19

MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

DURING THE past 60 years, no other aspect has been so much debated as has been Muslim personal law on various issues. This debate is not just confined to the lawmen and scholars of Muslim law but it has been subjected to deliberation even by laymen, thus, every individual whether he knows or doesnot know the basics of Islamic law, has been keen to engage in its discussion. And this is the reason, the debate did not restrict itself only within the limits of scholars but judiciary and political parties also have been involved with the issue. Ultimately, the issue reached the houses of the legislature who discussed the same according to their knowledge and perception, thoughit appears that the exercise was undertaken without any understanding of the actual law and even without reading any elementary book on the subject. Few exceptions are there and that's why we find certain debates in the Lok Sabha based on the sources of the Muslim law. Surprisingly, judiciary is also not free from this practice, which is its duty while deciding the litigations pertaining to Muslim law but while deciding the cases on Muslim law, the judges should not completely discard the various sources of Islamic law and if they do not have the time to refer to the authentic sources of Muslim law, atleast they should study the decisions given by Krishna Iyer, Behrul Islam, Badar Durez Ahmed JJ and their other brother judges who have profusely quoted from the Islamic legal sources and interpreted and deliberated the law in its true spirit.The judgments of Supreme Court and various high courts on Muslim law as reported during the year 2019 cover varied aspects of the subject highlighting some important issues pertaining to principles, essential practices, and statutory provisions. The cases cover marriage, dower, divorce, legitimacy and similar issues, on the law of status while the cases reported on property covers the concepts of gift, will, *waqf* and inheritance. These cases with their analysis are briefly given here under.

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II LAW RELATING TO STATUS

***Nikah* (Marriage)**

Marriage though essentially a civil contract is also a sacred covenant.[1] Every marriage performed under any personal law is a sacrament having an object of legalizing several processes and to safeguard the rights of the spouse and their children.The marriage in Muslim law is in the nature of a civil contract but it cannot be terminated or put to an end at the whims and fancies of the parties. The role of *Qazi* or the courts comes into operation only when the parties feel that they cannot live together despite having made all possible efforts to live together. Here, under the following heads, cases which are reported on marriage and related issues in the survey year are being analyzed.

In *Shubhangi Agarwal* v. *State of Uttar Pradesh,*[2] a Muslim married couple filed a petition before the Supreme Court to challenge the order given by High Court of Allahabad [3] to register their marriage under the Special Marriage Act, 1954. In this case, the girl originally being Hindu converted to Islam and thereafter got married to a Muslim male. The issue here was whether a converted Muslim spouse is required to get its marriage registered under the Special Marriage Act, 1954 even if the marriage was performed under Muslim personal law and a *nikahnama* was issued for that purpose. The High Court of Allahabad emphasized upon protecting inter-religious marriages.At the same time, it also insisted for registering such marriages under the Special Marriages Act, 1954 even if the parties after conversion performed their marriage under same religion. The Supreme Court, modified the order of High Court of Allahabad and held that the court cannot force a couple belonging tothe same religion to get their marriage registered under the Special Marriage Act, 1954.

This is not a new phenomenon, earlier in one case, the court directed Muslim parties to register their marriage under the Hindu Marriage Act,1955. This surveyor, being student of Muslim law was surprised to note that how parties who do not belong to Hindu religion can register the marriage under Hindu Marriage Act,1955. Similarly, here when both the parties are Muslim, of course the learned judge of the Supreme Court rightly directed that the parties cannot force them for registration of marriage under The Special Marriage Act,1954 though they can do it as per their wishes. In this case, the manner in which Supreme Court preserved the liberty and dignity of the parties must be appreciated.

Mehr (dower)

Dower is considered as a natural or legal incident of marriage, it is a consideration paid by the husband to her wife. This consideration is primarily an obligation upon

1 Abdul Rahim, a Muslim jurist regards the institution of marriage at par-taking both of the nature of *Ibadat* (devotional act) or *Muamalat* (dealings among men *i.e.,* when you have to become a part of the society). So, according to him it is both sacramental and contractual. Abdul Rahim, *Fatawa-e-Alamgiri*

2 MANU/SCOR/23908/2019.

3 2017 SCC OnLine AII 2458.

the husband created immediately upon the marriage as a mark of respect.[4] *Mehr* becomes confirmed on consummation of the marriage or by a valid retirement or by the death of either the husband or wife.[5] In *Saida Parveen* v. *Rizwan Ahmad*,[6] the husband was married with Shagufta Parveen, and during the continuance of this marriage, the husband married again with another woman Saida Parveen, who was the appellant in this case. According to the *nikahnama*, *mehr* payable by the husband to the second wife was agreed at Rs. 50,00,000/-. The husband claimed that the amount of *mehr* was payable in kind *i.e.,* in the form of two storied building measuring about 1395 sq. ft. The second wife gave birth to a male child namely Asad Ahmad. Since the first wife of the husband was residing in the same house, the second wife was not given proper treatment by the husband, which compelled her to leave the house, and reside with her parents. Thereafter, the second-wife issued notice to the husband calling upon him to pay the amount of *mehr*. The husband failed to respond to the notice. The second-wife filed petition before the family court for directions to the husband to pay the amount, or the double storied building should be given to the wife as her dower worth of the same amount. The family court dismissed the petition on the ground that it was not maintainable as the second wife was the legally wedded wife and not divorcee and, therefore, petition under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was not maintainable. After considering the submissions, the High Court of Bombay drew the following points for consideration, namely (i) Whether the judgment passed by the family court dismissing the claim of second wife for directions to pay amount of *mehr* is proper and sustainable in law?; and (ii) If no, then, whether the matter should be remanded to the family court to give an opportunity to the husband to put-forth his defence and prove it, as requested by the husband?

The high court relied on the *Principles of Mohammedan law,*[7] and stated that there are two kinds of *mehr*, one being 'prompt' and the other being 'deferred'. The court while expressing shock in the manner in which the family court dismissed the petition, observed how the same reflects both their ignorance of law as well as shows the callous approach.Thereafter, the court while rejecting the defense raised by the husband, held that the claim of the second wife for *mehr* was based on documentary evidence *i.e., nikahnama* and the same was not denied by the husband. Therefore, the husband was directed to pay the amount of *mehr* in kind *i.e.,* in the form of two storied building worth Rs. 50,00,000/- or in the alternative to pay the amount of Rs. 50,00,000/- to the appellant.

This surveyor while appreciating the judgment also wants to add that there is no deferred dower, and dower is due in all the conditions at the time of marriage and should be paid before consummation. However, if a man is too poor to pay the dower

4 *See* Faiz Badruddin Tyabji, *Principles of Mohammedan Law* (N.M. Tripathi, Bombay, 1940); Ameer Ali, *Commentaries on Mohammedan Law*, 1552-1557 (Hind Publishing House, Allahabad, 2004).

5 *See, Principles of Mahomedan Law*, Cl. 289A.

6 2020 (2) BomCR 264.

7 Sir Dinshah Fardunji Mulla, *Principles of Mohammedan Law* (19th edn, 1933).

amount then marriage should not be deferred and the husband is given relaxation to pay the dower as and when he is financially capable to pay the same. Most of the writers of the Muslim law forget to mention, another form of dower *i.e., Mehr-indat-talab*, which means that the dower is to be paid on the demand of the wife as and when she does so.

Dissolution of marriage

Marriage under Muslim law can be classified in various forms. It may be either from the husband's side or at the initiative of the wife or by mutual consent of the parties. And as a last resort it may be dissolved by the *qazi*/court. If the marriage is dissolved by the husband it is known as *talaq*, and if the dissolution is initiated at the instance of wife, it is known as *khula* or *talaq-e-tafweed*. If the separation is moved by mutual consent of the parties, it is known as *mubarat.* And when the court dissolves the marriage it is known as *fasq*. Hereunder a case of *mubarat* is mentioned.

Mubarat

Under Muslim law, where, both parties agree and desire a separation resulting into a divorce, it is called *mubarat*. The gist of this mode of dissolution is that it comes into existence with the consent of both the parties.[8] In *Samar Abdus Shakoor Dalvi* v. *Sagir Abdur Rehman Parkar*,[9] the parties intended to resolve their disputes through mediation. Accordingly, the parties were directed to approach the Supreme Court mediation centre. The mediation report along with the settlement agreement, duly signed by the parties and their advocates, mentioned that all the disputes and differences between the parties had been amicably settled. Both the parties agreed to apply for dissolution of marriage by mutual consent known as *mubarat*. As a result, both the parties jointly prayed before the court to pass appropriate orders to direct all the complaints and petitions filed by the parties against each other to be dismissed as withdrawn.

