17

MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

CONSIDERING *Inayatullah* v. *Gobind Dayal*[1] Justice Mahmood observed that in Hindu and Muslim legal system law and religion are so intimately connected that they cannot be disassociated from each other. British Judges could not understand this proposition and therefore they interpreted both the Hindu and Muslim laws in their own understanding and that's why most of the interpretations are not according to the spirit of Manu and Mohammad of India and Arabia. Interpretative abberations were found in the judgements of Indian courts related to judgments of Hindu and Muslim law not only by British Judges but after independence our own judges who are educated in British Style also could not justify the true interpretations of Muslim Law which we find in yearly survey of Muslim Law. This deterioted and distorted position forced the Krishna Iyer J., to state in one of his judgments "When Judicial Committee of Downing Street interprets Manu and Mohammad of India and Arabia marginal distortions are inevitable.[2]" This feeling of Krishna Iyer J., is not confined to the judges only but we feel the writers of Muslim law and our ill-educated *maulvis* also did not contribute less to distort the true Islamic law which is generally applicable. In this survey here also some substantial judgments on the subject case discussed. They are related to both law of status and law of property. Among the law of status marriage, divorce and guardianship are incorporated in the survey. As far as law relating to property the judgments are comprised on inheritance, will, gift and waqf and its administration. For last many years judgments on maintenance in law relating to status and decisions related to Waqf in reference to property are mostly to be found in the legal disputes and thus included more in the surveys. These judgements with their analysis are being presented as under.

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1 (1885) ILR 7 All 775.

2 *Yousuf Rawther* v. *Sowramma* AIR 1971 Ker 261.

II LAW RELATING TO STATUS

1. *Nikah* (Marriage)

Marriage is the very foundation of the civilised society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.[3] Marriage (*nikah*) among Muslims is a 'solemn pact' (*mithaq-e-ghalid*) between a man and a woman, soliciting each other's life companionship, which in law takes the form of a contract (*aqd*)[4]. Marriage (nikah) is defined to be a contract which has for its object the procreation and the legalizing of children.[5] It may not be out of place to mention here that Maulavi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as are religious sacrament.[6]

Still after 75 years of independence parties are not free to choose their life partner according to their will and if they are doing so, they have to face lot of social arrogance including threat to the life of spouse. Following are few cases reported in the survey year, which may worth mentioning towards this end. In *Abdul Habib Sk* v. *West Bengal*[7] appeal was made against the judgement of conviction by Assistant Session Judge Nadia Krishna Nagar. Where appellant was convicted under Sections 376, 366 or 363 of IPC 1860 to suffer rigorous imprisonment of 10 years with fine of rupees 1000. The appeal was made by Habib Sk. assailing the conviction and sentence passed against him. The brief facts of the case are that one Jalemmuddin Sk lodged, a complaint for kidnapping of her daughter Suksari Khatun aged about 17 years. The girl of class IX student, went to school in the morning but did not come back even after school hours. The local people said that the accused appellant Abdul Habib Sk took away his daughter with the help of one of his friend Rahim Sk another accused. The court below arrived at the conclusion that below eighteen years of age if any person without the consent of guardian takes her, it amounts to kidnapping under section 361 of the Indian Penal Code. The parents of the girl denied from the majority status of the girl. But the lowercourt found that the defence case was more reliable after taking in to consideration the statement of the victim girl.

The high court was of the view that the court below ought to have dealt with the effect of the production of *Kabinnama* which showed that the victim was married earlier. The trial court ought to have also considered the provisions of Muslim law in this regard, and for that purpose the highcourtquoted Mulla's' *Principle of Mahomedan Law*[8] which describes about the capacity of marriage. It runs thus:

3 *Sarla Mudgal* v. *Union of India* 1995 AIR 1531, 1995 SCC (3) 635.

4 *Amina* v. *Hassan Koye* 1985 CriLJ 1996.

5 Mulla, *Principles of Mahomedan Law*, 338 (Lexis Nexis 21st edn. 2017).

6 *Anis Begam* v. *Muhammad Istafa* (1933) ILR 55 All 743: AIR 1933 All 634.

7 *S.K. Abdul Habib* v. *The State of West Bengal* (2020) SCC On Line Cal 977.

8 *Supra* note 5, para 25.

S.251. Capacity for marriage. (1)Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.A Mahomedan girl of 15 years who has attained the age of puberty is competent to marry without the consent of her parents.[9]

Marriage under the Mahomedan Law is a civil contract. Hence it should attract all the incidents of contract as any other stipulated in the Contract Act. The provisions of s. 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally.

The provisions of s. 64 of the Contract Act are clear in this behalf and require only that person to return the benefits under the Contract, at whose opinion the contract is rescinded *Mahmad Usaf Abasbhai Bidiwale* v. *Hurbanu Mansur Atar*[10].

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians (270-275).

(3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

The same rule applies in the case of a Shafei girl who has attained puberty.[11]

Explanation. — Puberty is *presumed,* in the absence of evidence, on completion of the age of fifteen years. *Hedaya*, 529; Baillie, 4 Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to *marriage, dower, and divorce* . A Mahomedan wife who has attained puberty and is under eighteen years of age may file a suit for divorce without the appointment of a next friend.[12] (*see* notes to 115 above)

Consent to marriage obtained by force or fraud, when consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified.[13] Where consent to the marriage has not been obtained, consummation against the will of the woman will not validate the marriage.[14]

After referring the sources, the court viewed that a Muslim girl of 15 years old, who has attained the age of puberty is competent to marry without the consent of her

9 *Md. Idris* v. *State of Bihar*1980 Cri LJ. 764

10 (1978) Maha. LJ. 26.

11 *Hassan Kutti* v. *Jainabha* (1929) 52 Mad. 39, 113 I.C. 306, ('28) A.M. 1285; *Sayad Mohiddin v. Khatijabai* (1939) 41 Bom. L.R. 1020, 185 I.C. 390, ('39) A.B. 489.

12 *Naksetan Bibi* v. *Habibar Rahman* (1948) 50 C.W.N. 689, ('48) A.C. 66.

13 *Abdul Latif* v. *Nyaz Ahmed* (1909) 31 All. 343, 1 I.C. 538 [wife's illness concealed]; *Kulswnbi* v. *Abdul Kadir* (1921) 45 Bom. 151, 59 I.C. 433, ('21) A.B. 205 [Pregnancy Concealed]

14 Mt. *Ahmad-un-nissa Begum* v. *Ali Akbar Shah* (1942) 199 I.C. 531, ('42) A. Pesh. 19; Jogu Bibi v. Mesal Shaikh (1936) 63 Cal. 415 relied on; Abdul Kasem v. Jamila Khatum Bibi (1940) 1 Cal. 401, 44 C.W.N. 352, 188 I.C. 490. ('40) A.C. 251.

parents. Marriage is a civil contract and there is no dispute with this proposition. If a marriage is proved by producing the *Kabinnama* it is difficult for the court to accept that the girl was forcefully taken away from the lawful guardianship and appellant cannot be held to be a convict under the provision of which charges have been framed.

The court expressed its inability to accept the minority of girl which is not proved by complainant and mother of victim in cross–examination as well as certificate issued by the school in this regard.

The high court explained the Islamic legal position on the age for marriage of parties very rightly and suggested that the court below should have acted accordingly, for that the high court of Calcutta must be appreciated.

In another case of *Nazia Khurshid* v. *Union Territory of J&K*.[15] the parties to the case i.e., both the petitioners were major and having love affair and they disclosed this fact to their parents and request them for solemnisation of marriage. It was agreed by the parents but brother-in-law and sisters of the bride told the groom, that if in future he tried to see the bride he will be eliminated by them. Constrained with this situation the parties capable of understanding their well-being performed *Nikah* in accordance with Muslim law. After marriage the bride joined the company of groom as his legally wedded wife. The parents of the parties had no objection to the marriage but bride's sister and brother-in-law and some relations were giving threats to the couple that they would eliminate the bride.

That is why a complaint against them was filed before additional District Magistrate Udhampur and the same had been transferred to tehsildar. Petitioners along with their counsel appeared before the high court of Jammu and Kashmir and categorically stated before the open court, that they had performed *Nikah* with their free will and consent without any external force and here within they also claimed protection from the harassment by the brother-in-law and sisters of wife.

The petition was supported by an affidavit and has placed on record photocopies of marks card of 10th class issued by J and K State Board of School Education. Where in date of birth of bride & groom was shown as May 15, 1988 and January 5,1989 respectively. Nikah has been performed on 02.02.2020. So, petitioners were major at the time of solemnization of marriage.

The high court referred to *Shafin Jahan* v. *Asokan K.M*[16] where it was held that,the rights provided at national and international level are preventing from stopping such freedom of marriage.

The above decision of apex court was in consonance with the spirit of Justice *K.S. Puttaswamy* v. *Union of India*[17] where it was declared that, the ability to make decisions on matter close to one's life is an inviolable aspect of human personality.

In another constitutional bench of apex court *i.e., Common Cause (A Regd. Society)* v. *Union of India*[18] *it was* observed that*"*our autonomy as persons is founded

15 (2020) SCC OnLine J and K 39.

16 (2018) 16 SCC 368: AIR 2018 SC 1933.

17 (2017) 10 SCC 1.

18 (2018) 5 SCC 1.

on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives"

Ultimately on the insistence of the High Court the respondent no. 1 to 4 namely brother-in-law and sisters were in agreement with the disposition of the case and thus the petition was disposed accordingly with the direction that brother and sisters shall insure the protection of lives and liberty of couple and shall take necessary steps strictly in accordance with the ratio of decision.

The learned judges of J&K HighCourt indeed tried to provide safe guard given to an individual about his right to life and liberty in a very elaborate manner. Their opinion and judgement increase the importance in the present-day social atmosphere of the country.

In *Salamat Ansari* v. *State of U. P,*[19] briefly the facts of the case are that Salamat Ansari and Priyanka Kharwar @ Alia along with two others have invoked the extraordinary jurisdiction of the High Court of Allahabad for seeking quashment of an FIR under sections 363, 366, 352, 506 IPC and Section 7/8 POCSO Act, Police Station Vishnupura, Kushinagar on the premise that the couple is of the age of majority, competent to contract a marriage, performed *Nikah* on August19, 2019 as per Muslim rites and rituals, after Priyanka Kharwar renounced her Hindu identity and embraced Islam.

It was submitted to the court that the couple has been living together as husband and wife since last one year peacefully and happily and the FIR lodged by father of Priyanka Kharwar is prompted by malice and mischief only with a view to bring an end to martial ties, no offences are made out, FIR be quashed.

AGA and counsel for the informant vehemently opposed the submissions on the premise that conversion *per se* for contracting a marriage is prohibited, said marriage has no sanctity in law, thus this court should not exercise its extra-ordinary jurisdiction in favour of such a couple. They relied on a judgment of a single judge in Noor Jahan Begum @ Anjali *Mishra* v. *State of U.P.*[20] decided on December 16, 2014 and its recent reiteration in *Priyanshi @ Km. Shamren* v. *State of U.P.*[21] decided on September 23, 2020.

As per the evidences before the court it was undisputed that the couple has attained the age of majority. The petitions supported by an affidavit of Priyanka Kharwar @Alia, the alleged victim proved, that she was living voluntarily with Salamat

19 2020 SCC Online All 1382: 2021 Cri LJ (NOC 39) 13: (2020) 3 HLR 667 (DB): (2021) 114 ACC 543.

20 Writ C No. 57068 of 2014.

21 Writ C No. 14288 of 2020.

as a married couple. In conclusion of facts that once age of Priyanka Kharwar @ Alia is not in dispute as she is reported to be around 21 years, petitioner nos. 1 to 3 cannot be made accused for committing an offence under section 363 IPC or 366 IPC as victim on her own left her home in order to live with Salamat Ansari. Similarly once Priyanka Kharwar @ Alia is found not to be a juvenile, the offence under section 7/8 POCSO Act is also not made out. Allegations relating to offence under section 352, 506 IPC in view of above background, appear to be exaggerated and malafidely motivated with a view to implicate the family of the petitioner Salamat *i.e.,* the Husband of Priyanka.

The High Court of Allahabad showed its reluctance to see the couple as Hindu and Muslim. For the court they were two grown up individuals with their own free will and choice and were living together peacefully and happily over a year. In the view of the high court "the Courts and the Constitutional Courts in particular are enjoined to uphold the life and liberty of an individual guaranteed under Article 21 of the Constitution of India. Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty. Interference in a personal relationship, would constitute a serious encroachment into the right to freedom of choice of the two individuals."

The high court in order to form above opinion referred to the judgment of the apex court in *Shafin Jahan* v. *Asokan K.M*[22] and quoted from it as under:

> The principles which underlie the exercise of the jurisdiction of a court in a habeas corpus petition have been reiterated in several decisions of the Court. In *Gian Devi v. Superintendent, Nari Niketan*[23]a three-judge Bench observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay. Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is *sui juris* no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter.

The high court further went on to observe that when two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.

The court emphasized that right to choose a partner irrespective of caste, creed or religion, is inhered under right to life and personal liberty, an integral part of the fundamental right under article 21 of the Constitution of India. Privacy represents the

22 (2018) 16 SCC 368.
23 (1976) 3 SCC 234.

core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioral patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. To emphasize the above observation the HighCourt relied upon the issue of right to privacy, held in the judgment of *K.S Puttaswamy*v. *Union of India,*[24] mentioned as under:

> 298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence

24 (2017) 10 SCC 1.

> postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavor. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms Under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matter on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion Under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination. (emphasis supplied)

The high court relooked the case of *Noor Jahan Begum @ Anjali Mishra* v. *State of U.P.*[25] *Priyanshi @ Km. Shamren* v. *State of U. P*[26] and observed that none of these judgments dealt with the issue of life and liberty of two matured individuals in choosing a partner or their right to freedom of choice as to with whom they would like to live. We hold the judgments in Noor Jahan and Priyanshi as not laying good law.

The court reiterated while quashing the FIR that on the ground that no offences are made out, as described above, since the two grown up individuals were before it, living together for over a year of their own free will and choice. The ultimate contention on behalf of the informant was that he be afforded visiting rights to meet his daughter. Once the girl has attained majority, then it is her choice, as to whom she would like to meet. It was expected by the court that the daughter going to extend all due courtesy and respect to her family.

The judgment is complete in conformity with the Constitution of India as well as the human right values. Marriage after immediate conversion should certainly be

25 *Supra* note 20.

26 *Supra* note 21.

scrutinized by the court that the parties change their religion after impressing the religious teachings of other religion or simply, they make a tool of conversion, solely to legalize the marriage. This situation did not perpetuate the marriage and also create a chaos between the different societies. It is therefore submitted if the parties are already converted and they are marrying with free consent then neither society nor state can interfere as it is their right to life.

2a. Dissolution of marriage, *Talaq* (Divorce)

Muslim Personal Law prescribes three kinds of talaq which is sanctioned therein. These three kinds of talaq are namely; *talaq-e-ahsan*; *talaq-e-hasan* and *talaq-e-biddat*. Of these three kinds of talaq, "*talaq-e-ahsan* is considered as most reasonable form of divorce; whereas *talaq-e-hasan* is also considered as reasonable. These two forms of talaq are both approved by the *Quran* and *Hadith*[27] and as such, is to be considered as sacrosanct to Muslim religion.

Further another book of Muslim Law explains:[28]

> The divorce called talak may be either irrevocable (bain) or revocable (raja). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A talak bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:—(a) Once, followed by abstinence from sexual intercourse, for the period called the *iddat*; or (b) Three times during successive intervals of purity, i.e., between successive menstruations, no intercourse taking place during any of the three intervals; or (c) Three times at shorter intervals, or even in immediate succession; or (d) Once, by words showing a clear intention that the divorce shall immediately became irrevocable. The first-named of the above methods is called *ahsan* (best), the second *hasan* (good), the third and fourth are said to be *biddat* (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid.

In India, it is *talaq-e-bidaat* which has been the most talked of form of *talaq* within the Indian socio legal paradigm. *talaq-e-biddat* is an instantaneous form of divorce amongst Muslim and is popularly called as triple-*talaq*, it is recognized by *Hanafi* School but *talaq-e-biddat* is neither recognized by the Quran nor by *hadith*. Law of '*talaq*' as ordained by Holy Quran is: (i) that '*talaq*' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, '*talaq*' may be effected. Due to the emotional and financial implications involved,[29] divorces have the potential to embroil spouses in courtroom battles over prolonged periods, bargaining on issues

27 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 at 104.

28 R.K. Wilson, *Anglo-Muhammadan Law: A Digest*, 136 (6th edn., 1930).

29 Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88(5) *Yale Law Journal* 950-997 (1979).

such as distribution of assets, maintenance and child custody, leading to loss of both money and time.

In *Rafique Ahmed* v. *State of Madhya Pradesh*[30] the facts disclose about application of first anticipatory bail application under section 438 of Code of Criminal Procedure, 1973 filed by the applicants namely; applicant No 1-Rafique Ahmed, applicant no 2-Raeesa Bi and applicant no 3-Mohd. Raza as they were apprehending their arrest in connection with the offence punishable under section 498-A of Penal Code, 1860, section 3/4 of Dowry Prohibition Act, 1961 and section 3/4 of The Muslim Women (Protection of Rights on Marriage) Act, 2019. As per prosecution *nikah* of complainant took place with Hasan Multani (complainant's husband). However, some dispute arose due to which complainant started staying in her parental house.

