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MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

LONG BACK in a celebrated judgement, *Govind Dayal* v. *Innayatullah,*[1] leading jurist and renowned Judge, Mahmood J., while delivering the judgement observed that, "It is to be remembered that Hindu and *Muhammadan Laws* are so intimately connected with religion that they cannot readily be dissevered from it."This understanding implies that Islamic law is not a successor to English law or judge-made law, but rather a product of jurist-made law. This perspective may lead to confusion in interpreting Islamic law, not only for British judges but also for Indian judges after independence. However, there are exceptions such as Justice Krishna Iyer, Bahrul Islam J., and other like-minded judges who have studied Islamic law from its original sources. Inopportunely, the misinterpretation and misunderstanding of Muslim law are not limited to laymen but also touch legal professionals.

The 2021 survey reveals a decrease in the number of reported cases compared to the previous year. The survey focuses on both the laws related to personal status and property, covering a total of around 20 substantial cases. In the realm of personal status, considerable deliberation has been given to the Dissolution of Muslim Marriages Act and its various aspects such as Talaq, Khula, Mubaraat, and Faskh. The survey also addresses matters concerning the maintenance of wives and children, as well as the guardianship of minor children known as Hizanat. In terms of property law, only a few cases involving succession, Waqf, and wills have been examined. The survey provides detailed analysis and descriptions of these cases.

II LAW RELATING TO STATUS

Dissolution of marriage

In *Raseena Preekunju* v. *Muhammed Asif*[2] the major issue was whether a Muslim woman has lost their right to invoke extra-judicial divorce after coming into force of the Dissolution of marriage act, 1939.

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1 *Innayatullah* v. *Govind Dayal,* (1885) ILR 7 All 775, para 781 at 541.

2 *Raseena Preekunju* v. *Muhammed Asif*, II (2021)DMC513Ker.

The bunch of cases arise out of different proceedings before the Family Courts seeking varied reliefs. The issue involved in as above is inextricably connected to ultimate justice which women involved in all these cases seek

The brief facts of the case were that the cases had been brought to this level in light of Mat. A. No. 89 of 2020, wherein a young woman, hereinafter referred to as 'Y' was granted a decree of divorce by the Family Court, Thalassery. 'Y' had instituted the petition under the Act, on the grounds that her husband 'X', was impotent and treated her with cruelty. While the appeal came up for consideration it directed the parties to appear in person. 'Y' stood firm in her decision to dissolve her marriage with 'X'. On the other hand, 'X' stated that he was prepared to subject himself to a potency test to prove the falsity in 'Y' case. Challenging the decree 'X' preferred the appeal. Counsel for 'Y' contended that it is because of the decision in case. in *K.C. Moyin* v. *Nafeesa,*[3] 'Y' has been made to go through the ordeal of a long drawn adversarial litigation and is being prevented to invoke her right for extrajudicial divorce *vis-a-vis Khula*, as permitted and recognised under the Muslim personal law. Thus, permission to pronounce *Khula* so that miseries may not get prolonged. If *Khula* is accepted as valid, 'Y' has no objection in setting aside the impugned decree on fault grounds and the appeal can be disposed recording *Khula.*

The high court granted leave to 'Y' pronounce *Khula* and produced the same additional evidence in the appeal was accepted on board. When the appeal was taken up for hearing 'Y' stated that she was prepared to return the dower to 'X'. However, on 17.3.2021, 'X' had declined to accept the dower.

In another matter A. No. 72/2021, Muhammad Musthafa B.K. challenges the decree of the Family Court Kalpetta in O.P. No. 300/2019. During the pendency the parties were referred to mediation. In the mediation proceeding, Muhammad Musthafa B.K. agreed to divorce his wife-Harsha M.A. The Family Court based on the mediation agreement, granted a decree of divorce on mutual consent technically known as *Mubaraat.* This decree was challenged on the grounds of lack of consent on the part of Muhammad Musthafa. The validity of the divorce granted by the family court on mutual consent of the parties under Muslim law was also questioned.

Next O P. No. 372/2020 was filed by Farhana, the petitioner before the Family Court, Malappuram, seeking dissolution of her marriage with her husband Noufal P.P. under the Act of 1939.She seeks for an expeditious disposal of her case. Her Counsel submitted that Farhana may be granted the liberty to invoke extra-judicial divorce available to a Muslim wife under Sharia and specifically mentioned in Muslim personal law (Shariat) Act,1937, hereinafter referred to as 'Shariat Act'.

O.P. Nos. 124 and 133 of 2021 are filed by Raseena Pareekunju challenging the proceedings of the Family Court, Ernakulam against returning joint petitions filed with her husband-Mohammed Asif for dissolution of their marriage by mutual consent ('*Mubaraat')* and to declare that their marriage stands dissolved as per their personal law. According to them, their marriage has been dissolved by mutual consent invoking

3 *K.C. Moyin* v. *Nafeesa,*1972 KLT 785.

Mubaraat, an extra-judicial form of joint divorce, applicable to Muslim husband and wife. The Family Court refused to accept their petitions stating that there is no substantial law to entertain their petitions. The High court recognised Extra-judicial divorce as they are mentioned in the Shariat Act, 1937. The Judge of the family court stated that there is no substantive law about such type of divorce while the Judges of the High court established from various sources of Islamic law and jurisprudence like the Holy Quran, Hadith and the books written on these aspects by prominent jurists of the country. We will discuss the discourse of the High Court with the help of sources profusely quoted in the judgement under comment.

The quote rightly observed that there may be difference of opinion regarding the manner in which *Khula* has to be affected for e.g., some of the authorities or in view of that the consent of husband is a pre-requisite for a valid *Khula.* However, this view has least support from Hadith and other authorities of Muslim law. Wife's right to resort as *Khula* is analogous to the right of the husband to pronounce *Talaaq* on being convinced of irretrievable breakdown of marriage. *Khula*is the divorce at instance of the wife in which she agrees to give consideration. The court referred to a book titled "*Islamic digest of Aqeedah and Fiqh*[4]*" by* Mahmoud Rida Muradand published by published by Islamic Cultural Center, Dammam, Kingdom of Saudi Arabia which refers to '*Khula*' as an instant divorcement by which wife redeems herself from the marriage for a ransom or a compensation given to the husband. It further states as reproduced by the high court is that

> 'The *Khula*' is permissible whether the wife is in her menstrual period, or not. It is permissible for the husband to remarry the wife whom he divorced by *Khula*', with her consent after entering a new contract with new dower.'

The court also referred to celebrated treatise Sharia Theory Practice Transformations[5] by renowned scholar Wael B. Hallaq, as quoted from it as under:

> "If a woman dislikes her husband due to his ugly appearance or as a result of discord between the two, and she fears failure to fulfil her (marital) duties toward him, she may rid herself of him for consideration. But even though she may not dislike anything (about him), and they amicably agree to separate (through *Khula*) without a reason, it is also permissible."Yet, despite this legal permissibility, the jurists are unanimous in their view that it is morally reprehensible to dissolve a marriage for no compelling reason. Thus, *Khula* is classified by many jurists into three types: permissible (arising out of discord), reprehensible (without a compelling cause) and forbidden. The forbidden type is one that arose out of a situation where a husband deliberately oppressed his wife with a view to accomplishing dissolution of the marriage through *Khula* and still be compensated for it. If such

4 Mahmoud Rida Murad, *Islamic Digest of Aqeedah and Fiqh,* Dar-us-salam publications, Islamic Cultural Center, Dammam (first published in 1998).

5 Wael B. Hallaq, *Sharia Theory Practice,* Cambridge University press, (2009).

> an ambition is proven in a Court of law, the dissolution would still took effect, but the husband's compensation would be forfeit.

The court further referred to a tradition of prophet from '*Al- Bukhari.*'[6] This famous tradition is narrated from *Ibn-Abbas'* as under

> "The wife of Thabitbin Qais came to the Prophet and said, "O Allah's Messenger! I do not blame Thabit for defects in his character of his religion, but I, being a Muslim, dislike to behave in an un-Islamic manner (if I remain with him)." On that Allah's Messenger said (to her), "Will you give back the garden which your husband has given you (as Mahr)?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."

The *amicus curiae* also referred to various authorities submitting that all schools of Jurisprudence which are unanimous in their opinion on the right of wife to pronounce '*Khula'*

The court further gives a caption to *Mubaraat* and defined it quoting various authorities.[7] Accordingly *Mubaraat* is a form of separation by mutual consent. The Division bench referred to Chapter 4 of the Holy Quran verse 128 to 130[8] apparently refers to dissolution of marriage by mutual consent. These verses are reproduced in this Survey as under:

> "Verse 128: If a woman feareth ill-treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better. But greed hath been made present in the minds (of men). If ye do good and keep from evil, lo! Allah is ever Informed of what ye do.
>
> Verse 129 Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether away (from one), leaving her as in suspense. If ye do good and keep from evil, lo! Allah is ever Forgiving, Merciful
>
> Verse 130 But if they separate, Allah will compensate each out of His abundance. Allah is ever All-Embracing, All-Knowing."

The court also defined *'Faskh.'Faskh* is a form of judicial divorce. This mode of divorce is effected through the intervention of Court or through the authority at the instance of wife.

The court, while quoting from Justice Kauser Edappagath, who defines *'Faskh'*as under

> Apart from the divorce which may emanate either from the husband or the wife without the intervention of the Court or any authority, Muslim

6 Al Bukhari, *Kitaab al Talaaq,* chapter 5, (1878).

7 Kauser Edappagath, *'Divorce and Gender Equity in Muslim Personal Law of* India*'* (Lexis Nexis,2014).

8 Quran IV.

> law also provides for the dissolution of marriage to the wife by decree of the Court. It is called *Faskh*.
>
> The word *Faskh* means annulment or abrogation. It comes from a root which means 'to annul; or 'to rescind'. Hence it refers to the power of a Muslim qazi to annul a marriage on the application of the wife[9].

The court furthered referred to a Quranic verse which tells about the mode of divorce through the arbiter. It runs thus,

> And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware[10]

The court while describing other forms of divorce like Illa, Zihar, Lian, referred to Fyzee and reproduced paragraphs from his book as under:

> Illa and Zihar
>
> Although these two forms of divorce are mentioned in the Shariat Act, 1937 they are very rare in India and of no practical importance. In illa the husband swears not to have intercourse with the wife and abstains for four months or more. The husband may revoke the oath by resumption of marital life. After the expiry of the period of four months in Hanafi law the marriage is dissolved without legal process; but aliter in Ithna Ashari and Shafei laws where legal proceedings are necessary. This form is obsolete in India and apparently there is no case law on the subject.
>
> In zihar the husband swears that to him the wife is like 'the back of his mother'.
>
> If he intends to revoke this declaration, he has to pay money by way of expiation or fast for a certain period. After the oath has been taken the wife has the right to go to the Court and obtain divorce or restitution of conjugal rights on expiation. This is an archaic form of oath and dates from pre-Islamic Arabia. Says Tyabji.
>
> Zihar has hardly any significance so far as the law Courts in India are concerned. The words do not come naturally to Indian Muslims. A person wishing deliberately to give his wife a cause of action for restitution of conjugal righs in India would probably adopt an easier, more usual and better understood mode of doing so.

The author further refers to Lian as follows: [11]

> The procedure of lian may be described briefly as follows. A husband accuses his wife of adultery but is unable to prove the allegation. The wife in such cases is entitled to file a suit for dissolution of marriage.

9 *Ibid.*
10 Quran IV/35.
11 A.A.A. Fyzee, *Outlines of Mohammedan Law,* Oxford University Press (2004).

> It is to be observed that a mere allegation or oath in the form of an anathema does not dissolve the marriage. A qazi must intervene-in the Indian law a regular suit has to be filed. At the hearing of the suit the husband has two alternatives. He may formally retract the charge; and if this is done at or before the commencement of the hearing (but not after the close of the evidence or the end of the trial), the wife is not entitled to a dissolution. If the husband does not retract and persists in his attitude he is called upon to make oaths. This was followed by similar oaths of innocence made by the wife. The four oaths are tantamount to the evidence of four eye witnesses required for the proof of adultery in Islam. After these mutual imprecations the judge pronounces that the marriage is dissolved.

The high court noted that many modes of dissolution of marriage existed prior to Islam which were accepted by the Prophet with certain refinements and modifications. The Prophet as taken a liberal view in the matter of divorce in the best interest of the parties as opined by the court. The court arrived at a conclusion that in matter *'Khula'* the prophet asked the wife to return the garden she obtained from her husband. This pragmatic approach in different traditions. Paramount consideration in such a situation annulment is for reasonable cause or not and whether an attempt for reconciliation was made or not. The legal implication of the Quranic precepts are fragmentally aligned to ensure fairness, aligned by the court.

The High court also gives a caption The legal conundrum that has resulted from 'K.C. Moyin's case.'[12]

> The Muslim wife cannot repudiate a marriage dehors the provisions of the Dissolution of Muslim Marriages Act. The law laid down as above was in a proceeding arising from a private complaint filed by the husband against the wife and her second husband and relatives. Wife and others were prosecuted under Section 494 of the Indian Penal Code for an offence of bigamy. The wife defended the prosecution contending that she had repudiated the marriage by *Faskh*. The learned Single Judge was of the view that unilateral repudiation of marriage by *Faskh* without the intervention of Court under the Dissolution of Muslim Marriages Act is opposed to the law of the land. when a particular branch of law is codified, it is not possible to travel beyond the same and decide the rights of the parties.

The high court feels necessary to examine the law declared by the single judge adverting to the object of the scheme of Dissolution of Muslim Marriage Act, 1939. It would be appropriate to refer the statements of object and reasons of the act of 1939 which also reproduced in this judgement. It is as under:

> There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim Woman to obtain a decree from the Court dissolving

12 *Supra* note1.

> her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki Shafi's or Hanbali Law". Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill (now see Section 2 of the Act) a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called "Heelatum Najeza" published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book.

As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognising and enforcing the abovementioned principle is called for in order to relieve the sufferings of countless Muslim women.

The high court further raised a question that 'Is it the intention of the legislature to do away with Extra-judicial divorce' otherwise followed by the followers of different school?' This is the question which is answered in the case under comment.

The High court made a caption titled 'Reading the Dissolution of Muslim marriages act' under which the high court stated that in this caption the Author briefly described background of Dissolution of Muslim marriage Act,1939 and Shariat act, 1937. In order to get rid of the bondage of customary law which are totally against the woman's share in the property inherited at the same time it was not allowed emancipation of woman from getting rid of her undesired husband. Very little description of Maulana Ashraf Ali Thanvi and his celebrated treatise '*Hilat-al-Najizah'* (A lawful device for disabled woman) which is misspelt as it is taken from a book written by a person who is unable to pronounce and understand the law on the subject but only copy paste from other sources reproduced in English in the form of books and articles and our learned judges simply copied from it without any proper examination of the work. The court rightly stated that the act of 1939 is based only on the form of divorce known as '*Faskh'* it quoted the counsel's view from both the sides who had rightly pointed out that the intention of Dissolution of Muslim Marriage Act, 1939 is to extend judicial divorce to all Muslim women irrespective of the schools they belong to. However, the statutory provision never intended to do away with the practice of extra-judicial divorce otherwise available to a Muslim Woman. The court noted that other modes of extra-judicial divorce as referred in section 2 of the Shariat act remain untouched in the act of 1939. The high court opined that the consolidation of law of '*Faskh'* in the act of 1939 enumerates the grounds on which married Muslim woman would be entitled to divorce. These grounds are illustrative in nature but not

exhaustive. Specific grounds are mentioned from subsection 1-8 of section 2. However, a residuary class is provided under section 2(9) to secure divorce on any other ground which is recognised as valid for dissolution of marriage under Muslim Law.

The court referred to a renowned Islamic Law Scholar, Tahir Mahmood [Muslim Law in India and Abroad (Second Edition)] refers the background of the Dissolution of Muslim Marriages Act as follows:

> Under Muslim law a *The Qazi* or Court can dissolve the marriage of a woman on her complaint based on the grounds specified in the Muslim legal treatises. This is known as *Faskh*-e-nikah [dissolution of marriage]. The various schools of Muslim law differ in regard to its grounds and procedure. the most restrictive among them being the Hanafi school to which a dominant majority of Muslims in this part of the world belong. In India, as per the judicial practice settled by a Privy Council decision the Courts are however bound to apply in every disputed case among the Muslims the school of law to which the parties belong. Due to this judge-made rule the Courts cannot apply in any case any of the other schools of law which are relatively liberal in allowing judicial divorce at the behest of a wife. Muslim wives desirous of getting rid of their marriages were thus practically without a remedy until 1939.

The court further referred to learned author on the "impact on rights to private divorce" as follows:

> The title adopted for the Act was an inaccurate English translation of the caption of the Kazmi Bill in Urdu-Qanoon-e-*Faskh*-e-Nikah [law for judicial divorce]. In Muslim law "*Faskh*" is only one part of the law of divorce and means termination of marriage by a Court on wife's request on any ground recognised by Muslim law. It is entirely different from *Khula* [divorce by husband in wife's demand] and *Talaq-e-Tafwiz* [divorce by wife's own action in terms of her marriage contract], both of which are different from *Faskh*. The Act was not meant to abolish those rights of married women and restrict the Muslim law on their divorce rights to *Faskh* [divorce through court] only.