Talaq

Under article 58 of the Limitation Act, the period of limitation prescribed against a suit for declaration is three years, yet in *P.U. Mohammed Basheer* v. *P.U. Mohammed Basheer*,[10] the family court judge concluded that the husband failed to establish *talaq*.Further, the court found fault with the husband for not having produced the originals of the acknowledgment cards and instead relying on the photocopies. The court also did not agree with the contention of the husband that the petition is time barred by limitation. Thus, the appeal came before the High Court of Kerala. The high court opined that the family court, erroneously allowed the suit. The facts of the case are that the petitioner got married to the respondent on January 25, 1976 and had three children. After some time, their marital relationship ran into rough weather and as a result of which, the husband pronounced *talaq* on October 17, 1988 to the petitioner and later married other women on February 18, 1996. The facts further described that

8 *See Zohara Khatoon* v. *Mohd. Ibrahim*, AIR 1981 SC 1243.

9 MANU/SCOR/58549/2019.

10 MANU/KE/3351/2019.

the husband had communicated the *talaq* to the first wife by registered post. In this regard the photocopy of the acknowledgment card indicates that the first wife had also accepted the post with her signatureas it was submitted to the court. The husband further argued that the act regarding pronouncement of *talaq* was intimated to the *jama-ath* (a committee of Muslims for settling the dispute through arbitration).

The high court after careful perusal of the facts, evidences and law opined that the evidence adduced by the witnesses would indicate that pronouncement of *talaq* was not an abrupt decision taken at the heat of passion, but a well thought over decision, which was conveyed to the first wife and despite having received the communication pertaining to the dissolution of her marriage, she did not raise any objection about the *talaq* or its validity till 2003.[11] The court was of the opinion that the delay in challenging the validity of *talaq* was with ulterior motives. After considering the facts and circumstances of the case, the High Court of Kerala was of the opinion that the wife had been validly divorced by the husband and no longer continued to be a legally wedded wife. Consequently, the appeal was allowed and the order of the Family Court, Ernakulam was set aside and the petition was dismissed without any cost.

The High Court of Kerala in the matter, has explained the position under Muslim law about husband's right to pronounce the *talaq*, where it says that there is an absolute right that vests with the husband to pronounce *talaq*. The only requirement is that the husband is satisfied about the indocility of his wife. A *talaq* may be effected orally or by a written document called *talaqnama*. A *talaqnama* may only be the record of the fact of an oral *talaq*; or it may be the deed by which the divorce is effected. The court referred to section 313 of the *Mulla's Mohammedan Law*, which provides that in the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce that is, *talaq-i-bain*, and takes effect immediately on its execution. The court also referred to some precedents wherein it was opined that the deed of divorce in writing constitutes a valid divorce.[12] Further, under *Hanafi* law, divorce of wife by a written document is irrevocable.[13] And since most of the *sunnis* are *hanafis* the presumption is that a *sunni* is governed by *Hanafi* law.

Dissolution under Dissolution of Muslim Marriages Act 1939

The marriage under the Muslim law is in the nature of a civil contract hence there is an insistence on the subsistence of marriage, it is here that the intervention of the *Qazi* or/ and the court comes in, rather than its breach. However due to circumstances beyond the control of the parties, wherein the parties can no longer live together, the matrimonial contract may be broken by the parties by way of dissolution of marriage. Though the Muslim law in India is not codified, but some aspects such as dissolution of marriage etc. is regulated by legislations such as Dissolution of Muslim Marriages Act, 1939. As regards the Shariat Act, 1937 it can apply only when both the parties are Muslims hence if only one of the parties is Muslim then the said Act will not apply. The Dissolution of Muslim Marriages Act,

11 *Id*., para 19.

12 *Rasul Bakhst* v. *Bholon*, AIR 1932 Lah.498.

13 *Hayat Khatun* v. *Abdullah Khan*, AIR 1937 Lah. 270.

1939 has laid down several grounds wherein only the wife can sue for the divorce after she has proved the grounds so mentioned under the said Act. In Muslim law, either the husband can bring an end to the marriage and dissolve their marital tie by divorce in various forms which is by pronouncing *talaq* or when the dissolution is at the instance of the wife it is known as *Khula,* the mutual dissolution of their marriage by both the parties is known as *mubarat* and when the *qazi*/court has to intervene between the parties to dissolve their marriages which is called *faskh* (judicial separation). Hereunder, the following cases as reported in this survey year related to Dissolution of Muslim Marriages Act, 1939 are being analyzed.

In *Razia* v. *Sameer*,[14] the family court, Haridwar by its order decreed the petition of the husband under section 3 Dissolution of Muslim Marriages Act,1939 (Act of 1939) and dissolved the marriage. Thus, an appeal was preferred before the High Court of Uttarakhand. In this case, a suit was filed by the husband seeking declaration of divorce to his wife as per the Muslim personal law and the suit had been decreed by the judge of the family court. The wife appealed against the judgment in the high court. The High Court of Uttarakhand was of the view that section 2 of the Act of 1939 confers a right on a Muslim woman, married under the Muslim law to obtain adecree for dissolution of her marriage on any one of the grounds mentioned therein. The right conferred is on a Muslim woman, and not on a Muslim male. Further, it viewed that Muslim law permits both husband and the wife to enter into an agreement for dissolution of marriage between them, provided that the said agreement was not obtained on any misrepresentation and concealment of material facts. The high court agreed with the respondent's contention that lower court was not justified in granting decree under the Act of 1939, however it opined that this would not disentitle the husband from seeking dissolution of marriage on the terms of the agreement. The court was in agreement with the respondent that with respect to the matters wherein the issues ought to have been framed and upon which evidence should have been led, the lower court reached an erroneous conclusion and erred by not allowing parties to adduce the evidences on the issue. However, the high court declined to reopen the entire proceedings before the lower court, and left open for the husband to seek divorce in terms of the agreement as entered between the parties. It also opined that in such proceedings for divorce, if instituted, the court would adjudicate the *lis* on its merits and not under the influence of high court's observation. Accordingly, the appeal was allowed and the order under the appeal was set aside.

In *Sadaab Khanam* v. *Sadaab Ali Khan*,[15] the husband Sadaab Ali Khan filed a petition seeking declaration that he had divorced the wife and prayed that the divorce should be declared valid under Muslim law. The defendant wife filed an application against the suit filed by the husband claiming that under the provisions of the Dissolution of Muslim Marriages Act, 1939, there is no mention for obtaining a decree of divorce or seeking declaration of divorce by the husband. The High Court of

14 *Available at:* https://indiankanoon.org/doc/77 991128/(last visited on Dec.20,2020);MANU/UC/1010/2019.

15 *Available at:* https://indiankanoon.org/doc/133770369/(last visited on Dec. 20, 2020).

Allahabad clarified this position and opined that the husband was not seeking any relief under any statute. In fact, the husband has only prayed fora declaration that the divorce granted be declared valid under the Muslim law. Therefore, such declaration prayed, is not barred under any law. The high court while dismissing the appeal, did not find any apparent error in the view taken by the lower court regarding the petitioner's application.

Cruelty as ground of divorce by women

In *Shadab Khan* v. *Government of NCT of Delhi*,[16] the respondent was married to the petitioner as per Muslim law. They had a male child. Later, the marriage started breaking down, and the respondent raised allegations of having been subjected to cruelty and deprived of her *stridhan*. In this regard, a first information report (FIR) was registered on January 19, 2018. In her complaint, the respondent registered a case against her husband and the family members. The dispute between the parties also led to two other cases, one under section 12 of the Protection of Women from Domestic Violence Act, 2005 and the other under section 125 of the Code of Criminal Procedure, 1973. The parties were referred to Delhi Mediation Centre at Tis Hazari courts in the context of the case arising out of the domestic violence petition. As a result, they agreed to settle the matter amicably by executing a settlement deed dated December 6, 2018. The court while disposing off the petition rightly quashed the criminal proceedings. It is humbly submitted here that in a case where criminal proceedings arise essentially out of matrimonial dispute and the parties have decided to bury the hatchet, the court must examine if there is any likelihood of the criminal prosecution resulting in conviction. In fact-situation wherein the matrimonial relation has been brought to an end by mutual consent and the parties are eager to move on with their respective lives seeking closure and if there is nothing to indicate lack of *bonafide* on the part of any side, denial of the prayer for quashing the criminal case would restore acrimony rather than bringing about peace. Allowing continuance of the criminal action would be fruitless and clearly an abuse of judicial process. According to the facts and circumstances, the high court allowed the petition. The crime registered by the police under section 406, 498A, and 34 of the Indian Penal Code, 1860 and the proceedings emanating there from against the petitioners were quashed.