As per complainant, her husband pronounced *talaq* thrice on telephone and thereafter on, an FIR was lodged by the complainant against her husband. The FIR revealed that after the *nikah* when the complainant got pregnant her mother-in-law *i.e.,* applicant no 2-Raeesa Bi started alleging that complainant got pregnant much earlier and the child does not belong to her son and started asking for money saying that the complainant has not given enough dowry to the applicants and, thus, as per complainant, demand of dowry was the main factor for disassociation.The applicant husband submitted before the court that as per in laws due to her early pregnancy wife's character was being doubted and the marriage was annulled by her husband then how could the demand of dowry have been made after pronouncement of divorce? Husband further submits that FIR has been lodged more than a month after the complainant went back to her parental house. The complaint was filed by husband fearing some action on the part of complainant.

The high court after considering contentions of both the parties opined that there appears to be substance in the submissions of applicant husband that demand of dowry after pronouncing divorce is not possible.The provisions of The Muslim Women (Protection of Rights on Marriage) Act, 2019 are applicable only against the husband and not against in-laws. It is clear that there is no physical cruelty and it also appears that early pregnancy became the cause of dispute and as per complainant there was a telephonic call-in which husband of the complainant has sought to terminate the marriage. Looking to all these factors, along with belated FIR, a case is made out for grant of anticipatory bail to the applicants, but without making any opinion on merits of the case, the application filed by the applicants was allowed.

In *Adv. Thoufeek Ahamed* v. *Union of India Represented by Secretary (Justice), Ministry of Law and Justice,*[31] brief facts were that the petitioner claimed to be a practicing advocate and a social worker. As part of his social activities, he was elected as one of the Secretaries of the Muslim Association, Trivandrum, a socio cultural and educational society. It is submitted that this writ petition is filed to seek resolve for the practical difficulties faced by Muslim men in the matter of getting divorce. *Talaq*

30 2020 SCC OnLine MP 1521.

31 2020 SCC OnLine Ker 4252.

e bidaat or triple talaq was declared as unconstitutional by a full bench of the Supreme Court in *Shayara Bano* v. *Union of India*[31a]. After this judgment the respondent no1 has brought into force the Muslim Women (Protection of Rights on Divorce) Act, 2019, and section 2(C) declared *talaq-e-bidaat* illegal and void, and imposed penal provisions. It was submitted that by the amendment of the Muslim Women (Protection of Rights on Divorce) Act, 2019, a lot of confusion has crept in, so far, the divorce by men is concerned. The life of a couple may lead to divorce due to several reasons and after estrangement of the relationship. So, the conciliation talks before period of completion of talaq often fails resulting in non-redressing the grievance of the Muslim men to get divorce. As per petitioner submissions Muslim women can get divorce on any one of the grounds mentioned under section 2 of the Dissolution of Muslim Marriages Act, 1939. Muslim Personal Law do not discriminate the right of the husband and wife, in the matter of matrimonial affairs. So, necessary provisions have to be enacted to protect the interest of men similar to that of the women. Appropriate amendments will have to be incorporated in the Family Courts Act, 1984, for effecting divorce by *talaq*, in the event of failure of successive attempts of settlement.

Petitioner in prayer sought for a writ of *mandamus* directing the Secretary to Government, Ministry of Law and Justice, New Delhi (1 respondent), to make necessary amendments to the Dissolution of Muslim Marriages Act, 1939, so as to make it applicable to Muslim men. Petitioner has also sought for a writ of *mandamus* directing the respondents, to include divorce by *talaq hasan*, for dissolving the marriage of Muslim men under the Family Courts Act, 1984.

The high court here observed that:

> It is well known that after the judgment of Shayara Bano's case (cited supra), Legislature has brought about Muslim Women (Protection of Rights on Divorce) Act, 2019 and, by section 2(c), declared Talaqe bidaat as illegal and void. The said Act also has imposed penal provisions. Validity of the above said Act has been challenged before the Hon'ble Supreme Court. While pronouncement of 'Talaq-e-Biddat' itself has been declared as illegal and void, by an enactment, which has also been challenged before the Hon'ble Apex Court, reliefs sought for in the instant writ petition are misconceived and untenable.

The high court considered various Judgments in this regard,[32] and observed the high court under article 226 of the Constitution of India has no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as has been done in the present case. For the same reason, it was also not open to the high court to suggest any interim arrangement as has been given by the impugned judgment.

31a (2017) 9 SCC 1.

32 *Mallikarjuna Rao* v. *State of Andhra Pradesh* [(1990) 2 SCC 707, *Suresh Seth* v. *Commissioner, Indore Municipal Corporation* [(2005) 13 SCC 287, *Municipal Committee, Patiala* v. *Model Town Residents* Association. [(2007) 8 SCC 669, *Narinder Chand Hem Raj* v. *Lt. Governor, Administrator, Union Territory, Himachal Pradesh,* (1972) 1 SCR 940, *State of Himachal Pradesh* v. *A Parent of a student of Medical College, Simla,* (1985) 3 SCR 676.

It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motive of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts.

2(b) Dissolution under Family Courts Act, 1984

In*Rana Nahid @ Reshma @ Sana* v. *Sahidul Haq Chisti*[33] an appeal before the apex court arises out of the judgment passed by the High Court of Rajasthan. High court allowed the revision petition by the Husband(respondent) before it. This case is related to the subject matter of maintenance of Muslim wife and the appeal came before the Supreme Court against the orders of Family Court whereby the said high court set aside the order passed by the Family Court which had converted the application for maintenance under section 125 Cr PC into section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and also setting aside the maintenance amount awarded to wife (appellant No1 in this Appeal before the Apex Court) This case is also related to the controversy coming down between the two legal regimes *i.e.* Cr PC 125 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Having regard to the rival contentions, the question falling for consideration before the apex court was whether the family court has jurisdiction to try application filed by Muslim divorced woman for maintenance under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

As per Bhanumathi J., the facts of the *Iqbal Bano*[33a] case were clearly distinguishable from the facts of the present case. She states that:

> In Iqbal Bano case, the application under Section 125 Cr PC was made before the Magistrate which also had jurisdiction to entertain application under Section 3 of the Muslim Women's Protection Act. In that context, the Supreme Court upheld the order converting the application under Section 125 Cr PC as the one under Section 3 of the Muslim Women's Protection Act. Therefore, the application under Section 3(2) of the Act of 1986 by the divorced wife has to be filed before the competent Magistrate having jurisdiction if she claims maintenance beyond the iddat period. Even if the Family Court has been established in that area, the Family Court not having been conferred the jurisdiction under Section 7 of the Family Courts Act, 1984 to entertain an application

33 (2020) 7 SCC 657.

33a *Iqbal Bano* v. *State of Uttar Pradesh 2007(6) SCC 785.*

> filed under Section 3 of the Muslim Women Protection Act, the Family Court shall have no jurisdiction to entertain an application under Section 3(2) of the Act of 1986. The Family Court, therefore, cannot convert the petition for maintenance under Section 125 Cr.P.C. to one under Section 3 or Section 4 of the Act of 1986. The HighCourt, in my view, rightly held that the Family Court has no jurisdiction to entertain the petition under Sections 3 and 4 of the Act of 1986 and that the Family Court cannot convert the petition for maintenance under Section 125 Cr.P.C. to one under Section 3 or Section 4 of the Act of 1986. I do not find any reason warranting interference with the impugned order. In the result, the appeal is dismissed. The HighCourt has given liberty to appellant No1 to file application under Section 3 of the Act of 1986 before the competent Magistrate."

To conclude she states that:

> The application if any already filed by the appellant No1 or any application to be filed before the competent Magistrate of the First Class shall be heard and disposed of as expeditiously as possible. The Magistrate of the First Class shall not be influenced by any of the views expressed by this Court or by the HighCourt and shall consider the matter on its own merits.

As per Indira Banerjee J., the above rationality of Sister Judge is contentious. She finds herself in disagreement with the opinion of Bhanumathi J., and notes that

> The Family Courts Act, 1984 has been enacted to provide for the establishment of Family Courts inter alia with a view to secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The Statement of Objects and Reasons for enactment of the Family Courts Act records that several associations of women, other organizations and individuals from time to time, demanded that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated.

After deliberation various Sections of the Act, she contends

> The Family Courts have jurisdiction in respect of the matters specified in the Explanation (f) of Section 11 7(1), irrespective of religion or faith of the parties to the litigation. Wherever a Family Court is constituted, such Family Court not only exercises the jurisdiction and powers of any District Court or Subordinate Civil Court in respect of suits and other proceedings of the nature referred to in the Explanation (f) to Section 7(1), that is, suits and other proceedings for maintenance, it also exercises the jurisdiction and powers of a Magistrate of the First Class under Chapter IX of the Cr.P.C.

In her observation the 1986 Act for Muslim Women has been enacted to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

Under section 3(1) of the 1986 Act for Muslim Women, a divorced Muslim woman would be entitled to

i. a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

ii. where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

iii. an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage, or at any time thereafter, according to Muslim law; and

iv. to all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

The 1986 Act for Muslim Women is essentially a civil law, which makes provisions for maintenance for divorced Muslim women and not a criminal statute. The 1986 Act for Muslim women does contain any penal provision for any default which enables a divorced Muslim Woman to apply for maintenance under the said Act. The penal provision of the 1986 Act for Muslim Women is only to enforce compliance with an order under Section 31 of the said Act. The punishment of imprisonment is only for non-compliance with the order of maintenance. The magistrate referred to in section 3(2) and other sections of the 1986 Act, is, for all practical purposes, to be deemed to be a Civil Court subordinate to the District Court.

Though divorced Muslim women are excluded from the purview of section 125 of the Cr PC by reason of the 1986 Act for Muslim Women, Parliament has in its wisdom considered it necessary to make provisions for expeditious orders in applications for maintenance filed by divorced Muslim women. It is with this object in mind that Muslim women have been given the liberty of approaching the magistrate and the magistrate is required to make an order within one month from the date of filing of the application.

The order of the magistrate is executable in the same manner for levying fines under the Cr PC. Violation of an order of the magistrate entails sentence of imprisonment for a term which might extend to one year or until payment if sooner made, subject to such person being heard in defence and the sentence being imposed according to the provisions of the Cr PC. It was never the intention of the 1986 Act for Muslim Women to deprive divorced Muslim Women from the litigant friendly procedures of the Family Courts Act and denude Family Courts of jurisdiction to decide applications for maintenance of divorced Muslim women.

Lastly Indira Banerjee J., puts it as:

> If proceedings under Section 125 Cr.P.C. are civil in nature as held by this Court in Iqbal Bano (Supra), the Court of the Magistrate dealing with an application under Section 125 Cr.P.C. is to be deemed a Civil Court for the purpose of deciding the 31 application under Section 125 Cr.P.C. On a parity of reasoning, an application under Section 3/4 of the 1986 Act for Muslim Women is also civil in nature. The Court deciding an application under Section 3/4 of the 1986 Act for Muslim Women is to be deemed to be a Civil Court. Thus, the Family Court would have jurisdiction under Section 7 of the Family Courts Act to entertain an application under Section 3 and 4 of 1986 Act for Muslim Women, since the Court of Magistrate dealing with such an application is to be deemed to be a Civil Court subordinate to the District Court.

Since the two judges framed two opinions on the matter, there were two split verdicts in this case.

R. Bhanumathi J., identified herself more with literal understanding of the law. As per her understanding a divorced Muslim woman files a petition under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Family Court cannot try the matter for the lack of jurisdiction. Indira Banerjee J., identified herself more with the harmonious and purposive understandings of the law, that the family court should be open to even a divorced Muslim woman seeking maintenance. The case is now due to be heard by a larger bench owing to the split verdict.

***Nafqah* (Maintenance)**

A Muslim husband is required to maintain his wife both during and after termination of marriage, which is an ongoing marital duty of the husband. As per Islamic law, a divorced wife can receive maintenance only till the *iddat* period or the end of pregnancy, if she was found to be pregnant from her marriage. This legal situation was highly unfavorable for divorced Muslim wife who would often find herself destitute and homeless person after the end of the iddat period. The apex court tried to correct this situation of socio religious apathy wide *Shah Bano* case. The Supreme Court ensured to provide a remedy for Muslim women with a right to maintenance under 125 of the Criminal Procedure Code, 1973. This progressive legal change was restricted by the introduction of the Muslim Women (Protection of Rights on Divorce) Act, 1986, which reinstated the Islamic legal position. The verdict in *Danial Latifi* v. *Union of India*[34] was the moment of epiphany Fortunately, the right of a divorced Muslim woman even after the completion of the *iddat* period or her pregnancy as the case may be, has once again been reinforced. Per *Daniel Latifi* the husbands invoking *talaq* were to ensure a reasonable and fair provision for their former wives for the period extending beyond *iddat* period. This reasonable and fair provision has not been defined by the apex court. The term open to judicial interpretation, meaning that the provisions made in one case may differ from that of another. In

34 (2001) 7 SCC 740.

order to reduce the uncertainty which such a judicial exercise necessarily entails, it is recommended that *Kabinnama* should specify the nature of maintenance that they expect from their husband in such scenario. Such stipulation can at least provide the courts with some guiding factors in making their determination.

In the case of *Tarif Rashid Bhai Qureshi* v. *Asmabanu*[35] an appeal under section 19 of Family Courts Act, 1984 was made at the instance of the husband and was directed against the judgement and degree by the Principal Judge, Family Court, Ahmadabad instituted by the wife for a degree of divorce under the provision of the Dissolution of Muslim Marriages Act, 1939.

The facts of the case reveal that the plaintiff got married with the defendant (husband) in accordance with the Muslim law. In the wedlock, the plaintiff (wife) conceived, but unfortunately, as alleged on account of physical cruelty at the end of the defendant and his family members, the plaintiff gave birth to a still born child. The material on record revealed that the husband started harassing immediately after the marriage and a FIR was also lodged by the wife for the offence under section 498 A of Indian Penal Code 1860.As the wife was unable to continue with the marriage on account of incessant harassment, she left her matrimonial home and went back to her parental home. She also preferred an application in the Family Court at Ahmedabad under section 125 of the Criminal Procedure Code 1973, seeking maintenance. The family court awarded maintenance of Rs 2000/- per month, but defendant did not comply the order. Later, an application was filed in the court of the Metropolitan Magistrate, Ahmedabad under the provisions of the Protection of Women from Domestic Violence Act, 2005. In these proceedings also, the Metropolitan Magistrate, Ahmedabad passed an order of maintenance of Rs.2000/- per month. However, the defendant ignored the same. Later, a private complaint was lodged by the wife in the court of the Metropolitan Magistrate, Ahmedabad for the offence punishable under Sections 403, 406 and 420 of the Indian Penal Code, 1860. Ultimately, the wife instituted the Family Suit for the dissolution of marriage on the ground of cruelty and sought appropriate permanent alimony. The family court directed the husband to pay Rs 10,000/- towards the interim alimony. This order was challenged by the husband by a special civil application which was allowed by single judge of High Court of Gujarat and the order passed by the family court in favour of wife was set aside. Consequently, in the present appeal filed, the court discussed every aspect of the issues raised during the proceedings and finally concluded them as under:

> 114. From the aforesaid discussion the following conclusions emerge;
> (A) Before the enactment of the Act, 1939, a woman, under pure Muslim Law, had no right to get a decree for divorce from the husband if the husband refuse to divorce her. The Act, 1939, for the first time, conferred a legal right to move the Civil Court for a decree for dissolution of marriage on the grounds specified in Section 2 of the Act, 1939. After the Act of 1939, a wife thus had a statutory right to obtain a divorce

35 2020 SCC OnLine Guj 711: (2020) 61 (4) GLR 2645: (2020) 3 GLH 443.

from her husband through the Court on proof of the grounds mentioned in the Act. (B) A decree for dissolution of marriage obtained by the wife under the provisions of the Act, 1939 is a legal divorce under the Muslim Law by virtue of the statute. The ex-wife, having obtained divorce from her erstwhile husband under the provisions of the Act, 1939 is entitled to reasonable and fair provision under Section 3 of the Act, 1986. (C) Section 20 of the Family Courts Act, 1984 gives an overriding effect to the provisions of the Act over all other enactments. The Family Courts Act has in its comprehension all community including the Muslims. All disputes between the Muslim community within the purview of the Family Courts Act are to be settled by the Family Courts. (D) The dispute contemplated by Section 3 of the Act, 1986 is within the purview and four corners of the Family Courts Act as the dispute under Section 3 of the Act, 1986 also relates to matrimonial relations between the parties. (E) The right of maintenance and right in the matrimonial property are the consequences of the marriage or its dissolution. Those reliefs are incidental to the main relief of 'dissolution of marriage' and therefore, these reliefs are very much an integral part of the decree of 'dissolution of marriage'. The Law contemplates that the husband has two separate and distinct obligations; (I) to make "reasonable and fair provision" for his divorcee wife and (ii0 to provide "maintenance" for her. The obligation to make a reasonable and fair provision for the divorced wife is not restricted until the divorced wife remarries. It is within the jurisdiction of the Family Court to pass an order for a lump sum amount to be paid to the wife in discharge of the obligation of the husband under Section 3 (1)(a) of the Act, 1986 and such order cannot be modified upon remarriage of the divorced Muslim wife. (F) The provision for permanent alimony is incidental to the granting of a decree or judicial separation, divorce or annulment of marriage. (G) When the Family Court makes an order of permanent alimony or for onetime payment in the proceedings instituted by the wife for divorce, it is not founded on any stipulation that any part of the sum would be refunded either in whole or in part. Such sum is not granted on the condition against remarriage for all times to come or for any particular period. It is something different from the obligation to her husband to maintain his divorced wife for his life or until remarried. The permanent alimony in a way is an estimated sum in lump sum to discharge the husband from her future liabilities unconditionally. (H) The grant of periodical payment by way of maintenance to a divorced wife is in recognition/ obligation of the spouse to maintain her so long as she enjoys thecontinued the status of divorcee. If the wife gets remarried, her status of divorcee is come to an end and the liability of the husband to pay periodical maintenance would also come to an end.