In a number of cases the Courts have rightly explained the aims and scope of the Act of 1939 in these terms:

> I. the Act is a piece of declaratory legislation and does notamend all the rules of Muslim law[13];
>
> II. the object of the Act is to ameliorate the lot of Muslim wives and enlarge their rights, which object must be given effect by the Courts[14];
>
> III. the Act crystallizes only a portion of Muslim law and should, therefore, be applied in conjunction with the provisions of the whole of Muslim law[15].

13 *Fazal Begum* v. *Hakim Ali*, AIR 1941 Lah 22.
14 *Sofia Begum* v. *Syed Zaheer Hasan Rizvi*, AIR 1947 All 16.

The court further referred to judicial precedents in this regard where a single judge of Allahabad high court in *Sofia Begum* v. *Syed Zaheer Hasan Rizvi*[16] referred the Dissolution of Muslim Marriage Act, 1939 as distinct endeavour made by the legislature to ameliorate the sufferings of Muslim wife. It further referred another case of Nagpur bench of High Court of Judicature at Bombay *Jamila Khatun* v. *Kasim Ali Abbas Ali*[17] which placed reliance on the Noor Bibi's case[18] of division bench decision of the chief court of Sindh which held that the Dissolution of Muslim marriage act crystalises only a position of Muslim law and must be read in conjunction with whole of the Muslim law as it stands.

On the basis of the analysis of the scheme of Shariat act as well as Dissolution of Muslim Marriage Act mentioned above, the High Court of Kerela is of the considered opinion that the Dissolution of Muslim Marriage Act restrict Muslim woman to annul their marriage invoking '*Faskh'* except through the intervention of the court. However, all other forms of divorce mentioned in section 2 of Shariat Act relating to extra-judicial divorce are available to a Muslim woman. The High court in the case under survey held that the law declared in *K.C. Moyin's* case[19] is not a good law.

In order to understand the nature and legal validity of *Khula*, one needs to understand the general intent of Quranic precepts and conceptual idea of such precepts. The idea of justice in Quran is rooted in fairness. Marriage creates mutual rights and obligation. The court referred to Chapter IV verse 1 Quran. It refers to mutual obligation as follows:

> O mankind! Be careful of your duty to your Lord, who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women. Be careful of your duty toward Allah in. Whom ye claim (your rights) of one another, and toward the wombs (that bare you). Lo! Allah hath been a Watcher over you.

The court further referred to chapter 4 verse 58 of the Holy Quran in which:

> Lo! Allah commandeth you that ye restore deposits to their owners, and if ye judge between mankind that ye judge justly. Lo! comely is this which Allah admonisheth you. Lo! Allah is ever Hearer, Seer.[20]

The court further referred to chapter V from the holy Quran, it stated as follows:

> Oh ye who believe! Be steadfast witnesses for Allah is equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is Informed of what ye do[21].

15 *Jamila Khatun* v. *Kasim Ali*, AIR 1951 Nag. 375.
16 Sofia Begum v. Syed Zaheer Hasan *Rizvi*, AIR 1947 All 16.
17 *Jamila Khatun* v. *Kasim Ali Abbas Ali*, AIR 1951 Nagpur 375
18 *Noor Bibi* v. *Pir Bux*, A.I.R (37) 1950 Sind 8.
19 Supra note 1.
20 Quran IV/8.
21 Quran V/8.

The court opined that the idea of fairness has to be followed by the believer in every sphere of his life. This idea has to be read into the right conferred on the wife to invoke *Khula*. That does not mean that *Khula* would depend on the fulfilment of any obligation on the part of the wife to return what she obtained from her husband. Quranic verses as referred in verses 228 and 229 in Chapter II in clear terms confers absolute right on the wife to annul the marriage with her husband. Husband's consent is not a precondition for essential validity of *Khula*. Hadith of the prophet in such circumstances, directing the wife to return or pay compensation to the husband has to be understood to ensure fairness of justice. A wife cannot walk away from the marriage after obtaining material gain from the husband, on her own volition, without returning what she obtained. The right of the husband to claim back what was given in marriage cannot be construed to mean *Khula* can be effective only when husband consents to the offer made by the wife. Such an approach would deny the right conferred upon wife under Quran. If the wife invokes *Khula* and refuses to return the dower or what she had obtained from the husband, the husband can very well approach the Court of law for the return of the same.

The court further referred to Tahir Mahmood as under:[22]

> In Muslim law the concept of *Khula* by women is the counterpart of *Talaq*by men. Its law, explained below, is based on two verses of the Quran- II: 229 which speaks of *Talaq* and *Khula* together, and IV:128 which speaks only of *Khula*
>
> Under Muslim law drawn from these sources a married woman unhappy with her marriage can decide to put an end to it and ask her husband to divorce her by *Talaq*. As in *Talaq*, reconciliation attempts must be made in a case of *Khula* too but, just as in *Talaq* the last word is of the husband, in *Khula* the last word is of the wife. If a wife finally opts for *Khula*, the husband cannot compel her to continue in marriage and has to pronounce *Talaq* which will be irrevocable. He may ask the wife to forego her unpaid dower which otherwise becomes immediately payable by the husband in the case of a *Talaq* by the husband. The Quran [IV:20-21] urges men not do so, but the jurists of the past had ruled that if a husband insists on foregoing of dower by the wife she has to agree to his demand.

Tahir Mahmood also refers to a leading scholar and jurist of Islam Abul Ala Maududi by citing: [23]

> The wife's right to *Khula* is parallel to the man's right of *Talaq*. Like the latter the former too is unconditional. It is indeed a mockery of the Shariat that we regard *Khula* as something depending either on the consent of the husband or on the verdict of the *The Qazi*. The law of Islam is not responsible for the way Muslim women are being denied their right in this respect. "

22 Tahir Mahmood, *Muslim Law in* India *and Abroad (Second Edition)*.

23 Abul Ala Maududi, *Huqooq-uz-Zaujain*, 9th edn, Lahore, (1964).

The court further referred to Holy Quran which conferred a Muslim wife with right of '*Khula*' to annul the marriage without prescribing a procedure which indicates to mean that fairness is a matter relative consideration in a context to be followed in such course opted by a wife. As adverted earlier, when the Prophet was approached by a wife to invoke *Khula*, he advised the wife to return the dower and garden only to be considered as a part of equity and fairness. It cannot be treated as a pre-condition to validate *Khula*. When substantial provisions in unequivocal terms confer a right on a Muslim wife, procedural equity to be followed cannot override such substantial right. Insistence to return dower or payment of compensation, therefore, are to be understood as husband is legitimately entitled to claim back what is otherwise due to him on account of unilateral invocation of *Khula* by wife.

On the basis of above discussion, the court arrived on the conclusion that it clear that the right is an unconditional right conferred upon a Muslim woman to invoke *Khula*. In it's support the court referred some of the judicial precedents recognising '*Khula'* in India[24].

The court further discussed in a separate caption the effectiveness of '*Khula'* without attempts of reconciliation and referred from chapter II verse 182 Quran says about dispute resolution by way of conciliation as follows: [25]

> But he who feareth from a testator some unjust or sinful clause and maketh peace between the parties, (it shall be) no sin for him. Lo! Allah is Forgiving. Merciful.

It further referred Chapter-IV verse 35 Quran states about dispute resolution in marital dispute as follows:

> and as arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower. Aware.

The court finally held that *Khula* will be treated as valid or effective under law only if it was preceded by an effective attempt for reconciliation by the parties.

The court did not explain the position of India regarding *Khula* or women's right to divorce in India only but it described the global perspective in this regard and referred to the situation of Iraq, Jordan, Morocco, Syria, Lebanon, Malaysia, Nigeria, North America, Pakistan, Saudi Arabia, Yemen, Zanzibar.[26]

The court further elaborates the jurisdiction of family courts related to extra-judicial divorce. It opines that The Family Courts Act, 1984 provides for the establishment of the family courts to exercise the jurisdiction exercisable by district courts or any subordinate Civil Courts under law in regard to the matters specifically as referred to in Section 7 of the Family Courts Act. Explanation (d) of Section 7(d) of the Family Courts Act, confers the Family Court with the jurisdiction to declare the matrimonial status of any person. Therefore, there is no difficulty for the Family Court to endorse an extrajudicial divorce to declare the matrimonial status of a person. In

24 *Moonshee Buzul-Ul-Raheem* v. *Luteefutoon-Nissa* (MANU/PR/0004/1861).
25 Quran II/182.
26 See *supra* note 1, para 74.

the matter of *Talaq*, *Khula*, *Mubaraat*, *Talaq*-e *Tafwiz*, the Family Courts shall entertain such applications moved by either of the parties or both parties to declare the marital status of such parties. In the matter of unilateral dissolution of marriage, invoking *Khula* and *Talaq*, the scope of inquiry before the Family Courts is limited. In such proceedings, the Court shall record the *Khula* or *Talaq* to declare the marital status of the parties after due notice to other party. If any person wants to contest the effectiveness of *Khula* or *Talaq*, it is open for such aggrieved person to contest the same in appropriate manner known under law. In the matter of *Mubaraat* and *Talaq*-e-*Tafwiz*, on being satisfied that the dissolution is being effected on mutual consent, the family court without further inquiry shall declare the marital status. The court notices that family courts are overburdened with large number of cases. The family court therefore, shall restrain from adjudicating upon such extra judicial divorce unless it is called upon to decide its validity in appropriate manner. The family court in such matters shall endeavour to dispose the cases treating it as uncontested matter, without any delay by passing a formal order declaring the marital status.

Therefore, on the ground of above insights and deep study of the Muslim law of the divorce particularly women's right to divorce the division bench of the High Court of Kerala provided the following reliefs in different appeals in order to true spirit and content of Muslim law are as under:

Mat Appeal 89 of 2020: As afore noted, in this appeal, 'X' challenged the decree of divorce granted on the grounds of impotency and cruelty as referable under the Dissolution of Muslim Marriages Act. As already discussed, pending the appeal we permitted 'Y', the wife of 'X' to invoke *Khula* to dissolve the marriage. She invoked *Khula* and has communicated the same to 'X', which has been accepted in evidence by this Court. 'Y' has expressed her stand that if *Khula* is accepted by this Court, she is willing to unconditionally withdraw all allegations in the original petition with respect to impotency and cruelty and confine her case to declaration of marital status on the basis of *Khula* invoked by her. As we already noted, the Family Court has the necessary power under Explanation (b) of Section 7(1) of the Family Courts Act to declare the matrimonial status. Though 'Y' had instituted the petition to dissolve the marriage under the aforesaid grounds, in view of the present circumstances, we have no hesitation to declare that she has validly divorced 'X' on the basis of the *Khula*, as the appeal is a continuation of the original petition. An attempt for conciliation was made before this Court as well as before the Family Court. 'Y' also offered to return the dower but 'X' was not prepared to accept the same. In the light of the law declared by us on procedure of valid *Khula*, we declare that *Khula* invoked by 'Y' is valid. No doubt, if 'X' wants any compensation, or return of any valuables he gave to 'Y' during the subsistence of marriage, we reserve the liberty to 'X' to approach the competent Family Court. Thus, we hold that marriage between 'Y' and 'X' have come to an end consequent to the invocation of *Khula* by 'Y'. Thus the impugned decree was set aside and Appeal was accordingly disposed of.

Mat. Appeal No. 72/2021: This Mat. Appeal was filed by Muhammad Musthafa B.K. challenging a decree of divorce granted by the Family Court, Kalpetta, on mutual consent. In a petition filed by the respondent wife Harsha M.A., under the Dissolution

of Muslim Marriages Act, the parties were referred for mediation. In the mediation proceedings, Muhammad Musthafa agreed to divorce Harsha. It is based on the said agreement; the Family Court granted a decree of divorce. Though the family court had not adverted to it as a divorce based on mutual consent (*Mubaraat*) as recognised under Islamic law, it can be very well seen that such a decree was passed, based on settlement arrived at between the parties in the mediation. In such circumstances, there is a bar under section 19(2) of the Family Courts Act for this Court to entertain the appeal from a decree passed on the consent of parties. Muhammad Musthafa has now contended that his consent was obtained by committing fraud. However, he does not dispute the signature in the settlement agreement. Muhammad Musthafa is a literate person. We, therefore, are of the considered view that decree of divorce granted by the Family Court, Kalpetta, have to be treated as divorce in the form of *Mubaraat*. And decree granted is only a declaration of status of the parties based on such extra judicial divorce. Accordingly, we dismiss this appeal as not maintainable. However, we make it clear that dismissal of appeal will not preclude Muhammad Musthafa challenging the decree in appropriate forum on the ground of fraud.

OP (FC) 372/2020: This original petition was filed by a Muslim wife seeking for expeditious disposal of O.P. No. 286/2020 instituted by her under the Dissolution of Muslim Marriages Act. In the light of the declaration that Muslim women have the right to invoke extrajudicial divorce, we reserve the liberty to the petitioner to resort to extra-judicial divorce. We have already issued necessary guidelines to the Family Court in regard to disposal of pending matters through the judgment in O.P.(FC). No. 352/2020 and connected cases dated 23/3/2021. If the petitioner wants to pursue the case under the Dissolution of Muslim Marriages Act, the Family Court shall dispose the case in accordance with the said guidelines. The original petition is disposed of as above.

O.P.(FC). Nos. 124/2021 and 133/2021: These original petitions were filed by same persons, namely, Raseena Pareekunju. She along with her husband Muhammed Asif, filed a petition for dissolution of marriage by Mutual consent under Section 9(2) of the Dissolution of Muslim Marriages Act. The Family Court refused to entertain the petition stating that there is no substantial provision under the Muslim law to grant divorce on mutual consent. That is challenged in O.P. (FC). No. 124/2021. Thereafter, it appears the petitioner filed O.P. before the same Family Court for declaration of marital status based on *Mubaraat*. This was returned with an endorsement as follows: Quote the relevant provision of Muslim Marriage. Ad. Refused - 7 days. 87. The above is challenged in O.P.(FC). No. 133/2021. We have already adverted that *Mubaraat* is a form of an extra-judicial divorce based on mutual consent under Islamic law and same is valid as it remains untouched by the Dissolution of Muslim Marriages Act. The family court in such circumstances is neither called upon to adjudicate nor called upon to dissolve the marriage by decree of divorce. On the other hand, the Family Court only has to declare the marital status by endorsing the *Mubaraat* invoking jurisdiction under Explanation (b) of section 7(1) of the Family Courts Act. Once a declaration of joint divorce invoking *Mubaraat* is produced before the family court, the family court has to pass a decree declaring the matrimonial status

of the parties. The inquiry in such cases is limited to the extent to find out whether both parties have agreed upon to dissolve such marriage invoking *Mubaraat*. Once the family court is satisfied that *Mubaraat* is executed by both the parties, it shall declare the matrimonial status of such parties. We are therefore, of the considered view that the family court is bound to entertain a petition for declaration of the status based on *Mubaraat*. The family court shall dispose such matter, if both the parties have filed petition, after making a formal inquiry without any further delay treating it as an uncontested matter in the light of the guidelines issued by us in the judgment in O.P. (FC). No. 352/2020 and connected cases dated March 23, 2021. The original petitions were disposed of as above.

The judges of the division bench how much labour and time spent in delivering this judgement we find no parallel except justice Krishna Iyer. The learned judges of the bench did not leave any stone unturned to support their stance from not the secondary book but from the primary sources of Islamic law which is not generally found in the survey of Muslim law. For that, they must be applauded. One more interesting thing that they did not only highlight the Indian position but presented towards the reader a global scenario on the subject too. With respectfully it may be submitted that why in certain places in his judgement took the shelter of very ordinary sources and authors who have never read any book of Islamic law in Indian language Urdu leave aside the original source from Arabic.

Khula

In the case of *Asbi* v. *Hashim M. U.*[27] The High Court of Kerala had to decide on the scope and nature of enquiry to be undertaken by the family court in a petition filed under section 7(d) of the Family Courts Act, 1984 (for short, 'the Act') to endorse an extrajudicial divorce under the Muslim Personal Law and to declare the marital status of the parties to the marriage.

The brief facts of the case were that petitioner was the wife of the respondent. The respondent divorced the petitioner by pronouncing *Talaq*. The pronouncement of *Talaq* was in accordance with Muslim Personal Law. The third pronouncement was made and was communicated to the petitioner by registered post. The petitioner disputed the legal validity of the pronouncement of *Talaq* and filed a suit at the Family Court for restitution of conjugal rights. Thereafter the respondent filed original petition at the Family Court below to declare the mar ital status of the petitioner and the respondent on the ground that the marriage has been dissolved by pronouncement of *Talaq*. The court below adjourned the original petition to 10/11/2021. The respondent filed IA No. 6/2021 to advance heard the case and it was advanced to 25/9/2021. On that day, the case was adjourned for cross-examination to 28/9/2021 and it was taken for judgment to 30/9/2021. Therefore, the petitioner preferred the above original petition contending that she was not given proper opportunity by the Court below to contest the original petition on merits.

27 *Asbi* v. *Hashim M.U.,* 2021 SCC Online Ker 3945.

Decision-Observation: The High Court of Kerala heard the counsels of the parties and determined, by referring to the case of X v. Y[28], that the Family Court in exercise of the jurisdiction under Explanation (d) of S. 7 of the Act[29] is competent to endorse an extrajudicial divorce to declare the marital status of a person. It was made clear in the said judgment that in the matter of unilateral dissolution of marriage invoking *Khula* and *Talaq*, the scope of enquiry before the family court is limited and, in such proceedings, the Court shall record the *Khula* or *Talaq* to declare the marital status of the parties after due notice to other party. In the matter of *Mubaraat*, the family court shall declare the marital status without further enquiry on being satisfied that the dissolution was affected on mutual consent.

