was ill-treated and threatened that he would divorce her by pronouncing *talaq*. Owing to this ill-treatment, she left to her maternal house with the child. Thus, a petition was filed for realisation of gold ornaments and the money.

The petition was filed before the family court and the above cases were tried along with a maintenance claim under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The family court dismissed the claim for recovery of gold ornaments as well as money but directed return of the motor cycle. In absence of an agreement between the parties in this regard and no material to prove that she was having such quantity of gold ornaments or the money, the claim for past maintenance was rejected and maintenance towards the minor was directed to be paid at the rate of Rs. 500/- per month.

In a petition before the magistrate, the wife contended that the husband was employed in Gulf and was having sufficient income so, the wife was entitled for a reasonable and fair provision for maintenance. The husband in his objection denied the said fact. The learned magistrate directed payment of Rs. 3,15,000/- as *mata*, however, the sum was revised and reduced to Rs. 2,14,920/- in the sessions court. In an appeal before the Kerala High Court, the court did not find it necessary to interfere in the maintenance issue as in the court's view even a coolie worker earning 200/- or above can give maintenance. The court, stated that they did not find any error in the lower courts' order of paying maintenance. As far as return of gold ornaments and money were concerned, apparently no materials were produced to prove the acquisition of gold ornaments or the payment of money and there were discrepancies even in oral evidences. Consequently, the court did not find any reason to interfere in the trial court's ruling.

Though under Islamic law and as per provisions of the Act of 1986, all the bridal gifts from either side should be returned to wife but here in absence of material evidences for the same, the high court rightly confirmed the family court's decision and at the same time confirmed the fair provisions mentioned therein.

In *Muhammed Asharaf* v. *E.N. Naseema*[37] the appellant and the respondent got married as per the Muslim religious rites and ceremonies in which the respondent

36 MANU/KE/1644/2017.
37 MANU/KE/1966/2017.

was given 58 gold ornaments. Some of these gold ornaments were utilised by husband's family for giving it to husband's sister while the remaining were sold and replaced for giving gold ornaments to another sister. Further, at the time of *nikah* a sum of Rs. 1,50,000/- was paid to the father of husband. The husband and his family on the other hand denied having received any amount or the gold ornaments. However, after considering the documents and evidences produced by the wife, the family court directed the husband to pay the wife an amount equivalent to the gold ornaments and a further sum of money at the rate of interest of 9% per annum from the date of filing the petition towards its realisation.

The brief question to be considered in appeal before the Kerala High Court was whether the family court was justified in passing a decree as sought for.

The Kerala High Court after relying on the cross examination of the wife and her witnesses opined that the finding of the family court can be disturbed as far as the rate of interest is concerned and reduced it to 6%.

It may be mentioned to note that all this giving and taking of money which is making in roads in the Islamic society is unheard of and this can never be the issue of Muslim family Law. The other major flaw according to Islamic law in the decision is that order for interest is against the mandatory injunction of Quran.[38]

In *Shahin Shahad* v. *Areej*[39] the marriage between the petitioner, Shahin Shahad, and the respondent, Areej, was held as per Muslim religious rites. Discord developed between them and the wife was ultimately compelled to live with her parents. Since she had no source of income to maintain herself, an amount of 7,000/- per month was claimed towards maintenance. The petitioner-husband admitted that they were living separately since but expressed, before the family court, his willingness and readiness to take care of her and to maintain her provided, she lives with him.

The family court considered the questions whether the wife was justified in living separately, whether she is being neglected and whether she is entitled to get maintenance from the husband. The husband contended that he was working as an engineer earlier but was currently unemployed. However, the family court granted maintenance petition by allowing holding that the wife is entitled to get monthly maintenance and accordingly, granted monthly maintenance at the rate of 4,500/-. The husband was accordingly directed to pay the amount.

A revision petition was filed in the Kerala High Court against this order of the family court wherein the husband claimed that the wife is not incapable of maintaining herself, which is a requirement under section 125. As per section 125 of CrPC :" a person needs to maintain his wife who is unable to maintain herself".

The husband claimed that in the given case, there was nothing to show that the wife was unable to maintain herself. He believed that on the contrary, the evidence show that she was not a minor or physically or mentally incapable to work, she also

38 Quran II:275.

39 MANU/KE/2171/2017; 2018 (1) KHC 331.

did not have any children to take care of. Further, the evidence show that she is the heir of a father who is a rich man.

Moreover, the husband pointed out that as per section 125 of CrPC, the magistrate "may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife". The husband however contended that he was ready to maintain her provided she co-habited which the wife wasn't ready for, as he remarried; but the husband pleaded that under his personal law, he was allowed to have four wives at a time.

Upon the first contention of the husband that the wife was capable to maintain herself, the Kerala High Court relied on apex court's decision in *Rajathi* v. *Ganesan*[40] which states-

> If we refer to proviso to sub-section (3) of section 125 where a husband offers to maintain his wife on the condition of her living with him and she refuses to live with him a magistrate may consider any ground of refusal stated to her and nevertheless make an order notwithstanding such offer, if the magistrate is satisfied that there is just ground for so doing. Explanation to the proviso states that if a husband has contracted marriage with any other woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

It is evident from the said decision that even if the husband offers to maintain the wife on condition of her living with him and if she refuses the said offer, it is for the magistrate to consider whether there is any good ground for refusal to stay with him. If the magistrate satisfies that there is just ground for denying so, despite such an offer, an order for maintenance has to be made.

It is evident that it is the mental harassment, according to the respondent that constrained her to leave the matrimonial home. These being the indisputable position in this case, the wife is certainly entitled to refuse the offer of the husband to maintain her provided, she lives with him. In such circumstances, her refusal on that ground cannot be a reason at all to hold that she is not entitled to maintenance. It only goes to show that she is being neglected and therefore, entitled to claim maintenance. Thus, the high court dismissed the revision petition and allowed maintenance to be given.