The appellant husband was remarried much before the wife instituted the proceedings in the family court for divorce. He had raised a family also the husband hardly paid anything towards maintenance, the wife had to leave her matrimonial home. Soon after the marriage ultimately the wife was constrained to institute the proceedings of divorce in family court.

The high court in the present appeal was convinced with the reasoning given by family court while answering the issue regarding maintenance. The issue was whether wife was entitled to get maintenance at the rate of 25,000/- per month and or any other amount and the answer given by lower court in affirmative i.e., Rs 10,00,000/- by way of permanent lifetime lump sum maintenance. The issue regarding permanent alimony / maintenance come to be answered by the family court was as under:

> In *Danial Latifi* v. *Union of India*[36] the constitutional validity of section 3 of the 1986 Act was challenged. Upon considering in detail the court summed up its conclusion as under;
>
> i. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance a well. Such a reasonable and fair provision extending beyond the Iddat period must be made by the husband within the Iddat period in terms of Section 3(1) of the Act.
>
> ii. Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to Iddat period.
>
> iii. A divorced Muslim woman has not remarried and who is not able to maintain herself after Iddat period proceeds as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
>
> iv. The provisions of the Act do not affect Articles 14, 15 and 21 of the Constitution of India.
>
> It was observed that even after divorce and the period of Iddat the former husband will not be exonerated from the liability of making reasonable and fair provisions and they are to be made by husband within the period of Iddat. This liability of former husband was considered under the Act itself and not beyond that including section 125 the Criminal Procedure Code 1973.

Finally, the high court declared, 'this appeal fails and is therefore dismissed. In view of the order passed in the main matter, the connected civil application does not survive and the same stood disposed of."

36 *Supra* note 27.

In the case of *S.A. Dowlatha* v *S.A. Hameed* [37] the matter relates to claim of maintenance by a divorced wife. The appeal from the petitioner originates from the order passed by the Judge, Family Court, East Godavari District at Rajahmundry, where the concerned court dismissed the plea for maintenance. It is a criminal revision case under sections 397 and 401 of the Code of Criminal Procedure, 1973. The case of the petitioner (appellant) was that she is legally wedded wife of respondent no. 1(husband) by virtue of their *Nikah* which was performed in 2001. Respondent no. 1 being widower married the petitioner as his second wife. The children of respondent no. 1 from his first wife were all married. After the marriage respondent no. 1 and his children subjected the petitioner to harassment and cruelty and had ultimately driven the petitioner out of matrimonial house. Therefore, the petitioner was constrained to lodge a complaint under Section 498-A against respondent No 1 and his children. The petitioner waited for a considerable time for restoration of marital life. But respondent No 1 did not turn up. Hence, she filed maintenance case. The Husband contested the case by filing counter and denied the contentions made by the wife and contended that the she is not entitled for maintenance as she herself left him without assigning any reasons. After waiting for a considerable period when the wife refused to lead marital life with him, he pronounced *talaq* three times as per Muslim Law before the witnesses and reduced the same into writing *i.e*., *talaqnama* on the same day. It was also notarized. The said fact was informed to the petitioner by way of registered post and enclosed two demand drafts for Rs. 900/- and Rs. 500/- totally Rs. 1,400/- towards *Meher* amount for the *Iddat* period i.e., for three months. But the same was returned by the brother of wife to suppress *talaqnama* with an intention to claim maintenance. Therefore, he was not liable to pay any maintenance to the petitioner.

The high court first observed the fact that the concerned Family Court after considering the evidence adduced by both sides had dismissed the maintenance case and held that husband herein pronounced *talaq* to the wife and thereafter the wife claimed maintenance under the status of divorced Muslim woman which was not valid as the *talaq* was within the knowledge of the wife and the same was communicated to the her by following a procedure under Muslim law. The issue that falls for consideration for the highcourt was whether the petitioner can maintain an application under Section 125 of Cr PC after pronouncement of *talaq* and payment of *meher* for the *iddat* period.

The High Court referred to *Mohd. Ahmed Khan* v. *Shah Bano Begum*[38] where the Apex Courtheld that there was no escape from the conclusion that a divorced Muslim wife is entitled for maintenance under Section 125 Cr PC and *meher* is not such a quantum which can *ipso facto* absolve the husband of the liability under Cr PC and will not place him under section 127(3)(b) Cr PC and nowhere it was provided that maintenance is limited only for the *iddat* period and not beyond it. It would extend to the whole of life of the divorced wife unless she gets remarried… Muslim husband is liable to make reasonable and fair provision for the future of the divorced

37 2020 SCC OnLine AP 2980.

38 (1985) 2 SCC 556.

wife which obviously includes her maintenance as well as a reasonable and fair provision extending beyond the *iddat* period, which must be made by the husband within the *iddat* period in terms of section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and payment of maintenance is not confined to the Iddat period. A Muslim woman who has not remarried and who is not able to maintain herself after the Iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced woman including her children and parents and if any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

In this case at hand the high court noted that the husband has paid only Rs. 1,400/- to the wife by way of demand drafts towards Meher within the Iddat period. He had not paid any amount in lump sum to the petitioner towards her future requirements, such as residence, food, clothes, *etc.*, gifts received by her at the time of marriage or thereafter. The judgment impugned was passed by the lower court only on the ground that the husband had already pronounced *talaq* as per the Muslim Law and the same was informed to the wife before her filing application under section 125 Cr PC.

The high court was of the opinion after acknowledging the jurisprudence of the apex court, that the application filed by petitioner wife under section 125 Cr PC is maintainable before the family court as long as she does not remarry and the amount of maintenance to be awarded under Section 125 of Cr PC cannot be restricted for the Iddat period only. The criminal revision case was allowed setting aside the judgment of Family Court, East Godavari District at Rajahmundry and the matter was remitted for re-adjudication of the controversy of remarriage in question keeping in view the settled principle of law as discussed above by leading further evidence with regard to remarriage of the wife herein and the amount which can be awarded towards her maintenance. Further it was also directed to dispose of the case within three months from the date of receipt of copy of the order and the wife was at liberty to file a fresh application before the court below for grant of interim maintenance, if so advised pending miscellaneous petitions, if any, would stand closed.

In the case of *Firoj Khan* v. *Firdos Khan*[39] maintenance was the reason for appeal by the applicant. After appreciating the evidence adduced by the parties and hearing the parties, the family court directed the husband to pay Rs. 3,000/- per month to wife and Rs. 1,500/- per month to the daughter as maintenance. This order of the family court has been challenged before the High Court of Madhya Pradesh.

The high court after perusal of the matter in its entirety, held the opinion that the lower court did not commit any error. The argument advanced by the husband was that he has already given divorce to the wife and also paid the amount of *'mehar'* and expenditure of *'iddat'* to her, therefore, she is not entitled for getting any maintenance amount from him. However, he was failed to establish the aforesaid defence. There

39 2020 SCC Online MP 204.

was no material available on record to show that the applicant has already given divorce to the wife and paid the said amounts, therefore, the aforesaid submissions of the applicant was not acceptable. Applicant husband also took a plea that he was not having any source of income to pay the maintenance to the non-applicants as awarded by the courts' below, however, in this regard he had not adduced any evidence before the trial court. Although, he had filed some documents regarding his treatment but there is no medical certificate available on record to show that the applicant is suffering from permanent disability and he is not able to do any work. From the cross-examination of the husband, it appeared that he testified by standing in the witness box, without any support. He maintained his own vehicle. In the cross examination of the wife this has come to light that husband and his parents were jointly running grocery shop, therefore, it cannot be said that the he was not having any source of income, hence, he is unable to pay maintenance amount of Rs. 3,000/- per month to the wife and Rs. 1,500/- per month to the daughter. In view of the discussion made herein above, no interference was called for in this revision and the revision application being devoid of merits was dismissed.

There are few other similar cases where in the various high courts in their appellate authority have followed the spirit of 'reasonable and fair provision' while pronouncing on matters of maintenance to a divorced Muslim wife while resolving the issues related to *talaq, mehar* and *iddat* etc. which are being reproduced as under.

In the case of *Kallingal Elayodath Moideen* v. *Vallikkattu Valappil Jameela,*[40] the lower court, on an elaborate consideration of the facts and circumstances of the case, disposed of the petition directing the petitioner to pay a sum of Rs. 1,92,000/- to the first respondent by way of reasonable and fair provision and Rs. 30,000/- by way of maintenance for the *iddat* period. High Court of Kerala adjudicated that, the lower court cannot be found at fault with, for having assumed sufficient means for the husband to pay the reasonable and fair provision and maintenance to the first wife. No illegality, irregularity or impropriety warranted interference by the court, in exercise of the jurisdiction under Section 397 of the Code of Criminal Procedure 1973.

In *Mushtaq Ahmad Badyari* v. *Ruquya Akhter,*[41] the respondent-wife had filed an application under section 488 Cr PC for grant of maintenance on the ground that the marriage between the petitioner-husband and herself has been solemnized according to Muslim rites and rituals. Without any rhyme or reason, the petitioner herein had turned out the respondent-wife of her matrimonial home eight months prior to the filing of the application. The respondent-wife further stated that she was without any source of income and because of the neglect by the petitioner she had been residing with her brother. The respondent-wife had also filed an application for interim maintenance before the trial court. The petitioner herein filed the objections in which he has categorically stated that the respondent was a divorcee and was not entitled to any maintenance under Muslim Law. He pleaded that he had sent the divorce deed through registered post at her home address. The High Court of Jammu and Kashmir

40 2020 SCC OnLine Ker 6934.

41 2020 SCC OnLine J&K 583.

being the court of appeal observed that merely taking a plea of divorce in the objections by the petitioner before the court below by narrating that he has sent the divorce deed to his wife through registered post and the same stands received by the wife would not disentitle the wife to get interim maintenance. No fault can be found with the orders passed by both trial court as well as court of revision. The trial court had rightly granted the maintenance and also the order of the trial court has rightly been upheld by the revisional court.

In *Abdul Nasar* v. *Fathima*[42] The court of appeal in the instant case was the High Court of Kerala. The petitioner husband pleaded under section 482 of the Cr PC and challenged the concurrent orders awarding reliefs under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 on the file of Judicial First-Class Magistrate, Alathur, as illegal, improper and irregular. As per order, the learned Magistrate ordered the petitioner to pay a sum of Rs. 1,800/- per month during the period of '*iddat*' for three months and awarded an amount of Rs. 2,16,000/- being reasonable and fair provision and maintenance under Section 3(1)(b) of the Act. Interest at the rate of 9% was also awarded on the aggregate amount. The high court did not find any valid reason to interfere with the concurrent finding of the courts' below and observed that the impugned orders have been passed in accordance with facts, evidence and principles of law.

***Hizanat* (Custody of Child with Mother)**

The term 'Guardianship' (*Wilayat*) connotes the guardianship of a minor. Guardianship of a minor person means an overall supervision of the minor's personality. It means care and welfare of the child including the liability to maintain it. It is more than simply custody of the child upon a certain age. Under Muslim law, it is called *Hizanat.* Although mother is not the natural guardian of the child but she is entitled (1) in *Hanafi* law to the custody *(hizanat)* of her male child until he has completed the age of seven years and of her female child until she has attained puberty and (2) According to *Shiah Ithna Asharia* Law, the mother has the right to the custody of a male child until he attains the age of two years and of a female child until she attains the age of seven years.[43] In *Shiah Ithna Asharia* law after the child attains the age, as stated above, the father has the right to the custody of the child. In the absence of either the father or the mother, the other parent has the right to the custody of a minor child, whatever its sex and age. Hence the maternal grandmother cannot, if the parties are governed by Shiah law, claim the custody of a female child 3 ½ years old, during the life-time of the father. Under the *Hanafi* law in the absence, or on the disqualification, of the mother, the custody of the child-until, being a male, he has attained the age of seven years, or being a female, she has attained puberty- belongs to (1) the mother's mother;(2) the father's mother (3) the mother's grandmother how high-so ever (4) the father's grandmother how high soever (5) the full sister and (6)

42 2020 SCC OnLine Ker 13403.

43 *Akbal Ahamd* v. *Jamila Khatoon* on April 4, 2017 High Court of Judicature at Allahabad, Lucknow Bench, *available at*: https://indiankanoon.org/doc/74753495/(last visited on May 20, 2022).

the uterine sister. It may be clarified that a mother is not a guardian and for the welfare of minor, his or her custody is a special feature of Muslim law known as Hizanat. She cannot execute a waqf on behalf of the minor as she has no right to alienate minor's property unless appointed as a guardian by court.

In *Israr Ahmad v Azazul Hussain Ahmad*[44] the brief facts of the case were that marriage between Israr (appellant) and Zaafrana was solemnized according to Muslim law and out of the wedlock one baby was born namely Azazul Hussain. Matrimonial relation between the spouses became strained and consequently, the wife left her matrimonial home. The husband under this background filed the case before the principal Judge Family Court, Sitapur for custody of his minor child. The principal judge dismissed the case. The order of Principal Judge was appealed before the High Court of Allahabad and the argument of the appeal was that the matter pertains to the Mohammadan Law and the question of guardianship was to be considered by the Principal Judge, Family Court in the light of the Mohammadan Law, in which it has been provided that in respect of custody of a male child the father is entitled to its custody after the male child attains the age of seven years and the mother has no right and authority to retain custody of a male child after it attains the age of seven years.He further pleaded and led evidence to the effect future of the boy was in dark as the mother was unable to provide proper education. Principal Judge, Family Court, Sitapur has failed to consider the undertaking, the fact and the evidence led by the plaintiff-appellant and recorded a perverse finding to the effect that welfare of child is with mother. The father further submitted that judgement cited in the order impugned are not related with Muslim law and had been misinterpreted while specific undertaking was given by the father before the court to look after the child and provide him good education and other facilities.

In rebuttal the mother submitted, that there is no illegality or infirmity in the impugned order dated passed by the Principal Judge, Family Court, Sitapur and in its order the learned court below has specifically mentioned that divorce/talaq has already been taken place between the appellant Israr Ahmad and Smt. Zaafrana on July 6, 2013 and since 2008, when the child was born, he is living with his mother Zaafrana and at the time of passing of the order dated August 7, 2018, he was 10 years old and her mother is giving proper care and education, therefore, the present appeal is liable to be dismissed.

The High Court of Allahabad considered the submissions of the parties and perused the records. and question to be considered by the high court was whether lower court rightly held that father is not entitled to the custody of minor? The court referred to Para 351 in *Mulla's Principals of Mahomedan Law*[45] related to interpreting of relevant portions of section 17of the Guardian and Wards Act,1890, and observed that the matter to be considered by the court in appointing guardian:— (1) in appointment or declaring the guardian of the minor, the court shall, subject to the provision of this section, be guided by what, consistently with the law to which the

44 2019 SCC OnLine All 5315: (2020) 2 All LJ 323.

45 Dinshaw Fardunji Mulla, *Principles of Mahomedan Law* (Lexis Nexis 22nd edn.).

minor is subject, appears in the circumstances to be for the welfare of the minor. (2) in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness to kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relation of the proposed guardian with the minor of his property. (3) if the minor is old enough to from an intelligent preference, the court may consider that preference.

The court held that, it is true that the father is not proved to have lost the right to being appointed as the guardian of the minor. He has no defect and he being the natural guardian of the minor could be appointed provided it was in the interest of the minor. Minor cannot be forced to live with the father because that may cause psychological deterioration to the minor and may eventually affect his health also because of at this age he needs love and affection.The court further observed that because at this age the child meets love and affection and been the age of saving cannot show his preference as to with whom he wants to live and if he is given affection and love he needs at this age by the mother then he should be permitted to have affection and love of any one of them. It can be achieved to ascertain the wish of minor.

The High Court allowed the judgement of the family court and dismissed the appeal. The court did not find any infirmity or illegality in the impugned judgement and order passed by the Principal Judge, Family Court through which custody of minor child had been denied to father. Accordingly, appeal was dismissed. It appears that the court while dismissing case for custody of minor, considered the following facts:

i. That the father and mother married and out of wedlock a child was born.
ii. The mother with her male child left the matrimonial home and since them living separately and in intervening period appealed never tried to meet his son nor provided any financial support to him and had not disclosed source of his income nor monthly income and the father never ever bothered to know about welfare of child.
iii. The divorce had already occurred and son was getting proper care by his mother.
iv. The minor child was old enough to from an intelligent preference.

The high court apart from the Guardians and wards Act 1890, Muslim Law of guardianship referred to a number of judicial precedents[46] on the subject. After considering the above facts of circumstances the high court came to conclusion that looking in to welfare of minor child it would be appropriate that custody of minor child should be given to mother and further held that the conclusion drawn by the lower court vide its judgements an order need not be interfered.