Further, the high court identified that unilateral extrajudicial divorce under Muslim Personal law is complete when either of the spouse pronounce/declare *Talaq*, *Talaq*-e-*Tafwiz* or *Khula*, as the case may be, in accordance with Muslim Personal Law. So also, extrajudicial divorce by *Mubaraat* mode is complete as and when both spouses enter into mutual agreement. The seal of the Court is not necessary to the validity of any of these modes of extra judicial divorce. The endorsement of extrajudicial divorce and consequential declaration of the status of the parties by the family court invoking section 7(d) of the Act is contemplated only to have a public record of the extrajudicial divorce. Hence, detailed enquiry is neither essential nor desirable in a proceeding initiated by either of the parties to endorse an extrajudicial divorce and to declare the marital status. The Family Court has to simply ascertain whether a valid pronouncement/declaration of *Talaq* or *Khula* was made and it was preceded by effective attempt of conciliation. In the case of *Khula*, it has to be further ascertained whether there was an offer by the wife to return the "dower". It could be ascertained by perusal of the recitals in *Talaqnama*/*Khulanama* or its communication (if it is in writing) or by recording the statement of the parties. No further enquiry as in the case of an adversarial litigation like chief examination and cross-examination of the parties are not at all contemplated in such proceedings. If the Court is prima facie satisfied that there was valid pronouncement of *Talaq*/*Khula*/*Talaq*-e-*Tafwiz*, it shall endorse the same and declare the status of the parties.

The high court further decided to formulate guidelines to be followed by family courts in a petition filed under section 7(d), Family Court Act, 1984. The guidelines are produced as under:

> (i) On receipt of the petition, the Family Court shall issue notice to the respondent.
>
> (ii) After service of summons or appearance of the respondent, as the case may be, the Family Court shall formally record the statement of both parties. The parties shall also be directed to produce *Talaqnama*/*Khulanama* (if pronouncement/declaration is in writing)/*Mubaraat* agreement.
>
> (iii) The Family Court shall thereafter on perusal of the recitals in *Talaqnama*/*Khulanama*/communication of *Talaq*, *Khula* or *Talaq*-e-*Tafwiz* (if available)

28 X and Others v.*Y and Others, 2021 (2) KHC 709*
29 Section 7(d), Family Court Act, 1984

and the statement of the parties, ascertain whether there was valid pronouncement of *Talaq*/*Khula*/*Talaq*-e-*Tafwiz*. In the case of *Mubaraat*, the Family Court shall ascertain whether the parties have executed and signed *Mubaraat* agreement.

(iv) On prima facie satisfaction that there was valid pronouncement of *Talaq*, *Khula*, *Talaq*-e-*Tafwiz*, as the case may be, or valid execution of *Mubaraat* agreement, the Family Court shall proceed to pass order endorsing the extrajudicial divorce and declaring the status of the parties without any further enquiry.

(v) The enquiry to be conducted by the Family Court shall be summary in nature treating it as an uncontested matter.

(vi) The Family Court shall dispose of the petition within one month of the appearance of the respondent. The period can be extended for valid reasons.

(vii) If any of the parties is unable to appear at the Court personally, the Family Court shall conduct enquiry using video conferencing facility.

This court therefore, on the basis of submissions of the counsels, statutory provisions and precedents, by placing reliance on the facts determined that intimation given to the petitioner about the pronouncement of *Talaq* has been produced by the respondent. It was directed to the Lower court to record the statement of the parties, if necessary, without further delay and pass final orders in the light of the observations made in this judgment. The original petition was disposed of accordingly.

Talaq-al-Sunnat (Ahsan Talaq)

In the case of *Samim Rahaman* v. *Nasima Khatun,*[30] The High Court of Calcutta had to decide on the legality of order of Judicial Magistrate who directed present petitioner to pay interim monetary relief to opposite party No.1 at rate of Rs. 6000' per month for his wife and Rs. 4000' per month for minor child of parties.

The brief facts of the case were that the petitioner, Samim Rahaman, married the opposite party, Nasima Khatun, in 2014 under Islamic Law. He had a son from his previous marriage, whom he expected Nasima to take care of. However, Nasima neglected the child and left the matrimonial home in 2015. Samim then divorced Nasima by pronouncing three *Talaq*s in presence of witnesses and registered the dissolution of marriage before the Muslim Marriage Registrar and *The Qazi* office. Nasima filed a case against Samim in 2016, seeking interim monetary relief for herself and her child. The Judicial Magistrate granted her Rs. 10,000 per month, which was affirmed by the Additional Sessions Judge on appeal. Samim challenged the order in the High Court

The learned counsel on behalf of the petitioner contended that on the date of filing of the application under section 12[31] read with section 23[32] of the Domestic Violence Act, 2005 the opposite party no. 1 was not an aggrieved person and the

30 *Samim Rahaman* v. *Nasima Khatun*, CRR 2280 of 2018 MANU/WB/0225/2021.
31 S. 12, Domestic Violence Act.
32 S.23, Domestic Violence Act.

petitioner was not a respondent within the definition of terms under the Domestic Violence Act. Therefore, the opposite party No. 1 is not entitled to get any relief from the petitioner. The counsel placed reliance on the case of *Inderjit Singh Grewal* v. *State of Punjab*[33] which held that:

> the application under Section 12 of the said Act challenging a decree of divorce is not maintainable and would amount to abuse of process of court. The wife cannot claim that the marriage is still subsisting and also, she cannot get any relief under the Protection of Women from Domestic Violence Act.

Further, the counsel for petitioner relied on the case of *Sadhana* v. *Hemant*[34] wherein the High Court of Bombay held that there was no domestic relationship on the date of filing of the application under the DV Act and therefore the applicant/wife is not entitled for any protection under the said Act.

The counsel for the respondent submitted that pronouncement of *Talaq* to the opposite party No. 1 is not an irrevocable form of *Talaq* and therefore it is not binding upon the opposite party No. 1.

The counsel made reference to the two modes of *Talaq* as provided for under Muslim Personal Law, reproduced as under:

> *Talaq-ul-Sunnat* further sub-divided into *Talaq-i-Ahasan* and *Talaq-i-Hasan*. The requirement of *Ahasan Talaq* are:
>
> Marriage must be consumed; A single pronouncement of *Talaq* must be made; Such pronouncement must be made during *Tuhr* i.e., the period of purity between menstruations; The requirement of pronouncement of *Talaq* should be made during *Tuhr* does applies to an oral divorce, but it does not apply to a written *Talaq*; The requirement that pronouncement of *Talaq* should be made during *Tuhr* does not apply to a wife who has crossed the age of menstruation or the parties have been away from each other for a long time, or when marriage has not been consummated; There must be no sexual intercourse during *Tuhr* and There must be no sexual intercourse during the period of *Iddat*. In case of a pregnant woman, there must be no sexual intercourses till the birth of the child.

Thus, *Talaq* means pronouncing of single *Talaq* during the period of purity following abstinence of sexual intercourse during the period of *iddat*.

On the other hand, the requirement of Hasan *Talaq* is that the pronouncement of *Talaq* should be made during three successive *Tuhrs* (period of purity) with abstinence of sexual intercourse during the period between first, second and third *Tuhr*.

33 *Inderjit Singh Grewal* v. *State of Punjab*, (2011) 12 SCC 588.
34 *Sadhana* v. *Hemant*, 3(2019) DMC 142.

The counsel on behalf of the respondent also pointed it out to the high court that *Talaq* given by the petitioner to the opposite party was illegal and invalid as it was pronounced during the pregnancy of the opposite party no. 1.

On the basis of above submissions, the high court opined that in a proceeding under Section 12 of the Protection of Women from Domestic Violence Act, it is not required to go into the deep of the question as to whether the opposite party No. 1 was lawfully divorced or not. The court further referred to the *Talaqnama* on record and on perusal of the same stated that after pronouncement of three *Talaq*s which is followed by abstinence from sexual intercourse for more than three months, *i.e.,* during the period of *Iddat*, final pronouncement of *Talaq* becomes *Talaq-i-bain* or irrevocable *Talaq*. In view of the said facts the high court found that the petitioner divorced his wife pronouncing *Talaq* under Muslim Personal Law.

The high court further held that in exercise of revisional jurisdiction it has no scope to adjudicate the issue as to whether *Talaq* pronounced by the petitioner is valid or invalid. For the same the case of *Inderjit Singh Grewal* v. *State of Punjab*[35] was relied on to state that in a proceeding under Section 12 of the Domestic Violence Act, the court does not have jurisdiction to adjudicate as to whether divorce by pronouncing *Talaq* is legal and binding or not.

Further, The high court placed reliance on the case of *Juveria Abdul Majid Patini* v. *Atif Iqbal Mansoori & Anr*[36] and held that

> a divorced wife is included in the definition of aggrieved person. An application under Section 12 seeking relief under Sections 18 and 23 of the Domestic Violence Act is maintainable if the domestic violence had taken place when the wife lived together in shared household with her husband through relationship in nature of marriage.

Also,the court referred to the case of *Prabir Kumar Ghosh* v. *Jharna Ghosh*[37] to consider the question as to whether a divorced wife is entitled to claim relief under Section 12 of the Domestic Violence Act, 2005 for the reason that after divorce the wife had no occasion to live with her husband in the shared household and there was no scope of domestic violence after divorce. The high court opined:

> If economic abuse is evident in respect of an aggrieved person, who was in a domestic relationship and in the event, such economic abuse continues from day to day, the aggrieved person, in my considered opinion, would be entitled to institute a proceeding under Section 12 of the Act of 2005 for necessary relief.

On the basis of the aforementioned statutory provisions and precedents, The high court observed that the petitioner divorced the opposite party no. 1 finally on November 22, 2015. Since then, they had been living separately. It was also found from the record that the opposite party no. 1 had been residing in the house of her

35 *Supra* note 33 at 28.
36 *Juveria Abdul Majid Patini* v. *Atif Iqbal Mansoori* 2014 (10) SCC 736.
37 *Prabir Kumar Ghosh.*v. *Jharna Ghosh* 2016 (2) Cal.L.J. 154.

husband with her minor child. Therefore, the opposite party no. 1 in this situation was entitled to monetary relief for the maintenance of her minor child who was born in the wedlock between the petitioner and the opposite party no. 1

provided order of the additional sessions judge was set aside and modified stating that the petitioner shall pay monetary relief for the maintenance of the child who was born in the wedlock between the petitioner and the opposite party no. 1 at the rate of Rs. 6000/- per month till the disposal of the Domestic Violence case. The order of the monetary relief granted by judicial magistrate for opposite party no.1 and affirmed by the Additional Sessions Judge was set aside. Thus, the revised application was allowed partly but without costs.

***Mubaraat*:**

In the case of *Mohamed Saif Pasha* v. *Madiha Arif*[38] the High Court of Madras had to decide on the civil revision petition under article 227 filed against the order passed in O.S.SR.No.744/2020 by Principal District Munsif, Alandur.

The brief facts were that the parties to the suit were married in accordance with the Muslim Personal Law (Shariat) Application Act, 1937. After the marriage both the parties were unhappy and hence started living in separate rooms within the same premises for about 8 months and the respondent had left the matrimonial home. Attempts for reconciliation were made by the family members but the issues of the marriage were not resolved and as a result, the parties had decided that they wanted to dissolve the marriage between them. Both the parties have entered into an agreement to dissolve the marriage by a Memorandum of Understanding. The parties on the basis of the above decided to obtain a decree by presenting the same before the lower Court. The Lower court rejected the plaint of the petitioner on the ground that how the suit could be maintained by the plaintiff/husband when there was a Family Court in the District. In furtherance, the cause of action arose in Chemmenchery and re-presented the same on the ground that the marriage had taken place at Chemmenchery and they last resided together at Chemmenchery and the said jurisdiction falls within the jurisdiction of the said court and re-presented the same. Plaint was returned stating that the citation to be filed with regard to dissolution of marriage by plaintiff/husband and the Muslim/Husband can file suit for dissolution of marriage before Munsif Court. The process repeated, wherein the plaint was returned and the citation was filed for maintainability. The lower court made reference to the Central Government Act (The Dissolution of Muslim Marriages Act, 1939)[39]according to which, a women married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds namely: that the whereabouts of the husband have not been known for a period of four years; that the husband has neglected or has failed to provide for her maintenance for a period of two years; that the husband has been sentenced to imprisonment for a period of seven years or upwards; that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; that the husband was impotent at the time of the marriage and

38 *Mohammed Saif Pasha* v. *Madiha Arif*, AIR Online 2021 Mad 359.
39 Central Government Act (The Dissolution of Muslim Marriages Act, 1939.

continues to be so; that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease; that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; "Provided that the marriage has not been consummated; that the husband treats her with cruelty, which means:

> (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment,
>
> (b) associates with women of evil repute or leads in infamous life,
>
> (c) attempts to force her to lead an immoral life, or
>
> (d) disposes of her property or prevents her exercising her legal rights over it,
>
> (e) obstructs her in the observance of her religious profession or practice,
>
> (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
>
> The act provides a wide ground for divorce under section 2(9) which provides that the dissolution can be obtained on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law;

Further, the court placed reliance on the case of *Zuber* v. *Mahezabeen*[40] to conclude that under the Dissolution of Muslim Marriage Act, 1939, Only the wife is permitted to bring a suit for divorce, but the husband cannot prefer a suit and that a Muslim husband cannot approach the Court for decree of divorce. The plaint was finally rejected by placing reliance on Section 307 of Mulla's Commentary on Mohammedan Law, quoted as under:[41]

> (a) Where it does not disclose a cause of action.
>
> (b) Where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so.
>
> (c) Where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so.
>
> (d) When the suit appears from the statement in the plaint to be barred by any law.
>
> (e) When it is not filed in duplicate.
>
> (f) Where the plaintiff fails to comply with the provisions of rule."

Therefore, the Principal District Munsif, Alandur has refused to entertain the petition consequently the present revision petition comes into being.

40 *Zuber* v. *Mahezabeen*, Miscellaneous First Appeal No. 200834/2019 (FC).
41 D.F. Mulla, *Principles of Mohamedan Law* 20th edn. (s. 307).

The counsel for the petitioner submitted that as per the Muslim Personal Law, dissolution of marriage can be brought about by various means which includes *Talaq*, *Khula* and *Mubaraat*. *Talaq* is a form of divorce proposed by the husband to the wife. *Khula* is a form of divorce proposed by the wife to the husband. *Mubaraat* is a form of divorce proposed by both the parties and they decide mutually to put an end to their tie. In the said form of *Mubaraat*, there is no need for specifying any reasons for getting a divorce. To substantiate his argument, the learned counsel placed reliance on the case of *Juveria Abdul Majid Patni* v. *Atif Iqbal Mansoori*[42] which stated that the confusion with regard to application of customary law as part of Muslim Law was set at rest by the enactment of the Muslim Personal Law (Shariat) Application Act, 1937 and Section 2 of the said Act which is produced as under:

> "2. Application of Personal Law to Muslims.-Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *Talaq*, ila, zihar, lian, *Khula* and *Mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

Further, the court took notice of the observations made in the case of *C. Mohd. Yunus* v. *Syed Unnissa*[43] produced as under:

> the Court has held that what is also of great significance is the expression - 'dissolution of marriage, including *Talaq*, *ila, zihar, lian*, *Khula* and *Mubaraat*'. This gives statutory recognition to the fact that under Muslim personal law, a dissolution of marriage can be brought about by various means, only one of which is *Talaq*. Although Islam considers divorce to be odious and abominable, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. An elaborate lattice of modes of dissolution of marriage has been put in place, though with differing amplitude and width under the different schools, in an attempt to take care of all possibilities. *Khula*, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to Mahr (dower). *Mubaraat* is where both the wife and husband decide to mutually put an end to their marital tie. Since this is a divorce by mutual consent, there is no

42 *Juveria Abdul Majid Patni* v. *Atif Iqbal Mansoori.*
43 *C. Mohd. Yunus* v. *Syed Unnissa*, (1962) 1 SCR 67.

> necessity for the wife to give up or offer anything to the husband. It is important to note that both under *Khula* and *Mubaraat* there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of *Khula*) or the husband or together wife and husband together (in the case of *Mubaraat*) decide to separate on a no fault/no blame basis.

The above view was also taken in the case of *Zohara Khatoon* v. *Mohd. Ibrahim*[44] by stating that under the Mahomedan Law that there are three distinct modes, in which, a Muslim marriage can be dissolved and the relationship of the husband and the wife terminated so as to result in an irrevocable divorce. The relevant excerpt is produced below:

> "(2) By an agreement between the husband and the wife whereby a wife obtains divorce by relinquishing either her entire or part of the dower. This mode of divorce is called '*Khula*' or *Mubaraat*. This form of divorce is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where, however, both parties agree and desire a separation resulting in a divorce, it is called *Mubaraat*. The gist of these mode is that it comes into existence with the consent of both the parties particularly the husband because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to be the husband. ...."

On the basis of the above precedents and statutory provisions, the counsel for the petitioner submitted that the Supreme court has identified different modes of dissolution of marriage under the Muslim personal Law (Shariat) and when both the parties shall desire for separation by entering into a Memorandum of Understanding, which is resulting in a divorce, it is called *Mubaraat* and the court on the basis of the same can declare the marriage as null and void

The high court herein acknowledged the fact that the parties are not willing to live together and filed an MOU and hence was of the opinion that the lower court should have granted the prayer as required by law as declared by the Supreme Court.