Legitimacy

Muslim law clearly distinguishes between a valid marriage (*sahih*), void marriage (*batil*), and invalid/irregular marriage (*fasid*). Thus, it could not be stated that a *batil* (void) marriage and a *fasid* (invalid/irregular) marriage are one and the same. Effect of a *batil* (void) marriage is that it is *void ab initio* and does not create any civil right or obligations between the parties. The off spring of a void marriage is illegitimate.[17] Further the correct legal position of a marriage between a Hindu woman and a Muslim man is that such a marriage is merely irregularand the issue from such wedlock is

16 MANU/DE/2339/2019.

17 A Tahir Mahmood (ed.), *Fyzee's Outlines of Muhammadan Law* (Oxford University Press, New Delhi 2009).

legitimate.[18] In *Mohammed Salim* v. *Shamsudeen,*[19] the brief facts of the case were that the defendant Saidat, was the first wife of Mohammed Ilias, and no issue was born out of the said wedlock. Thereafter, Mohammed Ilias married Valliamma. Valliamma was a Hindu at time of her marriage with Mohammed Ilias. Both Mohammed Ilias and Valliamma lived together as husband and wife. Later, Valliamma was renamed Souda Beebi. Out of the said wedlock, the plaintiff (Shamsudeen) was born. Subsequent to death of Mohammed Ilias, Valliamma (Souda Beebi) married Aliyarkunju. The plaintiff claimed that he was the only son of Mohammed Ilias and on his death, he became entitled to 14/16th of share in one property. He also claimed half share in other property through inheritance, after demise of Zainam Beevi, as same would have devolved upon plaintiff, being son of predeceased son of Zainam Beevi, and Mohammed Idris.The defendant, being the only surviving son of Zainam Beevi, filed the suit.The defendants argued that, Valliamma was not legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage. She had not converted to Islam at the time of her marriage, and thus plaintiff being the son of Valliamma, was not entitled to any share in property of Mohammed Ilias, being the illegitimate child. It was further alleged that Mohammed Ilias had died two years prior to the birth of plaintiff. The lower court decreed suit and first appellate court allowed appeal and dismissed suit by setting aside judgment and decree of the lower court. However, the high court set aside judgment passed by first appellate court and confirmed judgment and decree passed by the lower court. Consequently, the appeal was filed by the legal representatives of those among them who had since died. While dismissing the appeal of Zainam Beevi, the court opined that the gifted property only devolves upon the legal heirs as it isthe absolute property. In so far, the second property is concerned, the court opined that the property belonged to Zainam Beevi and upon her death, devolved on her legal heirs. Since Zainam Beevi had two sons, both sons and their respective legal heirs would inherit half a share each after the death of Zainam Beevi. Also, defendant Saidat who was the widow and first wife of Mohammed Ilias, had admitted in her written statement that Mohammed Ilias married Valliamma, and out of the said wedlock, plaintiff was born, which is also evident from the birth register, which indicated that, plaintiff was the son of Mohammed Ilias and Valliamma. Further, it was pleaded that Mohammed Ilias and Valliamma were living together as husband and wife, and plaintiff was born two months prior to death of Mohammed Ilias.

Keeping in view, the facts and circumstances the lowercourt and high court were justified in their conclusion, based on preponderance of probabilities, that Valliamma was the legally wedded wife of Mohammed Ilias, and plaintiff was their child born out of said wedlock. The high court was also justified in its conclusion that though plaintiff was born out of a*fasid* (irregular) marriage, he could not be termed as an illegitimate son of Mohammed Ilias. On the contrary, he was the legitimate son of

18 *See Chand Patel* v. *Bismillah Begum*, (2008) 4 SCC 774. See also *Aisha Bi* v. *Saraswathi Fathima*, (2012) 3 LW 937 (Mad), *Ihsan Hassan Khan* v. *Panna Lal*, AIR 1928 Pat 19.

19 (2019) 4 SCC 130.

Mohammed Ilias, and consequently was entitled to inherit shares claimed in estate of his father. The High Court of Kerala, for its stand relied upon various texts of Muslim law to conclude that Muslim law did not treat marriage of a Muslim with a Hindu woman as void, and conferred legitimacy upon children born out of such wedlock. Muslim law clearly distinguishes between a valid marriage (*sahih*), void marriage (*batil*), and invalid/irregular marriage (*fasid*).[20] Thus, it could not be stated that a *batil* (void) marriage and a *fasid* (invalid/irregular) marriage are one and the same. Effect of a *batil* (void) marriage is that it is *void ab initio* and does not create any civil right or obligations between parties. So also, off springs of avoid marriage are considered to be illegitimate. Therefore, high court was right in concluding that, marriage of Valliamma with Mohammed Ilias could not be held to be a *batil* marriage but only a *fasid* marriage. As the marriage between a Hindu woman and Muslim man is merely irregular and not void, and the issue from such wedlock is legitimate. This has also been affirmed by various high courts.The Supreme Court observed that the high court was reasonable in modifying the decree passed by trial court and awarding the due share in favour of the plaintiff. There was no issue relating to the quantum of share, and therefore the appeal was dismissed.

Maintenance

Maintenance originates at the point of neglect by the husband, it is an implied undertaking by the husband at the time of marriage that he would maintain his wife. Maintenance instead of being a mark of respect, is rather a duty of the husband which continues even on the disruption of the marriage. The Muslim personal law allows the Muslim husband to maintain his divorced wife during the period of *iddat*, and thereafter the Muslim husband is liable to make reasonable provision for the future of the divorced wife whichobviously includes her maintenance. Further it is declared that the divorced Muslim woman if not remarried and is unable to maintain herself after the *iddat* period, she can seek maintenance from the husband.[21]

In *Bibi Mukbari Khatoon* v. *State of Bihar,*[22] a petition was moved before the High Court of Patna against the order given by the principal judge[23] wherein it was stated that as a Muslim divorcee appellant does not have the right to claim maintenance under Muslim law,therefore her application seeking maintenance under section 125 of Code of Criminal Procedure, 1973 could not sustain. The appellant cited the apex court's judgment[24] and contended that even as a divorced-Muslim woman, she does have the right to seek maintenance under section 125 of The Code of Criminal Procedure, 1973 until she remarries.The respondent on the other hand contended that being a divorced-Muslim woman she would be guided by the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 and an application under section 125 of the Code of Criminal Procedure, 1973 must be disposed of. The high court on

20 F.B. Tayabji, *Muhammedan Law* (N.M Tripathi, Bombay, 3rd edn., 1940).

21 *Daniel Latifi* v. *Union of India,* AIR 2001 SC 3958.

22 2019(3)PLJR 940.

23 Family Court, Munger in Maintenance Case No. 60 of 2017.

24 *Shabana Bano* v. *Imran Khan* AIR 2010 SC 305.

the basis of its findings held that the said order was entirely unsustainable in the eyes of law, the catena of decisions[25] endorses its findings that a Muslim divorcee does have the right to seek maintenance either under the Muslim Women (Protection of Rights on Divorce) Act, 1986 or under section 125 of The Code of Criminal Procedure, 1973. Moreover, the high courtheld that the application under section 125 of Code of Criminal Procedure before the family court would be maintainable as long as she does not remarry and also her right to seek maintenance extends even after the completion of the *iddat* period.

The maintenance order unless sought by any separate proceeding shall continue. Further, an order under section 125 Cr PC does not determine the status, rights and obligations of the parties as to the validity of the marriage, but for *prima facie* satisfaction about the relation, for the provision is meant to provide immediate succor.[26] In *Mohd Abdul Ali* v. *Hameda Begum*,[27] the High Court of Telangana rightly interpreted the law and opined that the law pertaining to maintenance is meant to prevent destitution, therefore in such case the summary finding is confined only to the case on hand and is not binding in other proceedings.

Marriage under Muslim law is a kind of contract entered into between the parties to the marriage. The dower money (*mehr*) is akin to the consideration amount agreed between the parties at the time of entering into contract. Thus, the dower amount is paid under contractual liability at the time when contractual marriage comes to an end. However, it is the statutory liability created by law, which enjoins every husband to maintain his wife and children and to pay monthly maintenance to his wife in case parties are residing separately and the wife is not in a position to maintain herself and the same cannot be adjusted against the awarded maintenance. In *Rahees Ahmed* v. *Fozia Khanam*,[28] the husband argued that there was no justification for directing him to pay maintenance once marriage between the parties was legally dissolved by the order of the family court. The High Court of Delhi was of the view that the definition of term 'wife' under section 125 Cr PC could not be imported into Domestic Violence Act, 2005 (Act, 2005). The court opined that the purpose and object of Act, 2005 and provision under section 125 Cr PC is different, especially when the former Act seeks to prevent acts of domestic violence on women living in a shared household, while later prevents vagrancy where wife is left high and dry without maintenance. Besides, law gives a right to claim maintenance under both civil law as well as under section 125 Cr PC to a divorced wife.[29] Further, the court confirmed the monthly maintenance of Rs. 3750/-, even after learning the fact that the husband was a driver by profession and had a second wife also.

