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MUSLIM LAW

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I INTRODUCTION

JUDICIAL PRONOUNCEMENTS relating to Muslim Personal Law reported in irrational media increasingly heightened awareness among our countrymen to find fault in Muslim law whenever opportunity arises-sometimes in the name of uncommon practice of polygamy, instant divorce least, descramble tradition of *halala* and non-existing practice of *Muta etc*. The reason behind this arrogance might have been sheer ignorance about Muslim law or deliberately playing a role as a source person of those elements who want to impose their own culture and law on every citizen of the country. The present year of survey is no exception to it. It has seen significant judgement relating to bigamy, *khula*, role of registrar for registering divorce and marriage in Assam. The survey year also covers the cases of seeking divorce by a Muslim under Hindu Law, validity and effectiveness of the pronouncement of divorce, claim for custody of minor girl child by *Naani* and *Daadi* simultaneously and maintenance of divorcee. The survey also includes the rulings pertaining to the validity of oral gift applicability of customary law of inheritance, jurisdiction of wakf tribunal *vis-a-vis* tribunals setup under other laws; succession of *mutawalliship*, deviation from the objects of the *waqf*, status of alienation of *waqf* property by way of *wasiyat*. Under present survey attempts have been made to analyse the cases handed down by the apex court and various high courts during the survey year under different heads.

II LAW RELATING TO STATUS

Under this caption the laws related to a person and his relationship with the family members have been discussed as there are the cogens of status aquired by male and female and ties up with the liabilities and duties. These laws provide some rights and liabilities acquired due to blood or marriage relationship. The illustration of laws relating to status may be marriage, divorce, maintenance, guardianship, acknowledge and paternity. This survey includes almost all the aspects relating to law of status. According to availability of the cases on the subject as per law reports are being discussed with comments in the following pages:

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***Nikah* (Marriage)**

It is a popular fallacy that Muslim marriage is a contact like Indian contact Act but this presumption is not fully correct. Marriage is a sacrament but not like the Hindu marriage. The parties are directed not to leave any stone unturned to subsist the marital tie until it is not impossible to live a harmonious and happy married life. Here under the following cases which are reported in the survey year are being analysed:

Restraining the second marriage

In *Muhammed Shafi* v. *Jasna*,[1] the High Court of Kerala had to decide as to whether the court can pass order to restrain a Muslim from contracting second marriage under the circumstances:

(i) When first marriage subsists,
(ii) In case marriage in dissolved;
(iii) Pronouncement of *talaq* is challenged.

In the present case the husband had given his wife *talaq* which was disputed by her and the petition was lying before the court for its decision. Meanwhile the Muslim sought permission of the *Jamat* for entering into second marriage. The divorced wife went to the competent court for a decree of injunction restraining the husband from remarrying till cases pending are disposed of. The trial court accepted the plea of the wife holding that "if the injunction is not granted irreparable injury will be caused to her". Hence the husband was restrained from contracting a marriage with another woman till the monetary claims of the wife were settled. This order of injunction of the lower court was challenged in the high court. It was contended on behalf of the appellant husband that he enjoyed a right to keep more than one wife under his personal law subject to equitable treatment meted out to all wives. It was brought to the notice of the high court that he had contracted only one marriage which had been allegedly dissolved by *talaq*. It was further averred that whether *talaq* was valid or not did not affect the right of the petitioner/appellant to contract the marriage with another woman. It was, therefore, claimed that the injunction order passed was "in blatant disregard of the personal law of the parties". Though, the high court conceded that the court below enjoyed the power to grant injunction restraining second marriage. However, the high court decided that such power could not be exercised to restrain a party from remarriage when the personal law expressly permits the same. The high court held that the trial court had acted "in exercise of its jurisdiction ignoring the personal law governing the parties".

Impact of polygamous marriage

In the case under review a government servant had contracted a second marriage while his first marriage was subsisting. After his death his both widows claimed family pension benefits. The High Court of Gauhati is the case of *Rejini Begum* v. *State of Assam*,[2] had to decide that which of the widow was entitled for the pension benefits. The facts of the case are briefly stated as under. The petitioner's late husband was a

1 MANU/KE/0762/2018.
2 (2018) 3 Gau LR 803.

government servant who died while working as a tractor driver. The petitioner applied for family person. Another woman, who claimed to second widow of the deceased also, presented her claim in this regard. The state government did not process the family pension papers. The petitioner claimed to be the first wife of the deceased. The lower court held that both the widows were the legal wives of the late husband.

The service rules of Assam government have stated the wife shall be entitled to have family pension benefits.[3] It was explained that in case where there are two or more widows, pension will be payable to the oldest[4] surviving widow.On her death it will be payable to the next surviving widow.[5] The Assam government rules relating to bigamous marriage state[6] that no government servant who can contract another marriage during subsistence of the first marriage without permission of the state government, even if, his personal law or customary law permits him to do so.

In the case under comment the deceased government servant had contracted another marriage without the permission of the state government. Though the Muslim personal law permits his male followers to have more than one wife, the Assam Government rules categorically prohibited such type of marriage. Therefore, the second marriage was regarded as against the conduct rules. It was held that no advantage or right could flow from the said prohibited marriage. Therefore, the court arrived at the conclusion that the second wife, in point of time, could not be made recipient of the family pension benefits as her counsel was failed to submit that the permission of the government was obtained for contracting second marriage**.**

Settlement of Mehr

In the present case under survey, that is to say, *Nawab Mir Barkat Ali Khan Waleshan Bahadur* v. *Princess Manolya Jah*,[7] the High Court of Hyderabad had to resolve the dispute relating to the settlement of *mehr* which was supposed to not fixed at the time of *nikah*. The facts of the dispute were complicated involving the nature and validity of some of the contracts and agreements and promissory notes on the basis of one or other cause of action. These agreements were also pertained to the amount of *mehr* which had not been settled at the time of *nikah* between the parties. The amount of *mehr* was altered from time to time by the parties during the subsistence of the marriage which was made part, term and stipulation of the agreements entered by the parties to the marriage voluntarily. It was observed during the hearing of the case that the amount of dower may be fixed either before the marriage or at the time of marriage or after the marriage and can be increased after the marriage. The parties to the litigation admitted that all papers relating to agreements presented in the court had been voluntarily executed while marriage was subsisting. It was the view of the court that the right to *mehr* accrues on account of marriage. After thorough examination of the facts and circumstances of the case, the high court expressed its considered

3 The Assam Services (Pension) Rules, 1969, Rule 143.

4 The term oldest has been defined to mean seniority with reference to the date of marriage

5 *Supra* note 3, see Note 1, attached to sub-rule (ii) to the Rule 143.

6 The Assam Civil Services Conduct Rules, 1965, sub-rule 1 of rule 24.

7 MANU/AP/0204/2018.

view holding the findings of the lower family court the agreement between the parties were admissible as evidence and had been true, valid and binding. The court held that dower or *mehr* amount was not fixed at the time of marriage which was fixed by the agreements entered into by the spouses while marriage was subsisting. The high court further held that if the husband had paid any amount or property had been given to her as gift during the subsistence of marriage could not treated as part of dower or maintenance. The husband was bound to pay *mehr* to the estranged wife. The court further decided that the husband had to give maintenance to his divorcee even after the period of *iddat* in accordance with the provisions of the Muslim Women (Protection of Right of Divorce) Act, 1986. Thus, the court upheld the finding of the family Court as legal and valid and did not suffer from any legal infirmity.