The high court referred to the judgement delivered in Mat. Appeal. 72/2021, OP (FC).372/2020, OP (FC). 124/2021, OP (FC).133/2021 etc. The Court observed that facts of the case above can be fairly applied to the present case. The court observed four major forms of dissolution of marriage and the case under comment is of *Mubaraat*, the court referred to Kauser Edappagath's J., observation on *Mubaraat* which are as under: [45]

44 *Zohara Khatoon* v. *Mohd. Ibrahim*, (1981) 2 SCC.
45 Supra at 6 .

> "The word *Mubaraat* indicates freeing of each other (from the marriage tie) by mutual agreement. No formal form is insisted upon for *Mubaraat* by the Sunnis. The offer may come from either side. When both the parties enter into *Mubaraat*, all mutual rights and obligations come to an end. Both Shia and Sunni laws hold it an irrevocable divorce. *Iddat* is compulsory after *Mubaraat* as after *Khula*. Under Sunni law, when both the parties enter into *Mubaraat*, all matrimonial rights which they possess against each other fall to the ground."

The court by placing reliance on the above precedents, statutory provisions and scholarly opinions sources of Muslim of law, observed that the family court only has to declare the marital status by endorsing the *Mubaraat* invoking jurisdiction under explanation (b) of section 7(1) of the family courts Act. Once a declaration of joint divorce invoking *Mubaraat* is produced before the Family Court, the family court has to pass a decree declaring the matrimonial status of the parties. Therefore, the lower court is neither called upon to adjudicate nor called upon to dissolve the marriage by decree of divorce.

The high court set aside the order passed by the earned Principal District Munsif and allowed the parties to approach the concerned family court. The court further directed that family court disposed of the matter, once both the parties had filed petition and after making a formal inquiry without any further delay treating it as an uncontested matter in the light of the guidelines issued by the Division Bench, High Court of Kerala, Ernakulam in the judgment in O.P. (FC). No. 352/2020[46]

Validity of Talaaq

In the case of *A. Sajani* v. *B. Kalam Pasha*[47] High Court of Kerala had to deal with the issues pertaining to the validity of the Talaaq pronounced and restitution of conjugal rights.

The brief facts of the case were that a wife filed a complaint against her husband. While the prayer in the OP's were for a declaration that the *Talaq* pronounced against her by her husband was void and invalid, and for a consequential decree for restitution of conjugal rights, the prayer in the MC was for maintenance in terms of Section 125 of the Code of Criminal Procedure on the premise that the marriage continued to subsist in the eyes of law. The court below, by the common judgment aforementioned, dismissed the OP's and consequently the MC as well.

The appellant pleaded that the parties were lawfully wedded and stayed together as husband and wife at various places where her husband was posted as a judicial officer. At the time of her marriage with the respondent, he was a widower with two children from his first marriage. The respondent took her to her home in Kollam and left her there and told her not to return to their matrimonial home or contact him anymore. Later she received a *Talaq*nama. The Appellant denied the existence of circumstances that would permit a pronouncement of *Talaq* against her. Relying on

46 See O.P. (FC). No. 352/2020, order dated June 24, 2022.
47 *A. Sajani* v. *B. Kalam Pasha,* ILR2021(4) Ker.561.

the case of *Shayara Bano* v. *Union of India,*[48] the appellant contended that the *Talaq*nama was not a valid one in law since (i) it was post-dated and the date was corrected by the respondent only subsequently through his letter dated March 9, 2017 and the said correction was not attested by any witness, (ii) there was only a single pronouncement of *Talaq* and it was made irrevocable thereby rendering it illegal and void (iii) that no valid grounds had been established by the respondent that would have enabled him to divorce her. The prayer in the OP was for a declaration that the *Talaq* pronounced by the respondent was illegal and void, that she continued to be the sole living wife of the respondent and that the second respondent was not the legally wedded wife of the respondent. Further, invoking section 9 of the Family Courts Act, based on substantially the same factual pleadings as above to claim a decree of restitution of conjugal rights on the contention that there was no valid *Talaq* pronounced by the respondent that had the effect of dissolution of their marriage.

The respondent contended that the talaaq was pronounced after a series of events. The respondent contended that the petitioner exhibited behavioural defects and she was forever suspecting his fidelity. She also took a hostile attitude towards his children from his first marriage as also towards his late wife's mother. On account of her hostile attitude as also suspicious nature, their marital life suffered greatly and he found it extremely difficult to lead a normal family life with the petitioner.The respondent maintained that what he had pronounced was a '*TalaqAhsan*' and the use of the word 'irrevocably' was only to alert the petitioner of the seriousness of the decision and to indicate that it was not to be taken lightly. Further, the respondent submitted that petitioner, treated the marriage as dissolved and demanded a huge amount from him towards maintenance on the understanding that the *Talaq* had already taken effect by then.

The Lower court held that the *Talaq* was invalid insofar as there was only one pronouncement made, and that too 'irrevocably', the learned judge found that the denouncement by the supreme court of the practice of triple *Talaq*, applied as such only to *Talaq*s effected through three pronouncements all made together. As in the case before it, there had been only a single pronouncement, it had to be seen as a *Talaq* Ahsan, notwithstanding the express use of the word 'irrevocably' in the *Talaq*nama. Taking note of the attempts for reconciliation, the court held that pre-requisites for a valid *Talaq* were fulfilled. The lower court observed the psychotic and suspicious behaviour of the petitioner and deemed it sufficient to establish that the marital bond between the petitioner and the respondent was irretrievably broken and beyond reconciliation. Therefore, the lower court had rejected the prayer for maintenance in terms of section 125 of the Cr.P.C 1973 and held the *Talaq* as valid.

Decision and Observation: The high court placed reliance on the case of *Shayara Bano* v. *Union of India*[49] to take note of the nature and characteristic features of a triple *Talaq* or *Talaq-ul-biddat* that was found objectionable by the court and which led the court to hold the practice as bad in law. The High Court concurred with the

48 *Shayara Bano* v. *Union of India,* (2017) 9 SCC 1.
49 *Ibid*

Supreme Court's observation that its instant irrevocability that rendered the practice 'manifestly arbitrary' in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it

The high court made reference to Mulla, *Principles of Mahomedan Law* (20th edn)[50] produced as under:

> Section 311— Different modes of *Talaq*. - A *Talaq* may be effected in any of the following ways: -
>
> (1) *Talaq* ahsan. - This consists of a single pronouncement of divorce made during a *Tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *Iddat*.
>
> When the marriage has not been consummated, a *Talaq* in the ahsan form may be pronounced even if the wife is in her menstruation.
>
> Where the wife has passed the age of periods of menstruation the requirement of a declaration during a *Tuhr* is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.
>
> *Talaq* Ahsan is based on the following verses of Holy Quran: "and the divorced woman should keep themselves in waiting for three courses." (II: 228).
>
> "and those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses." (LXV: 4).
>
> (2) *Talaq* hasan- This consists of three pronouncements made during successive *Tuhr*s, no intercourse taking place during any of the three *Tuhr*s.
>
> The first pronouncement should be made during a *Tuhr*, the second during the next *Tuhr*, and the third during the succeeding *Tuhr*.
>
> *Talaq* Hasan is based on the following Quranic injunctions:
>
> "Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness." (II: 229).
>
> "So, if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person." (II: 230).
>
> (3) *Talaq*-ul-bidaat or *Talaq*-i-badai. - This consists of -
>
> (i) Three pronouncements made during a single *Tuhr* either in one sentence, e.g., "I divorce thee thrice," - or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee", or
>
> (ii) a single pronouncement made during a *Tuhr* clearly indicating an intention irrevocably to dissolve the marriage, e.g., "I divorce thee irrevocably."

Talaq-us-sunnat and *Talaq-ul-biddat*: - The Hanafi's recognized two kinds of *Talaq*, namely, (1) *Talaq-us-sunnat*, that is, *Talaq* according to the rules laid down in the sunnat (traditions) of the Prophet; and (2) *Talaq-ul-biddat*, that is, new or irregular *Talaq*. *Talaq-ul-biddat* was introduced by the Omeyyade monarchs in the second

50 D.F. Mulla Principles of Mohamedan law by Mulla (20th Edition Section 311

century of the Mahomedan era. *Talaq-ul-sunnat* is of two kinds, namely, (1) *Ahsan*, that is, most proper, and (2) Hasan, that is, proper. The *Talaq-ul-biddat* or heretical divorce is good in law, though bad in theology and it is the most common and prevalent mode of divorce in this country, including Oudh. In the case of *Talaq*Ahsan and *Talaq*Hasan, the husband has an opportunity of reconsidering his decision, for the *Talaq* in both these cases does not become absolute until a certain period has elapsed (Section 312), and the husband has the option to revoke it before then. But the *Talaq-ul-biddat* becomes irrevocable immediately it is pronounced (S. 312). The essential feature of a *Talaq-ul-biddat* is its irrevocability. One of tests of irrevocability is the repetition three times of the formula of divorce within one *Tuhr*. But the triple repetition is not a necessary condition of *Talaq*-ul-b*iddat*, and the intention to render a *Talaq* irrevocable may be expressed even by a single declaration. Thus if a man says "I have divorced you by a *Talaq*-ul-bain (irrevocable divorce)", the *Talaq* is *Talaq-ul-biddat* or *Talaq-i-badai* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "bain" (irrevocable) manifests of itself the intention to effect an irrevocable divorce."

Further, the High court made reference to the case of *Shamim Ara* v. *State of UP,*[51] wherein The Supreme Court identified the requirements of a valid *Talaq* as (i) that the *Talaq* must be for a reasonable cause; and (ii) that it must be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one chosen by the wife from her family and the other by the husband from his family. If their attempts fail, *Talaq* can be effected.

It also placed reliance on the case of *Kunhimohammed* v. *Ayishakutty,*[52] The high court reaffirmed its position on effects of failed reconciliation holding that if an attempt for reconciliation by two arbiters has taken place, and they have not succeeded in bringing about a reconciliation, it can be held that there is a reasonable cause for pronouncement of *Talaq*, and the specific reason for divorce need not be established before the court and further, the specific reason will not be justiciable also.

To substantiate the above, the court observed that Islamic Law did not obligate a man to give reasons for the divorce or satisfy anyone else of such reasons. As regards the non-justiciability of the reasons, it was observed that if courts were to look into the reasonableness of the cause for divorce, there would be as many interpretations about the reasonableness of the cause for divorce as there are judges, making the law of divorce in Muslim law uncertain, vague and confusing.

From the above deliberations, the high court identified that the *Talaq* must also be free of the other feature viz. irrevocability. Therefore, this court opined that procedure prescribed for a valid *Talaq* has an in-built component of introspection, that postpones the stage of irrevocability of the *Talaq* to a period after three lunar months. And hence this aspect of a pronouncement of *Talaq* is also of great significance and purpose and a non-adherence to it could render the pronouncement invalid.

51 *Shamim Ara* v. *State of UP,* (2002) 7 SCC 518.
52 *Kunhimohammed* v. *Ayishakutty*, 2010 (2) KLT 71.

Addressing the rights of a Muslim wife to get maintenance from her husband, The high court referred to the case of *Kunhimohammed* v. *Ayishakutty*[53] and observed that the provisions of section 125 of the Cr.P.C 1973 must be interpreted in the light of the fact that the Muslim husband, unlike the husbands in any other religion, has a unilateral right to divorce his wife without intervention of the court. It was considering the vulnerability of such a wife that the Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted to confer on the divorced Muslim wife higher and superior rights than her counterparts in other religions. Accordingly, a larger and superior right is available to the Muslim wife who faces the vulnerability of arbitrary and unilateral divorce at the hands of her husband without intervention of any court. Even when she is able to maintain herself, she can claim capitalised amounts under section 3 of the Act. It is also significant that the rights of the divorced woman under section 125 of the Cr.P.C 1973 do not get extinguished on account of the larger rights conferred under Section 3 of the Act. If the divorced Muslim woman chooses to claim amounts under section 3 of the Act, only on such payments being actually made either voluntarily or in response to an order of the court does section 127 (3)(b) of the Cr.P.C 1973 get attracted to extinguish the liability of the husband under the Cr.P.C 1973. Till then, or till she remains a divorced Muslim wife, she will be entitled to claim maintenance from her divorced husband. Death, remarriage or actual payment of the amounts payable under Section 3 of the Act alone shall extinguish her right under Section 125 Cr.P.C to claim maintenance.

On the basis of the above precedents and statutory law, The high court opined that use of the word 'irrevocably' in the *Talaq*nama is certainly suggestive of an intimation by the respondent to the appellant, that he was not ready to reconsider his decision. The court observed that held the pronouncement of *Talaq* could be deemed as illegal on this ground but on grounds of subsequent events that unfolded. The court took notice from the evidence presented before them that, even after the pronouncement of *Talaq*, there were efforts at reconciliation, which were unsuccessful. The high court was of the opinion that the *Talaq* pronounced earlier was not irrevocable as the efforts to reconcile the parties was still underway. The court opined that that the ends of justice would be served by treating the lapse on the part of the respondent as a mere irregularity in the mode of pronouncement of the *Talaq*, that could be regularised by postponing the effective date of dissolution of marriage by the period of three lunar months required in the case of a *Talaq* Ahsan. The court observed that the *Talaq* pronounced was *Talaq Ahsan* which become irrevocable only after the expiry of three Lunar months from the single pronouncement of *Talaq*.

It referred to the constitutional bench judgement of *Danial Latifi* v. *Union of India*[54] which held:

> "The purpose of the Muslim Women (Protection of Rights on Divorce) Act, 1986 appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife

53 *Ibid.*

54 *Danial Latifi* v. *Union of India* (2001) 7 SCC 740.

> after divorce and the period of *Iddat*. However, a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce, and therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provisions for her residence, her food, her clothes and other articles"

Finally on the basis of the above, The High Court held that there was no claim for maintenance in terms of Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 but permitted the appellant to urged the parties and their counsels to claim a fair and reasonable amount from the respondent in the spirit of settlement, and subject to the condition that on payment of the said amounts to her, she would accept the same in full and final settlement of all claims, present and future, against the respondent. The appellant despite the court's best efforts to arbitrate a settlement was not inclined towards the offers made. As a result, the appeals were dismissed as they were devoid of any merit.

Restitution of conjugal rights

In *Jinnat Fatma Vajirbhai Ami* v. *Nishat Alimadbhai Polra*[55] the primary issue was pertaining to restitution of Conjugal rights under Mohammedan law and the Code of Civil Procedure. The family court dealt with issues pertaining to the restitution of conjugal rights of the respondent Husband prior to the alleged abandonment of matrimonial duties by the appellant-wife. The High Court of Gujarat questioned the legality and validity of the order passed by the family court whereby the family court allowed suit instituted by the husband for conjugal rights and directed appellant-wife to go back to her matrimonial home and perform her marital obligations and Whether order passed by family court liable to be interfered by the court in appeal.

Brief facts of the case were that the appellant wife, who was a practicing nurse in Palanpur Civil Hospital, left the matrimonial home along with their minor son on July 20, 2017 without any lawful ground and further even without informing anyone. Many attempts were made to persuade the wife to come back to her matrimonial home with the intervention of the family members and other members of the community but such efforts failed. The husband also issued a legal notice dated July 22, 2019 to his wife, however, the wife failed to respond to such notice. Through the appeal, The High court identified through material on record that the case put up by the appellant-wife presented that she was being pressurized to migrate and settle at Australia considering that the appellant is a qualified nurse and she may be able to secure a good job at Australia. The appellant was not inclined towards such proposals of the family and outrightly declined to leave her job at Palanpur and prepare herself to go

55 *Jinnat Fatma Vajirbhai Ami* v. *Nishat Alimadbhai Polra,* MANU/GJ/2317/2021.

to Australia. Due to matrimonial disputes arising out of the conflict of interest identified by the high court herein, the appellant has refused to cohabit with her husband and in-laws. Due to an erroneous judgement by the family court, an appeal against the impugned judgement was preferred by the appellant-wife through section 19 of the Family Courts act,1984[56]

On the careful analysis of the suggestions put by the learned advocate appearing on behalf of the wife in the cross-examination of the husband would indicate that the wife was not, at all, interested to go to Australia. In the cross-examination of the husband, an assurance was sought from the husband that if he would not insist that his wife should migrate to Australia and no further harassment is caused in that regard, then the wife would be inclined to return to her matrimonial home. A further assurance was sought for from the husband that he should not unnecessarily doubt the character of his wife and further should buy a house of his own so that the husband, wife and the child can stay together independently. The husband, in his cross-examination, declined to give any such assurance and also made himself clear that he would not go for a separate home and reside separately with his wife and child.

The high court identified through the submissions of the counsels a plethora of other allegations levelled against the husband in the form of various suggestions. The court took notice that suggestions made up for a negligible evidentiary value. However, the court observed that in cases like the one at hand, more particularly, matrimonial disputes, a duty is owed by the family court to read something in between the lines so as to try to understand the root cause of the discord between the parties rather than going by the strict rules of evidence. To substantiate the same, the court made a reference to Section 14 of the Family Courts Act, 1984. Section 14 reads thus;[57]

> 14. Application of Indian Evidence Act, 1872-A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

By the virtue of numerous decisions by the high courts across the nation, the high court observed that the consideration of evidence by a family court is not restricted by the rules of relevancy or admissibility provided under the Evidence Act. The family court is left free to receive any evidence or material which assists it to deal effectually with a dispute and the provisions of the Evidence Act would not be applicable.