25 Constitutional Bench decision in *Danial Latifi* v. *Union of India* reported (2001) 7 SCC 740, *Iqbal Bano,* 2007 AIR SCW 3880.

26 *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit* AIR 1999 SC 3348.

27 *Available at*: https://indiankanoon.org/doc/199651953/.

28 *Available at:* https://indiankanoon.org/doc/29158639/?type=print.

29 *Shabana Bano* v. *Imran Khan* AIR 2010 SC 305.

In another case,[30] *Padathukalangara Marakkar* v. *Padathukalangara Marakkar*, the husband was working as head load worker under a registered trade union. He had another wife and children to look after. Further, the respondent had her own income from a tailoring shop run by her, and she had also been abroad for some time for employment while residing separately from his husband. The High Court of Kerala opined that under the law, a divorced wife is entitled to claim maintenance under section 125 Cr PC, provided she is unable to maintain herself. From the careful perusal of facts of the case, the court found that the respondent had a tailoring shop of her own, besides it was also not clear as to why the lady claimed maintenance for the first son when he was 19 years old, and the age of the second child was 14 years in 2010. The court opined that the father's liability is only till the date on which the second child attained majority.While revisiting the amount of maintenance, the court reduced the amount of maintenance of respondent to half *i.e.,* Rs. 1500/- while confirmed Rs. 2000/- for the second child, especially considering the needs and necessities as a student of secondary classes.

In *Tarannum Bano* v. *State of Uttar Pradesh*,[31] a revision was sought before High Court of Allahabad as against the order passed by the Additional Family Judge, Azamgarh dismissing the case for maintenance. From the careful perusal of facts and evidences advanced, the court found that the crucial documents of divorce, *i.e., talaqnama*/*panchayatnama* evidencing the factum of divorce and the *nikahnama*, the contract of second marriage were never produced. To this extent, the court remitted the matter to the Family Judge, Azamgarh to decide a fresh considering the evidence and the statements already on record and also summoning the record. Further, the court found that since the marriage had been admitted by both the parties, therefore, the wife was not required to lead any evidence regarding marriage and, a *prima facie* case for maintenance under section 125 Cr PC was maintainable.[32] The court took note of the fact that the wife was pursuing the case of maintenance for more than a decade and accordingly directed the husband to give interim maintenance of Rs. 1,000/- per month to the wife on every fifth day of the month, beginning from the date of judgment till the final decision by the family judge.

In *Sabri* v. *Mohd. Jamil*,[33] the wife filed an application for grant of maintenance *pendente lite.*The trial court, dismissed the application, on the ground that there is no provision in the Muslim law or any statute governing them, for grant of interim maintenance. The High Court of Punjab and Haryana set aside the order of the trial court and opined that the application for maintenance is applicable. The court opined that it is the right of every citizen of India to receive the maintenance *pendente lite*. The court opined that:

> In case, the wife is suffering from paucity of funds or is unable to maintain herself or she has got no sufficient means for livelihood, then,

30 *Available at:* https://indiankanoon.org/doc/29153490/ (last visited on Nov. 30, 2020).

31 MANU/UP/0186/2019.

32 *Id*., para 7.

33 *Available at:* https://indiankanoon.org/doc/120246129/ (last visited on Nov. 30, 2020).

> the court, in a pending suit for restitution of conjugal rights,has got ample powers to direct for payment of maintenance in pursuance to the powers conferred by Section 151 of the Code of Civil Procedure. Needless to say that right to life and livelihood does notmean animal living but a quality of life suiting to the status of the person concern.

In *Jubair Ahmad* v. *Ishrat Bano,*[34] maintainability of application under section 125 of Criminal Procedure Code, 1973 was in question before the High Court of Allahabad. The court held that despite the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 adivorcee Muslim woman can still seek maintenance under section 125 of Code of Criminal Procedure, also the court opined that right of maintenance is an absolute right available to a wife from his husband and therefore even divorce cannot affect such a right provided she remained unmarried or is not self-sufficient. The court further held that section 125 of Code of Criminal Procedure, 1973 is one of the most secular enactments ever made in India which is neither community centric nor religion centric. The court observed that section 125 of Code of Criminal Procedure, 1973 is one of the tools to translate our constitutional promise of gender justice into social reality. Furthermore, it is impossible to consider right to life with dignity as a fundamental rightunless there is a fair and reasonable provision pertaining to maintenance of a divorced wife. The court concluded that while interpreting this beneficial legislation and dealing with the application of a destitute wife or helpless children and aged and infirm parents, the constitutional vision of equality, liberty and justice and more specifically social justice to women and marginalized section of society must be considered.

The applicability of section 127 and 125 of the Cr PC to a divorced Muslim woman holds special relevance, since it is extremely difficult to conceive that a woman would be in a position to manage herself within some meagre maintenance. Therefore, all efforts ought to be made towards ensuring adequate living, so that she can live with the same dignity as she would have lived in her matrimonial home. In *Shaheen Shaba* v. *Abdul Asif Mansoori*,[35] the husband was serving as an *adhyapak* bearing a salary of Rs. 26,400/- per month. His mother had been a government servant and was getting a pension of Rs.7,000/- per month. The High Court of Madhya Pradesh after careful examination of facts and the financial status of the wife enhanced the amount of maintenance from 1,000/- per month to divorced wife and Rs.1,500/- for the son to Rs.3,000/- to his divorced wife and Rs.4,000/- for the son respectively. In this regard, the court referred to the Supreme Court judgment in *Shamima Farooqui* v. *Shahid Khan*.[36] The relevant excerpt runs thus:

> In today's world, it is extremely difficult to conceive that a woman of her status would be in aposition to manage within Rs.2000 per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 Cr PC is for a melioration of the financial state of

34 2020(2) ALJ 342.

35 *Available at:* https://indiankanoon.org/doc/119878530/(last visited on Dec.20, 2020).

36 (2015) 5 SCC 705.

> affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there have to be some acceptable arrangements sothat she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival.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 long as the wife is held entitled to grant of maintenance within the parameters of Section 125 Cr PC., it has to be adequate so that she can live with dignityas she would have lived in her matrimonial home. She cannot be compelled to become a destitute ora beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. 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, for wife's right to receive maintenance under Section 125 Cr PC, unless disqualified, is an absolute right.

There is also a misconception that as per Muslim law, once the amount of *mehr* is paid the divorced wife is not entitled to claim maintenance from the husband. However, a conjoint reading of various Supreme Court pronouncements including *Danial Latifi* v. *Union of India*,[37] *Iqbal Bano* v. *State of Uttar Pradesh*,[38] and *Shabana Bano*v. *Imran Khan*,[39] categorically held that after divorce, the Muslim women can avail the provision of section 125 of the Cr PC before she remarries.

In *Mohd. Imran* v. *Mehjabeen Khatoon*,[40] an appeal was filed by the husband challenging judgement and order passed by Judge, Family Court, Basti under section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act, 1986) to pay a sum of Rs. 1,98,000/-.

The marriage of Imran and Mehjabeen was solemnized in accordance with Muslim law. The wife was granted the divorce and the copy of the divorce was sent by registered post. The wife filed a petition under section 3 of Act, 1986 claiming a sum of Rs.8,36, 208/- towards her dower and value of goods given by her parents at the time of marriage. It was alleged that marriage between parties was settled on dower (*mehr*) of Rs.25,786/, and at the time of marriage various articles were given to husband by her parents. List of gift items so prepared was duly signed by father of

37 (2001) 7 SCC 740.
38 (2007) 6 SCC 785.
39 2010) 1 SCC 666.
40 MANU/UP/3559/2019.

husband as well as father of wife. Pleadings regarding commission of physical and mental cruelty upon wife were also alleged, including demand for additional dowry. According to the wife, the husband divorced her by way of oral *talaq* and papers regarding the same were sent by registry. It was further alleged that father of the wife went to the house of husband to patch strained relations but the same did not materialize. Thereafter, the wife initiated the proceedings under section 156(3) Cr PC, and notices were sent. The matter was further referred to mediation. During mediation the husband reiterated that since wife had been divorced by way of triple *talaq*, therefore, no amount towards *iddat* was to be paid. On these grounds, the wife filed the suit for recovery of money from husband which was contested by the husband. The husband admitted the factum of marriage and agreed on dower of Rs.25,786/-. It was admitted by the wife that amount of prompt dower as well as gift items given by parents of the wife have been returned.