Dissolution of marriage

As we mentioned above that marriage is not such type of contract that it may be broken at the whim and caprice of the parties. It should be continued till all possibilities of continuation of marriage have not been exhausted. After mutual adjustment arbitration, and conciliation to subsist the marital tie, if the parties find themselves impossible to live a pleasant life then it can be broken off by the each party and even sometimes by the court. When the initiative of dissolution is taken by the husband it is known as *talaq*. When the dissolution is offered by the wife, it is known as *khula*. When the marriage is mutually dissolved by the parties, it is known as *mubarat*. Sometimes, the *qazi*/court has to intervene between the parties to dissolve their marriages which is called *faskh* (judicial separation). Following are the cases reported in the survey year pertaining to dissolution of marriage are being conceptualized as under:

Judicial dissolution at the instance of husband

A frequent situation arose before the high court of Jharkhand. In an appeal namely, *Md. Yusuf* v. *Nasreen Begum*,[8] the high court faced the question as to whether a Muslim husband enjoyed the right to approach to the court for a judicial divorce. Admittedly, the disputing parties had been married according to the rules laid down under Muslim personal law. The husband proposed a petition of divorce before the family court against his wife, which was dismissed by the family court. Aggrieved by this judgment of the family court, the husband went to the high court in appeal.

After their marriage, the matrimonial life of the spouses was never pleasant with the continuance of conflict between the parties on one or other pretext the relationship between them became very bad; so the petition for divorce was instituted in the family court. The trial court was of the opinion, and truly so that there was no mandate to go for a decree of divorce by the husband under Muslim law of dissolution of marriage. Therefore, the husband had no right to approach to the court for a judicial divorce. The high court found no anomaly in the judgment of the trail court. Therefore, the high court did not find any ground to interfere with the findings of family court. It is mentioned to note that under Muslim law *faskh* is a mode of judicial dissolution of

8 AIR 2019 Jhar 39.

the matrimonial alliance and this right is conferred on the wife under Dissolution of Muslim Marriages Act, 1939 on various grounds.

Role of register of marriage and divorce with process of dissolution of marriage

In *Meriza Khatun* v. *The State of Assam* [9] the High Court of Gauhati had to examine the powers of the Registrar of Muslim Marriage and Divorce conferred under the Rules of 1935. The petitioner (the wife) and the respondent no. 4 (the husband) were married according to Islamic *shariat* at Gauhati. From the beginning of marital life the relationship between spouses was strained and the discord culminated in the dissolution of marriage by pronouncement of *talaq* according to procedure established by *shariat*. The *talaq* had been pronounced three times at three different occasions and the *talaqnama* was sent to the Registrar for the registration of the divorce. The Registrar of Muslim marriage and divorce issued notices requiring attendance of the petitioner wife. Further these notices were sent to the petitioner through the police station. The petitioner challenged the issuance of these notices averring that the registrar did not enjoy such powers under the rules framed under the Assam Muslim Marriages and Divorces Registration Act, 1935. She contended that she was preparing for challenging the factum of *talaq* in appropriate court. The high court observed that the provisions of the 1935 Act and the rules of 1935 did not empower a registrar of Muslim marriages and divorce to issue divorce certificate. He was only to deliver to each of the applicants for registration of any marriage or divorce an attested copy of the entry to be made in the appropriate register. The high court held that issuance of notice by the registrar to the wife "and that too, through the police station" was without any authority of law and jurisdiction.

Judicial dissolution at the instance of wife

A Muslim woman had sought dissolution of her marriage solemnised under Muslim law under the provisions of section 2 of the Dissolution of Muslim Marriage Act, 1939. In the case of *Ali Abbas Daruwala* v. *Shehnaz Daruwala*,[10] the wife also claimed the custody of the children. She also prayed for maintenance and accommodation. The facts of this case are interesting. Initially the wife had exercised her right to seek divorce from her husband along with incidental reliefs thereto. Though the husband contested the dissolution petition, however, he pronounced divorce to his wife in the impression that it would amount to *khula*. *Khula* is a mode of dissolution of marriage at the instance of wife. After the pronouncement of divorce wife did not treat it as *khula* and went to the court to seek maintenance and other rights arise on divorce. She went to the extent claiming maintenance and accommodation under the Protection of Woman from Domestic Violence Act, 2005 (hereinafter DV Act). It was opposed by the husband. The court had to consider the applicability of the law as contained either is the Muslim women (Protection of Rights on Divorce) Act, 1986 or in the Domestic Violence Act, 2005. It was argued before the court that the disputing parties had been Muslims and marriage between them was solemnized in accordance with rules under Muslim law, so the provisions of the DV Act would not be applicable.

9 MANU/GH/0552/2018.

10 MANU/MH/1025/2018.

Moreover, the wife had sought matrimonial relief under the Dissolution of Muslim Marriages Act, 1939 the litigation would be done under Muslim law as contained under the Act of 1986. Therefore the high court framed moot point as whether proceeding claiming relief under DV Act could be entertained specifically when the main petition filed by the wife was under the Dissolution of Muslim Marriages Act, 1939.

The high court was of the view that the lower court did not accept the plea of the husband relating to *khula* and wife had contested the pronouncement of *talaq*, the husband would have to prove the factum of *talaq*. It was further observed that till the time *talaq* was not proved, the respondent was deemed to be legally wedded wife of the petitioner. The high court further held that the wife was in domestic relationship. Therefore, she was entitled to seek relief under DV Act as the Muslim women has not been excluded from the protection of this Act. The high court arrived at the conclusion that the "parties being governed by the Muslim Personal Law is not an impediment in the wife invoking the jurisdiction of the court under the provision of the Domestic Violence Act."

Jurisdiction of the court for dissolution of marriage

The High Court of Delhi, in the case of *M* v. *A*[11] had been countenanced relating to the jurisdiction of the family court in the case dissolution of marriage solemnized under Special Marriage Act, 1954.

In this case the marriage between a Muslim male and Hindu female had been contracted under the Special Marriage Act. It was an admitted fact the woman was Hindu at the time of marriage. Having solemnized the term marriage, the bride had converted to Islam and the parties performed *nikah* thereafter. The wife, after strained marital relation filed a petition for divorce before the family court in accordance with the provisions of the Special Marriage Act, 1954. This was contested by the husband challenging competence of the family court to hear the divorce petition. The plea was advanced that both parties were Muslim and the provision of Muslim Personal Law was applicable. The family court did not accede this line of argument and dismissed the plea of the husband. This order was challenged in the high court. It was the view of the high court that "whereas original religious marriage can be converted into a secular marriage, however, a secular marriage cannot be converted into a religious marriage". The court was of the view that the original marriage was solemnized in accordance with the provisions of the Special Marriage Act, after conversion it could not be changed into a marriage contracted under personal law. The certificate of marriage by the marriage officer is conclusive proof of the valid marriage. The court held that the husband could not be permitted to challenge the jurisdiction of the family court to entertain and file the petition for divorce instituted by the wife.