It may be mentioned to note that why for a Muslim wife the provision of CrPC are to be even invoked and applied by the courts. However, according to Islamic law, the refusal to live with the husband in the presence of second wife is justified. The husband's claim that he being a Muslim can have four wives and this right is ensured to him by his personal law is totally erroneous connotation and misinterpretation of Muslim law. Bigamy is allowed only in extreme emergency where no other option is available for the husband to continue with his first wife who is perpetually incapable

40 1999 SCC (Cri) 1118.

of cohabitation and that too with the permission of former wife. Of course it is better to have two wives than to oust the first one who is in dire need of support.

***Hizanat* (Custody) and *wilayat* (guardianship)**

Under Islamic law the concept of *hizanat* is a unique feature which ensures the right to Muslim mother and in her absence to her mother or some other female relatives to have the custody of the child.[41] However, this right of custody of mother does not affect the guardianship rights of father or any other guardian and therefore father is entitled to maintain his son or daughter when he or she is under the custody of the mother. This rule applies on the son till age of seven years and on the daughter till the age of puberty. Most of the courts are totally oblivious of this right and they confuse this right of guardianship. In this backdrop we are briefly discussing the following cases reported on the issue in this survey year.

In *Haroon Khan* v. *Nazreen Khatoon*[42] the case came before the Allahabad High Court to set aside the order passed by the principal judge, family court, under section 12 of the Guardianship and Wards Act, 1890. The facts of the case were that the father of the child was murdered in which the mother of child was made an accused. A *habeas corpus* petition was filed by the mother seeking custody of her minor child. The same was dismissed by this court on the ground that the mother was accused in the murder of her husband.

Against the dismissal of the aforesaid *habeas corpus* petition, a special appeal was filed, which was also dismissed with an observation that the appellant would be at liberty to invoke the provision provided under section 25 of the Guardianship and Wards Act, 1890 for custody of the minor.

Along with the said case, an application for interim custody of minor child under section 12 of the Act 1890 had also been moved. Against the said application, the petitioners have filed detailed objections and finally the Principal Judge, Family Court, Ghazipur had decided the application for interim custody of minor child and as an interim measure, the custody has been given to his mother i.e. first respondent and the same has been challenged by means of present writ petition.

Under the peculiar facts and circumstances of the present case, the Allahabad High Court observed that it would be appropriate that the court below should conclude the proceedings at the earliest as the matter relates to custody of the ward, who is hardly three and half years old and in this direction, the parties have also assured to the Court that no adjournment would be sought in the matter. The Allahabad High Court further observed that proceedings may be finalized within two months period and the custody of child may be handed over to the mother, who is the first respondent in the present petition within three days from today. With these, writ petition is disposed of.

41 AAA Fyzee, *Outlines of Muhammadan Law* 172-74 (OUP, 2nd edn., London, 1955).
42 MANU/UP/2736/2017.

A peculiar feature of Islamic law is that the custody of minor in case of boy till 7 years and in case of girl till puberty is with the mother. But if mother is deprived of the same on the ground of immoral character therefore in this case what should have been decided is only based on the facts and circumstances of the case. And unfortunately the judges made no mention of this peculiar feature of Islamic law.

In *Fakharuddin Ali Ahmad* v. *Tabassum Fatma Fakharuddin Ali Ahmad*[43] appellant-father was working as an administrative officer in the Ministry of External Affairs and marriage between appellant and respondent was solemnized out of which a son and a daughter were born. The case of the appellant is that respondent-wife demanded a flat at Patna from her husband after one month of their marriage. Differences grew to such a level that both of them were residing separately for the last four years and several litigations were going on between them. Respondent-wife has filed a case under section 498-A of the Indian Penal Code and also under the Dowry Prohibition Act, 1961 against the appellant. Respondent-wife has also filed a maintenance Case which is pending in the court of Additional Family Court, Patna. Son and daughter of the appellant are living with their mother at their maternal grandfather's place at Patna and it is alleged that respondent and her family members are denying appellant to meet his children. Since the son has attained the age of seven years, appellant being a natural guardian, has filed the present case for custody of his son and daughter under the principles of mohammedan personal law and same was dismissed by the impugned order. The appellant further contended that owing to dismal financial situation of the respondent-wife the children were deprived of proper care.

The case of the respondent-wife, as pleaded, is that the appeal is not maintainable in law or in fact and has been filed with *malafide* intention. The respondent-wife further pleaded that she has completed M.A. LL.B. from Patna University and is also having knowledge of computer and has joined in a 10+2 School at Patna and is in a position to maintain her children.

The Patna High Court observed that the fact that father is the natural guardian would not *ipso facto* entitle him to have custody. The welfare of minor is of paramount consideration and merely based upon the rights of parties custody of minors cannot be decided. The High Court interviewed the concerned children and the children unequivocally expressed their wish to remain with their mother. The court further observed that the respondent-mother should not prevent the appellant-father from coming to see the children and respondent should make necessary arrangement for the appellant to meet his children. It was finally held by the court that it is not desirable to disturb the custody of children and therefore the order of the family court with visitation rights given to father deserves to be maintained.

To this surveyor the judgement is not in consonance with Muslim law as far as the custody of son is concerned. The financial position of the mother should not have been taken into account. In the case of the boy, it is the liability of the father to

43 MANU/BH/1576/2017; AIR 2018 Pat 84.

maintain him but at the same time he has a right to the custody of his son also. Since daughter's custody with the mother under the rule of *hizanat* lies with the mother till her puberty so he can't get the custody of the daughter according to Islamic law. The brief survey of the judgement points out the inability of the court to have clarity about the provisions of Muslim law.

III LAW RELATING TO PROPERTY

***Wasiyat* (Will)**

A Muslim is directed by the *sharia* that he or she should leave some property for their children after their demise and not to put them in the state of destitution. However, if a person feels that his or her heir will not take care of some of their poor relatives to whom he is extending financial aid, in such a case a Muslim male or female can bequeath only one third of his property. Otherwise in favour of one heir no bequeath is allowed without the consent of other heirs. This one third provision of bequeathment is a very strong tool to compensate their orphan grandchildren, who are no more heirs in the deceased's property. With this brief discussion following cases pertaining to will are being analysed.