Upon perusal and appreciation of above contents, the lower court framed four issues for consideration. They are: i) Whether plaintiff is the divorced wife of the defendant? ii) Whether plaintiff is entitled to receive a sum of Rs. 25,786/- towards dower (*Mehar)* from defendant or defendant has paid aforesaid amount? iii) Whether plaintiff is entitled to receive any amount from defendant towards *iddat*. If yes then what amount? and iv) Whether plaintiff is entitled to receive amount mentioned in plaint and goods detailed or the value thereof?[41] The decision of the lower court was challenged before the High Court of Allahabad. The high court while dismissing the appeal opined that all four issues were correctly settled in the lower court, and further opined that the husband could not prove the very story he set out to prove.[42] The high court found no illegality in the award passed by lower court for quantifying a cost of Rs. 20,000/, payable by husband to wife, within a period of one month.

In *Mohammad Zirgham Ansari* v. *Shamina Begam*,[43] the appellant married the respondent according to Islamic law and started living together. The appellant husband divorced the respondent wife by way of triple talaq, which was communicated by registered post. The wife did not accept amount of divorce sent by money order. The husband obtained *fatwa* verifying the divorce by Sharia Court, Varanasi. Thereafter, in proceedings under section 125, Cr PC the husband pleaded that he has divorced the wife and she is not entitled to maintenance. However, chief judicial magistrate refused to recognise the *talaqnama* in absence of a declaratory decree of divorce. Therefore, the petition for declaratory decree in respect of divorce between the parties was filed before the High Court of Allahabad.

The high court while dismissing the appeal held that the husband during the proceeding of maintenance alleged that he had already divorced his wife which was not recognized in maintenance proceedings and the application given by the husband to that effect was rejected. After that, the husband made efforts to obtain *fatwa i.e.,* judgment of Sharia court by filing complaint where his wife did not appear. The court

41 *Id*., para 6.

42 *Id*., para 17.

43 2019 (4) ADJ 661.

was of the view that the judgment of sharia court will not have any valid effect in order to conclude that there was divorce between the parties. The court further held that during the maintenance proceeding, firstly, divorce has to be established, which the husband in this case failed to establish. The high court also laid down some principles that must be followed in so far as the judging of the validity of *talaq* is concerned. These principles are:[44]

i. *Talaq* whether oral or writing must be pronounced in presence of two witnesses.

ii. If wife is not present at the time of pronouncing *talaq*, it should be communicated to her.

iii. There should be reasonable cause for divorce.

iv. Effort of reconciliation made by two persons appointed by parties-one from husband side andother from wife side.

v. Mere averment of divorce in written statement/ application in a case before a court will not beeffected as valid divorce.

The High Court of Allahabad on the basis of the facts and legal discussion did not find any infirmity in the lower court's decision and therefore the appeal was dismissed. The court also referred to *Shamim Ara* case where it was observed that *talaq*, in order to be effective has to be pronounced.[45]

In *Nazia Begum* v. *Shoaib Ahmad*,[46] the issue before High Court of Allahabad was whether the husband had divorced the wife. From the perusal of facts, the court came to the conclusion that in relation to the alleged divorce, in respect of which declaration had been sought, there was no mention in the plaint that oral divorce was given by the husband. It was also nowhere mentioned that whether the husband was present or not. Besides, a written divorce had also been submitted, which however did not bear the signature of husband. On the basis of judicial decisions of Supreme Court on the subject and legal discussions, the high court opined that the findings of lower court were not legally sustainable and therefore its decision was set aside. Accordingly, the appeal was allowed.

In *Saiyyad Zameer Ullah* v. *Smt. Sheeba,*[47] the applicant challenged the order of the lower court which directed the applicant to give Rupees 51,786/- as *Mehr* amount, expenses of *iddat* period, Rs.21,000/- and a lump sum maintenance amount of Rs.6,50,000/- on the ground that the respondent, his wife, had already claimed a lump sum amount under section 125 of Cr PC and the case was closed under section 127 of Cr PC However, the respondent submitted that the applicant was not maintaining her even prior to or after the divorce. Therefore, she filed another application under section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

44 *Id*., para 20.

45 *Shamim Ara* v. *State of Uttar Pradesh* (2002) 7 SCC 518.

46 2019(1) MLJ 767.

47 *Available at*: https://indiankanoon.org/doc/24088936/.

The court found that the applicant did not reply to the lower court when the order under the Act of 1986 was made and remained *ex-parte*. Further, it was observed that the lower court did not mention anything regarding the adjustment of the amount fixed for maintenance as per section 125 of Cr PC against the amount of which the applicant was directed to pay under the Act of 1986. The court observed that:

> The respondent was entitled for the maintenance under Section 125 of the CrPC till the date of her divorce i.e. on 08.03.2012, after that if she is unable to maintain herself, she can claim maintenance from the person or relatives, who would be entitled to inherit her property after her death and she can also claim maintenance during *Iddat* period and if child is born, for child till he attains the age of two years.

The court, therefore, presumed that the applicant did not agitate on the amount fixed by the court. Thus, the court while dismissing the petitions of the application, held that there was no misuse of the law or any illegality or perversity in the order passed by the court below.

In *T.H. Abu Talha* v. *Naseema Bee*,[48] there was a criminal revision case filed against the order of maintenance passed by thedistrict munsif-cum-judicial magistrate, Ranipet, Vellore. The main contention of the husband was that as per Muslim law *talaq* had already been given to the respondent and she also received the amount of Rs.3,46,000/- and therefore she was not entitled to claim maintenance from the petitioner. In its order dated December 28, 2011, the lower court granted maintenance at Rs.1100/-, which was challenged by the husband. This criminal revision case was pending from the year 2012 without any progress.

The High Court of Madras while rejecting the criminal revision petition held that considering the income of the petitioner and the cost of living prevailing as on date, this court did not find any perversity in the order of maintenance at Rs.1,100/- granted by the lower court. The high court was of the view that even the divorced Muslim women, if she proved her income and claim, is entitled for maintenance till she remarries.

Similarly, in *Rukhsar Bano* v. *Ali Abbas*,[49] the applicant was married to the respondent as per Muslim law. The applicant's sister was also married to the brother of the applicant's husband. After marriage, the applicant's husband demanded dowry of rupees 50,000/- which was paid by the father of the applicant. The demand of dowry again came from the elder brother of the applicant's husband of rupees 3,00,000/-. Due to non-payment, the respondent started ill-treating his wife and on one day he left his wife and her sister on Railway Station, Harda. The father of the applicant tried to pursue the respondent and his brother but in vain. Thereafter, the applicant obtained a decree from the family court for the payment of rupees 4,000/- per month as maintenance against her husband under section 125 of Cr PC. Against this order, a criminal revision petition was filed by the husband for setting aside the order of the

48 *Available at:* https://indiankanoon.org/doc/112399281/ (last visited on Nov. 30, 2020).

49 *Available at:* https://indiankanoon.org/doc/31512024/ (last visited on Nov. 30, 2020).

family court and a criminal revision petition was also filed by the applicant for enhancement of the maintenance allowance. The husband of the applicant argued that he had divorced the applicant and had already paid the expenses of *iddat* and *mehr* and therefore, he was no longer under an obligation to maintain her. The counsel for the respondent husband also objected that court below had failed to observe that after divorce, the applicant was not entitled to file an application under section 125 of the Cr PC.

On the other hand, the applicant claimed enhanced maintenance allowance on the basis that her husband was working in Indore and earning rupees 40,000/- per month. The applicant failed to establish that she was living separately on account of demand of dowry. The court was of the view that grant of divorce by the respondent husband to his wife shows his unwillingness to live with her and that it was a sufficient cause for the wife to live separately. Therefore, the question before the court was whether a divorced Muslim wife could claim maintenance from her husband even after *iddat* period.

The High Court of Madhya Pradesh on the perusal of the facts and circumstances of the case, opined that the since the wife did not have any permanent means of earning to maintain herself, the husband was duty bound to maintain his wife. The court reiterated the already settled law that Muslim women could avail maintenance under section 125 of Cr PC as long as she did not remarry. Therefore, the criminal revision petitions were dismissed by the court.