Right incidental to judicial dissolution:-

The Bombay High court in *Adnan Chara* v. *Farhat Adnan*,[12] was to resolve the conflict as to whether "in a suit filed under section 2 of the Dissolution of Muslim

11 MANU/DE/1209/2018.

12 MANU/MH/2316/2018.

Marriages Act, 1939", the aggrieved party can claim relief like maintenance and relief in respect of matrimonial property of the spouses. A suit was filed by the wife, under section 2 of the Dissolution of Muslim Marriages Act, 1939, seeking divorce on the ground of cruelty. In the original suit he had claimed her *mehr* (dower), maintenance for her and two minor children and half share in a flat jointly owned by her and appellant husband.

At the trial court, during the hearing at every stage the husband resisted all claims and reliefs and denied the all claims. But he never raised any objection as to the maintain ability of the various reliefs claimed in the plaint. No plea was advanced before the trial court that these reliefs relating to the maintenance, *mehr* and share in the jointly owned flat could not be asked for. Neither were these opposed to be granted in the suit filed under section 2 of the Dissolution of Muslim Marriages Act, 1939. The suit was resisted on merits. The trial court decreed the suit granting all reliefs to the wife along with the decree of dissolution of marriage.

The defeated husband went to the first appellate court against this judgment and decree of the trail court. The first appellate court dismissed the appeal on all counts and confirmed the findings of the trial court. It is relevant to state that at this stage also, no specific contention was raised before the appellate court alleging the trial court was not competent to grant reliefs claimed for *mehr*, maintenance and share in the joint property under section 2 of the Dissolution of Muslim Marriages Act, 1939. The husband filed second appeal against the confirmation done by the first appellate court. At this stage of second appeal this contention was advanced for the first time. At this stage it was submitted that the trial court was not at all competent to grant any relief other than the dissolution of marriage. It was also averred that separate remedies were available for seeking these reliefs under various other statutes. The high court did not accept these assertions and expressed its opinion that "the law is required to be interpreted in such a manner that it causes least inconvenience to the parties to the litigation." It was the opinion of the high court that if the appellant has taken such objection at the earliest opportunity "things would have been different". The court decided the appeal in negative holding that after contesting the matter on merits, it was merely an attempt to protract and prolong the execution of the decree and thereby to harass his wife.

Cruelty-as the ground of dissolution

The High Court of Kerala had to give answer to the question as to whether the power of attorney holder could give evidence relating to the discharge of marital obligation on behalf of the husband who lived in a foreign county. In the case of *Pambodan Kunhimuhammed* v. *Nanambra Laila*,[13] the aggrieved wife filed a petition for divorce before the family court under section 2(ii), (iv), and (vii) and (f) of the Dissolution of Muslim Marriages Act, 1939. The family court gave verdict in favours of wife and granted the decree sought for by the wife. The husband went in appeal to the high court. It was brought to the notice of the court that the spouses were living separately for over six years by the time the petition seeking divorce was filed. The

13 MANU/KE/0753/2018.

parties accused each other responsible to such separate stay. The cumulative material of the law as contained in section 2 is that if the husband neglects or fails to provide maintenance for the wife for a period of two years, if the husband do not perform marital obligations for a period of three years, if the husband habitually assaults and makes her life miserable by cruelty and or in case of polygamous marital relation does not treat her equitably, the aggrieved wife is entitled to seek dissolution of her marriage. The court found all grounds stated above, present in the instant case in favour of the wife. The court observed that the appellant had been accused of not performing marital obligations so he must have come to the witness to face cross examination. The court held that power of attorney holders evidence could not he considered as rebuttal evidence. The court held "whether the allegation that the husband has denied his marital obligations to his wife can be deposed in court only by the husband and not by a brother or power of attorney holder." The court found itself satisfied that appellant had failed to perform his marital obligations for over a period of three years. The court did not accept the plea that the husband was working abroad so it was impossible to appear in person. The court observed that "to come here and give evidence may be inconvenient for him, but certainly not impossible." The grounds of cruelty and equitable treatment to all wives were also proved against the husband. The court was of the view that the appellant was indeed a cruel husband and stated that "the respondent wife was entitled to get her marriage with the appellant dissolved".

Validity of divorce

The High Court of Jammu and Kashmir had to examine the validity of the mode of divorce in the case *Javid Ahmad Wani* v. *Nigeena Akhter*.[14] In the case under comment, the wife placed an application before the competent court claiming maintenance under the provisions of the Code of Criminal Procedure, 1973. The husband contested this application and asserted that the woman was not entitled for maintenance as he affected divorce to her own before the date of filing of the suit claiming maintenance and as such the relationship of husband and wife between them had ceased to exit. The high court after surveying the law on the subject as legislated and judicially exposed reached to the conclusion that matrimonial relationship could not be ended whimsically, arbitrarily or capriciously. Citing the latest decision of the Supreme Court, laid down in *Shayara Bano* case,[15] the high court held that the husband could not take refuge under the plea that his wife was not entitled to any maintenance because he has already divorced her. The court further held that the divorce given by the husband in the instant case was not a valid one in the eyes of the law as elucidated in the judgments of the apex court holding that "an arbitrary, instant or irrevocable *talaq* is not a valid one".

Constitutional validity of the ordinance

The promulgation of the Muslim women (Protection of Rights on Marriage) Ordinance, 2018 was challenged before the High court of Delhi in the case of *Shahid*

14 MANU/JK/0640/2018.

15 *Shayara Bano* v. *Union of India* (2017) 9 SCC 1.

Azad v. *Union of India*.[16] A *mandamus* was sought to declare the entire ordinance unconstitutional on the ground that it adversely affected the fundamental right of the petitioner as conferred under Article 25 of the constitution. It was alleged that the ordinance ran counter to the shared belief, practice and tradition of Islam, hence it was alleged to the discriminatory in nature. Moreover, the manner in which the ordinance had been promulgated was arbitrary and unsustainable. The petitioner advanced the argument that one the law lay down by the Supreme Court declaring the practice of arbitrary instantaneous triple divorce to be unconstitutional; there was no necessity for promulgating the ordinance and when under article 141 of the constitution it was declared by the Supreme Court binding. The high court did not accept the pleas of the petitioner and saw no reason to make an indulgence into this matter. The high court held that "we are of the considered view that the ordinance in question has been brought into force in accordance with the requirements of law only to make more effective implementation of law laid down by the Supreme Court in the case of *Shayara Bano* case[17] in the form of an ordinance." Now this ordinance has become an Act in 2019.[16a]

Feasibility of the certificate of divorce issued by Jamat

In the case *Fathima Sheriff* v. *Sub-Registrar*,[18] a Muslim lady had been divorced as pre provisions of Muslim law of divorce. This divorce was registered with the local *Jamat*. The *Jamat* issue a certificate to that effect. The petitioner lady, a divorcee intended to solemnize second marriage with a person of choice who had been a Hindu. This intended marriage, an inter faith one, had to be solemnized and registered under the provisions of the Special Marriage Act, 1954. It requires that the intended parties to the married must not have a spouse living at the time of the proposed marriage. The women provided the certificate issued by the *Jamat* relating to the annulment of marriage by divorce affected under Muslim law. The sub-registrar of marriage did not accept this document of *talaq* and insisted that a decree of dissolution of marriage of the competent court be presented. This order of the registrar had been challenged in the high court. The court was of the view that the earlier marriage of the women was solemnized according to the rules of Muslim Personal Law. Under Islamic law a divorce can be effectively given without resorting to proceedings before a civil court. Moreover the legality and correctness is not being disputed by any side. It was held that the certificate issued by the Muslim *Jamat* is sufficient proof for dissolution of marriage and that marriage officer under the Special Marriage Act, 1954 could not insist on the production of a decree of divorce of a Civil court.