In *Abdul Kader Maricar* v. *Saraummal*[44] the brief facts of the plaintiffs' case were that Abdul Razack Maricar had three wives and through his first wife he had three daughters and two sons, the sons are plaintiff's 1 and 2 and the daughters are the defendant's 5 and 6. The plaintiff's 4 to 9 were born through the second wife viz., Ummasi Ammal. He had a daughter viz., Sabiya Ummal, the third plaintiff. The third wife is the first defendant and through her, he had four children viz., defendants 2, 3, 4 and 7. The deceased Abdul Razack Maricar left a registered will bequeathing his entire properties in favour of the first defendant and the will was alleged to be not valid as the sons and other co-sharers were not given a share. Therefore, the suit was filed for partition.

The first defendant filed the written statement wherein it was stated that the will is a valid document and under the Will Abdul Razack Maricar bequeathed all his properties in favour of the first defendant and since then the first defendant was in enjoyment of the same. The Will was executed with the knowledge and consent of the legal representatives and even after the death of Abdul Razack Maricar, the plaintiffs have given consent for the will.

On the basis of the evidence and materials, the trial court held that there was implied consent by the other legal heirs for the will executed by the Abdul Razack Maricar. Other legal heirs also kept quiet for more than 20 years, therefore, will was valid and binding on others. Ultimately, the trial court dismissed the suit. Aggrieved over the same, the present appeal came to be filed by the first plaintiff in the Madras High Court. The points taken into consideration by the Madras High Court was whether the will was valid and whether all the legal heirs have given consent for such a will?"

44 2017-2-LW 904.

The relationship between the parties was not disputed. The fact that the properties belonged to Abdul Razack Maricar was also not disputed. That Abdul Razack Maricar had executed a will bequeathing his properties in favour of his third wife was also not disputed. However, the only contention of the plaintiff was that under the Muslim personal law, bequeath made in favour of one person in respect of entire property is illegal and void. Hence the testator has no capacity to bequeath more than 1/3rd share of his property and any such bequeath cannot be made in favour of the legal heir.

The Madras High Court observed that it is well settled that under Muslim law a bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share and a bequest to an heir either in whole or in part, is invalid, unless consented to by other heir of heirs and whom so ever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent.

Prosecution witness in his evidence categorically denied any consent given by the plaintiffs either express or implied to the will executed by the father. When the parties specifically deny any consent, burden lies on the defendant to establish the factum of alleged consent given by the plaintiffs. The evidence of defence witness also clearly indicated that there was no consent by all the legal heirs. Moreover, if really all the legal heirs had given consent either implied or express, the defendant No. 1 would have effected mutation of records in revenue records. The revenue records were found to be in the name of original owner. These facts, the court observed, also show that the alleged consent pleaded by the defendant cannot be true. To make a will except 1/3rd share of the Mohammedan property the consent of all the legal heirs are absolutely necessary. Therefore, the will was held to be invalid as per Muslim personal law.

Since the first plaintiff alone filed the appeal and the other plaintiffs had not preferred any appeal, the Madras High Court passed the order in the favour of the first plaintiff and he was entitled to 14 shares in the suit properties and accordingly preliminary decree was passed, dividing the properties into 120 equal shares and allotting 14 such shares to the first plaintiff alone. Accordingly, the appeal was allowed and preliminary decree was passed in favor of the first plaintiff alone.

It must be mentioned to note that the courts are totally unaware of the laws of Islam and therefore they are unable to decide according to Islamic law. Under Islamic law a Muslim can bequeath only 1/3rd of his property. However, bequeathing in favour of one heir, this 1/3rd permission is subject to the consent of other heirs. The other thing is that there is no need of formal partition and when a person takes his last breath, his property is automatically vested among the heirs according to the shares provided under Islamic law. Therefore, the court rightly decided insofar as declaration of will as invalid is concerned, however, it must be submitted that this decision was not arrived after proper appreciation of Muslim law and therefore is likely to cause chaos and confusion.

***Hiba* (gift)**

A Muslim can gift his whole property to a heir or stranger irrespective of caste, creed or religion provided the possession must be handed over to the donee by the

donor and the donee must accept the property given in gift, this possession may be physical or constructive. Possession is very important element of gift and without it no gift is valid. Prophet himself says that "no possession, no *hiba*". In this background following cases pertaining to *hiba* are being discussed:

In *Mohd. Umar* v. *Mohd. Akbar Mohd. Yakub*[45] the appellant claimed to be the owner of the house in question and contended that his maternal grandfather Sardar khan orally gifted the said house property to the appellant and secondly, in order to avoid further litigation, Sardar khan executed sale deed of the said house property in favour of the appellant. It is further case of the appellant that the defendant, who is real brother of the appellant, was in need of residential accommodation and at his request he was permitted to reside in three rooms of the said property, therefore the respondent's possession is permissive. The appellant-plaintiff was in need of said portion, however, the respondent-defendant has refused to vacate the said portion of the house. The appellant thus instituted the suit for recovery of possession of the house property.

The respondent-defendant resisted the suit and denied that the maternal grandfather Sardar khan gifted entire suit house and thereafter sold it to the appellant. It was further contended that the appellant, being eldest son and male issue of the daughter, grandfather Sardar khan, treated all sons of his daughter like his male issue. It was further stated that since the appellant was the eldest and literate one therefore for the purpose of taxation of the property was mutated in his name. However, taxes were paid by Sardar khan as long as he lived. It was also contended that Sardar khan did not execute the sale deed of the house in favour of the appellant and said sale deed is false, forged and fabricated document. It has also been contended that late Sardar khan during his life time made oral will deed and by way of testament, allotted two rooms to the appellant, two rooms to the respondents and kept one hall common between two and allotted rooms to third brother Sk. Ahmed, to live together in their allotted portions peacefully and unitedly and pay the taxes proportionately. It has been contended that the appellant with forged document and false theory of oral *'hiba'* instituted false suit to grab entire house property.