III LAW RELATING TO PROPERTY

Under the Muslim law of property, the owner has the absolute right to decide the fate of his property, whether the property is inherited, self-acquired, or is occupied by a person from any other source. Thus, during his lifetime, the owner has an absolute and exclusive right by which he can adopt either of the modes of disposition of his property such as gift or Will or *waqf*. There is no joint property concept under Islamic law, thus a person owns his property during his whole life as an absolute owner of the property. As soon as he takes his last breath, the property devolves by way of inheritance upon his heirs immediately. The owner (donor) during his life time has the option to gift his entire property even to a stranger, irrespective of the religion and caste, to anyone called donee,even without any concurrence or connivance of would-be heirs who are existing and alive. However, the owner would have to give the possession of the said property to the donee and the same should be accepted by him. In case, the owner, during his lifetime, wants, he can bequeath one-third of his property to whomsoever he likes, who helps him in his/her life,where he feels that his heirs will not take care of him. If the Will is to be made, in favour of only one of his heirs, then it is mandatory for him/her to seek the permission of the other heirs as per the provisions laid down as per Muslim law. Last but not the least, if the owner intends to save his property from being destroyed by his heirs, who might utilize the property for their immoral acts, the owner may opt to *waqf* his entire property so the corpus be intact and the usufruct of the property may be utilised for religious and / or charitable purposes even for his own family and descendants and not limited to the poor and the destitute.

This *waqf* is known as *waqf-al-al-Aulad* (family waqf). Such a property shall continue till the time immemorial for the purposes for which the *waqif* has dedicated such property. In case the owner dies without availing any of the aforementioned options then his property automatically gets transferred to his legal heirs.Above all, the heirs under the Muslim law who inherit the property shall be bound to perform the owner's last rites and meet the funeral expenses as per their share provided for under the Muslim law. Hereunder the following cases relating to property law which are reported in this year are being analyzed and briefly mentioned.

Gift

In *Imtiyaz Yusuf Mansuri* v. *Muhammed Hanif Abdul Wahi Mansuri,*[50] a petition was moved before the High Court of Gujarat against an order of the Additional Sessions Judge, Surat for setting aside an interim relief granted by the trial court to the petitioners. In this case, it is contended that a gift deed was executed in the respondent's favour by his mother and thereby she transferred the entire property to him, also the said gift deed was accepted on the same day. However, it was alleged by the petitioner that respondent's mother was severely ill and suffering from stroke and paralysis around the time when the gift deed was alleged to have been executed. Further, it was alleged that none of the other legal heirs were aware about the said gift deed, and the daughter and son-in-law who were residing in the said property were also completely unaware of any such execution of the gift deed. Furthermore, the petitioner contended that as per the Muslim law, the gift made under *marz-ul-maut* cannot take effect beyond a third of donor's estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death. Moreover, it was also alleged that as per the Muslim law a gift cannot take effect without consent of the other heirs and therefore the gift deed executed in the favour of respondent was bogus, concocted and fabricated.

The two pertinent issues to be decided before this court were whether the gift deed made by the respondent is bogus, concocted and fabricated and whether the deceased could have gifted the entire property to the legal heirs.The high court has observed that since the question is raised against the gift deed itself and the gift deed has been made to one of the heirs, the same requires a full-fledged trial. Hence the court has made observations regarding the gifts in general and a gift made during *marz-ul-maut* or death bed gifts.

The rules governing gift or *hiba* define gift as "a transfer of property made immediately and without any exchange" by one person to another, and accepted by or on behalf of the latter. 'Gift' or 'Hiba' literally means the giving away of such a thing from which the person in whose favour the gift is made, may draw benefit. The definition of *hiba* or gift has been given in *Kanz al Dacquiq*[51] in the following words: "Hiba is the making of another person owner of the corpus of property without taking

50 MANU/GJ/2989/2019.

51 Zaylaˆi˜, ˆUthma˜n A, and ˆAbd A. A. Nasafi, *Tabyin Al-Haqa'iq Sharh Kanz Al-Daqa'iq*. (Bayrut: Dar al-Kutub al-'Ilmiyah, 2000).

its consideration from him." Thus, gift is the transfer of movable or immovable property with immediate effect and without consideration, by one person called the donor to another person called the donee and the acceptance of the same by himself or by some other person, authorised on his behalf, provided that the person making the gift must totally renounce all his title and rights in the property gifted away of his independent free will."In order to constitute a malady, *marz-ul-maut* there must be (i) proximate danger of death, so that there is a preponderance of apprehension of death, (ii) some degree of subjective apprehension of death in the mind of the sick person, and (iii) some external indicia, chief among which would be inability to attend to ordinary avocations, although attending his ordinary avocations does not conclusively prove that he was not suffering from *marz-ul-maut*. When a malady is of long continuance and there is no immediate apprehension of death, it is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, will not be valid. Whether the donor was or was not under the apprehension of death at the time the deed was executed or was on the death bed, is a question essentially of fact.

Will

In *Maimuna Khatoon* v. *Basanti Devi,*[52] an appeal was filed before High Court of Patna against the judgement passed by additional district and sessions judge in the favour of applicant/respondent in a probate case. In this case the testator executed a will before his death in the presence of attesting witnesses, the Will was registered by Sub-Registrar, Sheikhpura. However, the legatee of the Will, in whose favour the will was executed, filed an application before the court alleging that the original will was fraudulently taken away by the opposite party. The opposite party objected the grant of probate and letter of administration to the applicant and stated that the same was not maintainable as it had not been verified in the manner laid down under section 281 of the Indian Succession Act, 1956 (Act, 1956). Also, the objectors questioned the due execution of Will and alleged that the Will had been registered by practicing fraud upon the registering authority. It had been further stated by the objectors that certified copy of the Will did not come within the meaning and definition of will as defined under section 2(H) of the Act of 1956. Furthermore, the property covered by the said Will was more than three-fourth of the entire property left behind by the testator, as such, it was illegal as the testator was not empowered to execute the will with respect to more than one-third of his property.

The lower court in this case held that the title of the property which was the subject matter of the Will could not be decided by the probate court as it had limited jurisdiction to decide the authenticity of the Will. The lower court also on the basis of the appreciation of evidence found that applicants had been able to prove that the Will was duly executed by the testator in sound state of mind after fully understanding its contents in presence of two attesting witnesses and therefore satisfying the requirement of section 63(c) of the Act, 1956 as well as section 68 of Evidence Act, 1872. Moreover, under Muslim law the form of Will is immaterial and there are no

52 2020 (2) BLJ 91.

prescribed rules as to how the will of a Muslim individual shall be carried out. The lower court also stated that in the deed testator had clearly expressed his intention that the main legatee of the Will shall carry out the division of sale proceeds as he was maintaining for several years and he would take his share as per the provisions of Bataidari law of Government of Bihar and the rest of the income shall be contributed to charitable organization which was the basic ingredient of *waqf* law. The high court therefore did not find any merit in the appeal filed by objectors/appellants against the judgment of the lower court and dismissed the appeal accordingly.

Succession and inheritance

In *Talat Fatima Hasan* v. *Syed Murtaza Ali Khan (D) by L.Rs.*,[53] an appeal was filed against the order of the High Court of Delhi which concluded that Muslim personal law of succession was not applicable upon the property of the Nawab and it had to be governed by the Rule of primogeniture. The issue arose when the Nawab Raza Ali Khan of Rampur (the first princely state to accede to the dominion of India in 1949) died intestate. After his death, his eldest son Nawab Sayed Murtaza Ali Khan was recognised to be the ruler by the President of India, in terms of clause 22 of the article 366 of the Constitution of India. He was made the sole successor of all the properties-movable and immovable, of Nawab Raza Ali Khan by issuance of a certificate by the government. This certificate was challenged by the other son and the daughters of Nawab Raza Ali Khan, which was quashed by the orders of the High Court of Delhi. Thereafter, a partition proceeding was initiated by the grand-daughter of the Nawab Raza Ali Khan. In the meantime, 26th Amendment was made to the Constitution of India which amended the definition of ruler under clause 22 of article 366. As a consequence of this amendment, the suit filed in 1970 was withdrawn and a fresh suit was filed. The District Judge, Rampur issued an interim order to the defendant to not part with the property till further orders of the court. The suit remained pending for over 20 years. The high court dismissed the suit for partition in 1997 on the ground that the palaces were the official residence of the ruler and these palaces along with their furniture, pictures, fixtures, equipment, land and gardens *etc.* were adjuncts of the ruler and therefore could not be the subject matter of the suit. Thereafter, the petitioner moved to the Supreme Court.

The issue before the Supreme Court was whether succession to properties declared by an erstwhile ruler to be his private properties in agreement of accession with Dominion of India, would be governed by rule of succession applicable to the "*Gaddi*" (rulership) or by personal law applicable to ruler who is Muslim?