***Nafqa* (Maintenance)**

A Muslim is liable to maintain his parents, wife and children. The maintenance of parents and children as well as some other relations is subject to certain exemptions.

16 MANU/DE/3599/2018 14(a):

16a Act No. 20 of 2019.

17 *Supra* note 15; now this ordinance has become the act in 2019. It is mentioned to note that triple talaq is declared constitutionally valid by three judges (CJI, Justice Khehar, Nazeer J J and Kurian Joseph J and Nariman and Lalit JJ declared it unconstitutional. (for detailed comment see Annual Survey of Muslim law 2017)

18 (2018) 44 KLT (SN 15) 133.

However, wife's maintenance under Muslim Law is obligatory in all the circumstances even where wife is affluent and husband is destitute. After 1973, under section 125 of Cr PC, irrespective of a husband's religion he had been made liable to maintain her divorced wife even after dissolution of marriage until the ex-wife is not getting remarried or till her life time. This provision opposed by the Muslims as contrary to their law and ,therefore, a new law *i.e.,* Woman (Protection of Rights to Divorce) Act 1986 is enacted through which a husband is only liable till *iddat* period and thereafter her parent and relatives and in absence of them the waqf board will maintain the divorcee. However, still the cases are accepted by the courts under both the provisions and sometimes the parties play *ice-pice* game at the advice of their counsels and the courts which are already burdened increase their burden more. Following are the cases which have been reported in this survey year relating to maintenance of wife and children. These cases have been analysed and presented as under:

Maintenance as a ground of social defence

The social dimensions of the law of maintenance were appreciated by the High Court of Jammu and Kashmir as advice to prevent the vagrancy and destitution of the weaker section of the litigating parties. This aspect was considered in the case of *Zubaida Akhtar* v. *Tariq Mahmood Bhat*,[19] after the development of strain relationship the husband had been living separately in another city. The husband filed two cases against the wife. The first case was related to the restitution of conjugal rights and second one was concerned with the custody of minor child. The wife moved an application for the transfer of cases to any court of Jammu, where she was permanently residing. Meanwhile the husband sent a *talaqnama (*divorce deed), which was opposed by the wife seeking declaration of the *talaqnama* as null and void. The competent court stayed the operation of the said document. Subsequently the stay was vacated. The wife went in appeal in the court of additional district judge where the stay has been stayed again. The petitioner wife filed petition for grant of maintenance for her and her minor child. The judicial magistrate granted interim maintenance to the wife and minor child. The husband filed a revision in the court of second additional session judge who allowed the interim maintenance to the minor but it was dismissed in case of wife on the ground of divorce order of the additional session judge pertaining to inter diction of the grant of interim maintenance to the wife was challenged before the high court.

The high court was the of the opinion that the second additional session judge was not able to turn the established judicial policy that unless *talaq* is proved to be for reasonable cause and to be proceeded by attempts at reconciliation and husband has to prove by evidence that *talaq* is effective, the interim maintenance cannot be denied. The funding of the court below had not been found tenable by the high court. It is held by the high court that the propose of the remedy provided under section 488 of the Cr PC is to strike at the root of vagrancy and destitute purpose. The court enumerated that "the statute provides for maintenance of wife by her husband even after the divorce and creates an illusory or fictitious relationship between the two spouses in view of

19 2018 Cri LJ (NOC 346) 120.

the social conditions prevalent in the country". It aimed at the social defence from the state of poverty and destitution till the divorcee remarries.

Desertion as ground for granting maintenance:-

If the wife has taken plea of desertion on the past of husband in case the husband failed to prove the factum of divorce, she is held entitled to maintenance for herself. This was the moot point before the High Court of Kerala in the case of *Paravetti Moideen* v. *Poothamkodan Aysha*.[20] The appellant was the husband of the first respondent and father of four children. The spouses live separately. The children were with their mother. The reason for separate stay was the matrimonial cruelty at the end of the husband. The respondent wife moved to the family court for past maintenance of three years. The claim was allowed and decreed. The said decree had been challenged in this appeal. The husband had taken plea that he affected divorce to erstwhile wife. The family court did not accept the *talaq* allegedly pronounced by the appellant husband. The trial court found the evidence for the *talaq* was null and void and held that she continued to be the wife of the appellant.

The high court was in complete agreement with the family court that there was no evidence for *talaq* and therefore marriage had been subsisted. The first respondent-wife was regarded as a deserted wife. The court observed that a deserted wife was certainly entitled to claim maintenance from her husband and the high court found that the appellant was not maintaining his wife and children during the last 36 months for which maintenance was claimed.

Relevance of strict proof of marriage in proceedings for maintenance

The High Court of Rajasthan had been facing a question as to the nature of proof of marriage during the proceedings stated under section 125 of the Cr PC In the case of *Gulam Raza* v. *Smt. Razia Bano*,[21] the subsistence of marriage between litigating parties was disputed. The wife submitted a petition under section 125 Cr PC against her husband the petitioner for claiming maintenance and other expenses. The wife alleged that the petitioner started ill treating her with the demand of dowry. It was also averred by the wife that atrocious behaviour of the petitioner husband remained continue unabatedly. Consequently the wife lodged an FIR against cruel and atrocious behaviour of the husband for claiming maintenance, the respondent wife pleaded in the petition that she was living with her parents and was unable to maintain herself. The husband opposed all allegations and contested the same with bare denial of all averments of the wife. The trial court decided the case in favour of the wife and awarded the maintenance. This decision of the trial court was challenged. The appellant submitted before the high court that the marriage between the litigating parties was not valid and that at the time of marriage, respondent was already married and was not divorced by her previous husband. In such circumstances the marriage was not in accordance with Muslim law. But the factum of living together as husband and wife was not denied and remained undisputed. The court did not lose sight of this fact that other actions taken by the family of wife against the husband were found significant

20 MANU/KE/0965/2018.

21 (2019) 1 RLW82.

to show the fact of matrimony. The court was of the view that "unlike matrimonial proceedings, in a proceeding under section 125 Cr PC, strict proof of marriage is not essential". Therefore the court found itself unable "to find any illegality and impropriety" to interfere in the findings of the trial court.

Right for maintenance works as a restraint against the transfer of property-

In the case of *Ayishumma* v. *Kalapakassery Mothi Musaliyar* [22] the High Court of Kerala had to decide the question as to whether right of maintenance can work as a restraint in alienation of the Property? The wife went in appeal to the high court challenging the order of the family court by which the suit for setting aside the assignment deed had been rejected. The wife had agreed that she had been separated from her husband and was living separately. She also contended that she had a right for maintenance against her husband. At a stage when husband attempted to sell his property, a suit was filed for injunction for restraining him from eliminating the property. The Family court found that no decree could be passed in favour of the wife in the absence of independent right over the property in question. The family court was of the view that it was open for the petitioners to proceed against the property if the first petitioner was entitled to exercise the right of a lien in case she enjoyed such right of lien.