46 Kindly See *Chandrakala Menon* v. *Vipin Menon (Capt.)* 1993 (41) BLJR 536, 1993 (1) Crimes 556 SC, *Poonam Datta* v. *Krishanlal Dattaand* AIR 1989 SC 401,*Thrity Hoshie Dolikuka* v. *Hoshiam Shavaksha Dolikuka* 1982 AIR 1276, *Rosy Jacob* v. *Jacob A. Chakramakkal*, (1973) 1 SCC 840, *Kahkashan Bano* v. *Abdul Moiz Ansari* ((1990) 16 ALR 401).

III LAW RELATING TO PROPERTY

1. *Gift* (HIBA)

Gift is a voluntary transfer of property without consideration and a parting by owner of property without any pecuniary benefit.[47] A gift of immovable property has to be through a registered document and transfer of immovable property has to be effected by a registered instrument signed by or on behalf of donor attested by at least two witnesses, whereas in the case of movable property such gift should be effected either by registered instrument or by delivery.[48] Where the deed is to take with immediate effect, the property to be transferred during the executant's life, it would be a gift deed and not a Will.[49] The incidents of a gift between two Mahomedans are governed by the Mahomedan Law and not by the Transfer of Property Act, 1882.[50]

Abul Kalam Azad v. *Ali Ashraf Miah and Another*[51] was a suit for partition of the suit land along with a prayer for temporary injunction. Briefly stated the plaintiff's case was that the predecessor of the plaintiff and defendants' Rabia Khatoon was the original owner of the suit land and she died in the year 1993 leaving her husband Abdul Majid Miah, who subsequently died in the year1995, the plaintiff and defendants as the legal heirs and, thus, the plaintiff and defendants became the owner of the suit land by way of inheritance.

After listening the issues claimed by both the parties the high court went on to note certain facts of the case at hand and identified certain questions in relation to the present dispute in the instant case. The high court observed that, the undisputed facts as depicted by the learned trial court and referred to here-in-above are that the gift of the suit land was not reduced to writing and thereby not registered. As such, there was no written 'acceptance' and consequently, there was nothing written to suggest that the gift by way of oral declaration by the donor Rabia Khatoon, the mother of the plaintiff and the defendants, was followed by delivery of possession.

The questions, thus, fall for consideration were (i) Whether under the Mohammedan Law oral gift is valid? (ii) Whether registration as required under Section 123 of Transfer of Property Act and section 17 of the Registration Act is *sin qua non*? (iii) Whether physical departure by the donor or the formal entry by the donee is the requirement of law? All the questions as raised here-in-above were centred around the essential requirements for a valid "gift" under the Mohammedan Law. High Court first chose to answer the meaning of gift and observed from Mulla and other legal treatises "a *Hiba* or gift is 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

47 *Padam Chand* v. *Lakshmi Devi* 2010 (173) DLT 604 (Delhi).

48 *Commissioner of Income Tax* v. *Mayawati* 2011 (183) 617: 2011 (338) ITR 563).

49 *Vimala* v. *B. Narayanaswamy*1996 AIHC 4170 (4176) (Kant).

50 *Babu Lal* v. *Ghansham Das* (1922) 44 All 633; *State of A.P.* v. *Babbiti Subba Reddy,* AIR 2007 NOC 1174 (AP); *K. Mohamed Muthu* v. *Ms. Habeeba Beebi,* 2004 (3) Mad LJ 84 (87) (DB) (Mad).

51 2020 SCC OnLine Tri 507.

whose favour the gift is made may draw benefit[52]."The definition of *Hiba* or Gift has been given in *Kanz al Daquiq* a famous practice on Islamic Jurisprudence in the following words: " *Hiba* is the making of another person owner of the corpus of property without taking its consideration from him."[53] 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 one himself or by someone authorised on his behalf, provided that making the gift must totally renounce all his title and rights in the property gifted away of his independent free will.[54] The basis of the principle of gift is the Prophet's saying, "Exchange gifts among yourselves so that love may increase."[55]

After determining the meaning of gift under the Islamic law the high further went on to clarify that *Hiba* under Muslim law can be verbal as well.

The high court cited section 123 of the Transfer of Property Act, 1882 which reads as under:

> Section-123. Transfer how effected-For the purpose of making a gift of immoveable property, the transfer must be affected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be affected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

and observed that section 122 to 129 of the Chapter VII of the Transfer of Property Act, 1882 deal with gift. By section 123 of the Act, it is provided that a gift of immovable property must be achieved by a registered instrument signed by donor and attested by at least two witnesses.

To clarify the point of verbal *Hiba* high court referred to Mulla's para 147, and Privy Council Judgment of *Kamar-un- nissa Bibi* v. *Hussaini Bibi*[56]approving verbal gift. Mulla(supra) stated in its Para 147, "writing is not essential to the validity of a gift either of movable or of immovable property."[57]

The high court further went on to emphasize that the legislature consciously inserted the saving provision in the Transfer of Property Act, 1882 as section-129 exempting the Mohammadan Law from the applicability of certain provisions of the Transfer of Property Act. Section 129 of the said Act is a saving provision consciously enacted by the legislature. Similarly, a Mohammedan is not legally bound to comply the requirements as embodied under section-17 of the Registration Act. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having

52 Dinshaw Fardunji Mulla, *Principles of Mahomedan Law*, (Lexis Nexis 22ndedn.).

53 Al-Nasafi, Abdullah B Mahmud; *Kanz al- Daqaiq*,352 (Cairo 1626).

54 Tanzil-ur-Rahman, *A Code of Muslim Personal Law*,1 (Hamdard Academy, Vol. II, 1978).

55 Al-Marghinani, Burhan al-Din; Al-Hidaya,283 (Quran Mahal, Karachi Vol. III) 2020.

56 (1880) 3 All. 266. Kindly also see,*Kulsum Bibi* v. *Shiam Sunder Lal* (1936) All. L.J. 1027.

57 *Supra* note 40.

been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift, then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law.

The relaxation as provided under section-129 of Transfer of Property Act, 1882 exempting the Muslims of proper documentation followed by registration as envisaged under section123 of Transfer of Property Act, 1882 and section-17 of Registration Act suggests that when a Mohammedan claims to have the advantage of oral gift, the proof in the form of oral evidence regarding its vital requirements containing declaration, acceptance and delivery of possession as discussed and encrypted in the preceding paragraphs must be cogent, unequivocal and clinching any relapse in this regard is likely to facilitate an individual to trample the rights of other persons to succeed in accordance with law.

Apart from above enunciation of legal positions in regard to the law of gift applicable to Muslims the high court further assailed through a few authoritative pronouncements *i.e., Nasib Ali* v. *Wajed Ali,*[58] *Mohd. Abdul Ghani* v. *Fakhr Jahan Begam*[59] *Hafeeza Bibi* v. *Shaikh Farid*.[60]

The high court in final understanding observed, that the plaintiff failed to produce a single witness denying the fact of gift of the suit land by the original owner to the plaintiff and the defendants in equal shares. The defendants, apart from them, had produced two witnesses. On close scrutiny of the evidence, it has become apparent that the plaintiff during his evidence has failed to introduce any witness to substantiate his claim that her mother Rabia Khatoon did not make any oral gift in favour of him and his two brother and sister, the respondents herein. From the very beginning, it is the specific case of the defendants that their mother made an oral gift in presence of them and other witnesses.In course of trial, the defendants have been able to adduce evidence of Abdul Rashid Miah and Jalil Miah who were present at the time of making oral gift by Rabia Khatoon, the original owner of the suit land, though, the elder step brother had expired by that time. Both DW-3, Abdul Rashid Miah and DW-4, Jalil Miah had categorically supported the case of the defendants as they pleaded in their written statement that the suit land was orally gifted by their mother Rabia Khatoon during her life time divesting the suit property in favour of the plaintiff and the defendants no 1 and 2 in equal shares. They further supported the case of the defendants

58 *Nasib Ali* v. *Wajed Ali*AIR 1927 Cal 197.

59 (1921-22) 49 IA 195.

60 (2011) 5 SCC 654.

that in view of such gift, the plaintiff as well as the defendants took over the possession of the suit land and after the death of Rabia Khatoon and their father, they constructed their dwelling house over their respective portion of the suit land. These two witnesses have further categorically deposed that those constructions were made in front of them and the fact of construction was also known to the plaintiff who himself had shown the respective portions over which the defendants would construct their respective dwelling houses. In view of the aforesaid overwhelming evidence in support of the case of the defendants that their mother had unequivocally made an oral gift in favour of the plaintiff and the defendants in equal shares coupled with the delivery of possession has been proved completely. It reveals from the evidence that while making construction of the dwelling house by the defendants, the plaintiff had never raised any objection…so, the plea of the plaintiff that he was not noticed about the mutation proceeding stands repealed.

In the case of *Rasool Khan* v. *Abdul Aziz Khan*[61] A miscellaneous petition under article 227 of Constitution of India had been filed before the High Court Madhya Pradesh against the order passed by Additional Commissioner, Bhopal Division, which the mutation of names of petitioners in the revenue records, had been set aside regarding a *Hibanama* related to property in dispute.

The high court considered the submissions made by the counsel for the petitioners. The question which is necessary for determination is that whether the revenue authorities are competent to decide the genuineness of *Hiba* or not? The petitioners have filed the copy of the order sheets of the Court of Tahsildar, Lateri, District Vidisha. From these orders sheets, it was clear that respondent Abdul Aziz did not appear in person before the Court of Tahsildar. It was beyond understanding that when Tahsildar had decided to record the evidence of witnesses of petitioners, then why the Tahsildar did not insist for appearance and recording of evidence of respondent Abdul Aziz. Although in the order dated March 3, 1999 the Tahsildar has observed that respondent has verbally accepted the *Hiba*, but the said order sheet does not bear the signature of respondent. Thus, it was clear that the Tahsildar has acted in a most unfair manner.

The high court referred to *Dharamveer Singh* v. *Rushtum Singh*, by order dated August 27, 2019 passed in MP no. 3281 of 2019 has held that "the validity of "Will" can be decided by the Civil Court which has exclusive domain over such matter and this cannot be decided by the Revenue Courts." A similar view has been taken by a coordinate bench of the High Court of Madhya Pradesh by order dated 06/04/2017 passed in Writ Petition no. 1820 of 2011in Akshay *Kumar* v. *Ramrati Pandey*. Where the high court held "the Revenue Courts have no jurisdiction to decide the rights of any party on the basis of "Will" and if somebody wants to claim his/her title over any property, then he/she has to seek declaration from the Civil Court of competent jurisdiction." On the above citing's the high court drew the analogy that as the revenue courts have no jurisdiction to decide the rights of any party on the basis of Will and if somebody wants to claim his/her title over any property, then he/she has to seek

61 2020 SCC OnLine MP 2831.

declaration from the civil court of competent jurisdiction. Similarly, the revenue authorities have no jurisdiction to decide the question of *Hiba* also.

After introspecting from key angle, the high court was of the considered opinion that "the Tahsildar adopted the procedure which is unknown to law and without ensuring the appearance of respondent, passed an order of mutation in favour of petitioners. When the order of mutation was passed behind the back of respondent, then SDO, Lateri, District Vidisha should have condoned the delay as the contention of respondent that he was not aware of the order passed by Tahsildar, should have been accepted. Since the appeal filed by the respondent was dismissed as barred by limitation, therefore, it is true that Additional Commissioner, Bhopal Division, Bhopal should have remanded the matter back to SDO, Lateri, District Vidisha for adjudication on merits but since this court has already found that Tahsildar had mutated the names of the petitioners in a most unfair manner and with a solitary intention to give undue advantage to the petitioners by giving complete go-by to the principles of natural justice as well as the fact that the revenue authorities have no jurisdiction to decide the correctness of *Hiba* whether written or oral, therefore, since the proceedings before the Tahsildar, Lateri, District Vidisha were without jurisdiction, therefore, this Court is of the considered opinion that Additional Commissioner, Bhopal Division, Bhopal did not commit any mistake by not remanding the matter back to SDO, Lateri, District Vidisha. 13. Accordingly, it is held that. Petition fails and is hereby dismissed."

In *Faiz Pathan and Another* v. *Basheerali Pathan*[62] briefly the facts disclose a suit for partition of assets of the deceased parents of the plaintiffs and the defendant. In the same there was an interim application seeking appointment of Court Receiver, High Court of Bombay, in respect of a immovable property in Chapel Road, Bandra, consisting of ground plus two structures. The original structure constituted of a ground floor with additional structure on the first and second floor. The suit was filed in 2014, this interim application was filed in November, 2019. The reason for the interim application was the fact that defendant and his wife have entered into a Lease and License Agreement in the year 2018 with one Coventures (respondent no 3) which a partnership firm wherein respondent nos. 2 and 4 are said to be partners. The license is in the business of running a hostel under the brand name of co-hostel and which lets out hiring spaces in the premises on the first and second floors of the suit property.

It was claimed that the plaintiffs are entitled to 6/10 of the property by way of intestate succession. The sole defendant is the son of the deceased father of the applicant and the defence is to the effect that there has been an oral gift (Hiba) in favour of the defendant and by virtue of which he has been in possession of the property since the demise of the parents in 2009-10 respectively. The plaintiffs were claiming a share in the estate of the deceased parents whereas a gift was pleaded in the written statement on the basis of an affidavit-cum-declaration wherein the father of the parties hereto, is believed to have appointed one son to look after the property after his demise. It was evident that the affidavit is only by the father of the parties and not of the mother. The suit, however, was filed for partition of the estate of both parents. The court

62 2020 SCC OnLine Bom 5564.

receiver had in the present case filed a report which confirmed the fact that the hostel is being run at the premises, which was an admitted position. However, the defendant submitted before the high court that by virtue of the gift they are exclusively entitled to run this hostel. High court after perusal of the entire case *prima facie* rejected the version of the defendant that by virtue of the gift, the plaintiffs have no right whatsoever in the premises. The defendant cannot claim to be owner only on the basis of possession and an entry in the revenue record. High court further observed that such claim to ownership is required to be tested to ensure and protect the interest of all the parties and considering the fact that a hostel is being run at the premises and ground floor of the premises is used for residence of the defendant, a reasonable order securing the interests of both parties was issued by the high court.

2. *Wasiyat* (Will)

Will referred to a '*wasiyat*' or '*wasiyatnama*' is a legal testament of conveyance, created by legator in favour of legatee. The instrument of will is a legal declaration of the intentions of a Muslim person which he desires to being executed after his death. The inception of wasiyatnama can be traced back to the *sunna* of the Prophet. *Sunna* of wasiyat relates to a conversation,[63] whence, *Sa'd Ibn Abi Waqqas*[64] was visited by the Prophet to seek his wellbeing during illness. Conversation reveals that Sa'd Ibn Abi Waqqas desired to bequeath 2/3rd or ½ of his property in *sadqa* and sought advice from the Prophet for how much to give to his daughter and he responded "give one-third (in charity) and that is quite enough. To leave your heirs rich is better than to leave them poor, begging from people; that you would never incur an expense seeking therewith the pleasure of Allah, but you would be rewarded therefor, even for a morsel of food that you put in the mouth of your wife." Here, under the following cases which are reported on wills or *wasiyat* and other related issues of Muslim personal law in the survey year are being analyzed.

In the instant case of *Mohd Saleem* v. *Ahmad Ali*.[65] The situation, is peculiar. The applicants who have filed an application under Order I Rule 10 and who have filed an application for setting aside the compromise decree dated August 31, 2004 by seeking condonation of delay for approaching the court for such a cause, have not been a party either in the suit or to the appellate proceedings up to the stage of filing of second appeals and even on the date when the compromise decree was rendered on August 31, 2004.

The case of the applicants put forth before this court rests on the strength of a sale deed dated November 12, 1981 on the basis of which they claim their rights in respect of house no 73/1, situated at Mohalla Hadiganj, District Pratapgarh to the extent of half share situated on the western side. The said property is stated to have

63 Imam Abul Hussain Muslim Ibu al-Hajja, Sahih Muslim, *Kitab al Wasiya,* Chapter 2 (Book 13 Hadith Number 3991).

64 Sad ibn Abi Waqqas also known as Saˆd ibn Malik. He was one of the companions of the Prophet. He is known to be the seventh person who embraced Islam, he did it at a young age of 17.

65 Lnindord 2019 Luck 42.

been purchased by them from one Mohd. Newaz @ Niwazi, Mst. Momina and Mst. Saira in the year 1981. It is on the premise of this sale deed that an application for recall of the compromise decree dated August 31, 2004 has come to be filed in the year 2013. This court would gather that such an application came to be filed after the applicants were dispossessed allegedly on the strength of compromise decree dated August 31, 2004 in the year 2013.

To appreciate the controversy in a better way, it is necessary to reproduce the pedigree of the transferors in favour of the present applicants seeking recall of the compromise decree dated 31.8.2004.

Family Pedigree

Gazi

Kallu	Hadi Hasan (Pltff)	Mohd. Newaz	Tulli	Putunni
				Ahmad Ali, Hamid Ali,
				Mohd Shamim
				Mst. Momina and Mst. Saira

In the light of the pedigree extracted above, the high court noted that a suit for partition and declaration was filed by one Mohd. Newaz against the legal heirs of Tulli and Putunni, namely, Ahmad Ali, Mohd. Shameem, Mst. Momina and Mst. Saira. For the reasons best known to the plaintiff, third son of Putunni, namely, Hamid Ali was not impleaded in the suit proceedings. The regular suit filed by Mohd. Newaz was registered as Regular Suit No 32 of 1976. Suit for partition was filed seeking partition of the property left behind by one late Hadi Hasan who was the real brother of Mohd. Newaz, Tulli and Putunni.