The High Court of Bombay observed that there are three essentials to the validity of gift, (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift in pursuance thereto. It is also essential for the validity of the gift under Mahomedan law that the donor should divest himself completely of all ownership and domain over the subject of the gift. So far as the delivery of property, which is subject matter of the gift is concerned, no physical departure or formal entry is necessary in the case of gift of immovable property in which the donor and the donee both are residing at the time of the gift and in such case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The Mahomedan law

45 MANU/MH/3031/2017.

does not dispense with the necessity or acceptance of the gift even in case where donees are minors.

In the instant case the Bombay High Court found that the appellant's theory of '*hiba*' or gift fails on two counts. The appellant was minor at the time of alleged delivery of house property by way of *hiba*/gift and as such, right to take possession on behalf of him, belongs to his father/guardian. The appellant has only deposed that late Sardar khan had grown him up and educated him and also taken his care up to his marriage. The appellant has however, nowhere contended that his own father/natural guardian has been deprived of his rights and powers as guardian. There should have been a delivery of possession by grandfather late Sardar khan to the father of the appellant as guardian as his minor son and as such, gift is not complete. The mere fact that the appellant has been brought up and maintained by late Sardar khan, will not constitute late Sardar khan as guardian of their property so as to dispense with delivery of possession. Secondly, it further appears from the evidence adduced by the appellant that late Sardar khan had not divested himself completely from ownership and domain over the subject of the gift. It is true that no departure or formal entry is necessary in the case of gift of immovable property, in which the donor and the donee both are residing at the time of the gift and in such case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The existence of water tax receipts in the name of the appellant were not found to be sufficient by the court as the appellant had raised the issue of sale deed of the said property in his favour. Therefore, so far as the claim of the appellant about gift of suit property is concerned, the appellant has also failed to prove the overt act on the part of late Sardar khan indicating clear intention on his part to transfer possession of suit house and to divert himself of all control over the suit house. Thus, the courts below have rightly come to the conclusion that oral gift is not proved by the appellant.

In view of above discussion, the Bombay High Court found no substantial question of law in the present appeal and found no reason to interfere in the concurrent finding of facts recorded by the courts below.

It is respectfully submitted that the delivery of possession in case of minor should be handed over to his natural guardian who in this case was the father and therefore the gift could not be completed. Though the oral gift is valid under Islamic law but here the essential ingredients of the gift are not complied with and therefore the court has rightly held the gift to be invalid. It may further be mentioned that there's no concept of *karta* and joint family in Islamic law. Though the maintenance of orphan is emphasised beyond expectations but even the *kafil* (the one who maintains) can't be treated as a legal guardian. Such social and charitable gestures can't form the part of law.

In *Sirajudeen* v. *Sadurudeen*[46] three second appeals arose out of two suits and since the issue involved in all the three appeals was one and the same, the appeals were taken up for disposal by a common judgment.

46 (2017) 5 MLJ 87.

Initially, the deceased respondent, viz. Sadurudeen instituted the suit for recovery of possession and for damages with respect to a room in the first floor of the building. According to Sadurudeen, the suit property originally belonged to his father Sahib Khan Sahib, his brother Moinudeen Khan and himself. After the death of Sahib Khan Sahib, his property devolved upon Moinudeen Khan and himself equally. Thereafter, upon the death of Moinudeen Khan, since Moinudeen Khan and his wife Habija Beevi had no issues, he alone is entitled to the entire suit property as the sole legal heir. Since he permitted the appellant/Sirajudeen to occupy the suit property as a permissive occupant and subsequently cancelled the permission given to the appellant, he filed the suit for recovery of possession and for damages.

The appellant, Sirajudeen, pleaded that during the lifetime of Moinudeen Khan, he orally made a gift of the suit property in favour of his wife, Habija Beevi and after his death, Habija Beevi enjoyed the same by collecting rent from the tenant. The appellant further contended that Habija Beevi also orally gifted the suit property to him and hence, he is entitled to Moinudeen's half-a-share in the suit property. Moinudeen Khan and Habija Beevi, treated him as an adopted son and he lived along with them. He contended that he is not a permissive occupant as claimed by the deceased respondent, Sadurudeen. Thus, he filed a suit praying for permanent injunction restraining the deceased respondent from alienating the suit property.

The trial court, on examination of the entire oral and documentary evidence, held that the appellant was entitled to half of the share in the suit property and dismissed the relief of permanent injunction, as the respondent's rights as a co-owner would be affected. The suit filed by the respondent was dismissed by the trial court. Challenging the dismissal of the relief of permanent injunction sought by him, the appellant preferred an appeal challenging the common judgment and decree passed.

The first appellate court, by a common judgment and decree found that the *hiba* pleaded by the appellant was not proved and dismissed the appeal filed by Sirajudeen. While allowing the appeals filed by the respondent, the first appellate court held that the appellant is a permissive occupant and thereby allowed the suit for recovery of possession. Aggrieved by this common judgment and decree of the first appellate court, Sirajudeen filed a second appeal.

The core issue involved in all the second appeal was whether the suit property belongs to the appellant or the deceased respondent, Sadurudeen. The substantial questions of law that arose for consideration in these appeals was whether the judgment of the first appellate court is vitiated in its holding that *hiba* pleaded by the appellant is not valid in the absence of physical delivery of possession especially when the trial court found that both donor and donee lived together in the suit property before as well as after *hiba* and hence, only constructive delivery is possible?

The Madras High Court observed that as per Muslim law, when the husband dies without any issue, his property naturally goes to his brother. In this case, it was pleaded that when Moinudeen Khan was alive, he orally gifted the suit property to his wife Habija Beevi. Since they had no issues, after the death of Habija Beevi, the property would devolve upon her brothers and sisters. It is not in dispute that Habija Beevi was having a share in the suit property. Moreover, a claim for an oral gift has

got to be proved, however the same was not proved. Merely because the appellant resided in the suit property, he cannot take advantage of this fact under *hiba*. The first appellate court, in its judgment has clearly held that the first *hiba* supposedly given by Moinudeen Khan to his wife Habija Beevi has not been proved. However, it is not disputed by either of the parties that Habija Beevi, after the death of Moinudeen Khan resided in the suit property till her death. Even though the appellant has been residing in the suit property he cannot, as a matter of right contend that he is one of the co-owners and the same cannot be accepted. He may be the son of one of the co-owners being the legal heirs of Habija Beevi and may not be a trespasser, however, the respondent herein has got every right to seek possession of the suit property.