The argument on behalf of the wife was submitted that the husband of a deserted wife or divorced wife should not be permitted to assign his property since she has very lien for maintenance. It was further submitted the no amount has been paid towards her livelihood or reasonable provision as provided under sections 3 and 4 of the Muslim women (Protection of Rights on Divorce) Act, 1986. The high court observed that section 39 of the Transfer of property Act, 1882 only indicates that the right to service maintenance, *etc.*, could be enforced against the property on certain conditions. "The provision did not indicate that the husband had no right to assign the property. If the assignment is for valid purpose and *bonafide* purchaser has purchased the property for valid consideration, the same cannot be set aside."

Maintenance on the ground of desertion

When a Muslim wife claims maintenance from the husband on the ground of desertion and cruelty, the provisions of Muslim law present umbrella to the cruel husband by the investment of right to pronounce divorce to his deserted wife creating circumstances to compel her to depend on vagrancy. Such type of behavior of husband was mitigated by the provisions of the Cr PC pertaining to the claim of maintenance of the ex-wife. This situation was faced by High Court of Jammu and Kashmir in the case of *Shakeel Ahmad Sofi* v. *Dilshada Akhter.*[23] A victimized woman filed a suit for maintenance in the court of judicial magistrate under section 488 of the Cr PC. It was asserted by the wife that the husband was in habit of deserting her and treating her cruelty. The petitioner husband filed objections in response and admitted the factum of marriage but denied allegations of desertion and cruelty. The husband disclosed

22 MANU/KE/1665/2018.

23 201 SCC online J and K 982.

before the trial court that he had divorced his wife through a *talaqnama* duly executed and attested. Therefore, the husband pleaded the first respondent was not his wife and as such could not claim any maintenance. After having heard both side, the trial court passed order to grant maintenance to the children. But the trial court observed in case of wife that "it is settled law that *talaqnama* is to be proved in accordance with the provisions of Evidence Act and the document must itself be produced and its execution proved". The lower court held that the husband had failed to prove the photostat copy of *talaqnama* as he did not prove factum of *talaq*, so the wife was held entitled to maintenance being legally wedded wife of the respondent. This order of the trial court had been challenged before the Principal Session Judge, Shopian in an appeal. The first appellate court found itself in agreement with the findings of the trial court and dismissed the appeal. Dissatisfied with the judgment and order of the appellate court, the petitioner had filed the instant petition seeking quashing and setting aside the decision of the principal session judge.

It was submitted before the high court that the continuance of marital relationship is a pre-requisite for grant of assistance in terms of section 488 of the Cr PC. It was further submitted that this fact was manifestly, missing here. The plea that the personal law of the parties had to be given proper weight in examining the issue in question along with the provisions of statutory law, was advanced on behalf of the petitioner. It was also contended that reconciliatory efforts were made before annulling the marriage in question. But the high court observed that no ground made for quashing the orders of the trial court and principal session judge. The high court held that the petition without merit, hence dismissed.

Legality of territorial jurisdiction of a magistrate

In the present case, *Rabiya R.A. v. State of Kerala*,[24] the moot point before the High Court of Kerala was the question of territorial jurisdiction of a magistrate, in considering the application claiming rights on divorce under the Muslim Women (Protection of Right on Divorce) Act, 1986. After having solemnized the marriage, the spouses developed differences and came to loggerhead resulting the separation. The husband was living in *Kalamassery* and wife was residing at Peringala. It was contended that the petitioner and the respondent resided together as husband and wife and begot a child when they residing at Kalamassery. The respondent issued *talaq* notice form Kalamassery. The case of the husband was that the magistrate court of Kalamassery enjoyed the jurisdiction under section 2 (c) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In the high court it was held that this Act, being a special statue would be covered by the restrictive meaning and provided under section 2 (c), though its ramifications would be of wider nature. The court decided that "jurisdiction cannot be conferred by choice of the parties and being a special statue it will override the general statue". The court further held that the Muslim Women Act(Protection of Rights on Divorce) Act, 1986 confers jurisdiction on the court where she resides.

24 MANU/KE/0891/2018.

Maintenance clause by Muslim under Hindu law

A Muslim male filed a petition for restitution of conjugal rights in the court of civil judge, During the pendency of the suit, the wife made an application under section 24 of the Hindu Marriage Act, 1955 for grant of maintenance *pendente-lite* during the pendency of the case and also for legal expenses. This was done in the case of *Mohd. Hasan* v. *Kaneez Fatima* [25] which has been ultimately went to the High Court of Madhya Pradesh. The Husband filed reply to the said application raising plea that the parties are governed by the Muslim law and the provision of section 24 of Hindu Marriage Act, 1955 are not applicable at the case pending before the trial court. The trial court allowed the application. Being aggrieved by the orders of the trial court the petitioner had filed this petition before the high court. It was contended that there was no provision like section 24 of the Hindu Marriage, 1955 under the Muslim law for claiming interim maintenance during the pendency of the matrimonial proceedings. It was further submitted that the trial court had ordered in allowing the application under section 24 of the Hindu Marriage Act, when the parties was governed by the Muslim law.

After perusal of the record, the high court arrived at the conclusion that the trial court decided the case against the law applicable to the parties. The high court was of the view that "admittedly, both parties are Muslim and are governed by their personal law. Under the Muslim law, there is no provision for awarding the maintenance *pendente-lite*, it is only provided under Hindu Marriage Act. However, if the respondent wants the interim maintenance then she is entitled to file an application under section 125 of the Cr PC before the family Court."

Maintenance on the ground of abuse and ill treatment.

In the case of *G. Mohamed Tariq* v. *Shagufta,*[26] the High Court of Karnataka had to decide the repeated question as to whether the divorced wife was entitled to obtain maintenance after divorce was completed. In the instant case the parties to the dispute were Muslim and got married in accordance with rites and customs of Muslims law. The wife made complaints against the husband of mal-treatment, cruelty and harassment. The Husband sent a legal notice seeking divorce and also filed a petition for relief of divorce against her. He sent his wife to her paternal home and did not bring her back. He has deserted her and her child. The husband denied allegations and asserted that he had divorced his wife by pronouncing triple *talaq*. It was further submitted on behalf of the husband, that she was not entitled for maintenance after the period of *iddat*. In additional statement of objections the husband alleged that the wife had not obtained divorce from her first husband and by suppressing this fact, she entered into marriage with him. These allegations were denied by the wife and held false averments meant for her humiliation and mental torture because the present husband knew that her previous husband had been expired long back. The family court after examining the record allowed the petition of the wife and awarded

25 MANU/KE/0332/2018.

26 MANU/KE/1735/2018.

maintenance till lifetime or until she remarried. The husband preferred this appeal against the order of the family court.

The high court did not take cognizance of the statement of the husband that a mis-representation relating to her pervious marital status was made by the wife. The high court was of view that the contention of fraud and misrepresentation had to be proved by the husband. As such the primary burden to prove it was on the shoulder of the husband. However, the husband did not choose to lead his evidence. This plea of the husband was not accepted by the high court. The husband failed to prove his plea that his marriage with the respondent was null and void. The court was of the view that the wife and son were living separately from the husband/father for justifiable reasons. Hence, both are entitled for maintenance.