The plaintiff in his plaint had averred that even if a will deed was executed by Hadi Hasan in favour of legal heirs of Tulli and Putunni, namely, Ahmad Ali, Mohd. Shameem, Mst. Momina and Mst. Saira, yet as per the Muslim law the said will deed would legally not bequeath the property devolving upon him beyond 1/3rd of the share belonging to Hadi Hasan. Hadi Hasan had left behind one house *i.e.,* house no. 73/1 situated at Hadiganj, Pratapgarh and one shop but the present dispute is confined only to the house property. During pendency of the suit proceedings, it came to light those rights were also claimed on the basis of oral Hiba by defendant no. 1, namely, Ahmad Ali and an issue to this effect was also framed by the trial court.

Issue no. 1 framed by the trial court was to the effect, as to whether the legatee late Hadi Hasan could bequeath his entire property in favour of the legal heirs of his real sisters, contrary to the Muslim law of inheritance according to which the plaintiff was the sole legal heir in the family tree. Even if it was assumed that deceased Hadi Hasan had a right to execute a will deed, yet it was averred that the will deed could not bequeath the property left behind beyond an extent of 1/3rd share as per the Muslim law. In the light of the issues framed by the trial court, the trial court dismissed the suit for partition on the premise that the plaintiff had ratified the will deed in its entirety after the death of legatee late Hadi Hasan and, as such, he was bound by the terms of the will.

Insofar as the declaration of *Hiba* as void is concerned, the same was also decided against defendant no. 1, namely, Ahmad Ali. Consequently, two civil appeals arose under Section 96 of CPC against the judgement and decree rendered by the trial court on July 11, 1978 in Regular Suit No 32 of 1976. Regular Civil Appeal No 124 of 1978 was filed by plaintiff Mohd. Newaz whereas regular civil appeal no. 154 of 1978 was filed by Ahmad Ali who was defendant no. 1 in the suit proceedings. Both the appeals met with the fate of dismissal by judgement and order dated May 24, 1980 and thus, the judgement and decree rendered by the trial court stood affirmed.

With the dismissal of both the appeals by first appellate court, the rights in respect of house property stood crystallized in favour of Ahmad Ali, Mohd. Shameem, Mst. Momina and Mst. Saira. The judgement rendered by the first appellate court gave rise to the present two second appeals under section 100 of CPC. Second appeal no. 427 of 1980 was filed by the plaintiff (Mohd. Newaz) whereas second appeal no. 503 of 1980 was filed by Ahmad Ali being defendant no. 1 in the suit proceedings.

During pendency of the second appeals, appellant Mohd. Newaz along with Mst. Momina and Mst. Saira is stated to have executed a sale deed in favour of the present applicants on November 12, 1981 transferring half of the share in house no. 73/1 situated at Hadiganj, District Pratapgarh. According to the applicants, they enjoyed their peaceful possession during pendency of the second appeals and there was no interference in their right by any of the parties to the second appeals. It is also averred that their names were mutated in municipal records for the purposes of payment of taxes etc. The applicants who had purchased the property during pendency of *lis* between the parties, did not choose to participate in the proceedings and as per the averments made in the applications, there was no disclosure of any such dispute and nothing was mentioned in the sale deed whereunder rights were transferred in their favour. Although the sale deed has been mentioned to be free from any legal dispute, yet to believe that the applicants remained unaware about the legal proceedings ever since 1981 in the normal course would not be prudent. The court also had no material to import a direct knowledge on the part of the applicants about the ongoing proceedings of second appeals so as to bind the present applicants within the fold of compromise decree to their disadvantage.

The high court noted in its observations that a compromise decree came to be rendered in the second appeal on the basis of a compromise entered into between the parties on August 31, 2004. The plaintiff Mohd. Newaz who is a party to the sale deed dated November 12, 1981 does seem to have gained out of the compromise and protected his rights to transfer and execute a sale deed in favour of the applicants, if any, therefore, to say that the present applicants are affected by the compromise decree, is misconceived. The adverse effect of the compromise decree upon the present applicants can be understood only in the light of relinquishment of rights by Mst. Momina and Mst. Saira in favour of Mohd. Newaz but the sale deed placed on record does not make any mention of the proportion which they had transferred in favour of the applicants and there is no indication of the extent of respective shares in the sale deed. The sale deed dated November 12, 1981 executed by the three transferors in

absence of spelling out the respective shares would be valid as a whole on the vendors collectively or severally and once this position is clarified, the present applicants would not be aggrieved against the compromise decree rendered by this Court on 31.8.2004. The dispossession of the applicants from the property owned by them is a subsequent development which has taken place in the year 2013. The dispossession of the applicants constitutes an independent cause of action for which they have a remedy before the civil court.

The application for setting aside of compromise decree under Order XXIII Rule 3 is maintainable only on account of fraud. There does not appear to be any allegation that the parties to the compromise have not signed the compromise or their signatures are otherwise fake or the signatures have been obtained under duress. None of the parties to the proceedings have raised any such objection. Even the applicants have craved indulgence of this Court on the strength of sale deed executed in their favour of which the rights already transferred do not stand affected by the terms of the compromise in any manner. Once the terms of the compromise do not affect the civil rights of the applicants in the property, it is difficult to hold that the present applicants are the aggrieved parties in the present case for maintaining the application under Order XXIII Rule 3 CPC for which an application under Order I Rule 10, CPC may be permissible by reopening the proceedings. The applicants are at liberty to avail the civil remedy open to them under law in the light of what has been observed hereinabove.

The applications for implement moved under Order I Rule 10 CPC and the application for condonation of delay as well as application for recall of compromise decree dated August 31, 2004 filed in both the second appeals were accordingly disposed of in the aforesaid terms.

Waqf and waqf administration

Waqf is also an institution of Muslim property law to save the property from damage by the children and descendants and deplete the economic resources of Muslim community. *Waqf* is a property which is dedicated for the benefit of the poor. Here the *corpus* of the property is intact and from the *usufruct* the poor and the needy would be benefited. These benefits can be used for socio economic welfare of the Muslims also. For example, schools, hospitals and other charitable purposes. There are so many *waqf* properties spread throughout the length and the breadth of the country therefore the state as well as the central government are looking these properties through central and state waqf boards.

The management of the properties are governed by the various statutes enacted by state and central legislature. The latest central legislations are Waqf Act, 1995 and 2013. In this survey here most of the cases are pertaining to Waqf Administration and most of the cases the court tries to interpret the legislation regarding waqf Administration in such a way that the waqf property should be saved from illegal encroachment. Given below are the various cases decided by the apex court and highcourt which are almost similar in nature therefore the brief of some cases is given here under.

In *A.V. Latheef* v. *Islamic Propagation Centre*[66] which was a revision petition before the Kerala HighCourt from a suit before the Wakf Tribunal seeking to cancel the Wakf. He has been nonsuited citing the principle "Once a wakf, always a wakf". The high court was called upon to examine whether the said principle is one which does not permit any exception.

The facts were uncontroverted since none of the respondents chose to contest the suit. The revision petitioner executed a document in favour of the first respondent, purporting to be a Wakf deed and got it registered as Document No. 380 of 2010 of SRO, Payyoli (produced as Ext.A1 in the suit). Subsequently, he executed another document as document No. 2075 of 2011, cancelling Ext.A1. The possession continued with the petitioner. The first respondent did not exercise any right of possession over the property nor were any steps taken to effect transfer of Registry. The petitioner thereafter approached the Tribunal praying for cancellation of the Wakf Deed. The first respondent remained ex parte. The second respondent Wakf Board did not file any written statement. The tribunal in its judgment dismissed the suit holding that the settled position of law is "Once a Wakf always a Wakf" and that the very definition of Wakf in section 3(r) of the Wakf Act contemplates a permanent dedication.

According to the tribunal, the fact that the petitioner had not parted with possession is not of any consequence, having regard to the above settled principle of law. Aggrieved by the judgment of the Tribunal, the petitioner has filed the revision petition. Even though the 1st respondent was served a notice of this revision petition, they did not appear before the high court, apparently for the reason that they have accepted the cancellation deed.

The petitioner contended that the Waqf had not taken effect by mere execution of ext.A1, for the reasons that the possession remained with the petitioner and the property as described in the schedule to the document does not exist going by the description. He relied on the decisions in *Mohammed* v. *Mohammed Beke*[67] and *Garib Das* v. *Munshi Abdul Hamid* [68] in support of his contention that that the deed was not intended to operate as a Waqf but was illusory and fictitious.

The high court in its proceedings referred to Mulla's, *Principles of Mohamedan Law*[69] which deals with the manner in which the Waqf is completed, and para 186 of the book was reproduced by the court.

> Wakf how completed: — (1) A Wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the HighCourts of Calcutta, Rangoon, Patna, Lahore, Madras, and Bombay, and by the Oudh Chief Court. According to Muhammad, the Wakf is not complete unless, besides a declaration of Wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [Hedaya 233;

66 2020 SCC OnLine Ker 5336.

67 (1997) 1 KLT 48 (SC).

68 AIR 1970 SC 1035.

69 Dinshaw Fardunji Mulla,*Principles of Mahomedan Law* (LexisNexis, 20th edn.,2020).

> Baillie, 550]. At one time the HighCourt of Allahabad adopted this view, but a Full Bench decision of the Court has since decided that a mere declaration of endowment by the owner is sufficient to complete the Wakf. The Nagpur High Court has also adopted this view. The founder of a Wakf may constitute himself as the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner to his name as mutawalli. Such a transfer is not necessary even in Allahabad where the view of Muhammed prevails.

The court further referred to section 481 at page 509 of Faiz Badruddin Tyabji's book on Muslim law[70] regarding constitution and completion of a *waqf*. Which is being reproduced as under:

481. (1) under Hanafi law a wakf is completed (a) according to Abu Yusuf, by the mere declaration (b) according to Imam Muhammad, only if, after the declaration, a mutawalli is appointed, and possession delivered to him. (2) Abu Yusuf's view has been adopted by most of the HighCourts. Formerly the Allahabad HighCourt had given preference to Imam Muhammad's view, and there are dicta of the Privy Council favouring the necessity for transfer of possession. There is not (submitted) such a cleavage between the two views as may at first sight appear. (3) Under Shiite law a wakf is not completed unless either (a) possession of the wakf property is delivered to the first beneficiaries, or (b) they are authorised to administer it (s.511), or (c) where the dedication is for the benefit of a body of persons, a mutawalli is appointed, and possession is delivered to him. Explanation I.- The dedication being given effect to, or the wakf property being put to the uses to which it has been dedicated (especially where the wakif is himself expressly or impliedly appointed the first mutawalli) have the same legal effects as delivery of possession under section 481(1), (3). Explanation II.- Where the declaration of a wakf is not acted upon by the wakif, and its objects not given effect to nor the property utilized for them, it may be presumed that the wakf was not completed; or that the wakif had no *bona fide* intention to create a wakf and did not divest himself of the ownership of the property: the presumption that the wakf was not completed may be very strong in favour of creditors. Explanation III.- After the dedication of wakf has been competed, its validity is not affected by the misfeasance of the mutawalli nor by the debts or liabilities of the wakif arising subsequently.

Hight court stated "It can be seen from the above that there are two views available as far as the Hanafi law is concerned, regarding the manner in which a Wakf is completed. One view is that mere declaration is sufficient to complete the Wakf. Another view is that there must be delivery of possession. Going by the Shiite law, delivery of possession is a requirement for completion of the Wakf. It is possible to take a view that in the case of a Wakif appointing himself as the mutawalli, there is no

70 Faiz Badruddin Tyabji,*Muslim law: the personal law of Muslims in India and Pakistan* (N.M. Tripathi, Bombay, 4th edn., 1968).

requirement of a delivery of possession. But even in such cases, there is difference of opinion regarding the change of the nature of possession from that of an owner to that of a mutawalli. All the same, when the document is styled as a Wakf deed and is executed in favour of another person, necessarily going by the view of Mohammed, delivery of possession is required".

The court further referred to Supreme Court in *Garib Das*[71] where the apex court held that "It is also settled law that the settler and those claiming under him are not precluded from showing that no wakf had been created and that the deed was not intended to operate as a Wakf but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon." Drawing inferences from *Mohammed* v. *Mohammed Beke*[72] the high court observed that, "In appeal, the Supreme Court held that the founder must declare his intention to dedicate the property for the mosque and must divest himself completely from the ownership of the property. It was further held that the divestment can be inferred from the fact that he delivered possession to the mutawalli or Imam of the mosque. It was further held that if there was no actual delivery of possession, the mere fact that members of the Mohammedan public are permitted to offer prayers with *Azan* and *Ikmat* does not make the *Wakf* complete and irrevocable. On facts, the court found that the founder remained in possession and continued to take usufructs. Like in the case before us, in the case before the Supreme Court also a registered document was executed which contained an intention to create a *wakf*, the courts below had held that the *wakf* had taken effect; and the same cannot be cancelled. The apex court held otherwise"

Before forming any final opinion in the present case of revision petition the high court referred to *Khwaja Mahmud* v. *Khwaja Muhammad Hamid,*[73] *Mt. Bibi Kuniz Zainab* v. *Syed Moharak Hossain*[74] and *Abadi Begum* v. *Kaniz Zainab.*[75]

The high court finally, arrived at the conclusion that there was force in the contention of the revision petitioner that Ext. A1 document dated January 21, 2010, was not intended to be acted upon and that no waqf has been created and completed by the mere execution of the document. The executant is not the *mutawalli*. It is in evidence that the possession of the property has not changed hands and that no steps were taken to effect mutation of the property. A reading of the description of the property shown in Ext.A1 also clearly shows that the property was not identifiable and there was uncertainty regarding the property. The fact that the waqif never intended to create a Waqf is also clear from the fact that waqif himself thereafter sought to cancel the document; though the cancellation is relevant only by virtue of the other attendant circumstances. It further observed that the principle "Once a waqf, always a waqf" does not permit any exception. The said principle cannot be applied as a thumb

71 *Supra* note 68.
72 *Supra* note 67.
73 AIR 1917 Lah 122.
74 AIR 1924 Pat 284.
75 AIR 1927 PC 2.

rule. However, it will apply in all cases where the creation of the Waqf is complete in all respects. Whether the creation of the Waqf is complete will necessarily depend on the facts of each case that may come up for consideration before the court. Accordingly, the court allowed the revision petition and decree the suit. The judge of the High Court of Kerala decided the case in the true perspective of Islamic law supporting his stand from the original sources. His efforts in this regard are illustrious and generally not found in other decisions of Muslim law.

In *Al Farook Residential Senior Secondary School Trust,* v. *Sub Registrar.*[76] the petitioner was a trust and it approached the High Court of Kerala with Exts.P8 and P9 orders of the 1 and 2 respondents to rectify a mistake in index register recording the property covered in Ext.P3 series as a waqf instead of settlement deed. The question of concern in this case was whether the settlor created a waqf or not?

The decisive factor in this case was regarding to the nature of transfer effected by the settler in favour of Muslim Educational Society from whom petitioner got the property for the purpose of expanding an existing School. Ext.P3 clearly stated in that this property was given by the settlers as a gift in favour of a Muslim Educational Society for utilizing the property for the welfare of the orphans. The question before the highcourt was whether this document had to be treated as a *waqf* deed or not. The court stated that this cannot be treated as a *waqf* deed, for the simple reason that all of the factors that required constituting a *waqf* do not exist in this deed. The court defined the *Waqf* as it is defined under *Waqf* Act,1995 which require the following three elements/subjects (i) Dedication (ii) There must be a subject (iii) An object. The first is related to a dedication to the almighty. Second, subject means movable or immovable property. Third object means any pious or religious purpose. The court further elaborated that the question in this case is surrounded in the light of first aspect related to the *waqf*, first aspect of dedication must be with God, if there is no dedication to the property to the Almighty, it cannot constitute as a *waqf*. In this case the property was given to an institution for utilizing for pious or religious purposes. Though the 2nd and 3rd elements are existing, there was no dedication to the God. Keeping in view the above the highcourt held that this deed cannot be considered as a *waqf* deed the writ petition was disposed of accordingly allowing the petitioners plea for correction.

It may be submitted that the learned judge of the high court rightly constitutes the denomination of waqf with the help the definition given in the Waqf Act 1995. However, the definition of the *waqf* is anyway not contrary to the Islamic Law.

In the case of *Haroon Rasheed N.M.* v. *Hidayathul Islam Sangam*[77] the facts disclose that there were three writ petitions related to the management of the Karassery Juma-ath Palli and all of them they were heard together. The legal question to be decided was appointment of mutawalli.

76 2020 SCC OnLine Ker 11603.

77 2020 SCC OnLine Ker 13214.