The court identified that in the present case, the matrimonial house was not left by the appellant wife with the intention to desert the respondent husband and abandon her matrimonial duties. The court having regard to the evidence on record identified that the wife was not comfortable at her matrimonial home on account of various domestic issues.

By putting reliance on the case of *Raj Mohammad* v. *Saeeda Amina Begum,*[58] the high court insisted on the fact that the decision in a suit for the restitution of

56 S. 19 of the Family Courts Act,1984.

57 Indian Evidence Act, 1872.

58 *Raj Mohammad* v. *Saeeda Amina Begum* AIR 1976 Kant 200.

conjugal rights does not entirely depend upon the right of the husband. The family court should also consider whether it would make it inequitable for it to compel the wife to live with her husband. The court observed that the current notions of law in that regard have to be altered in such a way as to bring them in conformity with the modern social conditions. As long as there is no such rule which compel the courts to always pass a decree in a suit for restitution of conjugal rights in favour of the husband, it would be just and reasonable for the court to deny the said relief to the plaintiff-husband if the surrounding circumstances indicate that it would be inequitable to do so.

In support of the above mentioned, the court placed reliance on Mulla's Muhammadan Law,[59] which deals with the aspect of the restitution of conjugal rightsproduced as under:

> "Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights. "

The court identified that the aforementioned provision also fails to shed light upon the circumstances, a decree for restitution of conjugal rights can be granted or declined and hence the court reached a conclusion that there is no such law for seeking the relief of restitution of conjugal rights. Therefore, the parties involved were to be governed by their personal law.

The high court shed light upon the available defences to a wife in suit for restitution of conjugal rights as under mentioned:

> (1) That the marriage between the parties was not a valid marriage or is no longer binding. The existence of a valid matrimonial relationship is an essential condition for a decree in the suit. If the marriage is not valid (i.e., either irregular or void) restitution will not be allowed. So also, if subsequently the marriage has terminated, for example by reason of the husband having become an apostate or by the exercise by the wife of the option, on attaining puberty, of repudiating her marriage or of a power to the wife to divorce, restitution will 08-06-2023
>
> (2) That the husband was guilty of legal cruelty. For legal cruelty, "there must be actual violence of such a character as to endanger personal health or safety or there must be reasonable apprehension of it. A simple chastisement on one or two occasions would not amount to such cruelty. The Mohammedan law on the question of what is legal cruelty between man and wife does not differ materially. A good deal of ill-treatment, even if it is short of cruelty, may amount to legal cruelty. If the Court is of opinion that by the return of the wife to the husband, her health and safety would be in danger.
>
> (3) That the husband made a false charge of adultery against the wife. Restitution will not, however be refused if the charge was true.
>
> (4) That there was gross failure by the husband in the performing of the matrimonial obligations imposed upon him for the benefit of the wife. Cruelty

59 D.F. Mulla, *Principles of Mohammedan Law* by Mulla 20thedn., s.281 from the at 367.

> is not the sole defence. The Mohammedan wife has got better rights than the English wife. The Court may well admit defences founded on the violation of those rights. Conduct falling for short of legal cruelty (e.g., charges of immorality and heaping of insults) may be a good defence to a suit by the husband. In fact, any reprehensible conduct on the part of the husband affords grounds for refusing to him the assistance of the Court. Expulsion of the husband from caste has been held to be sufficient ground for refusing restitution of conjugal rights. But the mere fact that the wife cannot get on with mother of the husband would not be sufficient ground. (5) That, where the marriage has not been consummated, her prompt dower has not been paid. This would be a means for securing the payment of dower by the husband.

The court remarked thata marriage between Mohammedans is a civil contract and a suit for restitution of conjugal rights is nothing more than an enforcement of the right to consortium under this contract. The Court assists the husband by an order compelling the wife to return to cohabitation with the husband. By placing reliance on the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*[60] and *Abdul Kadir* v. *Salima*[61] the court asserted that

> Disobedience to the order of the Court would be enforceable by imprisonment of the wife or attachment of her property, or both

Dealing with the kinds of defences which a wife under the Muslim Law can take in a suit for restitution of conjugal rights, the Judicial Committee of the Privy Council observed in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum,*[62] as follows:

> "It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered and considered with some reference to Mohammedan Law."

Further the High Court quoted Chief Justice Sulaiman in the case of *Anis Begum* v. *Muhammad Istafa Wali Khan*[63]

> "Their Lordships of the Privy Council in the case of *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, observed that a suit for restitution of conjugal rights, though in the nature of a suit for specific performance is in reality a suit to enforce a right under the Muhammadan law and the Courts should have regard to the principles of Muhammadan law.

60 *Moonshee Buzloor Ruheem* v.*Shumsoonnissa Begum* 11 Moo Ind App 551 (609).
61 *Abdul Kadir* v. *Salima* ILR 8 All 149 (FB).
62 Supra at 5.
63 *Anis Begum* v. *Muhammad Istafa Wali Khan*, AIR 1933 All 634).

> The observation of their Lordships was directed to emphasising the point that Courts should not exercise their discretion in complete super session of the Muhammadan Law, but that in exercise of their discretion they should refer to that law. But the principle was fully recognised that in passing a decree for the restitution of conjugal rights, the Court has power to take into account all the circumstances of the case and impose terms which it considers to be fair and reasonable."

The high court asserted that a decree, for the specific performance of a contract is an equitable relief and it is within the discretion of the court to grant or refuse it in accordance with the equitable principles. Placing reliance on the case of *Abdul Kadir* v. *Salima*,[64] The high court identified that in a suit for conjugal rights, the courts in india shall function as mixed courts of equity and be guided by the principles of equity well-established under the English Jurisprudence. One of those is that the court shall take into consideration the conduct of the person who asks for specific performance. If the court feels, on the evidence before it, that the husband has not come to the court with clean hands or that his own conduct as a party has been unworthy, or his suit has been fled with ulterior motives and not in good faith, or that it would be unjust to compel the wife to live with him, it may refuse him assistance altogether. Therefore, in a suit for restitution of conjugal rights by a Muslim husband against his wife, if the court after a review of the evidence feels that the circumstances reveal that the husband has been guilty of unnecessary harassment caused to his wife or of such conduct as to make it inequitable for the court to compel his wife to live with him, it will refuse the relief.

The court took a hypothetical situation wherein the wife leaves her matrimonial home on account of matrimonial disputes and in the meantime, the husband marries for the second time and brings home a second wife and simultaneously institutes a suit for restitution of conjugal rights against his first wife, still whether the court would be justified in passing a decree of restitution of conjugal rights on the ground that a Muslim under his personal law can have several wives at a time upto a maximum four. In such a circumstance, the court opined that the wife may decline to live with her husband on the ground that the Muslim law permits the polygamy but has never encouraged it. The Muslim law, as enforced in India, has considered polygamy as an institution to be tolerated but not encouraged and has not conferred upon the husband any fundamental right to compel his wife to share his consortium with another woman in all circumstances.

The aforementioned was substantiated by referring to the case of *Sheikh Abdullah W/o. Sheikh Hafzullah* v. *Husnaara Parveen W/o. Sheikh Abdulla,*[65]

> it is necessary for the appellant in such case to establish that the other spouse has without reasonable excuse withdrawn from the society of the petitioner. The Court in such case, if it is satisfied as to the truth of

64 Supra at 6

65 *Sheikh Abdullah W/o. Sheikh Hafzullah* v. *Dr. Husnaara Parveen W/o. Sheikh Abdulla* 2012 (1) MH.L. J

66 *Lachman Uttamchand* v. *Meena* AIR 1964 SC 40

67 *Hamid Hussain* v. *Kubra Begum*, ILR 40 All 332: AIR 1918 All 235.

> the averments made in the petitioner and also that there is no other legal grounds as to why the petition/application shall not be granted, may decree restitution of conjugal right, as prayed for.

Further, in the case of *Lachman Uttamchand* v. *Meena*[66]

> the Constitution Bench of The Hon'ble Supreme Court made reference to settled law as to burden of proof in such cases. It was observed that heavy burden lies upon a petitioner who seeks relief on the ground of decision to prove four essential conditions, namely (1) the factum of separation, (2) animus deserendi; (3) absence of his or her consent and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

By placing reliance on the aforementioned, the court was of the opinion that even in the absence of satisfactory proof of the husband's cruelty, the Court will not pass a decree for restitution in favour of the husband if, on the evidence, it feels that the circumstances are such that it will be unjust and inequitable to compel her to live with him.

The high court discussing the nature of cruelty, placed reliance on *Hamid Hussain* v. *Kubra Begum*[67] in which the Court was of the opinion that by a return to her husband's custody the wife's health and safety would be endangered though there was no satisfactory evidence of physical cruelty.

Further, the court deemed it necessary to refer to the case of *Itwari* v. *Asghari*[68] to indicate that Muslim jurisprudence has always taken into account changes in social conditions in administering Mohammedan Law.

> Principles governing legal cruelty are well established and it includes any conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give a reasonable apprehension of such a danger. in determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character, and social status ibid p. 80. In deciding what constitutes cruelty, the Courts have always taken into consideration the prevailing social conditions, and the same test will apply in a case where the parties are Mohammadans.

With reference to the aforementioned, The court asserted on the passing of the Dissolution of Muslim Marriages Act, 1939, by which, the legislature enabled a Muslim wife to sue for the dissolution of her marriage on a number of grounds that were previously not available, and the judgment of the Supreme Court in the case of

68 *Itwari* v. *Smt. Asghari*, AIR 1960 All 684.

Shahbano Begum,[69]wherein it was ruled that a Muslim wife can pray for maintenance invoking section 125 of the Code of Criminal Procedure. The then government tried to nullify this judgment of the Supreme Court by passing a legislation termed as the "Muslim Women (Protection of Rights on Divorce) 1986 According to this legislation, the Muslim women were entitled to a "fair and just" amount of money within the "*Iddat*" period beyond which the husband was to have no liability.

The court made a reference to the case of *Danial Latif.* v. *Union of* India[70] which upheld the validity of the Act of 1986.

> "(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *Iddat* Period must be made by the husband within the *Iddat* period in terms of Section 3(1)(a) of the Act.
>
> (2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the *Iddat* Period.
>
> (3) A divorced 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. 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.
>
> (4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

Further the court made a reference to the case of *Shayara Bano* v. *Union of* India[71] wherein the Supreme Court declared the concept of "instantaneous triple *Talaq*" arbitrary and being violative of article 14 of the Constitution of India[72]

Through the aforementioned precedents and legislations, this court has shed light upon the progressive development in Muslim law.

The high court looked into the application of the provisions of Order XXI Rule 32(1) and (3), C.P.C[73] and concluded that a decree for restitution of conjugal rights cannot be enforced except by way of attachment of the property of the other party or compensation and *mesne* profits. In the case under comment, there is nothing on record to indicate that the appellant-wife has a property of her own which could be attached. The object behind Order XXI Rule 32(1) and (3) CPC is that no person can force a female or his wife to cohabit and establish conjugal rights. If the wife refuse

69 *Mohd. Ahmad Khan* v. *Shah Bano Begum* 1985 (3) SCR 844).
70 Supra at 46.
71 Supra at 40
72 Art.14 Constitution of India.
73 Order XXI Rule 32(1) and (3), Civil Procedure Code.

to cohabit, in such case, she cannot be forced by a decree in a suit to establish conjugal rights.

The court elucidating upon the characteristics of secularism referred to Pardiwala's J., observations in the case of *Jafar Abbas Mohammed Merchant* v. *State of Gujarat* [74] referred by high court which is as under:

> One characteristic feature of Indian Secularism is its determination to adopt a rational and scientific approach in the discussion and solution of socioeconomic problems. Blind adherence to, or reliance on, any sacred text is completely foreign to Indian Secularism, whether the text is that of Hindus, Muslims, Parsis, Sikhs, Buddhist, Christians makes no difference. The tendency of the human mind to lean on textual authority in support of or against a proposition is so powerful that it needs consistent and deliberate effort on the part of intellectuals to promote independent and basic thinking in dealing with problems unhampered by the weight of authority or the printed word. Lawyers know that in Courts of Law, precedents in the form of decided cases sometimes have such an overwhelming influence on judicial approach that Judges show a disinclination to analyse and consider the basic points involved in any controversy. The value of precedents cannot be denied; but the precedents sometimes tend to hold the judicial mind in bondage and that shows an approach which is not strictly rational and as such, is inconsistent with the philosophy of Secularism.
>
> When the Hindu Code Bill was being debated in Parliament, the conservative Hindus raised a plausible plea that if a Civil Code was intended to be evolved, it should be made applicable to all the communities in India. The main object in raising this plea was not so much to make the Code applicable to the Muslim community as to retard, and if possible, to defeat the Hindu Code itself. The advocates of the Hindu Code wanted to take the first step in the right direction. They realised that to bring the Muslim community within the purview of the Civil Code was impractical at that time having regard to the fact that the public opinion in the Muslim community had not been adequately educated in that behalf. The approach adopted by the reformers in confining the Code to the Hindu community as a first step brings out another feature of Secularism, and that is that Secularism in establishing its philosophy in the social life of the country, adopts a pragmatic approach."

Hence on the basis of above analysis the court found it fit to allow the appeal and interfere in the order of the Family court by quashing and setting the same aside.

74 *Jafar Abbas Mohammed Merchant* v. *State of Gujarat,* Criminal Misc. Appl. No. 14361 of 2020, decided on 05.11.2015

Bail after Triple Talaaq under Muslim Women (Protection of rights on marriage) Act of 2019

In the case of *Rahna Jalal* v. *State Kerala.*[75] The Supreme Court had to decide on whether the high court was justified in declining the prayer for anticipatory bail moved by the appellant (the second petitioner in the special leave petition as it was originally filed).

The brief facts of the case were that the marriage between the second respondent and the appellant's son was solemnised. a child was born out of the issue. the second respondent lodged a first information report, complaining of offences under the provisions of Section 498-A read with section 34 of the Penal Code, 1860 ("IPC") and the Muslim Women (Protection of Rights on Marriage) Act, 2019 ("the Act"). in the present appeal, the FIR contains an allegation that the appellant's son pronounced *Talaq* three times at their house. Following this, it has been stated, the appellant's son entered into a second marriage. The petitioners filed an application for anticipatory bail was moved to the High Court of Kerala after efforts of settlement were unsuccessful. The Hon'ble High court declined the request for anticipatory bail by making observations but did provide for reasons as to why the bail is being rejected.

V. Chitambaresh, learned Senior Counsel has submitted that the power of the court to grant anticipatory bail under section 438 Cr PC has been taken away by the provisions of section 7(*c*) of the Act. Opposing this submission, Haris Beeran has argued that section 7(*c*) of the Act provides no express prohibition on the exercise of the power of the court to grant anticipatory bail.

The court referred to section 3[76] and section 4[77] of the Muslim Women (Protection of Rights on Marriage) Act, 2019 which are as under:

> "3. *Talaq to be void and illegal*. —Any pronouncement of *Talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.
>
> 4. *Punishment for pronouncing Talaq*. —Any Muslim husband who pronounces *Talaq* referred to in Section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine."

The high court observed and asserted that he prohibition in sections 3 and 4 is evidently one which operates in relation to a Muslim husband alone. This is supported by the Statement of Objects and Reasons accompanying the Muslim Women (Protection of Rights on Marriage) Bill, 2019, when it was introduced in Parliament. The court took notice of the legislative intent behind the introduction of the Bill. It was specifically stated that the Bill was to give effect to the ruling of this Court in *Shayara Bano* v. *Union of* India[78] and to "liberate" Muslim women from the customary practice

75 *Rahna Jalal* v. *State of Kerala*, (2021) 1 SCC 733.
76 S.3, Muslim Women (Protection of Rights on Marriage) Act, 2019.
77 S. 4, Muslim Women (Protection of Rights on Marriage) Act, 2019.
78 *Supra* at 40.

of *Talaq-e-biddat* (divorce by triple *Talaq*) by Muslim men. Thus, providing the context in which the provisions of Section 7 would have to be interpreted.

Further the court referred to section 7[79] of the act quoted as under:

> **7. *Offences to be cognizable, compoundable, etc*.**—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
>
> (*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *Talaq* is pronounced or any person related to her by blood or marriage;
>
> (*b*) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *Talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;
>
> (*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *Talaq*is pronounced, is satisfied that there are reasonable grounds for granting bail to such person."

Through the analysis of the above statutory provisions, the court observed that the appellant as the mother-in-law of the second respondent cannot be accused of the offence of pronouncement of triple *Talaq* under the Act as the offence can only be committed by a Muslim man.

Further, the court addressed the contention that section 7(*c*) of the Act bars the power of the court to grant anticipatory bail under section 438 CrPC. The court identified the non-obstante clause which operates "notwithstanding anything contained" in the Cr PC, the court emphasised that its applicability is restricted to the clauses (a) (b) and (c) of section 7.