Applicability of Domestic Violence Act, 2005

The High Court of Hyderabad in *Mohd. Kaleem* v. *Waseem Begum*,[27] had to decide as to whether the provisions of DV Act had been applicable even if the marriage had been dissolved in accordance with the provisions of Muslims law in the form of *Khula*. The issue before the high court was that whether the domestic relationship between wife and husband ceases on obtaining a divorce in spite of the sharing a household, at some point of time? The case of the petitioner was that no provisions of the protection of women from Domestic Violence Act, 2005 enabled a divorced wife to seek reliefs under section 18 to 25 of the Act of 2005. It was submitted before the court that the first respondent had ceased to be the wife of the first petitioner long prior to the filling of the case under DV Act. Hence the suit was not maintainable.

After the perusal of the law on the point in question the court was of the view that past Domestic Violence Act could not be wiped out "on the mere taking or grant of divorce". It would amount to be contrary to criminal jurisprudence. The court opined that "no one can escape the rigour of the law for past criminal misdeeds; unless the matter is compromised as per law or law itself permits it. The overall facts and circumstances of each individual case would be the guiding factor in deciding the case". The court was of the view that in the instant case, mere grant of divorce would not resolve the petitioner from the criminal misdeeds committed by him during the existence of a domestic relationship between the parties.

***Wilayat* (Guardianship)**

Father is a guardian of his minor son under Muslim law and in his absence grandfather and uncle are the guardians then only mother is entitled to guardianship. However a very interesting feature of Muslim law is that mother is given a special right to *Hizanat* (custody of child) in case of male till 07 years and in case of female till puberty (majority) or till marriage. Leave the common man most of the lawmen in this country often confuse between these two aspects of *Wilayat* and *Hizanat*. The father is guardian, even if the child is in the custody of mother and he has to maintain their children irrespective of fact that they are under the custody of their mother and in absence of mother some other female relations. Given below is an interesting case

27 MANU/HY/0578/2018.

pertaining to guardianship and custody has been reported in this survey year which is discussed here under:

Guardianship of the minor girl

In the case of *Firoza Popere* v. *Usha Dhananjayan*,[28] the High Court of Bombay had been confronted with the circumstances under which both *Naani* (Maternal grandmother) and *Daadi* (Paternal Grand Mother) sought to be appointed as guardian of minor girls. The girl child was born to Muslim father. Her mother was converted from Hindu religion to Islam and thereafter she got married with the father of child according to rules of Muslim law. Her husband killed her by strangulating and committed murder of his wife. She left a girl child born out of the wed-lock. Before the strangulation and murder, the minor child was living with her *Daadi*, the maternal grandmother who wanted the child to live with her. The litigation was started between the two over the custody of the child. The trial court appointed the maternal grandmother as the guardian of the minor child under the Guardian and Wards Act, 1890. In appeal, the order of the trial court was stayed. However, access was given to the maternal grandmother for a week during Diwali vacation. The girl remained with the *Naani* for 10 days and the child was returned to her paternal grandmother. After the return of the child, she was medically examined and a case under Protection of Children from Sexual Offences Act, 2012 (POSCO) was filed against the maternal uncle of the child alleging sexual assault on the child. The argument on behalf of the appellant, paternal grandmother had been advanced that the minor child is Muslim; she was in custody of the appellant before the murder of her mother and continued to be so. It was further submitted that the age, sex and religion of the minor were material facts in appointing the person as a guardian. This plea was opposed on the ground that long association does not create ties. It was stated that the case of sexual assault was false and bogus just to save the skin of the killer of the wife by presenting the plea for clemency on the ground of the maintenance of the minor girl.

After examination of the submissions and facts, the high court adopted the formula of the "Welfare of the child" as the paramount consideration while handing over the custody or appointing the guardian. The moral and ethical welfare of the child must be reckoned with physical wellbeing. After considering all necessary parameters of the welfares of the child, the high court maintained the order passed by the district judge appointing the maternal grandmother as guardian with some riders and restrictions. Paternal grandmother and others were to be given 50% access in the summer vacation.

III LAW RELATING TO PROPERTY

Under Muslim law, the properties persists by a person is his own property and he has exclusive right over his property till his whole life. There is one title for property *i.e.,* exclusive property whether it is self acquired or ancestral property or from any other source the owner obtained it. The whole property is his own exclusive property till his death. There is no concept of limited estate in Islam. During his life

28 (2018) 4 BOM CR 398.

he can gift his whole property to a stranger excluding his children and relations irrespective of caste, creed and religion. However, he is to handover the possession of the property to the stranger (donee) and it is to be accepted by the donee also. After his demise, his rights have automatically been transferred among his heirs even if his body is yet to be disposed. The heirs are responsible to meet the funeral expenses as per their share in heritance. If he feels that his heirs will not take care some of his relations to whom he is extending financial assistance from his property he can bequeathed one-third of property in favour of his nears and dears. However, the will in favour of one heir can only be made with the permission of other heirs. It is mandatory requirement under Muslim law of will. This provision resolved the problem of orphan grand children also which had been excluded from the deceased property according to the rule of representation. This type of law on obligatory bequest find place in some Muslim countries statue book. Another mode of disposition of the property under Muslim law is *waqf i.e.,* dedication where a person dedicated his property for the charitable purpose and in that case the property can neither be sold nor inherited and transferred or alienated any other way. It will continue till immemorial time. The *corpus* is intact and the *usufruct* of the property will be utilized by the poor, destitute, widows, orphans and for any other charitable and religious purpose for what the *waqif* dedicated his property. This is the best way to save the property from the notorious children who destroy the property for their lust and for lavishly living and the property ultimately extinguished. This institution is very useful for economic and social benefits of the community at large. Cases relating to property law of Islam – gift and *waqf* are reported in this survey year and their analysis is as under:

Hiba (Gifd)

Oral gift

Some local Muslims founded a society for development of Muslim minority to enhance jobs skill to spread education and to inculcate and promote cultural values in the populace of minority community. The society designed a plan to purchase the land and immovable properties situated around its boundaries. But the society was running in the lack of necessity of funds for purchasing the same. It was requested from some well to do members of the minority community to purchase the immovable properties adjacent to its boundaries. A man, namely, Hyder Ali acceded to the request and purchased some plots and other immovable properties from their own funds and bequeathed it as oral gift to the said society. The bone of contention, in the case of *T.M. Hyder Ali* v. *Thondi Muslim Education society*[29] was that the alleged transaction of oral gift. At some point of time Hyder Ali started to construct building on the land which was alleged and supposed to the subject matter of the oral gift. The society asserted that Hyder Ali had purchased the immovable property on the request and for the society and transferred the same to the society after having made gift in favour of the society. This averment was denied by Hyder Ali. The High Court of Madras had to settle the issue relating to the validity of the oral gift. It was the opinion of the high court that under Muslim law, a Muslim can alienate his property by way of gift either

29 MANU/TN/5715/2018.

by oral transaction or through written document. Oral gift, it is acted upon in accordance with the provision of Muslim law shall be held perfect. Under Muslim law, gift could be made either orally or in writing. The high court laid down that the society was under obligation to discharge the burden of proof relating to the declaration of the oral gift.

The high court held that the person who asserted a fact in his favour, was bound to prove the same. No proof had been produced by the society that Hyder Ali had given the immovable property in question to the society as a gift. There had been no proof regarding declaration of intention of making gift, nor the possession of the property in question was transferred to the society, nor there was any symbol which showed the society had accepted the gift. It was the view of the High Court that these were three essential ingredients of the gift. No matter gift was orally or in writing. The society failed to establish the validity of the making of the gift.