Upholding the lower Court's decision the Madras high court held that no donor/donee relationship was established between Moinudeen Khan and his wife Habija Beevi. When the first *hiba* has not been established, there cannot be any donor/done relationship between Habija Beevi and the appellant. Thus, the substantial questions of law were answered against the appellant and the second appeal was dismissed. However, it was left open to the appellant's mother and other legal heirs of Habija Beevi to seek partition.

The Madras High Court in this complicated case delivered the judgment in order and after fully understanding the law of Islam on the subject, for that it should be appreciated. An oral gift is valued in Islamic law but the facts and circumstances of the case show that in the name of *hiba* the purpose was only to divest the heir's, which is totally against the spirit of Islamic law of inheritance.

***Wirathat* (succession and inheritance)**

About the law of *wirathat* Prophet says that it is one third of the total knowledge: Learn the laws of inheritance (*faraid*)and teach them to the people; for they are one half of the useful knowledge.[47] The Muslim law of inheritance is very wide and covers not only the nearest relatives and the descendants but also the relatives of remote relations. When the deceased takes his last breath, his property is automatically dissolved amongst the heir, whether the property is formally partitioned or not. Each and every heir is entitled to own and possess the property. Among the *Quranic* heir's out of eleven, eight heirs are female and only four are male. The daughter is a *Quranic* heir but the son is not listed under this category, though he can get double share as a residuary. Similarly many technicalities are found in the law of succession which can be perused from any good book of Muslim law.[48] In this survey here some cases on the issue of inheritance are reported, which are as under:

In *Safinaz Abbas Bharmal* v. *Khalil Gulam Nabi*[49] the deceased Gulam Nabi had three children, viz. one son (Khalil) and two daughters (Zubaida and Zulekha)

47 *Sirajiyyah* tr. A. Rumsey as cited in *supra* note 42 at 329.

48 See for example, *id.* chapter 13 and 14 pp. 329-400.

49 MANU/MH/1623/2017.

plaintiff Nos. 1 to 12 are children of Zubaida and Ajij Ahmed Akbar Nachan who is plaintiff No. 13.

Defendant no. 1 Khalil is son of deceased Gulam Nabi. Defendant nos. 2 to 4 are sons of defendant no. 1. Defendant no. 5 – Zulekha Rais is sister of Defendant no. 1 Khalil and deceased Zubaida. It is claim of the plaintiffs that after the death of Gulam Nabi, defendant no. 1, being male member of the family and as a trustee of his two sisters, took charge and control of the suit lands for himself as well as defendant no. 5 and deceased Zubaida. It was contended that defendant no. 1 had no exclusive right, title and interest in the properties left by the deceased. As per Islamic law (*shariat*), defendant no. 1 was entitled to 50% share whereas defendant no. 5 and deceased Zubaida were entitled to have 25% share each in the suit lands. It is claim of the plaintiffs that the deceased Zubaida was demanding her 25% share in the suit properties till her death i.e., 23rd February, 1965. However, defendant no. 1 kept on promising, but did not give any share till her death. It is further case of the plaintiffs that plaintiff no. 13 and other plaintiffs were also making the demands for their share. However, defendant no. 1 kept on promising that he will give the share, but did not act on the said promise. It is their further case that in or around October 1994 plaintiffs came to know that defendant no. 1 had illegally and unlawfully excluded the plaintiffs and defendant no. 5 from their share. Upon inquiry they came to know that defendant no. 1 with malicious, mischievous intention and in *mala fide* manner was attempting to deprive the plaintiffs of their legitimate 25% share in the suit properties. In this background the suit came to be filed for partition, separate possession and declaration with ancillary reliefs before the Bombay High Court.

The defendants contended that much prior to the death, deceased Gulam Nabi, by a valid oral gift deed, had gifted the properties to defendant nos. 1 to 4 as well as to late Smt. Khairunnissa, who was wife of defendant no. 1. It is their further case that *vide* registered deed dated 14th February, 1959 he executed a declaration of gift in writing. It was also contended that on the basis of the said oral gift, which was subsequently registered, deceased Gulam Nabi made correspondence to the various authorities for mutating name of these defendants in the record. The defendants further submitted that deceased Zubaida and the plaintiffs, and defendant no. 5 were very much aware about all this since the year 1958 and therefore their suit was barred by limitation.

The Bombay High Court referred to the observations of the privy council in the case of *Mahomedally Tyebally* v. *Safiabai*, wherein it was observed that the heirs of a Mahomedan succeed to his estate in specific shares as tenants in common, and the suit for recovery of immovable property is governed by article 144 of The Limitation Act (presently article 65).

The Bombay High Court in the present case observed that in view of article 65, the suit will have to be filed within a period of 12 years when the possession of the defendant becomes adverse to the plaintiff. It could thus, be seen that under article 65, suit will have to be filed within a period of twelve years from the ouster or exclusion of the plaintiff. However, in the present case since the plaintiffs are claiming through deceased Zubaida, in view of explanation (b) of article 65, possession of defendant

nos. 1 to 4 shall be deemed to have become adverse only after the death of Zubaida. It was further observed by the Bombay High Court that if the plaintiffs prove that it is for the first time in the year 1994-95 there was ouster or exclusion from the suit property, the suit will be within limitation. Conversely, if the contesting defendants prove that ouster is prior to period of 12 years from the date of institution of the suit, it will have to be held that suit is barred by limitation. It has been the case of the plaintiffs that since the death of Gulam Nabi Bure, the demands of 25% share in the suit property were made several times. On 1st of August, 1995, the plaintiffs asked for the final reply from defendant no. 1 and on that day, defendant no. 1 for the first time refused to give share. It is therefore contended that 1st August, 1995 would be relevant date to consider ouster or exclusion.