The court emphasised that clause (c) to section 7 follows two conditions. One of them is in the realm of procedure while the second is substantive. The first, procedural, condition requires that a hearing is to be given to the married Muslim woman upon whom *Talaq* has been pronounced. The second condition requires the court to be "satisfied that there are reasonable grounds for granting bail to such person". This substantive condition is only a recognition of something which is implicit in the judicial power to grant bail. The court asserted No court will grant bail unless there are reasonable grounds to grant bail. All judicial discretion has to be exercised on reasonable grounds. Hence, the substantive condition in clause (*c*) does not deprive the court of its power to grant bail. Parliament through this legislation has not overridden the provisions of section 438 Cr PC. There is no specific provision in section 7(*c*), or elsewhere in the Act, making Section 438 inapplicable to an offence

79 S. 7, Muslim Women (Protection of Rights on Marriage) Act, 2019.

punishable under the Act. The power of the court to grant bail is a recognition of the presumption of innocence (where a trial and conviction is yet to take place) and of the value of personal liberty in all cases. Liberty can, of course, be regulated by a law that is substantively and procedurally fair, just, and reasonable under article 21.

Further, the court placed reliance on the case of *Hema Mishra* v. *State of U. P*[80] to emphasise the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. Through this judgement, the court held that a writ court is even empowered to grant anticipatory bail in spite of a statutory bar imposed against the grant of such relief.

Therefore, the court held that entertaining an application for grant of anticipatory bail for an offence under the Act, the competent court must hear the married Muslim woman who has made the complaint, as prescribed under section 7(*c*) of the Act. Only after giving the married Muslim woman a hearing, can the competent court grant bail to the accused.

Further, to substantiate the above observation, The High Court pointed out the lack of an express provision which barred the application of section 438CrPc.The High Court referred to the case of *Balchand Jain* v. *State of M. P.*[81] wherein the court had to decide whether an order of anticipatory bail can be made by a Court of Session or High Court in the case of an alleged offence falling under Rule 184[82]of the Defence and Internal Security of India Rules, 1971, the relevant portion is produced as under:

> Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after the arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them

Further, the court quoted Justice Fazal Ali's concurring opinion in the judgment aforementioned

> Now if the intention of the Legislature were that the provisions of Section 438 should not be applicable in cases falling within Rule 184, it is difficult to see why the Legislature should not have expressly saved Rule 184 which was already there when the new Code of 1973 was enacted and excepted Rule 184 out of the ambit of Section 438.

The high court noted that certain legislations exist which expressly exclude the provisions of section 438 CrPC. The court made reference to section 18[83] and 18-A[84] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the case of *Prathvi Raj Chauhan* v. *Union of* India[85] the aforementioned sections have been discussed. Justice S. Ravindra Bhat in his concurring judgement opined:

> As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where

80 *Hema Mishra* v. *State of U.P.,* (2014) 4 SCC 453.
81 *Balchand Jain* v. *State of M.P.*, (1976) 4 SCC 572.
82 Rule 184 of the Defence and Internal Security of India Rules, 1971.
83 S. 18, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
84 18-A, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
85 *Prathvi Raj Chauhan* v. *Union of* India, (2020) 4 SCC 727.

> no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

Therefore, through the judgement it was held that the exclusion will not be attracted where the complaint does not prima facie indicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.Therefore,the high court opined that provisions of Section 7(*c*) of the Act must be distinguished from the provisions which are contained in such statutes.

Placing reliance on the abovementioned precedents and statutory provisions the court held that there is no bar on granting anticipatory bail for an offence committed under the Act, provided that the competent court must hear the married Muslim woman who has made the complaint before granting the anticipatory bail. It would be at the discretion of the court to grant ad interim relief to the accused during the pendency of the anticipatory bail application, having issued notice to the married Muslim woman.

The court in this judgement was of the view that having regard to the vague and general nature of those allegations in the FIR, bereft of details, the appellant (whose son is in a marital relationship with the second respondent) should not be denied the benefit of the grant of anticipatory bail.

Further, the court observed that since the Act in the aforementioned provisions only directs a punishment for a Muslim man who has pronounced *Talaq* upon his spouse. Therefore the appellant i.e., the Mother-in-law in the event of the arrest of the appellant, she shall be released on bail by the competent court, subject to her filing a personal bond of Rs 25,000.

Maintenance

In the case of *Rehena Khatoon* v. *Jargis Hossain,*[86] the High Court of Calcutta had to decide on the plea of maintenance refused to the wife who has unilaterally divorced the husband, by the additional sessions judge.

The brief facts of the case were that the complaint was filed by the petitioner in pursuance to secure maintenance for herself and her minor child under section 125 CrPc. he Learned Magistrate refused the prayer for maintenance for the petitioner but allowed the said prayer for the minor daughter of the parties. The same was challenged in-front of the Additional Sessions Judge who rejected the prayer for maintenance by observing that:

> Section 125 of the Criminal Procedure Code mandates that a wife be entitled to receive maintenance from her husband, if husband having sufficient means neglects or refuses to maintain his wife. The divorced wife until her remarriage falls under the meaning of wife. But in case wife without any reason refuses to live with her husband, she is not entitled to receive maintenance. In the present case, the revisionist is a divorcee. As per observation of the Supreme Court, divorcee is entitled to receive maintenance from her erstwhile husband until she got

86 *Rehena Khatoon* v.*Jargis Hossain*, AIROnline 2021 CAL 356.

> remarried. Here, the wife has on her own accord unilaterally granted divorce to her husband. The husband in his written objection has stated that the wife was found to be in objectionable situation with some third person by the villagers, though the same was not being substantiated by any corroborative witnesses. Learned Magistrate has observed that conduct of wife was not inspiring and she was not considered to be a destitute as willful neglect on part of her husband so to maintain her was not being proved, for the same maintenance in her favour was denied. I do not find that any interference is required by this Court regarding such observation. This Court concurs with the observation of the Court below that the revisionist/wife who voluntarily granted *Talaq* is not entitled to claim maintenance from her husband as because I do not find any act of violence or cruelty that the opposite party has perpetrated upon the revisionist so to compel her to leave her matrimonial home. Moreover, she concealed the fact that she has granted *Talaq*. Thus, the revision to that respect is dismissed on contest".

The high court identified that the lower courts have refused and rejected the prayer on grounds that the petitioner unilaterally granted divorce to her husband and the conduct of the petitioner/wife was not inspiring and she was not considered to be destitute as she willfully neglected her husband. Therefore, the husband of the petitioner is not entitled to pay maintenance to the petitioner. This court observed that despite the settled law that even a divorced wife is entitled to get maintenance till her remarriage if she is unable to maintain herself, the lower courts have wronged the petitioner.

On the basis of above observations and statutory provisions, The High Court while allowing revision, set aside the order given by the learned Additional Sessions Judge and directed to rehear the case to ascertain whether the petitioner being a divorced wife is entitled to get maintenance under the facts and circumstances of the case.

Execution of maintenance

In another case,*Ezazur Rehman v. Saira Banu,*[87] the High Court of Karnataka had dealt with issue pertaining to the execution of maintenance to the divorced wife by Husband after his re-marriage and begetting a child.

The brief facts were that the concerned parties were practicing Sunni Muslims and were married. Not long after the marriage, the wife complained of dowry harassment resultant to which the wife left for matrimonial home. The petitioner due to these reasons uttered *Talaq* and accordingly *'Mehr'* was paid along with maintenance for '*Iddat*' period. The Ex-wife filed a civil suit for maintenance to which the petitioner resisted by filing a written statement citing reasons for the same i.e., 1) he had uttered *Talaq*, 2) He contracted another marriage, 3) He has begotten a child from the marriage 4) wife had filed dowry harassment case in which he was acquitted and 5) the ex-wife should invoke the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986

87 *Ezazur Rehman* v. *Saira Banu*, AIR 2022 Kar 30.

The Lower court ordered the plaintiff-in this case, to pay a monthly maintenance of Rs. 3000/- from the date of the suit till the death of the plaintiff or till she gets remarried or till the death of the defendant. Further the ex-wife had put decree in enforcement by filing execution *inter alia* by way of arrest and detention of the ex-husband which was stoutly resisted by pleading that the ex-husband did not have sufficient means to pay the decreetal amount. The lower court did not agree to the said contention and was sent to civil prison. He was released in a month by paying Rs. 30,000. In order to seek a determination of his financial incapacity, the plaintiff-in this case filed another application under Order XXI Rule 37 of C.P.C., 1908, the same was rejected and hence the plaintiff had approached The High Court by the means of a writ.

The high court identified the issues to be dealt in this petition. The issues identified by the court are produced as under:

> (i) whether a Muslim is duty bound to make provision for his ex-wife beyond *Iddat* despite paying paltry *Mehr* if she remains un-remarried and is incapable of maintaining herself?
>
> (ii) whether a decree for maintenance like any other money decree can be resisted on the ground of lack of financial capacity of the judgment debtor?
>
> (iii) whether a Muslim contracting another marriage and begetting children from it can resist execution of the maintenance decree obtained by his ex-wife, on that ground per se?

The high court addressed the aforementioned issues by first establishing the nature of Muslim marriages as civil contracts. To substantiate this, this court placed reliance on the case of *Abdul Kadir* v. *Salima*[88] quoting the observations of Mahmood J produced as under:

> "marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Quran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion."

The court understood "Marriage as a contract" as the kinds of relationships this social institution brings into existence regardless of religion. The court observed that Marriage amongst Muslims begins with the contract and graduates to the status as it ordinarily does in any other community; this very status gives rise to certain justiciable obligations; they are ex contractu; a Muslim marriage is not a sacrament, does not repel certain rights & obligations arising from its dissolution; such a marriage dissolved by divorce, per se does not annihilate all the duties & obligations of parties by lock, stock & barrel; in law, new obligations too may arise, one of them being the circumstantial duty of a person to provide sustenance to his ex-wife who is destituted by divorce.

88 *Abdul Kadir* v. *Salima*, (1886) 8 ALL 149.

By placing reliance on primary sources of Muslim law, The high court took notice of Scriptural injunction to Muslims for providing life essentials to their indigent ex-wives produced as under:

> "When you divorce women, and they (are about to) fulfil the term of their (*Iddat*), either take them back on equitable terms or set them free on equitable terms, but do not take back to injure them (or) to take undue advantage, if anyone does that, he wrongs his soul..."[89]
>
> "There is no sin on you, if you divorce women while you have not touched (had sexual relation with) them nor appointed them unto their *Mehr*, but bestowed on them (as suitable gift) the rich according to his means and the poor according to his means, a gift reasonable amount is a duty on the doers of good"[90]

Further, the high court held that there is sufficient intrinsic material in the Holy Quran and Hadith, which lays foundation to the accrual of a corresponding right in favour a divorced wife for maintenance; generally, it is conditioned by three cumulative factors *viz.,* (i) *Mehr* amount is insignificant; (ii) she is incapable of paddling her life boat on her own; and (iii) she has remained un-remarried.

Further, this court placed reliance on the case of *Hamira Bibi* v. *Zubaida Bibi*[91] to hold that it is Indisputable that A Muslim ex-wife has a right to maintenance subject to satisfying certain conditions. in Islamic jurisprudence, as a general norm, *Mehr* i.e., dower is treated as consideration for marriage; it may be a 'prompt dower' payable before the wife is called upon to enter the conjugal domicile or it may be a 'deferred dower' payable on the dissolution of marriage. The court concurred that the right of an ex-wife to maintenance does not extend beyond *Iddat* even though this has not been treated as a thumb rule. The court identified that this norm is subjected to the amount amount paid to the ex-wife, be it in the form of *Mehr* or be it a sum quantified on the basis of *Mehr*, or otherwise, is not an inadequate or illusory sum. Taking into consideration the societal construct, the Judge opined that the *Mehr* is usually fixed inadequately.

The court placing reliance on the case of *Danial Latifi* v. *Union of* India[92] concurred that the duty of a Muslim to provide sustenance to his ex-wife is co-extensive with her requirement, the yardstick being the life essentials and not the luxury. The Act of 1986 has observed that a Muslim is duty bound to make a reasonable & fair provision for the future of his divorced wife, and this duty, as of necessity, extends for a period beyond *Iddat*. The court to substantiate the above, placed reliance on the case of *Jubair Ahmed* v. *Ishrat Bano*[93] which observed that the right to maintenance available to wife is absolute and is unaffected by divorce unless the wife is disqualified on account of remarriage or her sufficient earning

89 Surah Al Bakhra ,Aiyat No. 231.
90 Surah Al Bakhra Aiyat No. 236.
91 *Hamira Bibi* v.*Zubaida Bibi*, (1916) 43 IA 294.
92 Supra at 46.
93 *Jubair Ahmed* v. *Ishrat Bano*, **(**2020) 2 All LJ 342.

The high court to further address the frugal nature of deferred dower and right to maintenance beyond the *Iddat* period, The high court by placing reliance on *Kesavananda Bharati* v. *State of Kerala*[94]which held thatan illusory compensation for the public acquisition of private property is 'no compensation. Therefore, the payment of frugal *Mehr* money per se cannot be a defence availing to an able-bodied man for denying the claim or defying the decree, for maintenance

The court on the basis of above discussion held that he duty to furnish essentials to the ex-wife is coterminous with *Iddat* period post *Talaq* and that the quantum of maintenance amount cannot exceed the size of *Mehr* money, are difficult to sustain. The judge frowned upon the tokenistic amount of Rs. 5,000/- paid by the husband to the ex-wife as *Mehr* or its quantification on the basis of *Mehr* and called it "militantly unjust and illusionary, the payment of Rs. 900 as maintenance for three months i.e., the *Iddat* period was also deemed to be insufficient.

The high court identified that the above stance was already recognised in the case of *Shah Bano*[95] and *Shayara Bano* case[96]

Further, this court made reference to article 51 (c) of the Constitution of India[97] and the case of *Vishaka* v. *State of Rajasthan*[98] to assert that the International Treaties and Conventions animate our domestic law, be it legislation, precedent, custom or contract. The court made reference to "The United Nations Convention on the Elimination of All Forms of Discrimination Against Women" (CEDAW)[99] to which India is also a signatory. The court by making reference to the objects of the treaty, identified that discrimination based on gender stereotype, stigma, harmful & patriarchal cultural norms, and gender-based violence which particularly affect women, have an adverse impact on their ability to gain access to justice on an equal basis qua men.

In furtherance of the above, the court made reference to Goal 5 of United Nations Sustainable Development Goals[100] produced as under:

> Ending all discrimination against women and girls is not only a basic human right, it's crucial for sustainable future; it's proven that empowering women and girls, helps economic growth and development

The high court asserting the significance of dignity in a person's life, quoted Immanuel Kant who said "Dignity is of unconditional and incomparable worth that admits of no equivalent." By asserting this, the court opined that destitution diminishes the dignity and worth of an individual. This court asserted that "dignity of the individual" as a universal "human value" has been identified in international treaties, our constitution, and in our judicial precedents as mentioned above. The above provides support for right of divorced women to sustenance, which includes all such things

94 *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
95 *Supra* at 60.
96 *Supra* at 40 .
97 Art. 51 (c), The Constitution of India.
98 *Supra* at 37.
99 The United Nations Convention on the Elimination of All Forms of Discrimination Against Women" (CEDAW)1979.
100 Goal 5 of United Nations Sustainable Development Goals 2030.

food, clothes, shelter, etc. which are necessary to support life. This right as been recognised in Islam as '*Nafaqah'*

The high court further analysed the Social context approach and the Muslim law of maintenance by placing reliance on judicial precedents pronounced by the Supreme Court.

Further the court referred to the case of *Danial Latifi* v. *Union of* India[101] and deemed it substantial to make reference to the judgment's paragraph no. 5 produced as under:

> "Our society is male-dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to be a distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints...."

the court made reference to *Rana Nahid @ Reshma v. Shahidul Haq Chisti*[102] to shed light on the principles of gender equality as identified under international treaties and the Constitution of India. The said treaties are produced as under:

> "29. The right to equality, irrespective of religion, is a basic human right, recognized, reaffirmed and reiterated in the Universal Declaration of Human Rights adopted by the United Nations on December 10, 1948. Article 2 of the declaration reads:

101 Supra at 46.
102 *Rana Nahid @ Reshma* v. *Shahidul Haq Chisti*, 2020 SCC OnLine SC 522

> "Article 2: Everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[103]
>
> 30. The International Covenant for Civil and Political Rights (ICCPR) obligates the state parties to ensure equal right of women to enjoyment of all rights mentioned in each of the covenants. This right is irrespective of religion".
>
> 31. The Convention on the Elimination of All Forms of Discrimination against Women 1979, commonly referred to as CEDAW, recognizes amongst others, the right of women to equality irrespective of religion, as a basic human right. Article 2 of CEDAW exhorts State Parties to ensure adoption of a woman friendly legal system and woman friendly policies and practices.
>
> 32. As a signatory to the CEDAW, India is committed to adopt a woman friendly legal system and woman friendly policies and practices. The 1986 Act for Muslim Women, being a post CEDAW law, this Court is duty bound to interpret the provisions of the said Act substantively, liberally, and purposefully, in such a manner as would benefit women of the Muslim community.
>
> 33. Under the Indian Constitution, the right to equality is a fundamental right. All persons are equal before the law and are entitled to equal protection of the laws, be it substantive law or procedural law
>
> 34. The competing and conflicting principles of religious freedom of citizens and gender equality for women, has posed a major challenge to the judiciary in India..."

The high court also opined that the maintenance jurisprudence as developed by legislative and judicial process in this country shows that this right to sustenance is not founded on contract; courts have repelled the argument of financial incapacity while awarding maintenance when the husband has an able body; therefore, the pecuniary incapacity of the judgment debtor that ordinarily avails as a ground for resisting the execution of a money decree does not come to the rescue of the petitioner.