The Supreme Court stated that Nawabs were only titular rulers enjoying certain privileges and privy purses but neither had territory nor subjects. The *Gaddi* system had ceased to exist with the extinction of their sovereignty. The court observed:

> When they were actual sovereigns, their entire State was attached to the Gaddi and not any particular property. There are no specific properties which can be attached to the Gaddi. It has to be the entire

53 AIR 2019 SC 5399.

> 'State' or nothing...Since, we have held that they were rulers only as a matter of Courtesy, to protect their erstwhile titles, the properties which were declared to be their personal properties had to be treated as their personal properties and could not be treated as properties attached to the Gaddi.

Thus, the court ruled in favour of the petitioner and held that the properties of Nawab have to be divided according to the Muslim Personal Law (Shariat) Application Act, 1937.

Waqf

In *Hammad Ahmed* v. *Abdul Majeed,*[54] the brief facts are herewith, the dispute had arisen between the parties as to who should be discharging the duties of the chief *mutawalli*, of Hamdard Laboratories (India) earlier known as Hamdard Dawakhana prior to the death of the previous undisputed chief mutawalli Abdul Majeed. In this case, the appellant had asserted and claimed that after the death of Abdul Majeed, chief *mutawalli* on March 19, 2015 he took over the office of chief *mutawalli* on March 20, 2015 as being the senior most male direct successor of *waqif mutawalli*. The appellant sought a declaration that respondent is no longer a *mutawalli* under the *waqf* deed dated August 28, 1948. And further also sought a permanent injunction restraining the respondent no. 1 to continue as a *mutuwalli* of Hamdard Dawakhana. The appellant also filed an application under Order XXXIX Rules 1 and 2 read with section 151 of the Code of Civil Procedure 1908 along with the suit. Apart from the issue of injunction before Supreme Court, theissue which is of relevance was whether it is the senior most male descendant in line of succession who would be appointed a chief *mutawalli* to discharge the duties of the chief *mutawalli* of Hamdard Laboratories (India) after the death of the previous chief *mutwalli* Abdul Majeed. The single judge after interpreting the *waqf* deed held that the appellant is a chief *mutawalli.* Whereas in appeal the division bench took a contrary view. Hence this matter came before the Supreme Court. It was held that the senior most male descendant in line of succession was *prima facie* entitled to be appointed as chief *mutawalli* and the succession to the office of the chief *mutawalli* must not devolve by the Rule of Lineal Primogeniture. In other words, the Supreme Court had held that the *waqif mutawalli* had constituted a board of five *mutawallis*. Hence it is the body of *mutawallis* which has been vested with the right of management of Hamdard thus the senior most be appointed the chief *mutawalli*.

In *Siraj Ahmad* v. *Sanjeev Kumar,*[55] the issue was whether the suit property in question is a *waq*f or a *waqf* property or a matter required to be determined by the tribunal constituted under the *waqf* Act, 1995 (hereinafter Act, 1995) so as to oust the jurisdiction of the civil courts by virtue of section 85 of the Act of 1995 and that the plaint under Order VII Rule 11 of CPC be rejected. It was held in this case, that since the petitioner had failed to place any material on record to show that the said property fell within the ambit of section 85 of the said Act, 1995 hence the jurisdiction of the

54 (2019) 14 SCC 1.

55 2020(3) ALJ 196.

civil courts being plenary in nature and unless the same was expressly or impliedly ousted by the said Act, 1995, the plaint was not liable to be rejected under Order VII Rule 11 (d) Code Of Civil Procedure 1908 and the civil courts would continue to exercise their jurisdiction under section 9 of CPC

In the case of *Aliyathammuda Beethathebiyyappura* v. *Pattakal Cheriyakoya,*[56] the three judge bench of the Supreme Court held that the female descendant cannot be a *mutawalli*, if the *waqif* has intended to eliminate them. In other words, the woman cannot hold the office or stake a claim to the *mutawalliship* of the *waqf* estate, if the *waqif* intended to create the *mutawalliship* only in favour of the male descendants. Hence, the succession to the office of the *mutawalli* should be in accordance with the intention of the *waqif* who created the *waqf*, and no contrary intention can be subverted through any other document to show a contrary intention.

In *Kaushar Shahjahan* v. *U.P. Sunni Central Waqf Board,*[57] the case pertains to the appointment of a *mutawalli* of *waqf* Haji Mohd. Salim. The *mutawalli* of the *waqf* Mohd. Shahjahan died intestate leaving behind two daughters and four sons. On his death, two rival applications were filed for appointment as a *mutawalli*. One by the revisionist, Kaushar Shahjahan, on the basis of the nomination made by his father, the erstwhile *mutawalli* and another by eldest son of the erstwhile *mutawalli* claiming in accordance with the deed of *waqf*. The *waqf* board appointed the eldest son as the *mutawalli* and the claim of the revisionist was rejected on the ground that a *mutawalli* had no power to nominate his successor under the *waqf* deed. Aggrieved by this order, the revisionist filed a writ petition which was disposed of vide order dated September 12, 2017 directing the *waqf* board to pass a fresh order after hearing the parties. As a result, the earlier order was recalled by the *waqf* board and the revisionist was appointed as the *mutawalli* of the *waqf*. Against this order, the eldest son approached the *waqf* tribunal, which gave its decision in favour of the eldest son and earlier orders of the board were set aside. Hence, this revision petition was filed by the revisionist before the High Court of Allahabad. The court stated that:

> It is unable to accept the contention of counsel for the revisionist because his claim was based exclusively upon the alleged nomination made by his father in his favour. No issue regarding the incapability or otherwise of the opposite party no. 4 was ever raised in the application filed by the revisionist, seeking his appointment as *mutawalli*.

The court further observed that the claim of the revisionist "was based exclusively on the nomination and it was found that there exists no power of nomination" under the *waqf* deed. The court did not find any illegality in the impugned order passed by the wakf tribunal and held that the only issue raised, namely, the nomination in favour of the revisionist was duly considered and rightly repelled for cogent reasons. Hence the revision petition was declared to be without merit and was dismissed.

56 AIR 2020 SC 2892.
57 2019 (134) ALR 439.

In *Surender Kumar* v. *M. Salim*,[58] the petitioner, a tenant, challenged the eviction order of the Additional Rent Controller, Tis Hazari court in respect of a shop in Delhi. The property in dispute was the property of a *wakf-al-al-Aulad* created by Sheikh Ahmed. He appointed the respondent *i.e.,* Mohd. Salim as the sole *mutawalli* and beneficiary of the said *waqf*. The *mutawalli* required the suit premises for setting up his professional office from where he could carry out his professional activities. Therefore, he filed an eviction application against the petitioner. The question before the court was whether a *mutawalli* can file an eviction petition for evicting the tenant in his own name and for his own purpose. The court held that a tenant/petitioner cannot challenge the *wakf-al-al-Aulad* as also the competency of its *mutawalli*. The court stated that:

> Since the petitioner now requires the tenanted shop for his own benefit for setting up his professional office the tenant cannot question his intention to use his property in the way he genuinely desires to.

In *Md. Abrar* v. *Meghalaya Board of Wakf*,[59] a resident of Shillong, Haji Elahi Baksh (waqif), executed a registered *waqf* deed dated November 9, 1936 dedicating properties belonging to himself, his son Md. Shafi and his son-in-law cum nephew Haji Kammu Mia to the waqf and appointed Md. Shafi and Haji Kammu Mia as joint Mutawalli. Md. Shafi died on December 20, 1960, whereupon Haji Kammu Mia became the sole mutawalli and did not appoint the successor to the deceased Md. Shafi. Hence, his son Md. Sulaiman approached the Assam Wakf Board, seeking appointment as joint mutawalli with Kammu Mia. The Assam Wakf Board while taking a note of the fact that since the surviving mutawalli has to appoint a successor from the Waqif's family line and surviving mutawalli Kammu Mia had failed to do so, appointed Md. Sulaiman as joint mutawalli. Thereafter, Kammu Mia died on February 2, 1980, upon which Md. Sulaiman became the sole mutawalli. However, this time it was Md. Sulaiman who failed to nominate asuccessor to the deceased Kammu Mia even though Kammu Mia had nominated his daughter's son Md. Taiyab as his successor before dying. Md. Taiyab approached the Meghalaya Board of Wakf, which denied his claim on the ground that he does not belong to the waqif's family line. Md. Taiyab again served notice on Meghalaya Board of Wakf in 2002, after coming into force of the Waqfs Act, 1995 but the Wakf tribunal concluded that since Md. Taiyab was Kammu Mia's descendant through the female line, he could not be regarded as a direct lineal descendant, and hence was not eligible for appointment as mutawalli. Thereafter, another son of Kammu Mia's daughter, Md. Zakaria, was impleaded before the tribunal in the same matter seeking appointment as joint mutawalli. His claim was also rejected by the tribunal on same grounds. He then filed a revision petition before the high court whereas Md. Tayabji filed a writ petition challenging the same order. Both the petitions were dismissed affirming the tribunal's findings. Again, the appellant herein, Md. Abrar, brother of Zakaria also a descendant of Kammu Mia through the female line, approached the Wakf tribunal seeking

58 257 (2019) DLT 584.