The brief facts necessary for the disposal of the writ petitions are as follows. One Nedunkandathil Koyakkutty Haji had by *waqf* deeds bearing nos. 589/1956 and 848/1965 dated January 12, 1956 and February 28, 1965 respectively, created waqfs of some of his properties. The properties included the Karassery Juma-ath Palli, the Hidayath Sibiyan Madrassa and N.C. Koyakkutty Haji Memorial School. The waqif died in the year 1972. His younger brother Kunjoyi Haji was mutawalli till 1976. From 1976, Sri. Muhammed Haji, the elder son of the waqif assumed mutawalli ship and he continued till his death on November 28, 2009. Disputes regarding the management started thereafter, which finally came up before a division bench of this court in four writ petitions and C.R.P. (Wakf) No. 212 of 2018. By a common judgment dated August 16, 2019, which is produced as Ext. P3 in W.P. (C) no. 11816 of 2020, a division bench of this court disposed of the cases with certain directions. This Court held that the petitioner in W.P. (C) No. 11628 of 2020 shall function as an interim mutawalli and he shall conduct an election as per the terms of the waqf deed and appoint a committee of not less than 11 members and ensure that the senior-most male member of the family as per clause VI of the waqf deed shall be a member of the committee. This court further held that the said senior-most male member shall function as *mutawalli* and he shall abide by the majority decision taken by the committee in the matter relating to management of the waqf properties. Pursuant to the judgment, the interim *muthavalli* conducted an election. On the basis of the election, it is stated that a panel consisting of 11 persons including the interim *muthavalli* have been elected as the present managing committee. The list of such persons has been produced as Ext.P3 in W.P. (C) No. 11628 of 2020. Ext.P3 would show that the election was conducted on January 14, 2020.

The contention of the interim *muthavalli* was that he was the son of the waqif and thus entitled to be the mutawalli of the waqf. He claimed that his elder brother has relinquished his right to be appointed the *mutawalli*. The contention of the petitioner in W.P. (C) No. 11816 of 2020 is that he is the son of the brother of the *waqif* and he is the senior-most male member of the wakif's family and is hence entitled to be the mutawalli. According to the court the mutawalli depends on the stipulations in the *waqf* deed. The above stipulations in the *waqf* deed were already considered by the high court in its Judgment in C.R.P. (Waqf) No. 212 of 2018 and it was held in paragraph 12 of the judgment which is reproduced as under:

> In so far as such a committee has not been formed so far, the members of the mahal have to call for a meeting and then a Committee has to be constituted with the only condition that the senior most male member of the waqif's family, *i.e.,* the family consisting of his brothers and their children shall be a member and he will act as Manager in respect of the wakf properties. Of course, there is dispute between the parties as to who would be the senior most male member in the family eligible to become a member, but such issues are to be decided by members of the mahal and if there is any dispute regarding the same, it shall be open for such parties to take appropriate proceedings in accordance with law.

Admittedly, the interim *muthavalli* was only around 60 years of age while the petitioner in W.P. (C) No. 11816 of 2020 was aged 80 years. There was no dispute that the interim *muthavalli* was the son of the *waqif* and the petitioner in W.P. (C) No. 11816 of 2020 was the son of the *waqif's* brother. Going by the stipulations contained in the *waqf* deed and the direction contained in the judgment in C.R.P.(Wakf) No. 212 of 2018, the petitioner in W.P. (C) No. 11816 of 2020 being elder among the children of the brothers had a better claim to be the *muthavalli* than the petitioner in W.P. (C) No. 11628 of 2020.

The high court took in to consideration all the provisions relating to the *muthavallis* qualification under the waqf administration and according to the circumstances of the case. The court held that the petitioner in W.P. (C) No. 11816 of 2020, along with the 10 persons who were stated to have been elected on the basis of election conducted on January 4, 2020 as evidenced by Ext.P3 in W.P. (C) No. 11628 of 2020 will form the committee for managing the waqf properties. However, the continuance of the ten elected members is subject to the result of the suit, which is said to be pending before the waqf tribunal, regarding the election which has been conducted by the interim *muthavalli*.

The high court accordingly disposed of the writ petitions with certain directions given as below in the result, the writ petitions were disposed of with the following directions:

W.P. (C) No. 11628 of 2020 is closed as infructuous, since the prayer for police protection is no longer relevant. W.P. (C) No. 9324 of 2020 is closed directing the petitioners therein to work out their remedies in the proceedings before the *waqf* tribunal. W.P. (C) No. 11816 of 2020 is allowed and the waqf board is directed to approve the petitioner, U.N. Abdussalam Haji as the Muthavalli of the *waqf* created as per document Nos. 589/1956 and 848/1965.The finding regarding the entitlement of the petitioner in W.P. (C) No. 11816 of 2020 to be the Muthavalli will not in any way affect the rights of any other member of the family of *waqif*, who has a better claim, on grounds only of his age.

In *Shaik Naseeruddin* v. *Chief Secretary*[78] the prime issue was construction of a wall within a reasonable time upon a graveyard at the open land of Qutub Shahi Masjid in Survey No. 89 situated at Bharath Nagar, Uppal Kalan, Medchal-Malkajgiri District. The petitioners were residents of Uppal Kalan, Medchal-Malkajgiri District. The 1st petitioner was the Mussali (person who perform prayers in a Mosque) of Qutub Shahi Masjid. Petitioners have been making efforts to safeguard the *Waqf* properties from illegal encroachment of the graveyard of the subject Masjid by constructing boundary wall around the graveyard and open land of the subject *Masjid*. According to the petitioners, the subject *masjid* is the notified gazette *waqf* property published in Supplement Part-II of Andhra Pradesh Gazette No. 6-A, dated August 9, 1989 with serial No. 2999, at page 250 of the said gazette with specific boundaries and survey number. The petitioners, for the purpose of construction of boundary wall and sanction of budget, have submitted a representation dated October 29, 2017 to the deputy

78 2020 SCC OnLine TS 717.

Chief minister and the same was considered. Accordingly, the Minorities Welfare Department has sanctioned an amount of Rs. 18,09,000/- for construction of boundary wall around the subject *masjid* by way of issuing G.O.Rt. No. 291 dated December 18, 2017. It was submitted by the learned counsel for the petitioners that the said amount was also paid to the 8 respondent-Deputy Commissioner, Circle-2, GHMC, Uppal on October 5, 2018 itself. A committee for construction of the compound wall was also constituted vide proceedings dated April 9, 2018 by the 8 respondents. Meetings were conducted. There was exchange of correspondence between the respondents. Even then, the respondents were not proceeding with the construction of the compound wall. There was no coordination and cooperation among the respondents and they are blaming each other. Ultimately, there was delay in construction of the compound wall.

The petitioners have earlier submitted representations/reminders dated December 23, 2019 December 24, 2019, December 26, 2019 and January 3, 2020 to the respondents 3 to 11 with a request to remove the illegal and unauthorized occupants from the graveyard land and to construct boundary wall around the graveyard and the open land of the subject *masjid* at Uppal. Despite the same, the respondents were not proceeding with the construction of compound wall and removal of illegal occupants. Therefore, the present writ petition came before the High Court of Hyderabad.

The high court heard counsel for the petitioners, learned government pleader for social welfare for the 2nd respondent, standing counsel for respondents 3 and 4, government pleader for home for respondents 5, 7, 10, and 11 and government pleader for revenue for respondents 6 and 9 and learned counsel for the 8 respondents.

The counsel appearing for respondents 3 and 4 stated that the subject *masjid* is a *waqf* property and a committee was constituted by the 8th respondent, for construction of compound wall. According to him, the GHMC has to take steps for construction of the compound wall by removing the illegal constructions and the officials of respondents 3 and 4 are ready to cooperate with the GHMC authorities. With the said submissions, counsel for respondents 3 and 4 sought to pass necessary orders in accordance with law. The counsel appearing for the 8-respondent submitted that it was the Waqf Board which has to remove the encroachments as per section 54 of the Waqf Act, 1995 and they have to cooperate with the GHMC authorities for removing the illegal encroachments and evicting illegal occupants. He would further submit that; however, a committee was constituted with 11 members vide proceedings, dated April 9, 2018 itself. As per him the 11 members had to coordinate with each other in constructing the compound wall. He would further submit that they have already addressed letters to the other respondents seeking their cooperation in removing the illegal constructions and the unauthorized occupants. He would further submit that the 8 respondent is ready to complete the construction of compound wall by removing the illegal occupants of the subject *masjid*. Government Pleader for Revenue stated that they have furnished relevant information to the GHMC authorities and also to the Waqf Board and they are ready to cooperate for construction of the compound wall. Learned Government Pleader for Home would state that they were ready to

extend the required assistance as and when required by the GHMC, Revenue and Waqf Board authorities. With the said submissions, the learned Government Pleader for Home sought to pass necessary orders as per law. The HighCourt learnt from the pleadings of the writ affidavit and the contentions of the parties, that it was not in dispute that th subject *masjid* was the notified *waqf* property published in Supplement Part-II of A.P. Gazette No. 6A, dated December February 9, 1989 with serial No. 2999 at page 250 of the said gazette. The boundaries and survey numbers were also specifically mentioned in the said gazette.

The high court categorically noted that this was a classic case of red-tapism and lethargic attitude of the official respondents. This petition was disposed of at the admission stage by the high court since there was no dispute with regard to the facts of the case. However, there were no orders as to costs. As a sequel, miscellaneous petitions, pending if any, stood closed. The high court must be appreciated for rectifying the conditions of the various authorities involved with waqf administration and given certain guidelines to settle the matter as an earnest way.

In another case *i.e., Najma Begum* v. *Bnatul Quresh Girls Inter College,*[79] the matter was a civil revision under section 83(9) of the Waqf Act against the judgment and order dated June 2, 2015 passed by Waqf Tribunal/District Judge, Nainital, in Misc. Case no. 01 of 2014.

The facts of the case were that, Mohd. Idrees was the owner of two double storeyed buildings known as 'Idrees Buildings', situated at Mohalla Quidwai Nagar, Malgodam Road, Haldwani, District Nainital. He executed a registered *waqf* deed on September 2, 1960 whereby he dedicated two properties mentioned in the said deed, mainly for family welfare and his own maintenance as also for the maintenance of his two wives. However, he reserved the right that in his lifetime he will be the Mutawalli of the *waqf* properties and after his death his wives namely, Shugra Begum and Kulsoom Begum will become joint Mutawallis of the *waqf*. Mohd. Idrees died on December 31,1966. Thereafter, his wives became the joint Mutawallis of the *waqf* property.

Sugra Begum filed a petition before U.P. Sunni Central Board of Waqfs stating therein that *vide* registered *waqf* deed dated September 2, 1960 the properties were dedicated by her husband and she is the *mutawalli* of the waqf, therefore, the said property be registered in her name in the register of Waqf Board. The said application was rejected by the U.P. Sunni Central Board of Waqfs. Then, Smt. Sugra Begum was constrained to institute a Civil. Case before the Civil Judge, Nainital, District Nainital. Case filed by the petitioner Sugra Begum was allowed. A direction was issued to the Board of Waqfs to issue certificate of registration and instead of *Waqf Alal Khair*, *Waqf Alal Aulad* be recorded in said certificate of registration. On July 1, 2015, Waqf Tribunal/District Judge, Nainital in *waqf* Case no. 4 of 2015, *Sugra Begum* made a noting in the order sheet that in compliance of order dated June 02, 2015, rendered in Misc. Case no. 01 of 2014, *Bnatul Quresh* v. *Najma Begum*, the order dated June 30, 1989, rendered in Waqf Case no. 7 of 1989, *Sugra Begum* v. *U.P. Sunni Central*

79 2020 SCC OnLine Utt 929.

Board, has been set aside. The case be registered. The record be placed on July 30, 2015 for hearing.

On July 30, 2015, Bnatul Quresh Girls Inter College, Moradabad filed an application in Misc. case no. 01 of 2014, stating that the Bnatul Quresh Girls Inter College is the beneficiary of the waqf property and the application submitted by it was accepted by the court and the ex parte order dated June 30, 1989 of the Civil Judge, Nainital was set aside. It was also stated that the applicant Institute is not a party to the original petition. A prayer had been sought that the counsel for the plaintiff Sugra Begum be directed to implead the applicant Institute as party respondent in the original application and the copies of the application be supplied to the applicant Institute. The said application of the applicant Institute was taken on record by the Waqf Tribunal/District Judge, Nainital and the application was directed to be listed on September 01, 2015 for disposal of objections. On September 01, 2015, the case was again listed for September 10, 2015. On September 10, 2015, a note has been made by learned counsel for Waqf Board that the plaintiff Sugra Begum has expired and a week's time was granted to learned counsel to take steps for impleading the heirs of deceased Sugra Begum. On September 30, 2015 the case was called out and November 02, 2015 was fixed for written statement. The *waqf* case was dismissed on November 02, 2015 by the Waqf Tribunal in the absence of the parties to the case and the record was consigned to the record room.

Meanwhile, Misc. Case no. 01 of 2014, Bnatul Quresh Girls Inter College v. Nazma Begum was filed before the District Judge/Waqf Tribunal, Nainital against the ex parte judgment and decree dated June 30, 1989, passed by Civil Judge, Nainital in Civil Misc. Case no. 07 of 1989, *Sugra Begum* v. *U.P. Sunni Central Board*. It is contended that the Bnatul Quresh Girls Inter College (hereinafter referred to as the Institute) was not impleaded as party respondent whereof the Institute is necessary party to the suit, therefore, the ex parte order dated June 30, 1989 be set aside and the matter be heard on merit. It is further contended that the order has been obtained by playing fraud upon the court. Objections were filed by the revisionist against the application filed by the Institute. District Judge, Naintal allowed the application filed by respondent no. 1 under Section 151 of the Code of Civil Procedure, 1908 and set aside the ex-party order dated June 30, 1989. Hence present civil revision came to exist before the HighCourt of Uttarakhand.

The highcourt of Uttarakhand heard counsel for the parties and perused the material available on record and stated that the Perusal of the lower court record revealed that the registered *waqf* deed was executed by Mohd. Idrees. It was not disputed, that by means of *waqf* deed he vested the property in the name of God known as *Waqf Alal Khair*.

It was not a family *waqf,* but after the death of Mohd. Idrees, his wife Smt. Sugra Begum moved an application before the U.P. Sunni Central Board of Waqfs with a prayer that the property be registered in the register of Waqf Board as *Waqf Alal Aulad*. Said application was rejected by the U.P. Sunni Central Board of Waqfs. Feeling aggrieved Smt. Sugra Begum approached the Civil Judge, Nainital. A perusal

of the order passed by the Civil Judge, Nainital dated 30.06.1989 would reveal that no reason has been assigned by the court below in allowing the application and setting aside the order dated 13.03.1987 of the Waqf Board. A further perusal of the record would reveal that the U.P. Sunni Central Board of Waqfs did not contest the matter, nor was it served. It is contended that the revisionist has been nominated *mutawalli* of the *waqf* property by the wife of late Mohd. Idrees during her lifetime and a certificate to this effect has been issued in her favour by the Waqf Board appointing her as a *mutawalli*. The revisionist has come with a case that she is the beneficiary of the property in dispute which has been dedicated in the name of God and not as a public Trust. It is alleged that some mafias are having greedy eyes over the property in question and they want to grab the property by removing the revisionist as *mutawalli* and also by converting the property as '*Waqf Alal Khair'* in order to appoint themselves as *mutawalli* and to mismanage the entire property.

Waqf Tribunal/District Judge, Nainital has categorically recorded its findings that the order dated 30.06.1989 has been obtained by playing fraud upon the court in order to get the desired decree of the court only to grab the *waqf*/charitable properties. It also held that condition no. 4 of Waqf deed clearly mentioned the intention of *waqif* that his wife had no right to amend/alter/change any of the conditions of the aforesaid *waqf* deed, the aforesaid fact was also concealed by the applicant and had not come before the court concerned with clean hands and thereby the applicant Smt. Sugra Begum exercised fraud on the court causing prejudice to its beneficiaries. The Waqf Tribunal was of the firm opinion that petitioner Smt. Sugra Begum in Civil Reference no. 07/1987 got the ex-parte judgment by committing fraud on the court concerned and succeeded in getting the order dated June 30,1989 set aside so that the beneficiary may get proper opportunity of being heard during the proceedings before the court concerned. Waqf Tribunal/District Judge, Nainital, accordingly, allowed the application moved by the Institute under section 151 of CPC. The high court referred to the precedent from apex court which is settled position in law that fraud vitiates every solemn act. Apex court in *Ram Chandra Singh* v. *Savitri Devi*[80] has held as under:

> "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the

80 (2003) 8 SCC 319.

> rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

By the order impugned, the *ex parte* order dated June 30, 1989 has been set aside meaning thereby the *lis* has to be decided on its merit so that the parties may get proper opportunity of being heard during the proceedings before the court concerned.

It was argued by counsel for the revisionist that the application for setting aside the ex parte order was not maintainable at the behest of the third party. The submission of learned counsel for the revisionist was misconceived. The high court relying on *Ram Prakash Agarwal v. Gopi Krishan (dead through LRs),*[81] held that an aggrieved party has a right to get the ex parte judgment and decree set aside under section 151 of Civil Procedure Code. Relevant paragraphs of the judgment are extracted hereunder:

> Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The court under section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited. The consolidation of suits has not been provided for under any of the provisions of the Code, unless there is a state amendment in this regard. Thus, the same can be done in exercise of the powers under section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non-consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law …The court observed that in exceptional

81 (2013) 11 SCC 296.

> circumstances the court may exercise its inherent powers, apart from Order IX CPC to set aside an ex parte decree. An ex-parte decree passed due to the nonappearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the court. An application under section 151 CPC will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of Order IX CPC may not be attracted, and in such a case the court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of court, the injustice so done must be remedied, in accordance with the principle of actus curia neminem gravabit -an act of the court shall prejudice no person.