Addressing the issue of whether the ex-husband is liable to pay maintenance after getting re-married and begetting a child, The high court heard the counsel on behalf of the plaintiff and was unconvinced. The high court sternly asserted that the plaintiff ought to have known his responsibility towards the ex-wife who does not have anything to fall back upon; the said responsibility arose from his own act of *Talaq* and prior to espousing another woman; the responsibility and duty owed by a person to his ex-wife are not destroyed by his contracting another marriage.

103 Article 2, Universal Declaration of Human Rights,1948

On the basis of aforementioned precedents, statutory law, international treaties and scholarly opinions The High Court dismissed the writ petition for being devoid of any merit.

Maintenance of child born from Inter-faith marriage

In the case of *J.W. Aragadan* v. *Hashmi N.S.*[104] The High Court of Kerala identified two issues or questions of law that arose from the suit filed. The high court addressed whether the father of a child born out of an inter-faith marriage have legal obligation to maintain it in the absence of a statutory stipulation and whether an unmarried daughter born to an inter-faith couple entitled to marriage expenses from her father.

The brief facts of the case were that the parties in the suit are the daughter (respondent-1) and her parents (Father-appellant and Mother- Respondent-2) The child is born out of an inter-faith marriage and was brought up as a Muslim. The respondent-1 filed for a suit past and future maintenance along with the expenses for marriage from her parents under Hindu Adoptions and Maintenance Act, 1956[105]

The lower court on scrutiny of evidence held that the respondent-1 was brought up as a Hindu and hence the original petition filed under Hindu Adoptions and Maintenance Act, 1956 was perfectly maintainable and hence the lower court granted the reliefs prayed for. a decree for Rs.1,08,000/- towards past maintenance, Rs.14,66,860/- towards marriage expenses and Rs.96,000/-towards educational expenses with interest was granted.

The aforementioned decree and judgement were challenged under appeal. The appellants pleaded to the lower court that since the child has been brought up as a Muslim, the invocation of Hindu Adoptions and Maintenance Act, 1956 would render the petition invalid and unmaintainable.

The high court found the judgement of the lower court erroneous while deciding the maintainability of the petition. The high court recognised that the provisions of Hindu Adoptions and Maintenance Act, 1956 would be applicable on a child who has been brought up as a Hindu. This court observed that in the present case, evidence and the petition itself admits that the respondent was brought up by her maternal grandparents- who were Muslims. Further, the court placed reliance on the fact that the respondent-1 was married to a Muslim in accordance to Muslim Law. Therefore, the court held that the respondent-1 was brought up as a Muslim and hence the provisions of Hindu Adoptions and Maintenance Act, 1956 would not be applicable. Further, The high court acknowledged that the Muslim Personal Law (Shariat) Application Act,1937 would also be not applicable to the present case by placing reliance on section 2[106] of the which mandates both the parents to be Muslims. Further, this Court observed that the Special Marriage act, 1954 was also silent on this and hence the court opined that There is no substantive law mandating a father of a child born out of an inter-religious marriage to maintain it.

104 *J.W. Aragadan* v. *Hashmi N.S.*, ILR2022(1) Ker. 269.
105 Hindu Adoptions and Maintenance Act, 1956.
106 S. 2, Muslim Personal Law (Shariat) Application Act 1937.

Therefore, in the absence of a statutory stipulation, The high court asserted that since father is recognized as the guardian, he is under a duty to maintain and protect the child. The child being non sui juris, the State and the courts as *Parens Patriae* are bound to protect it. Further, by placing reliance on article 18 of the the United Nations Convention on the Rights of the Child (UNCRC)[107] asserted that the primary responsibility of the parents to maintain their children. To substantiate the above, this court placed reliance on the case of Sheela Barse v. Secretary Children's Aid Society[108] wherein The Supreme Court held that Conventions ratified by India for protection of children cast an obligation to implement the principles embodied therein. Further reliance was placed on the case of *Vishaka* v. *State of Rajasthan*[109] wherein The Supreme Court held that International Conventions and Norms were to be read into fundamental rights in the absence of enacted domestic law in the field.

Further, the court placed reliance on the case of *Mathew Varghese* v. *Rosamma Varghese*[110] wherein this court had dealt with similar issues. This in the abovementioned case drew inspiration from article 21 of the Indian Constitution[111] and held that irrespective of the faith of the father, he has an indisputable liability to maintain his child. The above stance was reiterated in the case of *Ismayil* v. *Fathima* .[112]

This court further reiterated that civil remedies are available to a child by the virtue of section 9 and O. XXXII A of the Code of Civil Procedure and section 7(1)(e) of the Family Courts Act, 1984 to claim maintenance. This court acknowledged the provisions for maintenance of child by the father in section 20 of the Hindu Adoptions and Maintenance Act, 1956 imposes a statutory obligation on the parents to maintain their legitimate or illegitimate children. Under the Muslim Personal Law administered in our country, a Muslim father is bound to maintain his sons until they have attained the age of puberty and his daughters until they are married.

The court made reference to the Judgements by The Hon'ble Supreme Court that establish that the parties to a live-in relationship or non-formal relationship who have lived together for an extended period of time could be brought within the purview of laws relating to maintenance. The abovementioned was affirmed in the case of *Chanmuniya* v. *Virendra Kumar Singh Kushwaha.*[113]

Therefore, this court held that there are no sufficient reasons as to why maintenance should not be given to a child born out of an inter-faith marriage. Hence this court asserted that all children are to be treated alike and are entitled to be maintained by their fathers.

Addressing the Second issue pertaining to whether marriage expenses could be considered within maintenance, The high court made reference to article 21 of the

107 Art.18, The United Nations Convention on the Rights of the Child (UNCRC),1992.
108 *Sheela Barse* v. *Secretary Children's Aid Society*, AIR 1987 SC 656.
109 *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241.
110 *Mathew Varghese* v. *Rosamma Varghese*, 2003 KHC 362.
111Art. 21 of the Indian Constitution
112 *Ismayil* v. *Fathima and Another,* 2011 (3) KHC.
113 *Chanmuniya* v. *Virendra Kumar Singh Kushwaha and Another* (2011) 1 SCC 141.

Indian Constitution[114] which devolves upon everyone a right to a dignified life and the forementioned judgements in *Mathew Varghese* v. *Rosamma Varghese*[115] and *Ismayil* v. *Fathima.*[116] This court observed that article 21 also encompasses within itself the inherent right to marry someone of one's own choice as affirmed in the case of *Shafin Jahan* v. *Asok K.M. and Others*[117]

The high court by making reference to the *Ismayil* v. *Fathima* observed that the maintenance and well-being of the child must include all expenses for the mental and physical well-being of the child and so far as unmarried daughter is concerned, her marriage is also something essential for the mental and physical well-being of the child. The question under consideration in the above case was whether a Muslim father is liable under Personal Law to meet the marriage expenses of his unmarried daughter. It was held that Muslim father also like all other fathers have the obligation to meet the marriage expenses of his unmarried daughter. By placing reliance on the aforementioned, The High Court held that an unmarried daughter born to an inter religious couple is entitled to marriage expenses from her father.

Further, The high court while addressing the means of identifying the quantum of maintenance for Expenses on Marriage, The high court acknowledged the current trend in marriages which are extravagant, pompous and luxurious but also did not entirely disregard the concept of small intimate marriage ceremonies which were seen often during the COVID-19 pandemic. The high court while keeping in mind the free- will to marry in a way as desired, opined that an unmarried daughter cannot ask or compel her father to conduct marriage in a lavish or luxurious manner. Father cannot be fastened with the liability to bear the amount spent by the daughter lavishly according to her whims and fancies. Placing reliance on the case of *Ismayil* v. *Fathima* which held that the right of the unmarried daughter and the duty of the father is only to meet the reasonable marriage expenses, that too only when the daughter is dependent on the father. The financial capacity of the father has also to be taken into consideration while determining the quantum. Hence, in a petition filed by the unmarried daughter against the father claiming marriage expenses, the court can only award bare minimum reasonable expenses, that too only if the father has requisite means and the daughter is dependent on him.

The high court made reference to the Islamic customs and rites to determine the quantum of marriage expenses while considering the expenses incurred by the respondent-1 for her marriage. The court made reference to the Prophet Muhammad produced as under:

> "The marriage which is most blessed is the one which is the lightest in burden [expense]. However, if people are well catered for, without extravagance and show, there is no problem with that either." (Bayhaqi)."The best marriage is that upon which the least trouble and expense are bestowed."

114 *Supra* at 39.
115 *Supra* at 110.
116 Supra at 112.
117 *Shafin Jahan* v. *Asok K.M. and Others*, AIR 2018 SC 1933.

The high court identified that most of the expenditure was done on purchasing gold ornaments, This court held that the appellant cannot be held responsible to pay for such luxuries. Therefore, this court altered the judgement and reduced the amount granted for marriage expenses to 3,00,000.

Custody of a minor child (*hizanat)*

In the case of *Mohammed Mushtaq G.K.* v. *Ayesha Banu*[118] the High Court of Karnataka had to decide upon the grant of custody of a minor child to one of the parties. The brief facts of the case were that the parties were Sunni Muslims married to each other and a child was born out of the wedlock. Due to personal differences, the marriage had broken down irretrievably and a suit had been filed for the dissolution of the same. The parties lived separately and ever since, the petitioner-ex-husband had remarried and has had another child and the respondent- ex Wife had been living separately and raising the child in question alone with the means available to her. The Family Judge had granted visitation rights to him but being aggrieved by the denial of custody, petitioner approached the High court; the respondent appearing in person opposes the petition. The petitioner has filed a petition for the exclusive custody of the minor child.

The petitioner has contented that the exclusive custody of the child is for the betterment of the child as the petitioner is in a better financial position and would be able to provide for best upbringing education and a complete family environment. The respondent has contented that the parties were subject to a plethora of civil and criminal suits against each other, the petitioner was alleged of dowry harassment and physical and mental cruelty.

The high court after hearing the parties decided not to indulge in this matter. The high court observed that a petition for dissolution of marriage filed by the petitioner is already pending. The facts had indicated that the petitioner had remarried and begotten a child, on the other hand the respondent resided separately and raised the minor child with the help of her brother. The court after interacting with the child is also of the opinion that the child has preferred to stay with the respondent. Further, the court observed that the petitioner was ignorant of the minor child's maintenance. Therefore, the contention of financial stability is rejected as the child is already able to access all the necessities of the child.

Further, the high court observed its duty as a writ court and its supervisory functions as the main case was still pending in the lower court. Therefore, the impugned order was only by way of interim arrangement and thus obviously subject to outcome of the main matter; learned Judge of the court below in his accumulated wisdom & discretion has granted visitation rights to the petitioner. The high court held that in circumstances like the one at hand, a writ court exercising a limited supervisory jurisdiction constitutionally vested under article 227 and hence cannot undertake a deeper examination of the matter; the high court further observed if the custody is given to the petitioner, than the respondent will be left alone, which the court felt offended the very sense of Justice.

118 *Mohammed Mushtaq G.K.* v. *Ayesha Banu*, MANU/KA/5532/2021.

Further, the court acknowledged the petitioner along with his second wife had filed an affidavit, assuring to take care of the child. The high court placed reliance on the case of *T.N. Muthuveerappa Chetty* v. *T.R. Ponnuswami Chetty*[119] wherein the observations of the Madras High court were relied upon and as produced here under:

> "...It would make it the duty of the Court to come to its own conclusion as to what would best promote the minor's interests. It does not appear that, excepting the respondent's wife, there is any female relation living with him competent to take proper care of the child. It would be hardly safe to presume that his wife, the child's step-mother, would be willing to do so... There is good reason for believing that the maternal relations have strong affection for the child..."
>
> Further, The High Court made reference to prominent leading Islamic Scholar A.A.A Fyzee's book and produced it as under:
>
> "The custody of an infant child belongs to the mother". He quotes the following from another scholarly work i.e., Baillie I, 435:
>
> "The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted"[120].

Further, the high court made reference to prominent Muslim Legal Scholar D.F. Mulla, who observed as under:[121]

> If a separation takes place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother because it is recorded that the woman once applied to the Prophet, saying: 'O Prophet of God; this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own 'care' to which the Prophet replied 'thou hast a right in the child prior to that of thy husband. So long as thou does not marry with a stranger'. Moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child

The Hon'ble High Court while placing reliance on the case *Sri YusufPatel* v. *Smt. Ramjanbi*[122] This Court held that the act of a Muslim in espousing a second wife during the subsistence of first marriage per se amounts to cruelty and that not only the first wife can stay away from the matrimonial home but seek divorce too on these grounds. Hence the wife can refuse to stay with the husband and hence could retain the exclusive custody of the minor child.

119 *T.N. Muthuveerappa Chetty* v. *T.R. Ponnuswami Chetty,* 13 IND CAS 16.

120 A.A.A. Fyzee, Outlines of Muhammadan Law, 161(Oxford 5th edn.,2009).

121 D.F. Mulla, *Principles of Mahomedan Law*, 439 (Lexis Nexis, Butterworths,20th Edn.)Quotes Hamilton Volume I at 385.

122 *Sri Yusufpatel* v. *Smt. Ramjanbi* ILR 2021 Kar 746.

Further, it is pertinent to note that in this court that made efforts to reach an amicable settlement which were unsuccessful due to the petitioner's adamant approach despite being living happily with the second wife.

On the basis of above, The Hon'ble High court held that the petition filed was devoid of merit and hence was dismissed with a cost of 50,000 to be paid by the petitioner to the respondent

III LAW RELATING TO PROPERTY

Succession

In the case of *Abdul Mujeeb* v. *T.P. Somasekharan Nair*[123] the High Court of Allahabad through an appeal had to ascertain upon the issues framed pertaining to lapse of procedure by the lower appellate court and vitiation of findings due erroneous assumptions based on nikahnama.

The facts are indicative of a civil suit for succession of the assets of one Radha mani (later Shama) who had embraced Islam and married the plaintiff. After her demise, the plaintiff being her husband had applied for her post death benefits and emoluments. The plaintiff-appellant had applied for a succession certificate which was granted in his favour. However, the respondents in the case had also filed for a succession certificate which was granted. To seek further clarification on succession, the plaintiff instituted a suit for declaration seeking the relief that it be declared that the plaintiff is the heir of Ms. Shama. The Respondents contested the proceedings and the Trial court framed two issues addressing the jurisdiction of the court and whether the petitioner was the legal heir of his deceased wife. The Trial court heard the parties and recorded documentary evidence along with oral testimonies of the witnesses. Further the Trial also noticed the official documents i.e., the service book wherein Radhamani had nominated the plaintiff as her heir and that she had also adopted the prefix "Smt." The Trial court finding that the defendants did not lead any clear evidence to dispute the said facts by means of its judgment and decreed the suit. The Respondents appealed to the lower appellate court which heard the parties and reversed the judgement of the trial court. As a result, the petitioner had appealed to The High Court.

on the basis of the various precedents and statutory law, the high court held that holding the nikahnama was not proved as erroneous and further the reasons given by the lower appellate court in disbelieving the relationship of the marriage also does not flow either from the pleadings or the evidence led by the defendants. Consequently, the high court was of the opinion that the lower appellate court had overstepped its jurisdiction in embarking upon the inquiry as a first appellate court beyond the material available on record, accordingly, the same cannot be sustained. On these grounds the judgement of the trial court was reaffirmed by the high court.

Inheritance/Will:

In the case of *Krishna* v. *Shaukin*[124]the High Court of Allahabad had to decide an appeal arising from the judgement of the appellate court which set aside the

123 *Abdul Mujeeb* v. *T.P. Somasekharan Nair*., MANU/UP/3332/2021.
124 *Krishna* v. *Shaukin* MANU/UP/0502/2021.

judgement of the Civil court hence dismissing the suit. The issues involved addressed Will and Inheritance of property. The dispute arose when the plaintiff-respondent prayed for decree of partition in the disputed property in respect of his one-half share.

The plaintiff-respondent had instituted Original Suit contending inter-alia that one, late Ajimuddin son of Mohd. Bux was exclusive owner of the property in dispute. He transferred one half share of the disputed property by the sale deed dated 14.3.1962 in favour of Wahid Bux son of Murad Bux Lohar. Abdul Wahid died issueless and had executed a Will of his share in the disputed property in favour of one Fateh Mohammad son of Bashir Ahmad on April 20, 1977. It is further stated that Abdul Wahid and Fateh Mohammad had died and the plaintiff-respondents are legal heirs of Fateh Mohammad.

The suit was contested by the respondent nos. 9 and 11. In the aforesaid suit, the respondent Nos. 9 and 11 filed joint written statement contending inter-alia that late Ajimuddin had not transferred one half share of the disputed property to late Abdul Wahid by sale deed datedIt was further pleaded that the sale deed dated 14.3.1962 was forged document and hence it is void in law. The said averment had been made on the ground that late Ajimuddin was suffering from epilepsy since before 1962 and as he was not mentally fit to enter into a contract, he could not execute the sale deed. The respondent denied that the plaintiff-respondent is the owner of half of the disputed property. The trial court formulated five issues regarding the share of the appellant and possession over the property by the defendant-appellant. The trial court on admitting the evidence and hearing the witnesses decided that the respondents claiming ownerships were not co-owners and the trial court found that the defendant-appellant has established their possession and hence it has decided the said issue in favour of the defendant-appellant.