On perusal of the documents on record the High Court observed that defendant nos. 1 to 4 have been claiming to be in exclusive ownership and possession of the entire suit properties right from inception. All the documents of revenue authorities further go on to show that either deceased Gulam Nabi or defendant no. 1 have made applications to the concerned authorities for entering the names of the contesting defendants in respect of immovable properties. The plaintiffs on the other hand have not placed a single document on record to substantiate their contention. In any case, it is important to note that if the deceased was demanding their share and defendant no. 1 was dilly dallying, then at least after deceased Zubaida's death the plaintiffs could have taken some action to assert their right. Undisputedly, after Zubeda's death, after a period of almost 30 years, suit is filed.

The high court in view of the law laid down by the privy council in *Mahomedally Tyebally* stated that the suit ought to have been filed within a period of 12 years from the date on which the contesting defendants had asserted their right in the suit property as exclusive owners thereof.

Reliance was also placed by the Bombay high court on a similar case decided by apex court viz. *Syed Shah Ghulam Ghouse Mohiuddin* v. *Syed Shah Ahmed Mohiuddin Kamisul Quadri,* wherein it was observed that the estate of a deceased Mohammedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster of denial of title.

Therefore, in the present case the Bombay High Court held that that plaintiffs have failed to prove that suit is within limitation and therefore dismissed the appeal.

The clear cut law as enunciated by the Apex Court also is that the property among the heirs of the deceased devolves among the heirs as soon as the person takes his last breath. Whether the property is practically partitioned or not, every heir is owner of the property according to his share. But in this decision the court placed emphasis on the procedural law and not on the substantive law of inheritance in Islam.

In *Amirun Nessa* v. *Md. Habib Ali*[50] the appellants were the respondent in the court of Civil Judge, (Senior Division), Hailakandi. The suit was preferred by the respondent/plaintiff claiming his right, title and interest by way of inheritance over the suit property left behind by his brother i.e., husband of the appellant. The plaintiff along with the husband of the appellant were the owners of the suit property. By entering into a registered partition deed both the brothers partitioned the suit properties which resulted in three kedars of land being given to the respondent and remaining land thereof was divided into two equal shares between both the brothers. Both the respondent and the deceased brother got their share of the land.

The deceased brother transferred his land by way of gift deed to the appellant and his foster son. He also purchased some land. Upon his death, he left behind his wife as the sole heir for the purpose of inheritance of the property under Mohammedan law. The respondent, in his suit had claimed that he was entitled to Rs. 75,000 approximately amounting to 3/4th share out of the total land left behind as the deceased brother was indebted to the respondent for his medical treatment. The respondent, thus, filed the suit seeking declaration of right, title and interest and confirmation of possession of lands which he got as his share by virtue his brother. The appellant-wife on the other hand claimed that she had not been paid the dower fixed to the tune of Rs. 18000 at the time of marriage.

The issues before the learned trial court were:

1. Is there any cause of action for the suit?
2. Whether the plaintiff has right, title and possession over the disputed land?
3. To what relief or reliefs plaintiff is entitled to?

After analysing all the evidences produced, the learned trial court decided that the respondent was entitled to get 3/4th share of the estate after discharging 3/4th share of the liability. The learned trial court while assessing the liability took into consideration the unpaid dower money and the expenditure for funeral expenses thereby assessing the total liability towards the appellant to be Rs. 28,000 which amounted to $3/4^{th}$ of the share of the respondent. Accordingly, the learned trial court passed a decree favouring the respondent's right, title and interest over 3/4th share of the property left by the deceased subject to discharge of the liability until the same is partitioned by the collector.

Upon being aggrieved by the judgment, the plaintiff preferred an appeal on the ground that the said decree by the trial court was made conditional so far payment of liability is concerned. The learned first appellate court allowed the appeal.

This decision by the first appellate court was challenged before the Gauhati High Court. This appeal was admitted on the following questions of law:

1. Whether in view of prevailing customs a foster son is entitled to inherit property of foster father as per Mohammadan law of succession?

50 2017 (4) GLT 49.

2. Whether plaintiff as brother of late Safiqur Rahman inherit 3/4th share of the property left by Safiqur Rahman and, that too, without sharing proportionate share of his debt, his medical and funeral expenses?

3. Whether the learned courts below erred in law in declaring the right, title and interest of plaintiff to the extent of 3/4th share although no documentary evidence as to property of the deceased has been adduced?

4. Whether in the absence of any finding as to the *Swaranlipi vis-a-vis* the averments made in plaint, the learned courts could have come to pass a preliminary decree for partition?

The appellant submitted that she would confine her argument with respect to the substantial question of law nos. 2 and 3 as the other substantial questions of law as per her had no relevance since under the Mohammadan law, a foster son is not entitled to inherit the property of foster father.

With regard to the substantial question of law no. 4, she submitted that the cause of action for the suit of the respondent itself accrued on the basis of the partition deed however, the respondent was claiming his share on the admitted share of the husband of the appellant.

In order to substantiate the question of law nos. 2 and 3, she submitted that under section 39 of the *Mulla's Principles of Mohammadan Law*,[50(A)] the estate of a deceased Mohammadan is to be applied successively in payment of (i) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration or succession certificate, etc. It is also submitted by Mr. Ghosh that under Mohammadan law, the payment of the debts of the deceased takes precedence over the legacies.

From section 294 of the same book, it appears that the heirs of a deceased Mohammedan in the case of dower debt are liable to the extent only of a share of the debt proportional to his share of the estate. Where widow is in possession of her husband's property under a claim for her dower, other heirs of her husband are severally entitled to recover their respective shares upon payment of quota of the dower debt proportional to those shares.

The appellate court found that the provisions of law as submitted by the wife cover the case of the appellants beyond any doubt and that the learned first appellate court while going through the findings of the trial court on the issue did not consider the provision of law as prescribed under the principles of Mohammedan law thereby arriving at the findings devoid of any basis in law.

Thus, the appellate court decided the substantial question of law nos. 2 and 3 in favour of the appellant by allowing the second appeal. The appellate court set aside the judgment and order passed by the first appellate court thereby upholding the judgment and decree passed by the learned Civil Judge, Hailakandi.