Waqf

Jurisdiction to be exercised under law of wafq

The main thrust of judgments handed down by the judiciary seems to be on the jurisdictional issue relating to the disputes or *waqf* property and matter relating to *waqf*. The controversy had been related to the competence of the civil court to try the cases pertaining to the issues related with the *waqf* property or these disputes should be hear by the *waqf* tribunal. One of the such cases came before the High Court of Calcutta to resolve the question of jurisdiction in the case of *Gopala Conclave Pvt. Ltd*. v. *Haji Nurul Huda Layek*,[30] a suit was instituted before the trial court for declaration, injunction and recovery of *Khas* possession. The *waqf* tribunal heard the case and passed an order allowing an application for temporary injunction directing the parties to maintain *status quo* over the suit property till the disposal of the suit. The request of petitioner was rejected for asking relief for dismissal of the suit on the ground that it was not maintainable before the *waqf* tribunal and thus, for rejection of the application for temporary injunction. On behalf of the petitioner it was argued that the *waqf* tribunal had no jurisdiction as the suit property was not specified in list of *auqaf* as contemplated in section 6 of the Waqf Act, 1995, though the suit was filed *inter-alia* for the declaration that it was a *waqf* property. So, it was contended that the civil court had no jurisdiction to hear such a suit in view that it was fallen outside the provision of section 6 of the Wakf Act, 1995. It was admitted from the inception of suit that it was related to a declaration that the suit property was a *waqf* property and the same property was not registered as *waqf* property.

The high court was of the opinion that tribunal acted on the presumption that the dispute was related to *waqf* property and the *waqf* tribunal had jurisdiction to try the dispute. However, the high court found that the disputed property was not enlisted as a *waqf* property as contemplated in the Waqf Act, 1995, so it did not attract the provisions of section 6 and 7 of this Act. The high court held that whether the dispute is a *waqf* property or not the main issue would be whether the suit property is listed in

30 (2019) 1 ICC 397.

the list of *auqaf* as the *waqf* property. In the later position the jurisdiction of the civil court is not barred under section 85 of the Waqf Act, 1995. In view of the high court tribunal had acted without the jurisdiction in "assuming jurisdiction and granting injunction".

Jurisdictional conflict between two tribunals

In the case of *Board of Wakfs, West Bengal* v. *The State of West Bengal*,[31] the High Court of Calcutta had to decide as to whether the tribunal set up under the provisions of the West Bengal Land Reforms and Tenancy Act, 1997 has jurisdiction to try the case of vesting of property of *waqf*. The petitioner, Board of Waqf had challenged the same before the West Bengal land Reform and Tenancy Tribunal. A long term settlement was made in favour of the respondent no.8 by the land reforms commissioner which was challenged by the aggrieved party before the above mentioned tribunal. On behalf of the aggrieved party it was contended that there was no automatic vesting under the law. It was further asserted that no possession was taken over under sub section (2) of section 10 of the West Bengal Land Acquisition Act, 1953. Therefore, the state was not entitled to lease out the land in question. The original application has been discussed by the tribunal. The order of the tribunal had been challenged in this writ petition. The writ petitioner, the Board Waqf of West Bengal submitted that the tribunal had no authority to hear disputes relating to *waqf* property and matters relating to the same. It is to be tried in accordance with the provisions of the Wakf Act, 1995. The contention of the petitioner was that sub-section (f) of section 83 of the Wakf Act, 1995 makes it mandatory for any dispute, question or other matter relating to *waqf* or *waqf* property herewith in the exclusive jurisdiction of the wakf tribunal. The same had been made more explicit by the amendment carried out the Wakf (Amendment) Act, 2013 wherein it is stated that all dispute relating to *waqf* to be determined by the wakf tribunal. This was contested by Advocate General of the West Bengal who submitted that the instant matter was related to a vesting under the Land Acquisition Act, 1953. It was his contention that the original application was moved challenging the said vesting. The case of the respondent was that the provisions of the Wakf Act, 1995 would be applicable in case the property was registered in the list of *auqaf*. If the property was not listed as such then wakf tribunal is not authorized to exercise jurisdiction. The advocate general further submitted that the challenge was with the reference to vesting of property and there was no dispute in relation of *waqf* properties.

On behalf of the waqf board, a plea pertaining to section 51 of the Wakf Act, 1995 relating to the acquisition of the waqf property was not accepted and was held that the acquisition of *waqf* property did not fall within the preview of the Wakf Act because the vesting order and the Act of 1953 which is under challenge was not an acquisition *per se*. The court was of the view that the Act of 1953 was a legislation for bringing about land and agrarian reforms that removed the intermediaries and intermediary interest. The court expressed the opinion that "upon the vesting of a

31 (2018) 2 Cal LJ 49.

land under the Act of 1953 holding of the person above a particular limit vests with the government and the status of person changes from land owners to that of a tenant". The court also laid down that "the Concept of Acquisition under the Land acquisition Act, 1894 and other acquisition laws is quite different from the process of vesting under the Act of 1953".

Therefore, the court held that the challenge was untenable and liable to be rejected. Moreover, the court held that the Wakf Act, 1995 had no overriding effect on the Act of 1953 or on the functioning of a Tribunal created under the Act of 1997.

Status of encroacher

The High Court of Madras faced a piquant question when it was requested to resolve the controversy relating to use and abuse of *waqf* property by the purported beneficiaries. This issue was the focal point in the case of *M. Mohamed Thaha Maraicair* v. *N. Syed Sultan Beevi*.[32] The issue for consideration in the civil revision petition was to examine the correctness of the order of the principal district judge by which the court had set aside the order of the wakf board issued under the Wakf Act, 1995. The wakf board had directed the first respondent to remove the encroachment and delivered the possession of the *waqf* property in question to the trust.

A *waqf* was created in 1932 of a plot of land which was vacant site deserting it as a garden in the *waqf* deed. Several beneficiaries were named in the *waqf* and were directed to elect unanimously, one amongst them to manage the property to collect the income from usufruct. It was the direction that after defraying the expense, for the upkeep and maintenance of the property, Rs 4/- had to be spent on reciting *Fateha*. Remaining balance was allowed to be distributed among the children of the *waqf* and their children, that is to say, the descendants of the *waqf* if and their children that is to say, the descendants of the waqif. Practically it was a *waqf alal-aulad* (family waqf). It was a fact that when the *waqf* had been created, the Wakf Act, 1995 had not come into force and therefore the *waqf* property in question was not brought within the fold of the waqf board, a petitioner. After the death of the *waqif*, his daughter entered into property and altered the position of the vacant site by putting up a small thatched hut. Her son, the husband of the first respondent also entered the property and was residing in the said house. The property was used by them to the exclusion of all other beneficiaries. Meanwhile the Wakf Act, 1995 came into force and seventh respondent, a beneficiary of original *waqif* approached the petitioner, wakf board to register the *waqf* under the Act. The seventh respondent made a complaint before the wakf board that the property which the *waqif* wanted to be retained as vacant land had been encroached upon by the respondents from 1-6. This had been contrary to the wishes of the *waqif*. After adopting due procedure and process the wakf board passed an order to the alleged encroachment and removed the first respondent as *mutwalli*. Consequently it appointed the seventh respondent as *mutwalli.* This order of the wakf board was challenged in the wakf tribunal which was set aside on the ground that the respondent 1-6 had been in possession of the premises form 1954. The contention that Nooruddin was unanimously elected as *mutwalli* by all the beneficiaries.