59 2020 (139) ALR 688.

appointment as a joint mutawalli. The tribunal dismissed the appellant's application on the ground that the high court order had attained finality and hence the question of mutawalli-ship has been decided. The appellant filed a revision petition before the high court challenging the tribunal order. The high court held that while the founder's female children may be considered as his successors for mutawalli-ship, the descendants of the founder's daughters would not be considered as lineal descendants under Mohammedan law, "unless there is a special term in the wakf deed indicating an intention to the contrary" (emphasis supplied). Hence the appellant was excluded from consideration for mutawalli-ship. Hence, the appellant came before the Supreme Court. The two issues which arose for consideration in this appeal were:

> First, whether a person from the waqif's family line could succeed to thevacant post of joint mutawalli after the death of any of the two original joint mutawallis?
>
> Second, if the first issue is answered in the affirmative, whether jointmutawalli-ship can be held by the appellant herein, though he is Kammu Mia's daughter's son?

On the first issue, the court observed:

> Our interpretation of the waqf deed in the above terms is supported by the order ofthe Assam Wakf Board dated 4.3.1973 allowing Respondent No. 2's claim to beappointed as joint mutawalli together with the deceased Kammu Mia. The Wakf Board strongly condemned the deceased Kammu Mia for continuing as sole mutawalli andobserved that this indicated a desire on his part to misappropriate the income of the waqf for his own family, to the exclusion of the other descendants of the waqif.

While answering the second issue, the court observed that:

> Waqif not only included the direct descendants of his son butalso his descendants through the female line, which includes Kammu Mia's daughter'sdescendants, as part of his 'family line'. The High Court's finding that the *waqif* intended that the mutawalli-ship should devolve upon Kammu Mia's descendants only after the waqif's direct lineal descendants are exhausted is patently incorrect in as much as the waqf deed does not contain any such stipulation.

IV CONCLUSION

The above decisions laid down by the apex court and the various high courts along with their observations reveal that the judicial trend is not deviating much from the real spirit of Muslim law. The cases pertaining to marriage show that the fact that the freedom of the parties in marriage under Islamic law is to be secured, has been acknowledged by the high court and even by the Supreme Court. Even the apex court did not bind the parties to register the marriage under the Special Marriage Act, 1954 if they were Muslim. The law pertaining to dower has also been interpreted in its true nature and spirit and the common practice of Indian Muslims has been discarded

accordingly in this regard. Usually, it is understood that the *dower* is paid only after divorce, however the court rightly pointed out that the dower is not the attribute of divorce but it is the attribute of the marriage, which should be paid immediately after the marriage and if the husband is financially incapable of doing so, it should be paid at the demand of the wife. Most writers of the Muslim law mention only two types of dower that is *moajjal* (prompt) and *muwajjal* (deferred) but the court pointed out a third form of the dower which is to be paid at the demand of wife anytime. Though the court did not mention the name of such type of *dower* which is known as *Indat-talab* but it recognized this form of dower also, for that the court must be appreciated.

The law relating to divorce has also been exposed by the courts in its true spirit, for example divorce by mutual consent which is known as *mubarat* has been applied in its true import. However, in some cases the court could not distinguish between the divorce by mutual consent and divorce initiated under the Act of 1939. Under the Act of 1939, the wife can obtain divorce on various grounds mentioned in the Act, however, husband cannot obtain any remedy from this legislation. The Act of 1939 has created a history in India and India was the first country where for the first time in 1939, Muslim women were allowed the right to dissolve their marriages. This right was initiated as a result of the movement launched by Maulana Ashraf Ali Thanvi which was mentioned in the speech of Mohd. Ahmad Kazmi during the presentation of the Bill.[60] This type of confusion between the kinds of divorce known as *khula*, *mubarat*, and *faskh* has remained quite common and these terms are often misunderstood not only by the laymen but by the lawmen as well and we find this confusion in the judgments as well. Similar confusion is found in some of the cases under this survey year.

Many cases pertaining to issues of maintenance have been decided in this year. But the judicial trend in this regard has not been changing so far. When the party gets the remedy in Muslim Women (Right to Divorce) Act, 1986, she is allowed to have the remedy under section 125 of Cr PC also and in almost every case the decision of *Daniel Latifi* case has been referred to. It looks like that the *Daniel Latifi* decision of Constitution bench declares the Act of 1986 as unconstitutional. However, this decision has created a lot of confusion. The exercise done after *Shah Bano* judgment by the legislature has now become the major issue of confusion for the courts.The decision of *Daniel Latifi* restores the effect of *Shah Bano* judgment and the remedy provided under section 125 of Cr PC to the divorcee. But in spite of this, the surveyor's humble request through the medium of the survey is that the courts should not open the flood gates of litigation by allowing the women to exploit both the remedies because the purpose for both is the same and that is to provide social security to women either one way or the other. Therefore, the court should not allow the remedies available in two regimes *i.e.,* Cr PC and the Act of 1986 and must not increase their burden when it is well known how they are already overburdened. In this way they can stop the exploitation of illiterate women by their lawyers.

60 For details see Furqan Ahmad, *Towards the Renaissance: Shibli and Maulana Thanvi on Sharia* (New Delhi, Indian Law Institute, 2018).

A case in this survey year is also reported on law relating to legitimacy which is also decided in accordance with *Shariah* where the issue from the *fasid* marriage has been declared to be illegitimate. Only *batil* marriage which has no existence at all makes the child illegitimate.

Apart from law relating to status, the property laws have also been a part of this survey year, they are relating to gift, will, *waqf* and inheritance. The decision of the various high courts and Supreme Court on these issues are also having conformity with the principles of Islamic law except in some cases of *waqf* administration. For example, in one case the jurisdiction of civil court is given preference over the jurisdiction of *waqf* tribunal which were specifically established under the Waqf Act of 1995 to settle the dispute relating to *waqf* in order to save the *waqf* properties from unauthorized encroachment. Merely on the ground of technicalities, the issue of jurisdiction need not be decided. Rather while dealing with such issues, the spirit of law should be taken into consideration by the court in order to secure the *waqf* properties which are fully under encroachment by various common men, sometimes even at the initiative of the *waqf* board itself. The *waqf* tribunal have been doing well in this regard and therefore the jurisdiction under the *waqf* board as it is ensured by the legislature should also be protected by the judiciary.

For the last many years, this surveyor feels that the courts have been dependent either on the judicial precedents or on the secondary books of Muslim law and generally on the Mulla's book on Principles of Muslim law and they have quoted the sections of Mulla's book, sometimes in such a manner as if the court are referring to the sections of any enactment pertaining to Muslim law.This creates confusion among the readers and should thus, be avoided. At the same time since Muslim law is a jurist made law like Roman law and unlike common law it is not a judge made law, therefore the juristic verdicts have much more importance in comparison to the decisions of even the highest court of justice.Therefore, the reference from leading books of Islamic jurisprudence based on the primary sources would be more effective for Muslims as is generally being done by their brother judges like Krishna Iyyer, Baharul Islamand Badar Durrez Ahmed and the like. This surveyor can understand the problem of the present-day judges that they cannot read the Islamic source in its original language but now almost all the sources have been translated into English and are available on the internet itself. Atleast the books of Islamic scholars who had been associated with the judiciary itself like Ameer Ali and some other scholars should be considered by the court for supporting their stand. The reason is that writers like Amir Ali, Tayyab ji and Professor Faizi were fully conversant in Islamic law and had access to its sources in its original language and they reproduced the same in the form of their works. Having said that, the surveyor would like to appreciate the effort that has been put in by some judges in the current year in order to refer to original sources of Islamic law for adjudicating matters pertaining to the concept of gift/ *Hiba*, wherein a reference has been to *Kanz Al-Daqa'iq* to look at the exact definition of gift. The same is a leading authority in Islamic law jurisprudence and contains some early work on Hanafi *fiqh* by Abd Allah ibn Ahmad al-Nasafi. Such efforts at exposition of the original Islamic law deserve appreciation and encouragement.

Last but not the least it may be submitted that 'dowry and stridhan are those issues/concepts which are totally unknown to Muslim law and thus our courts should not take cognizance of the same and even do not consider them treating as frivolous and absurd as far as Muslim Law is concerned.

In this way, the Indian judiciary will secure the confidence of Indian Muslims as well as and through the informed judgments, the Muslim populace shall also become conversant about the actual Islamic law and the judiciary could then be regarded as its true interpreter in the letter as well as the spirit of the law.

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