It may be mentioned to note that the learned High Court has a good understanding about the Muslim law of inheritance, about which even law men seems blank, leave

50(A) *Supra* note 7.

the lay man. For the decision of this complex inheritance case the learned judge must be appreciated. But the surveyor fails to understand that why only Mulla is the authority for him leaving aside Quranic texts, traditions of the Prophet and other modern writers who are well versed in and have a grip over the original sources of Islamic law like Amir Ali and Tayyeb ji, etc.

Waqf

Waqf is an institution on which the base of the economic welfare of Muslim society is based. According to this law of property the corpus be intact and the *usufruct* is dedicated to poors and for other charitable and religious purposes. The *usufruct* may be used by the dedicators, children and descendants which is known as *waqf al-al aulad.* This institution of *waqf* is drawing its validity from the Prophet's sayings and the illustrations of the companions and opinions of the leading Muslim jurists, irrespective if school and sects they belonged to.[51] The *waqf* administration is also equally important and Indian statute book is replete with the provisions of better administration of *waqf*. Given below are some of the cases relating to *waqf* and its administration.

In *Mohammed Aslam* v. *Neelu Dhandhiya,*[52] one Smt. Neelu Dhandhiya the decree holder (pertaining to a portion of the suit property) had filed a suit seeking specific performance of an agreement against Abdul Sami the judgment debtor. The said suit was decreed by the trial court. It was the contention of the judgement holder that the said property was transferred to her by the legal heirs of the original owner of the property. The said judgment and decree was assailed by the judgment debtor in the form of first appeal before the Rajasthan High Court. It was the case of the appellants that Abdul Samad, father of the judgment debtor, declared the suit property as *waqf al-al aulad* with a direction to dedicate Rs. 6000/- per year out of income from such *waqf* property to Dargah Hazrat Makdoon Shah Sahab and a "*wakfnama*" was executed on 10.2.1983. Thus, according to him by virtue of such an act, the property became non-transferable and the agreement executed in favour of the decree holder by legal heirs of Abdul Samad was void and illegal. It was further contended that wakf tribunal was seized of the matter and a stay order was passed by such tribunal, but the executing court usurped the jurisdiction vested in the tribunal and illegally commented upon the "*waqfnama*" dated 10.2.1983 and the judicial proceedings pending before the wakf tribunal.

In order to thwart the decree holder from reaping the fruits of the decree, a new series of objections were initiated. First in this line was an objection raised by the wife of judgment debtor contending that part of the property was orally gifted to her by her father-in-law late Shri Abdul Samad, the father of judgment debtor. She contended that such alleged oral gift was reduced in writing and she was in possession of the said part of the property since then and the decree was inexecutable against her.

51 For details see author's book *supra* note 13.

52 2017 (4) CDR 1882 (Raj).

This objection petition was dismissed by the executing court against which an execution first appeal was filed, which was dismissed by the High Court.

Thereafter the son of the judgment debtor Abdul Wajid filed an objection petition on the basis of an alleged oral "*hiba*" by his grandfather Late Shri Abdul Samad but the same was dismissed by the executing court. This gave rise to another objection petition being filed by another son of the judgment debtor Abdul Wali on the basis of alleged "*hibanama*" and after hearing, the same was dismissed by executing court again. But this did not deter the filing of objection petitions and another objection petition was filed by the present appellant Mohammed Aslam claiming that there exists a *waqf* property Dargah Hazrat Makdoon Shah Sahab which is registered in the *waqf* register and which is managed by him along with his three brothers by effect of a will executed by his father Islamuddin @ Chhotu Khan. It was further asserted that apart from property gifted to the judgment debtor's wife, rest of the property was declared by Abdul Samad [the father of judgment debtor] as *waqf al alAulad* with a direction to dedicate an amount of Rs. 6000/- per year out of income from such alleged *waqf* property to Dargah Hazrat Makdoon Shah Sahab. Thus it was asserted that the suit property being part of larger *waqf* property, was non-transferable and thus the agreement which was the basis of the suit for specific performance was void *ab initio*.

It was further asserted in the objection petition that after the year 2010 as legal heirs of Late Shri Abdul Samad, in violation of the alleged "*waqfnama*" stopped sending the annuity of Rs. 6000/- created by the "*waqfnama*" and were desperate to transfer property, a suit for declaration and injunction was filed before the wakf tribunal along with an application for temporary injunction against the judgment debtor and other legal heirs of Abdul Samad. It was asserted that an order to maintain status quo was passed by the wakf tribunal which was effective till date. The executing court after hearing the objector and analysing the entire material available on record concluded that the theory of alleged "*waqfnama*" evolved by the objector was nothing but a device to scuttle the execution proceedings designed in connivance with the judgment debtor and others.

The Rajasthan High Court raised suspicion over the fact that the appellants did not make the judgement holder a party in the suit before the wakf tribunal. Therefore, the High Court dismissed the appeal, took notice of the fact that the appellants were unable to produce alleged *waqfnama* and the decree holder has already occupied the said portion of the property, and held that no illegality can be made out in the decision of the executing court.

It may be mentioned to note that the *waqf al-al aulad* was made for the children and descendants of the *waqif* and certain portion was dedicated for charitable purposes which constitutes the perfect family *waqf*. The wakf tribunal is, after 1995, a competent authority to decide upon the *waqf* matters and it was also in favour of validity of *waqf al-al aulad* then how the High Court alter the decision in favour of an individual keeping aside the purpose and object of *waqf al-al aulad* which is an integral part of property law of Islam. And therefore the judgement is not in accordance with the spirit of Muslim law and against the socio-economic upliftment of poor Muslims of the country.

In *Mohammad Saleem Krodhi* v. *U.P. Sunni Central Board of Waqf, Lucknow*[53] the present revision has been filed in the Allahabad high court under sub-section (9) of section 83 of the Wakf Act, 1995 against the order passed by two members including the Chairman of U.P. wakf tribunal at Lucknow. The learned counsel for the revisionist has submitted that waqf tribunal at Lucknow has been notified consisting of three members including the chairman. As per subsection (4) of section 83 of the Wakf Act, 1995 a tribunal must comprise of three members including the chairman. The statute does not provide a quorum for its functioning therefore all three members of the tribunal must participate in the decision-making process as such the order of tribunal must be signed by all three members. But the order impugned has been passed under the signature of two members only and, therefore, the said order is void and *non-est*.