32 MANU/TN/5912/2018.

Aggrieved by this judgement of the wakf tribunal the petitioner went before the high court. After perusing the law, submissions of the litigants and the record before it, the court formed its opinion that the respondent and their predecessor in interest did not take any step to register the said *waqf* property under the Wakf Act, 1954 or the Wakf Act, 1995 and they continued to enjoy the property as their own. The court found that from the beginning of the entrance of Zulaika Bee and the making a registered will in favour her son to bequeath the *waqf* property to his legal heirs was in total violation of the terms of the waqf deed executed by the *waqif*. The court was of the view that the actions of the respondents 1-6 were akin to misappropriation of the income of the waqf property and fraudulently dealings with the property of *waqf* in question. These respondents committed a breach of trust in relation to the *waqif*. The court opined that they had "rendered themselves ineligible to become a *mutwalli*." The court held that "the tribunal below had proceeded on an erroneous assumption that the physical possession of the property gives the person a right to continue as *mutawalli*."

Where the suit for eviction of a tenant from the promises of the waqf property shall lie? The court referred to two enactments deal with such controversy. One was the West Bengal Premises Tenancy Act, 1997 and other was the Wakf Act, 1995. The court further referred to judicial precedence also. In the case of *Syed Masoon Ali* v. *Abu Naim Siddique*,[33] the petitioner challenged the maintainability of the suit before a civil court which was filed under the West Bengal Premises Tenancy Act, 1997. According to the petitioner the suit ought to have been filed before the wakf tribunal in view of the bar contemplated in the Wakf Act, 1995.

After having persuade the submission of the parties to present case it was appeared to the court that "undisputedly, in the present case the suit property was a *waqf* property" but the suit was instituted under the provisions of the West Bengal Premises Tenancy Act, 1997 for the eviction of a tenant. The court was of the view that it was not established before the court that the suit of eviction was covered by the definition as given under Section 3(ee) of the Wakf Act, 1995. Therefore the provisions of section 54 of the Wakf Act, 1995 were not applied. Thus, the present suit was governed by the West Bengal Tenancy Act wherein the tenancy had not to be terminated merely on given notice of eviction by the *mutawalli* or wakf board. A premised tenancy under the Act of 1997 is terminated only upon an eviction decree being passed against the tenant on any grounds stipulated in section 6 of the Act of 1997. The court was of the view that the petitioner could not be termed as a person whose tenancy has been expired or terminated. Thus, the present petitioner is not governed by the provisions of sections 3 (ee) and 54 of the Wakf Act, 1995. That is why the court held that the suit was maintainable before the civil court and not to be relegated to the wakf board for being decided.

IV CONCLUSION

Judicial decisions during period under survey, seem to have not done any major breakthrough in the field of Muslim law, but have contributed to further strengthening

33 (2018) 3ICC 468.

the feeling that judiciary did not lose time to make some of the otherwise rational provisions relating to Islamic legal traditions, inapplicable even on not so strong grounds. It is noticed that judiciary did not appreciated the settled principles and proposition of Islamic law of *Khula*, which contains pragmatic rules conferring rights upon woman to get her marriage dissolved if discord arises. Judicial trends seem to be based on preconceived notions that Muslim law is biased against women. The trends set up by Khalid J, Bahrul Islam J and Krishna Iyer J based on pragmatism found no place in present time framework. This view has been strengthened when the legal traditions of *khula* under Islamic jurisprudence have not been upheld by the judiciary. A woman sought divorce from her husband and filed a petition to that effect in the competent court. The husband responded and tendered a *talaqnama* which was challenged by the wife. The husband advanced the plea that wife herself demanded the *talaq* which amounted to *khula*, *i.e.,* dissolution of marital bond at the instance of wife. The court did not accept the plea of *khula*. On the contrary, the court observed that *talaq* was not a valid one as it was given without sufficient cause and did not follow the procedure established by law. This trend will left tremendous impact on legal precept and concept of *khula* providing social rights to obtain *talaq* from her husband. It has introduced a significant change in the settled law relating to rights of women. The present trend shows that judiciary must give ear to the voices of gender justice even if the women are guilty of *nushuz* (disobedience).

Decisions on the problem of maintenance of divorcee have adopted the line of thought adopted by the judiciary in *Shah Bano* case. One discernable feature is that the judiciary had applied the provisions of DV Act in case a Muslim women by taking plea of domestic violence even after the marriage has been dissolved. It was the view of the court that past act of violence on the part of the husband should be sufficient ground for claiming maintenance.

A distinct trend is visible when the court decided that the minor girl child shall remain with the custody of maternal grandmother *(Nani)* even she was victimised by her name who tried to outrage her modesty. The court asserted that the man should not reside in the same house where the minor girl child shall be kept. It is also significant to note the court did not applied the rule and principle appreciated by itself that religion and religious traditions are important for the paramount development of the minor girl child. In the case under comment the girl child was Muslim. And therefore principle of *hizanat* must have been mentioned.

Alienation of *waqf* property by way of *wasiyat* is against the law of Islam. The court rejected this arrangement, and rightly so, made by beneficiary of the *waqf*. The court also did not permit the notion of succession of the institution of *mutawalli* and accorded its approval to procedure laid down by the *mutawalli* in the terms and conditions of *waqf*. Resolving the issue of the jurisdiction between *waqf* tribunal and tribunals, established under other laws, the court held that if the matter is related to "vesting of the property" (including *wakf* property) shall come under the jurisdiction of the tribunal set up under provisions of the specific legislations. The court upheld the validity of Muslim (Marriage protection) Ordinance which has now become the Act without giving any consideration whether the proposed law is in favour of woman

or it will make the problems of victimized woman much grave than she has been facing since long. The criminalization of the marriage law will not make the implementation of law of *talaq* much strong but it will destroy the woman and family structure as a whole. In this survey year only few cases have been reported. This indicates very bad situation. It may have two reasons: one is that the litigants did not want to waste their money and wait till long for the justice. Instead they are approaching the local arbitrators – *molvis* and *qazis* and rely onto their settlement of the disputes. This is a good trend. But if they are not coming to the court as they do not have much confidence upon the present day judicial trend. And therefore they avoid litigations in order to follow their own law. This situation ia alrming to wind up it would be advisable to note the story which Professor Baxi mentioned in his book, *The Future of Human Rights*.[34] When he met her after *Shah Bano* episode and as a matter of fact, the turn of events following the *Shah Bano* judgment and the politics of reform thereafter illustrate the need for reforms, inevitability of brining reforms within. In this regard, Baxi's meeting with Shah Bano gains significance. It runs hereunder:

> *"When some of us gained access to Shah Bano, (a woman in her sixties who had been married for over decades) she reminded us, at the height of impassioned national controversy, that she was not just a woman but that she was also a Muslim woman. She was not a napak; as a woman she belonged, and stood constituted, by the lived tradition of the Shari'a. In other words, she claimed gender equality within her tradition and was loathe to surrender it to the power of secularized interpretive communities…her identification as an Indian citizen led her to activate judicial power for the vindication of her rights, but the rights which she sought were within the Shariah, not in dwelling in the much –vaunted secularity of high judicial discourse."*

34 Upendra Baxi, *The Future of Human Rights* (Oxford University Press, Delhi 3rd edn. 2007).