The high court finally viewed that it is settled position in law that the matter should be decided on its merit and the technicalities in deciding the matter should not come in way in dispensation of justice. In the opinion of the court no prejudice did occur to the revisionist. Civil revision lacked merit and was accordingly, dismissed. The high court has rightly emphasized that while dispensing with justice, the technicalities should not come in the way and frustrate the justice itself as some times the decisions fail to supply justice only because of the mere technicalities which are given much consideration.

In the *State of Tamil Nadu* v. *K. Fazlur Rahman*, the subject matter deals with the *Waqf* Administration. In this case, many appeals have been filed against the common judgment of the High Court of Judicature at Madras writ petition nos.726 of 2020, 8377 of 2020 and 9557 of 2020. The division bench of the high court by the impugned judgment had allowed writ petition nos. 8377 and 9557 of 2020. Since the State of Tamil Nadu aggrieved because Signature did not verify in the impugned judgment. Consequently, these appeals came before the Supreme Court of India.

The brief facts of the case were that the Tamil Nadu Waqf Board is a statutory body governed by the Waqf Act, 1995. The term of earlier Waqf Board expired on 14.06.2017 and thereafter the State of Tamil Nadu reconstituted Tamil Nadu Waqf Board by order dated 10.10.2017. The Board constituted on 10.10.2017 consisted of 11 Muslim members from various categories. The Board comprise of one Muslim member of parliament and other 2 members of state legislature and next 2 members belong to senior Muslim advocates. 2 members are taken as category of Mutwallis, 1 member should be a person of personal excellence, 2 further scholars belonging to Shia and Sunni respectively, 1 member belong to the state government nominee.

Two senior Muslim advocates as referred above were nominated by the state government in exercise of power under proviso to section 14(1)(b)(iii) of the Waqf

Act, 1995. One Muslim Member of Parliament, two Muslim Members of State Legislature and two Mutawallis were elected members under Section 14(1)(b).

The nomination of two Senior Muslim Advocates was challenged before the high court by a writ petition which was dismissed upholding the nomination.

The notification was issued after issuance of show cause notice to the 10 members of Waqf Board existing at that time. The membership of member of Parliament ceased in May, 2019 reducing number of members as 10. The state government was of the opinion that two Senior Advocates who were nominated as members under section 14(1)(b)(iii) proviso cannot be treated as elected members hence the number of elected members is less than nominated members. Consequently, the Board is unable to perform its work as per the Waqf Act, 1995. The ground of supersession is mentioned in paragraph 8 of the notification which is reproduced by the court as under:

> And whereas, the Tamil Nadu Waqf Board has been called upon to show cause within 7 days from the receipt of that notice as to why the Tamil Nadu Waqf Board should not be superseded by the state government under section 99 of the Waqf Act, 1995. Further it has also been mentioned therein that in case no reply is received within stipulated time, action will be pursued in accordance with law. The show cause notice was served to all the present 10 members of the Tamil Nadu Waqf Board. In response to the show cause notice, out of 10 members 4 members namely, Thiruvalargal K.A.M. Muhammed Abubacker, M.L.A., A.S. Fathima Muzaffer, Dr. Haja K. Majeed, Syed Ali Akbar, Members, Tamil Nadu Waqf Board alone have sent their replies to the government. They have stated that the Senior Advocates nominated as Members can be considered as elected members and requested that the superseding process may be dropped. In this regard, the Government had already received legal opinion that the Senior Advocates can be considered as nominated members. In view of above, the elected members are less than the nominated members and the Board is unable to perform its functions as per the Waqf Act, 1995. Thiru A. Sirajudeed, member, Tamil Nadu Waqf Board without responding to the notice has submitted his resignation as a member of the Tamil Nadu Waqf Board, citing personal reasons vide his letter dated September 9, 2019.

According to the apex court only state government which is to establish a board as per composition provided under section 14. Section 14(4) is a provision which incorporates democratic principles in constitution of the Board. The Legislature contemplates that Board is to be run by majority of elected members which is to ensure democratic principle and make the voice of elected representatives a determining factor in the decisions of the Board.

As per apex court the facts revealed that there could be not dispute that at the time when the Board issued show cause notice as well as notification dated September 18, 2019, the number of elected members was less than the number of nominated

members. The provision of section 14(4) which mandates that number of elected members of the Board shall at, all times, be more than the nominated members of the Board is a provision compliance of which has to be ensured by the State which is authorized to constitute the Board. The apex court further opined that during constitution of the Board, the state government has to be conscious of the fact that the composition of Board shall be such which may fulfill the objectives enshrined in section 14(4). The state government when makes nomination of two senior advocates under section 14(1)(b)(iii), the said nomination was bound to have adverse effect on requirement of Section 14(4). While constituting the Board as per Section 14, the State has to keep in mind the principles and objectives as enshrined in Section 14(4) and constitution of Board shall be such as to give effect to the democratic principle which is to guide the Board in its functions.

The apex court opined that in event there is vacancy in the Board or any defect thereof, the proceedings or act of the Board are not to be invalidated which has been saved by Section 22. Thus, when the initially Board was constituted on 10.10.2017, the objective as enshrined in Section 14 was not fulfilled even in the initial constitution, the Board has been superseded not due to any action, inaction or omission and misconduct on the part of the Board rather due to number of elected members becoming less than to the nominated members. The order dated 18.09.2019 spells out the reason for supersession, i.e., A. Anwhar Raajhaa, Member of Parliament whose term came to end in May, 2019, other members of the Board as constituted on 10.10.2017 were same. Therefore, according to the court, the circumstance which has been taken as ground for supersession of the Board was not any action of the Board. The event of cessation of membership of an elected member is not under control of the Board. It was the duty of the State Government to constitute the Board as per the objectives enshrined in Section 14(4). The State Government has ample power to conduct election for the members as enumerated in Section 14(i)(b), (i) to(iv).

The Apex Court held that according to the facts of the present case, the State Government could have very well complied with objective of Section 14(4) by conducting an election for members under Section 14(1)(b)(iii) by permitting nominated members to continue till the election is held. The State has further option to exercise power under Section 14(3) in event State was satisfied that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub clauses (i) to (iii) of clause (b) of sub-section (1), the State could have then nominated under Section 14(3) which nomination shall have overriding effect on the objective of Section 14(4) since sub-section (3) begins with non obstante clause "Notwithstanding anything contained in this section,". The Supreme Court noted that the obligation on the State Government to constitute the Board in accordance with Section 14 keeping in view the objective under Section 14(4) was both right and duty of the State and any lapse therein cannot be a ground for superseding the Board.

The Supreme Court therefore took the notice the objective and purpose of the second proviso to Section 99 which has been inserted by Act 27 of 2013. Second proviso contains an injunction that the power of the State Government shall not be

exercised unless there is prima facie evidence of financial irregularity, misconduct or violation of the provisions of the Act. The present is not a case of any allegation of any financial irregularity or misconduct on the part of the Board. The proviso is sought to be explained on behalf of the council of the appellant who relied on the "violation of the provisions of this Act".

The Supreme Court opined that the second proviso has to be read in conjunction with the main provision. The second proviso contains further restriction on the power of State Government to supersede the Board, *i.e.,* unless there is *prima facie* evidence. There can be no dispute that *prima facie* evidence of financial irregularity, misconduct has to be prima facie financial irregularity or misconduct by the Board which is sought to be superseded. The third expression that is "violation" of the provisions of this Act has also to be read in the same manner that is violation of the provisions of this Act by actions of the Board. The court further opined that in view of the legislative intendment as contained in second provision to Section 99, this was not a case where State could have exercised its power of supersession of the Board. In view of the foregoing discussion, the apex court was satisfied that the high court did not commit any error in holding supersession as contrary to law.

The Supreme Court emphasized to consider the submission made on behalf of appellant that the high court ought not to have set aside the notification partially insofar as two elected members of the Mutawalli category only. It is to be noted that the high court had categorically held that supersession order is not sustainable in law but after holding that, the high court had moulded the relief in the facts of the present case and subsequent events which had taken place. Two writ petitions being Writ Petition No.8377 and 9557 of 2020 which have been allowed by the high court were filed by Syed Ali Akbar who was elected member from the Mutawalli category. Since, only one category petitioners were before the high court, it confined the relief to that category. The Supreme Court stated that it is not needed to dwell into the question any further since before us there is no further challenge on behalf of the writ petitioners that supersession order ought to have been set aside *in toto*. It is State which has come in the appeals against the judgment of the high court which has partially set aside the notification dated 18.09.2019 for mutawalli category only. The high court has not interfered with the fresh constitution of the Board by election and nomination of other categories except the category under section 14(1) (b)(iv). The supreme as per foregoing discussion, upheld the order of the high court. Consequently, the fresh election of two members in category under Section 14(1) (b)(iv) held in the year 2020 shall become non est and Syed Ali Akbar and Haja K. Majeed shall continue to occupy their office till their normal tenure of five years from 10.10. 2017.All the appeals were dismissed.

It may be respectfully submitted that the learned judge of the Supreme Court made a complete scrutiny of the Act of 1995 in order to arrive the conclusion. How much pain the court has taken in order to analyze all the provisions of the Act and determine the procedure and composition of the board and its election process, it must be appreciated.

In *V.P. Annamalai* v. *Janab S. Syed Gouse Sahib*[82] the petitioner suffered from an order of eviction under the provisions of the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975, concurrently before the Original Authority and the Appellate Authority, has come up with this Civil Revision Petition.

The respondent issued a notice on November 25, 2016 claiming that the period of lease under the Lease Agreement dated October 18, 2015 executed by the petitioner had expired on September 17, 2016 and hence he was called upon to surrender vacant possession within 15 days from the date of receipt of the notice. The reply of notice was sent by the petitioners on December 25, 2016 denying the title of the respondent to the suit Property. The claim of the respondent that the petitioners had executed a Lease Deed on October 18, 2015 was not denied. Upon the petitioner's refusal to vacate the respondent launched proceedings under the above said Act, before the Competent Authority. In the application filed before the competent authority, *viz.*, the Estate Officer, the respondent had specifically claimed that the petitioners came into possession of the property as tenants under a rental agreement dated March 01, 1999 on a monthly rent of Rs. 100/-. The original lease was for a period of 11 months and it was periodically extended till the year 2016 and the rent was also periodically enhanced and the final rent that was paid by the petitioner was Rs. 1,100/- per month. The copies of the agreements dated March 01, 99 and October 18, 2015 were filed along with the application. Though the petitioners filed objections running to five pages questioning the title of the respondent, the execution of the lease deeds dated March 01, 1999 and October 18, 2015 was not denied. The competent authority by his order dated January 11, 2018 rejected the claim of the petitioners herein to the effect that the respondent is not the owner of the property and concluded that having executed a Lease Deed admitting the title, the petitioners cannot deny the title of the *waqf* and set up title in himself and in some other person. On the said findings the Estate Officer/Competent Authority allowed the application and ordered eviction. Aggrieved the petitioners preferred an Appeal before the Principal District Judge, Vellore in CMA No. 1 of 2018.

The principal district judge upon a re-appreciation of the evidence concluded that the respondent/waqf has proved the tenancy and the tenancy having expired the possession of the petitioners became illegal rendering them liable to eviction under the provisions of the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975. As regards the claim of the petitioners that they are not a tenant under the waqf, the learned Appellate Judge concluded that the petitioners having not denied the execution of the Lease Deed, either in the reply notice or in the objections filed before the competent authority, cannot claim that they did not execute the Lease Deeds dated March 1, 1999 and October 18, 2015.

The appellate court also took note of the fact that the respondent/Waqf had produced rental receipts and ledgers to show the ownership of the property. On the above conclusions, the principal district judge dismissed the appeal. Aggrieved the petitioners/tenant came with civil revision petition before High Court of Madras.

82 2020 SCC OnLine Mad 10548.

On behalf of the petitioners, it was contended that the respondent had not proved its title. She would also produced various documents filed by the respondent/*waqf* to show that there is a cloud over the title to the property and therefore the authorities under the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975, do not have the jurisdiction to order eviction.

On behalf of the respondent, it was submitted that the execution of the Lease Deeds had not been denied. The principal district judge has compared the signatures found in the lease deeds with the admitted signatures and had concluded that they are of the same person. He would also point out that in the absence of denial of those documents, *viz.,* the Lease Deeds; the petitioners cannot now contend that the Lease Deeds are not true and valid. He would also submit that the Authorities under the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975 cannot go into the question of title in a proceeding for eviction of a person, who is admittedly a tenant of the property. He would therefore submit that there is no ground for interfering with the orders of the eviction passed by the Authorities.

The petitioner attacked the title of the respondent *waqf* to the property in question the high court is of the view that sitting in a revision that too in a proceeding under the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975, would go into the question and examine the title of the respondent/*waqf*.

As rightly pointed out by the respondent that the execution of the lease deed had not been denied anywhere during the proceedings by the petitioners. Both the authorized officer and the appellate authority/principal district judge have come to the conclusion that the petitioners cannot deny the title of the waqf without even denying the execution of the lease deeds. Once the execution of the lease deeds is admitted, then the relationship of the landlord and tenant should also be admitted. It is also seen that the lease period had expired. Proceedings for eviction were launched only after the expiry of the lease period. The Authorities below have considered the entire evidence and have come to the conclusion that having not denied the lease deeds, the petitioners cannot be allowed to deny the title of the respondent/*Waqf* to contend that the proceedings under the Tamil Nadu Public Premises (Eviction of Unauthorized Occupants) Act 1975, are not maintainable.

It may be humbly submitted that the learned judge the Madras HighCourt seriously took the matter keeping in view the lifelong encroachment of waqf properties for that he should be appreciated.

In the case of *Harmeet Kaur* v. *Abeda Khatoon*[83] the first defendant challenged in a suit for recovery of possession for damages from the defendant nos. 1 and 2, the defendant nos. 1 and 2 as well as for making extensive illegal construction in the suit premises without any plan sanctioned by the Kolkata Municipal Corporation, for permanent injunction restraining the defendant nos. 1 and 2 and their men, servants and agents from making further construction in the suit premises and from creating any third party interest and for ancillary reliefs, before the Waqf Tribunal at Kolkata.

83 2020 SCC OnLine Cal 1856.

The counsel for the petitioner submitted that, by virtue of the impugned order, the tribunal partially rejected the application, filed by both the defendants under Order VII Rule 11 of the Code of Civil Procedure on the ground that the civil court, and not the waqf tribunal, had jurisdiction to decide the suit. Such rejection was allowed only against the defendant no.2

The petitioner began with arguing that the impugned order is contradictory in as much as the plaint was rejected against the defendant no.2 on the ground that eviction was sought against the said defendant, whereas, in spite of a similar relief having been sought against the defendant no.1/petitioner as well, the plaint was refused to be rejected against the petitioner.

It was further argued, on the basis of a judgment at *Syed Masoon Ali* v. *Abu Naim Siddique Anr* [84] rendered by this court, that section 83(1) of the Waqf Act does not vest jurisdiction in the waqf tribunal. The tribunal's jurisdiction is, *inter alia*, derived from Sections 6, 7 and 54 of the Waqf Act, 1995.It was held in the said judgment, that the inclusion of disputes relating to eviction of a tenant in Section 83(1) of the Waqf Act, relates only to constitution of tribunals and cannot operate beyond the periphery of Sections 6 and 7 of the said Act, which do not include suits for eviction against the tenant.

In the said judgment, it was further laid down that the judgment reported at *Faseela M's* case[85] took a contrary view than that taken in.[86] The earlier case of *Ramesh Gobindram* v. *Sugra Humayun Mirza Wakf,*[87] was also relied on for the afore mentioned propositions.

Counsel for the petitioner further cited *Punjab Wakf Board* v. *Sham Singh Harike*[88] for a similar proposition, that section 83 of the Waqf Act relates to bar of jurisdiction of civil court and the relevant words therein are "any dispute, question or other matter relating to a wakf or wakf property", which is required by or under the Waqf Act to be determined by the tribunal. Thus, it was held, that bar of jurisdiction of civil court was confined only to those matters which were required to be determined by the tribunal under the Act of 1995.

Relying on the above judgments, it was argued on behalf of the petitioner that the waqf tribunal ought to have rejected the plaint as a whole, since the conspectus of the suit did not fall within the periphery of the jurisdiction of the waqf tribunal, as primarily reflected in sections 6 and 7 of the Waqf Act.

The plaintiff/opposite party no.1 was submitted that Section 3(aa) of the West Bengal Premises Tenancy Act, 1997 is not applicable to a public waqf. Since the present case, pertains to a public *waqf* and as such, falls within the domain of the waqf tribunal. The plaintiff also relied on a judgment *Rashid Ali Molla* v. *Board of*

84 2018 SCC OnLine Cal 8390.

85 *Faseela M* v. *Munnerul Islam Madrasa Committee* (2014) 16 SCC 38.

86 Board of waqf, *West Bengal and anr* v. *Anis Fatma Begum* (2010) 14 SCC 588.

87 (2010) 8 SCC 726.

88 (2019)4 SCC 698.

Waqfs,[89] for the proposition that the tribunal had ample jurisdiction to take the consequential issue of eviction as well, not merely under Sections 52 or 54 of the *Waqf* Act but in the sense that such recovery was a fallout of the negation of the petitioner's right pertaining to the nature of *waqf*.