The Allahabad high court referred to the judgement of the apex court in the case of *United Commercial Bank* v. *Workmen*[54] wherein, according to the majority view, it was held that a tribunal comprising of certain number of members, in absence of any provision to the contrary, must function with all its members and the order passed by it must be signed by all its members. Further in *Lloyds Bank Ltd*. v. *Lloyds Bank Staff Association*[55] it was held that order passed under signature of two members of a wakf tribunal is void and *non-est*. It has thus been submitted that the order passed by the tribunal deserves to be set aside and the matter be remanded back to the tribunal for deciding the matter afresh, in accordance with law.

Therefore, the Allahabad High Court held that there's no dispute that the impugned order has been passed under the signature of only two members therefore the impugned order is void in the light of *United Commercial Bank* case and is accordingly set aside.

It is submitted that wakf tribunal and its powers are given by the Wakf Act, 1995 and are peculiar in nature. And their purpose is to just ensure the administration of *waqf* is carried on smoothly and the precedents of other tribunals are not appropriate as far as wakf tribunals are concerned. Therefore if there's no *maladministration* in the *waqf* property, the order passed by two members of the wakf tribunal might have been treated as appropriate and it should not be compared with other tribunals because such type of judgements will be obstacles for the smooth functioning of the *waqf* administration and it would be difficult to save the encroached *waqf* properties.

Miscellaneous issues

In *Muhammad Ismayil* v. *Saibinisha*[56] the wife filed a petition seeking for a declaration of title and possession in respect of schedule properties A and B and for injunction to restrain the husband and his parents from evicting her and her child from another schedule property C. The wife also filed for a temporary injunction to

53 2017 (124) ALR 637.
54 AIR 1951 SC 230.
55 AIR 1956 SC 746.
56 MANU/KE/1179/2017.

restrain the respondents from alienating or encumbering schedule properties A and B and from forcibly evicting her and her minor son from the schedule C house till the disposal of this petition.

The family court decided that the wife and her son should not be evicted from schedule C house till the disposal of the original petition. The petitioner husband contended that in so far as schedule C building is concerned, there is already a finding by the learned magistrate that it is not a shared household and therefore, she is not entitled for any order permitting her to reside in the said house. The respondent wife contended that the building was constructed with the money provided by her and her brother for which she couldn't produce any evidence. According to the petitioners, she had no right in respect of the said building other than contending that she is residing in the said building.

The Kerala High Court observed that issuance of an order of injunction is absolutely a discretionary and equitable relief. Injunction can be given only to protect possession of the owner or person in lawful possession. Injunction would not be issued against the true owner. After going through the findings of the magistrate that the schedule house C was not a shared house the Kerala High Court reached the conclusion that the property in question belonged to the petitioners and it was not a shared property and that the family court erred in issuing the order of injunction against the petitioners.

The decision of Kerala High Court seems to be correct and how minutely the court observed the case according to the spirit of Islamic law of property should be appreciated.

IV CONCLUSION

The analysis of the above cases reveals that neither judgment debtors are fully conversant of the Muslim law not the reporters are able to understand the subject with full sincerity and dedication. Many cases like dowry etc. are reported under the heading of Muslim Personal Law though they should have been reported somewhere else. As far as the law of marriage is concerned the court's resolve the dispute in the spirit of *sharia* particularly on the issues of mutual consent and consent of daughter. Still in India there is a mentality that it is the parents right to marry off their daughter as per their choice without giving any regard to the consent of daughter. What more can be requested from our brothers and sisters that Prophet Mohammad (Peace be upon him) himself obtained prior consent of his daughter Fathima on her marriage with Ali. The cases pertaining to the dissolution of marriage have also been decided according to the spirit of the *sharia* and concerned legislation. As far as t*alaq-e-biddah* is concerned the surveyor has already commented at length in the last year's survey after *Shayara Bano* case, still the surveyor is of the opinion that any law without proper consent of Muslim jurists would not be effective and if the husband is penalised this process would automatically break down the marriage and it would be more injurious to the poor wife to live with the husband who has already been penalised. And thus instead of resolving her problems it would multiply them as the ordinance is silent on the

situation which would arise when the husband would be imprisoned and the wife would be left to fend for herself and her children.

As far as *talaq-e-biddah* is concerned though the executive asserted that the issues of *talaq-e-biddah* have been increasing day by day but this surveyor could not find any substantive case on this issue instead of *Shayara Bano* judgment, which has already been commented upon.

As far as maintenance is concerned the surveyor is unable to understand why the two regimes CrPC and Muslim Women (Protection of Rights on Divorce) Act, 1986 both are allowed to increase the burden of the court, which is already over-burdened. And these provisions which are meant for safeguarding the clients, themselves lead to the exploitation of the Muslim women as they are reduced to being mere puppets in the hands of their lawyers.

As far as guardianship is concerned the law of *h*izanat which is unique concept for the betterment of the minor children and provide the custody of minors to the mother and some other maternal relatives. Why courts are reluctant to enforce this right which is totally in the interest of children.

So far the law of property is interpreted most of the courts have acted in the right direction and the cases pertaining to gift, will and inheritance have been decided in consonance with *sharia*. However, as far as *waqf* and its administration is concerned the court is inclined to leave the deteriorating state of the *waqf* property in its status quo, which is not only against the institution of *waqf* under *sharia* but it is also not in accordance with the legislative will and the repeated assertions of executive that they would not leave any stone unturned to secure the *waqf* property, which is the backbone of economic upliftment of the Muslim society.

Last but not least we humbly submit that our *ulema* and personal law board are much concerned about triple talaq, *halala*, etc. but they are least bothered to eradicate certain social evils from the society particularly law relating to marriage and inheritance. Neither they launch a moment against the dowry which is totally against the *sharia* nor are they much interested in empowering the women from economic and social exploitation. If we do not our home in order, we are ourselves giving a chance to the others to interfere in our personal laws and interpret them according to their will and interest.