The counsel for the Board of *Waqf*, West Bengal, being the Performa opposite party no.2, adopts the argument of the opposite party no.1 and buttresses the same by submitting that the revision application suffers from nonjoinder of defendant no.2 in the suit, who was a necessary party. It was further argued that one of the reliefs claimed in the suit, bearing suit no. 19 of 2018, was for recovery of possession of a *waqf* property, as envisaged under Section 52 of the *Waqf* Act.

It was argued that, in a different suit filed before the civil court by the petitioner, bearing Title Suit No. 1171 of 2011, already a relief has been claimed, *inter alia*, for a decree of declaration that a purported letter dated February 24, 2011, for termination of the development agreement, issued by the first defendant (present plaintiff/opposite party no. 1) was bad in law and was not binding upon the plaintiff (present petitioner) and the same be delivered up and cancelled. Moreover, it was argued that none of the grounds taken in the application under Order VII Rule 11 of the Code of Civil Procedure are tenable in the eye of law. In this regard various judgments were cited[90].

The submissions of the parties, *prima facie* that the *waqf* tribunal acted without jurisdiction in partially rejecting the plaint, which is deprecated by settled judicial opinion in India. The High Court of Calcutta observed that since the recovery of possession claimed in the suit was against both the defendants, the tribunal passed an inherently contradictory judgment in rejecting the plaint against the defendant no.2 on such ground but retaining the plaint against the defendant no.1. The finding of the tribunal, that the defendant no.2 was a tenant, did not find support from the plaint pleadings, which were the only pleadings to be seen in adjudicating an application under Order VII Rule 11 of the CPC.

The court opined that so far as the judgments cited by the petitioner are concerned, both of them were relevant to the context. Both the judgments, of the Supreme Court as well as high court, have dealt substantially with all the previous cases. The Supreme Court, in *Punjab Wakf Board,*[90a] has come to the specific conclusion that section 83 of the Waqf pertains to the bar of jurisdiction of civil court with regard to the matters which are required to be determined by the tribunal. The court further viewed that section 83 is circumscribed by the provisions of sections 6, 7, 54 and other like provisions which empower the tribunal to decide certain issues. According to the court in the present case, the scope of the suit revolves around the alleged

89 2019 (3) CHN (Cal) 268.

90 (i) (2010) 8 SCC 588 [*Board of Waqf, West Bengal*. v. *Fatma Begum*]; (ii) (2010) 8 SCC 726 [*Ramesh Gobindram* v. *Sugra Humayun Mirza Wakf*]; (iii) AIR 2014 SC 758 [*Bhanwar Lal*. v. Rajasthan Board of Muslim Wakf & Ors.]; (iv) (2017) 14 SCC 561 [Rajasthan Wakf Board vs. Devki Nandan Pathak & Ors.];(v) Civil Appeal No. 8018 of 2015 [Haryana Wakf Board vs. Rajendra Kumar].

90a *Punjab wakf board* v. *Sham Singh Harike* (2019) SCC 698.

cancellation of the development agreement entered into by the plaintiff with the defendant no.1.

The court further held that, both the substantive reliefs claimed in the suit, being recovery of possession and damages, arise from the assumption that the development agreement between the plaintiff and the defendant no.1 was duly terminated by the plaintiff/opposite party no.1. In the absence of a declaration seeking the validity of the said termination and the cancellation of the development agreement, no relief, as claimed in the suit before the tribunal, could be validly claimed. The reliefs actually claimed in the suit would at best be a consequence of the unilateral termination of the existing development agreement by the plaintiff being valid in the eye of law, which is a disputed question even as per the plaint, rendering the present suit *ex facie* bad in law in the absence of such a relief having been claimed.

The court further viewed that a declaration as to the validity of the termination of the development agreement and as to such development agreement being no longer binding on the plaintiff is thus a *sin qua non* for the present suit and thus has to be deemed as an implicit relief sought in the suit. Thus, it has to be deemed that those declaratory reliefs are the plinth of the suit, although not prayed for in so many words in the suit. Such declaratory reliefs fall within the exclusive domain of a civil court and do not find place in Sections 6, 7, 54 or any of the similar provisions of the Waqf Act, which empower the tribunal to decide over certain issues.

As regards the judgment cited by the opposite party no.1, the court opined that it is evident from the ratio of paragraph nos. 68 to 72 thereof, that section 83 of the *Waqf* Act envisages the determination of any dispute, question or other matter relating to a *waqf* or *waqf* property and any allied question. A conjoint reading of the said section with sections 6 and 7 of the Act, in that case, conferred the tribunal with jurisdiction to take up the principal reliefs claimed in the suit. It is evident from the aforesaid paragraphs that the principal relief actually sought in the said suit was a negation of the petitioners' rights pertaining to the nature of the *waqf*, which falls within the purview of sections 6 and 7 of the *Waqf* Act. It was held that the actual relief (a) claimed therein was an incidental relief and the principal reliefs, pertaining to the nature of the waqf, fell within the jurisdiction of the tribunal.

The court further said that , though the parties admitted that the property was a waqf property and there was no question raised at all regarding the enrolment of the property as a waqf estate or as to the nature of the waqf, on a plain and meaningful reading of the plaint, which is the established test for deciding applications under Order VII Rule 11 of the CPC, thereby taking the suit outside the purview of sections 6 and 7 as well as any other section in the Waqf Act which empower the tribunal to take up the matters.

As far as the judgments cited by the Board of *Waqf* are concerned, the cases of *Fatma Begum,*[90b] *Ramesh Gobindram*[90c] *and Bhanwar Lal* [90d] were all considered in

90b *Board of wakf, West Bengal* v. *Fatima Begum and anr.* (2010) 8 SCC 588.
90c *Ramesh Gobindram* v. *Sugra Humayun Mirza waqf* (2010) 8 SCC 726.
90d *Banwari Lal and anr.* v. *Rajasthan Board of Muslim wakf and ors.* (2017) 14 SCC 561.

the judgment of *Punjab Wakf Board (supra)*, which is the latest judgment cited on the field. As far as the judgment of,[91] cited by the Board of Wakf, the question as to whether the property was waqf or not was involved in the said case and as such, it was justified for the Supreme Court to hold that the matter fell within the jurisdiction of the waqf tribunal. In *Haryana Waqf Board,* no ratio of law was laid down but the matter was merely remanded upon certain prima facie observations. Hence, the said judgments cannot operate as *ratio decidendi* in the present context.

The court concluded that in such view of the matter, suit no. 19 of 2018, filed by the opposite party no.1 before the waqf tribunal, falls totally within the domain of the civil court and does not satisfy any of the provisions empowering the waqf tribunal, under the Waqf Act, to decide the matter. Hence, the bar envisaged in section 83 of the Waqf Act is not applicable at all to the said suit, since the same does not relate to any power or authority exercisable by the waqf tribunal. The court further viewed that as regards the objection of non joinder of the defendant no. 2 to the present application under article 227 of the Constitution, the same is devoid of merit since, in view of the plaint having already been rejected against the defendant no. 2, which portion of the impugned order has not been challenged by any of the parties, the said defendant is no longer a necessary party to the suit, and consequentially the present proceeding.

The high court held that in the light of the above discussions, the trial court acted without jurisdiction in partially refusing the defendants' prayer for rejection of the plaint as far as the defendant no.1 was concerned. Therefore, the court allowed C.O. No.2970 of 2019 thereby modifying the impugned order to the effect that the entire plaint of suit no.19 of 2018 pending before the Waqf Tribunal at Kolkata, West Bengal, is rejected, since the waqf tribunal has no jurisdiction to entertain or decide the suit.

It may be humbly submitted that the purpose of *waqfs* statutes is to save the property of waqf from encroachment of strangers and the technicalities generally taken in to consideration by our learned courts frustrate the very purpose of *waqf* legislations enacted time to time for the benefits of the poor's who can be supported by *waqf* properties and therefore a special jurisdiction of the cases relating to *waqf* property was initiated by the legislature through waqf Act. 1995. This surveyor feels that this type of interpretation of the cases relating to jurisdiction will automatically devolve the merit of the of these legislations and encourage the encroachment of *waqf* properties which the only economic source of poor and downtrodden Muslims of India.

III MISCELLANEOUS

In this survey here one more case on the issue of validity and sanctity of Islamic Judicial decision which is known as *fatwa* has also been taken in to account by our learned High Court of Delhi. Therefore, it is discussed in the head of miscellaneous. The analysis of the case is given as under.

91 (2017) 14 SCC 561.

In*Mohd Ashraf* v. *Abdul Wahid Siddique*[92] case the court issue relating to Muslim law which had to decided was that whether *fatwa* to be treated as parallel to judgment of Indian legal system.

The High Court of Delhi heard the counsels for the parties and then stated that the legality and validity of a *fatwa* issued by *maulvis* has been the subject matter of the judgment of the Supreme Court in *Vishwa Lochan Madan* v. *Union of India*.[93] The Supreme Court was concerned with the question as to whether a *fatwa* is binding and if so, in what manner. The Supreme Court was unequivocal in its pronouncement that a *fatwa* does not satisfy the requirements of a legally binding document and it does not trace their origin to validly made law. The observations of the Supreme Court were as under:

> As it is well settled, the adjudication by a legal authority sanctioned by law is enforceable and binding and meant to be obeyed unless upset by an authority provided by law itself. The power to adjudicate must flow from a validly made law. A person deriving benefit from the adjudication must have the right to enforce it and the person required to make provision in terms of adjudication has to comply that and, on its failure, consequences as provided in law are to ensue. These are the fundamentals of any legal judicial system. In our opinion, the decisions of Dar-ul-Qaza or the fatwa do not satisfy any of these requirements. Dar-ul-Qaza is neither created nor sanctioned by any law made by the competent legislature. Therefore, the opinion or the fatwa issued by Dar-ul-Qaza or for that matter anybody is not adjudication of dispute by an authority under a judicial system sanctioned by law. A Qazi or Mufti has no authority or powers to impose his opinion and enforce his fatwa on anyone by any coercive method. In fact, whatever may be the status of fatwa during Mogul or British Rule, it has no place in independent India under our constitutional scheme. It has no legal sanction and cannot be enforced by any legal process either by the Dar-ul-Qaza issuing that or the person concerned or for that matter anybody. The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored. In case any person or body tries to impose it, their act would be illegal. Therefore, the grievance of the petitioner that Dar-ul-Qazas and Nizam-e-Qaza are running a parallel judicial system is misconceived.

The court has observed earlier, the fatwa has no legal status in our constitutional scheme. Notwithstanding that it is an admitted position that *fatwa* have been issued and are being issued. The All-India Muslim Personal Law Board feels the necessity of establishment of a network of judicial system throughout the country and Muslims

92 2020 SCC OnLine Del 1658.

93 AIR 2014 SC 2957.

should be made aware that they should get their disputes decided by the Qazi's. According to the All-India Muslim Personal Law Board "this establishment may not have the police powers but shall have the book of Allah in hand and sunnat of the Rasool and all decisions should be according to the book and the sunnat. This will bring the Muslims to the Muslim courts. They will get justice.

The court opined that the object of establishment of such a court may be laudable but we have no doubt in our mind that it has no legal status. It is bereft of any legal pedigree and has no sanction in laws of the land. They are not part of the *corpus juris* of the State. A *fatwa* is an opinion, only an expert is expected to give. It is not a decree, nor binding on the court or the State or the individual. It is not sanctioned under our constitutional scheme. But this does not mean that existence of *Dar-ul-Qaza* or for that matter practice of issuing *fatwa* are themselves illegal. It is informal justice delivery system with an objective of bringing about amicable settlement between the parties. It is within the discretion of the persons concerned either to accept, ignore or reject it. However, as the *fatwa* gets strength from the religion; it causes serious psychological impact on the person intending not to abide by that. As projected by Respondent 10 "Godfearing Muslims obey the *fatwa*". In the words of Respondent 10 "it is for the persons/parties who obtain fatwa to abide by it or not". He, however, emphasizes that "the persons who are Godfearing and believe that they are answerable to the Almighty and have to face the consequences of their doings/deeds, such are the persons, who submit to the *fatwa*". Imrana's case is an eye-opener in this context. Though she became the victim of lust of her father-in-law, her marriage was declared unlawful and the innocent husband was restrained from keeping physical relationship with her. In this way a declaratory decree for dissolution of marriage and decree for perpetual injunction were passed. Though neither the wife nor the husband had approached for any opinion, an opinion was sought for and given at the instance of a journalist, a total stranger. In this way, the victim has been punished. A country governed by rule of law cannot fathom it.

The high court after perusal of the above judgment of Supreme Court makes it abundantly clear that a *fatwa* cannot be imposed on a third party. A *fatwa* can be completely ignored and no one needs to challenge the same before any court of law. Imposition of a *fatwa* would itself be illegal. The effect of this judgment on the alleged *fatwa*, which is the basis of the plaintiffs claim to ownership, would therefore have to be adjudicated by the trial court.

The court observed that recognizing such rights based on a *fatwa* which has not been examined or sanctioned by a Court of law would be contrary to the Constitutional scheme. While a *fatwa* can be the basis of an amicable settlement of disputes between parties who submit to such a settlement process, binding the same on a third party would be contrary to law.

IV CONCLUSION

The case analyzed above reveal that the Indian Judiciary tried its best to upheld the Muslim law as far as possible keeping in view the statutory requirement and the

social need of the country. These cases are comprised of marriage, divorce, maintenance and guardianship so far law of status is concerned.

The law of marriage deals with the consent of the parties and their exploitation by the guardians in order to maintain their false honor and dignity of their family means superiority of their family upon others. Therefore, the boys and girls are not allowed to marry according to their choice but they are bound to admit the choice of their parents and relatives whatever may the consequences of the marriage. In this survey the reported case reveals that If love marriage is not under permission of the guardian, they file the suit of kidnapping. But the learned Judges keeping in view the concept of Puberty (Age of Majority of Parties) under Islam. Similarly, they allowed the marriage after conversion in case the parties are major and it has been proved that the marriage was solemnized through the free will of the parties.However, this surveyor appeals that the courts should satisfy about the conversion after the scrutiny whether it is because of the impact of any faith or belief to whom the boy or girl is converted or only for the sake of lust to be legalized in the form of marriage.

As far as the cases of divorce in this survey are concerned the court decided according to the statutory provisions of the law of divorce keeping in view the Islamic law of divorce. Particularly *talaq-e-biddat* and present legislation brought for its prohibition. As per statutory requirement the court decided the case in a right direction as per the law of the land. The bulk of the cases like previous years this year has also been reported and the same issue whether Cr.P.C, overrule the Muslim Women's right to divorce Act and vice versa. It is mentioned to note that why our Judges encourage the dual regime and give the ball in the hand of lawyers to exploit their client time and again and burden the overburdened courts. Sometimes the judgments give an impression that *Daniel Latifi Case*[93a] held the Act of 1986 as unconstitutional.

The survey reveals that court are still confused to understand two different institutions of Muslim law i.e., *Hizanat* and *Wilayat*. Keeping in view the welfare of the minor Islamic Law gives a special right to mother that is the custody of child of boy and girl up to certain age limit. But it does not mean that this right encroaches the right to *wilayat i.e.,* the right to guardianship which is always vested with the father parallel to the mothers right to custody. The court rightly decided that if the custody of the child is expired because of the age limit and it is in the interest of the minor that he she should remain under the custody of mother. It is not against the Muslim Law and this is the only purpose of this special feature of mothers right to *hizanat*.

The survey also covered law relating to property and the cases relating to will, gift and waqf have been reported.The Islamiclaw of the gift and will has been retained by the courts.

As far as *waqf* is concerned here also we found bulk of the cases in this survey mostly covered the law relating to Waqf administration like the power of the waqf board, appointment of the *mutawalli*, jurisdiction of the waqf tribunal *etc*. The courts in majority of the case tried to their best to save the *waqf* property from unauthorized

93a *Supra* note 27.

encroachments so that economic position of Muslim community must not be further deteriorated.

In this survey here a case on the new aspect is reported that is why it is given the caption of miscellaneous. This case is related to legal authenticity of *fatwa*, old judicial system of Islamic Law. Here also following the apex courts' earlier decision the High Court of Delhi gives a balanced view. It observed that the fatwa as far as settlement of disputes on local or community basis have been coming down since long and it has nothing to object in this dispute settlement mechanism which lowers the burden of the courts. However, the *fatwa* is nor parallel to the judicial decisions of the courts having statutory recognition.

As far as Imrana's case is cocerned, this surveyor has tima and again emphasized the contribution of ill-educated *maulavis* and so called *mufti's* is not anyway less than the judges and writers towards distorting the true image of Islamic Law. While doing this survey, when the surveyor was going through the count judgements, he observrd that pain was taken by the justice system to reach authentic and originalsources of Islamic law, while they were referred to for claims and clarifications. For example the leading book of Islamic Jurisprudence *Kauz-al-Daquiqe* anf famous *Hanafi* Jurist Mohammed, disciple of Imam Abu Hanifa, founder of Hanafi School. Keeping full respect towards judiciary it is hereby submitted that looking in contemporary knowledge of lawyer about Islamic law and jurisprudence, the learned judges should have mentioned the brief introduction about the book and jurist, so that readers are devoid and safe from any confusion. However it is a welcome steo towards interpretation of Islamic law and must be applauded.