Further, the appellate court framed 3 issues and on the basis of the documentary and oral evidence reversed the judgement of the trial court establishing the ownership of the plaintiff-respondents on half of the disputed property. The appellate court in order to ascertain the validity of the Will observed that the plaintiff-respondent led evidence which proved that late Abdul Wahid executed will deed in favour of late Fateh Mohammad. The appellate court noticed that in the sale deed it is stated that possession has been delivered to vendee and the boundaries described in the sale deed tallies with the boundaries of the disputed property described at the foot of the plaint. The court heard the statements of the prosecution witness who was a witness to the Will. The Appellate court found no inconsistency with the statements of the witness and placed reliance on the case of *Banga Bahera* v. *Brajkishore Nand*[125] decided by The Supreme Court and held that the plaintiff-respondent has proved the Will.

Further, In response to the argument of defendant-appellant that Abdul Wahid being Muslim could not execute the Will of his whole property, the appellate court considered the Will and found that it is stated in the 'Will' by the executor that "he has no issue". Thus, the appellate court found that late Abdul Wahid had no heir. Further, the appellate court found that the defendant-appellant has not led any evidence

125 *Banga Bahera* v. *Brajkishore Nand*, 2008 (104) RD 61.

to prove that the Will executed by Abdul Wahid was ever objected by any heirs of late Abdul Wahid. Further, the court also rejected the contention of the defendant-appellant claiming the sale deed to be a forged one. The appellate court placed reliance on the death certificate of late Ajimuddin filed by Krishna, defendant-appellant and found that the certificate does not establish that late Ajimuddin had died prior to the execution of the sale deed. The reason for not believing the death certificate paper by the appellate court was that the death certificate paper was given to Hamid who was the son of Ajimuddin, after 2-3 years of the agreement to sale dated May 13, 1996, *i.e.,* the same was given in 1999. The appellate court by perusing the said document observed that it was registered on September 6, 2003 and issued on October 11, 2003. The court on this basis identified that the whenever the paper is being claimed to be given, at that time it did not exist. Accordingly, the court found that the plaintiff-respondent had proved that they are owner and in possession of half of disputed property.

On issue 2 framed by the appellate court, *i.e.,* whether any right in favour of defendant-appellant accrues in respect of disputed property by agreement to sale dated May 13, 1996, the appellate court found that the agreement to sale has been executed in respect of 217 sq. yd. of the disputed property whereas the sale deed dated April 7, 2011 has been executed in respect of 136 sq. meter. The court was unconvinced by the defendant-appellant on the question of how and in what circumstances the sale deed was executed for an area lesser than the area described in agreement to sale as according to agreement to sale. The court also noticed the sale deed being silent on the boundaries of the disputed property and therefore, the issue was decided against the defendant-appellant. Challenging the aforementioned, the appellant had approached The High Court.

The counsel for the appellant submitted that 1) The judgment of the appellate court has been rendered in violation of the mandatory provision of Order 41 Rule 31 CPC[126] as the appellate court has rendered the judgment without formulating the points for determination and 2) late Abdul Wahid being Muslim could not bequeath his whole property in view of the prohibition in the Mohammedan Law that a Mohammedan cannot bequeath his whole of the share, therefore, 'Will' in favour of plaintiff-respondent was void.

The high court while dealing with the first contention of the counsel concurred by the observation of the Trial court and identified the point of determination after taking all documentary and oral evidence into consideration. The counsel for the appellant was not able to point out anything erroneous or perverse in the findings of the appellate court.

Further, the High court while addressing the issue 1 and 2 framed by the appellate court observed that illegality as the trial court failed to consider that the sale deed was unchallenged and the contents of the Will along with the witness testimony were disregarded by the trial. Therefore, this court held that the will was valid and late Hamid bequeathed his whole of the share in the disputed property in favour of later

126 Order 41 Rule 31 Civil Procedure Code,1908.

Fateh Mohammad and plaintiffs being heirs of late Fateh Mohammad inherited the property from him

Further, The high court concurred with the appellate court in recording the finding that the defendant-appellant could not explain as to how sale deed was executed with respect to 136 sq. yd. land whereas the agreement to sale was in respect to 217 sq. yd of the disputed property. On the grounds mentioned above, the high court upheld the judgement of the appellate court on the first issue of contention and rejecting the counsel on behalf of the appellant's argument.

Further, The high court addressing the second submission pertaining to Abdul Wahid bequeathing the whole of the property is invalid observed that the plea for the same has not been raised by the defendant-appellant through their written statements and No issue has been formulated for the same. Further, this court acknowledged the stance taken by the appellate court which held that the Will stated that Abdul Hamid was issueless and hence had no legal heirs. This court acknowledged that the practice of bequeathing the entirety of the property is prohibited in Islam but since no case was made or put forth by the means of a written statement, the plea was accordingly rejected. The high court did not find any perversity or error in the judgement of the appellate court and accordingly dismissed the appeal.

Will

In the case of *Ashiq Ali* v. *Yasin Mistri*[127] The High Court of Himachal Pradesh had to decide upon the validity of the Will by addressing two issues framed pertaining to interference of the lower appellate court in the execution of Will due to non-examination of the scribe and second whether the evidence provided by the witness is misread and mis-appreciated.

The facts herein indicate that the respondent No. 1 filed a civil suit for declaration and permanent prohibitory injunction against the appellants herein alleging that the Will executed by the mother of appellant No. 1, respondents and grandmother of the appellants no. 2 to 4 in respect of properties owned and possessed by her in favour of the appellants no. 2 to 4 was illegal and wrong and she did not execute any legal and valid will during her lifetime nor she could execute the Will as per the personal law applicable to the parties and it was further the case of respondent No. 1 that in case the Will is held to be legally validly executed in that event also the same is not valid beyond 1/3rd share as the Will beyond 1/3rd share by Muslim is not permissible under the personal law. The Trial court on analysing the documentary and oral evidence presented held that the Will is duly executed in accordance with law but by taking the restriction on bequeathing the entire estate placed by the personal laws, The trial court decided that the Will is only valid to the extent of 1/3rd share of the estate bequeathed and the remaining 2/3rd is to be inherited by legal heirs of the Testator. Aggrieved by the said decree and judgement, the appellant had preferred an appeal to the Lower appellate court which further decided against the appellant by setting aside

127 *Ashiq Ali* v. *Yasin Mistri* ., MANU/HP/0235/2021.

the trial court judgement which held the will legal and valid. Aggrieved by the decrees, the appellant through a second appeal approached the high court.

In the opinion of this high court, the lower appellate court had drawn an adverse inference against the appellant on grounds that the scribe of the Will was not produced as a witness, the same was prima facie evident from para-19 of the impugned judgement produced as under:

> The will is shown to have been scribed by the documents writer Shri Shamshad Ahmed Qureshi and attested by Mohd. Ramzan and Lovender Singh. It would be seen that scribe Shamshad is alive but has not been produced in the witness box. DW-1 Ashiq Ali in his cross-examination has admitted that Shamshad Qureshi is alive and residing in Gunnughat at Nahan. Although he has stated that he has heart trouble and he is not in a position to walk but his statement could have been got recorded by getting a local commissioner appointed. No such steps were taken by the defendants. One attesting witness Lovender Singh has been produced whereas another attesting witness Mohd. Ramzan has died. Since Mohd. Ramzan is no more, the scribe who is alive should have been produced in the witness-box. His non-production or for non-getting his evidence recorded by appointment of commission an adverse interference is required to be drawn against the execution of the Will. Then Lovender Singh does not state to have witnessed Smt. Tulsa putting her signatures. As already stated, Mohd. Ramzan has already died and scribe Shamshad Ahmed Qureshi has not produced thus there is no evidence to prove that the witness had seen Smt. Tulsa putting her signatures over the Will. Under Section 63 of Indian Succession Act, the marginal witnesses while appearing have to prove under Section 68 of the Indian Evidence Act that the attestor had scribed the Will in their presence and after having heard and understood the same had signed or put her thumb impression in their presence and further that both attesting witnesses then appended their signatures in presence of the attestator. These requirements of law have not been proved to have been fulfilled by Lovender Singh, the only attesting witness produced in the Court. Regarding the mode of execution the case cited in 2007 (3) RCR 240 is referred to. Also, the case cited in PLR 1998 (2) 524 is relevant. These were held to be the inherent defects in the execution of the Will in the citation CCC 1996 (1) Supreme Court 37.

The counsel on behalf of the appellant submitted that the aforementioned observation of the lower appellate court are perverse on grounds that there is no legal requirement for the scribe to be examined to ascertain the validity of the will. The counsel asserted that the Scribe was not required since an attesting witness was thoroughly examined.

The Counsel on behalf of the respondent placed reliance on the case of *Mehandi Hassan* v. *Rafiquan*[128] to submit that the mode of proving the Mohammedan Will is

128 *Mehandi Hassan* v. *Rafiquan* (2001) 2 Shim. LC. 231.

different from proving Will governed by the provisions contained in Part-VI of Indian Succession Act, 1925. While a Mohammedan Will is required to be proved under Section 67 of the Evidence Act, 1872,[129] a Will governed by the provisions contained in Part VI of the Indian Succession Act, 1925, is required to be proved as laid down under Section 68 of the Evidence Act, 1872.[130] Therefore, the validity of the will in question Exhibit DW-2/A is required to be examined under the provisions of section 67 of the Evidence Act.[131] Section 67 of Evidence Act is produced as under:

> "67. Proof of signature and handwriting of person alleged to have signed or written document produced.- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Further reliance was placed on the case of *Miyana Hasan Abdulla* v. *State of Gujarat*[132] to substantiate the above statutory provision. The high court while addressing both the issues together concurred with the observations of the Lower Appellate court and the counsel on behalf of the respondent's submission pertaining to section 67 of the Evidence Act. This High court held that since the attesting witness has not stated to have witnessed the testator putting her signatures over the Will, the testimony of the scribe would assume importance. Therefore, The High court found no merit in the appeal and accordingly dismissed the same.

Waqf and waqf administration

Sheikh Salim Raza v. *State of Chhattisgarh,*[133] is related to special status of the Waqf Act, 1995 and its prevalence over the criminal action when the remedy for irregular conduct lies within the said Act. The facts in the present case reveal that a writ petition was filed by the appellant / petitioner stating therein that earlier he was the President of Anjuman Islamia Society, where from he has been removed illegally. He contended that on the basis of written complaint filed by the Chief Executive Officer of Chhattisgarh State Waqf Board, Raipur, under sections 406, 420, 467, 468, 471/34 of Indian Penal Code, 1860 A case of committing co financial irregularities and preparing forged books of accounts by manipulating in the documents has been registered at Police Station, Jagdalpur, Bastar. It has been stated further that based on aforesaid facts and incident, a private complaint under Section 200 of Code of Criminal Procedure has also been filed in the Court of Chief Judicial Magistrate, Jagdalpur, Bastar against appellant and others. Lodging of aforesaid FIR for the same offence and for same time period, amounts to double jeopardy of the appellant / petitioner for the same crime. Registration of aforesaid FIR is also baseless, against the prescribed provisions and procedures of the Waqf Act, 1995 (for short, 'the Act, 1995'), the issue involved is of civil nature, therefore, alleged FIR registered against appellant /

129 S. 67 of the Evidence Act, 1872.
130 S. 68 of the Evidence Act, 1872.
131 *Supra* at 121.
132 *Miyana Hasan Abdulla and another* v. *State of Gujarat*, AIR 1962 Guj 214.
133 *Sheikh Salim Raza* v. *State of Chhattisgarh*, AIROnline 2021 CHH 746.

petitioner be quashed and appropriate direction be issued to the Police to take action against complainant for making false complaint. After hearing both the sides, learned Single Judge considered the matter at length and by declining to grant relief, as prayed for, dismissed the writ petition, which has given rise to this writ appeal.

Learned counsel for the appellant / petitioner submits that private complaint filed by Chhattisgarh State Waqf Board, Raipur which has been registered as Criminal Case No. 159/2017 alleging therein that, being mutawalli of Anjuman Islamia Committee, Jagdalpur, appellant and other accused persons have committed various financial and other irregularities. On the basis of same facts and same time period, a FIR has also been lodged by Waqf Board against the petitioner and others in Police Station Jagdalpur, District Bastar. This was in violation of Article 20 (2) of the Constitution of India, as well as against section 300 of Cr PC, as the registration of FIR and criminal complaint case in respect of same incident is amounting to double jeopardy of the appellant / petitioner.

Learned counsel for the appellant / petitioner further submitted that the Act, 1995 is a special Act. Section 108 A provides overriding effect to the provisions of this Act over any other law. Section 61 of the Act, 1995 provides for the procedure to take cognizance of the offence committed in respect of the waqf property. Section 61 (1) and (2) (b) provides for punishment / penalty also, for non-compliance of duties by mutawalli, as provided in the Act. Section 61 (3) bars registration of FIR. Section 61 also emphasizes that cognizance of the offence can be taken solely by the Waqf Board or its authorized officer, upon filing of the complaint case. Section 72 (6), (7) and (8) of the Act, 1995 also provide the procedures, required to be followed, if any irregularities had been done in respect of waqf property. Alleged crime has been registered against the appellant / petitioner without following aforesaid provisions of the Act, 1995. It was further submitted that aforesaid provisions of the Act, 1995 demonstrate that if any irregularities had been committed in respect of waqf property, then action could be taken under the Act, 1995, only by following procedure prescribed therein. Therefore, registration of aforesaid FIR against the appellant / petitioner was against the prescribed provisions and procedures of the Act, 1995, and that apart, the allegations are of civil nature. It was further submitted that the learned Single Judge without properly considering aforesaid aspects, has dismissed the writ petition, hence, he prayed for allowing the writ appeal and grant of relief, as sought for, by the appellant in writ petition.

Sate Counsel controverted the submissions of the Counsel for appellant/ petitioner. As per him FIR No. 108/2020 (Annexure A/2) has been registered by the Police on the basis of written complaint filed by the Chief Executive Officer of Chhattisgarh State Waqf Board, Raipur, wherein it has been alleged that between 2011-12 to 2019-20, appellant and other office bearers of Anjuman Islamia Committee have made financial irregularities / embezzlement of crores of rupees of waqf property during their tenure by manipulating / fabricating documents of books of account, which demonstrate cognizable offence against the appellant and other co- accused persons. Therefore, Police had no option except to register the FIR against them and now, whether any offence has been committed or not, could have been ascertained

only after investigation of the matter. He further submitted that case projected in complaint case and facts narrated in written report / FIR are not based on the same set of facts and the Act, 1995 does not bar to take action with regard to crime like cheating, fabrication of false documents, embezzlement of amount etc. in respect of waqf property. It is further submitted that order passed by the learned Single Judge is well founded and a reasoned order, which does not call for any interference of this Court, hence writ appeal is liable to be dismissed.

Learned counsel for the respondent No. 3 while supporting the submissions made by learned State counsel, submitted that contents of both the cases i.e., private complaint and FIR, are of totally different nature of facts and offence. It was further submitted that alleged FIR has been lodged after detailed enquiry conducted at the behest of Anjuman Islamia Committee, Jagdalpur. The Act 1995 does not bar the Police to take action against miscreants, who have embezzled crores of rupees by manipulating documents in respect of waqf property. Hence, the appellant / petitioner is not entitled for relief, as sought for, by him in the writ petition. Therefore, he also prayed to dismiss this writ appeal.

After hearing both the sides Hon'ble High Court of Chhattisgarh took notice of the fact that appellant heavily relied on section 61 of the Act, 1995 and the respondent counsels made the submission that it was not a case of double jeopardy as the factual deposition of fir and private complaint differ. The high court then further perused the entire situation claimed. It first took notice of the section 61 of the Act, which reads as:

> 61. Penalties. —
>
> (1) If a mutawalli fails to—
>
> (a) apply for the registration of a wakfs;
>
> (b) furnish statements of particulars or accounts or returns as required under this Act;
>
> (c) supply information or particulars as required by the Board;
>
> (d) allow inspection of wakf properties, accounts, records or deeds and documents relating thereto;
>
> (e) deliver possession of any wakf property, if ordered by the Board or Tribunal;
>
> (f) carry out the directions of the Board;
>
> (g) discharge any public dues; or
>
> (h) do any other act which he is lawfully required to do by or under this Act. he shall, unless he satisfies the court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.
>
> (2) Notwithstanding anything contained in sub-section (1) if—
>
> (a) a mutawalli omits or fails, with a view to concealing the existence of a wakf, to apply for its registration under this Act, —

(i) in the case of a wakf created before the commencement of this Act, within the period specified therefor in sub-section (8) of section 36;

(ii) in the case of any wakf created after such commencement, within three months from the date of the creation of the wakf; or

(b) a mutawalli furnishes any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular, he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No court shall take cognizance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorised by the Board in this behalf.

(4) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the fine imposed under sub-section (1), when realised, shall be credited to the Wakf Fund.

(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the court shall also impose such term of imprisonment in default of payment of fine as is authorised by law for such default."

The high court observed that, section 61 (1) and (2) provides duties of *mutawalli*, which are required to be done by him and if he fails to do his duty as provided therein, he shall be liable to be punished, as provided in sub-Section (1) and (2). Sub Section (3) of Section 61 provides that cognizance of an offence punishable under the Act, 1995 could be taken only on the basis of complaint made by the Waqf Board or an officer authorized by the Board in this behalf.

In the understandings of the High Court, perusal of private complaint revealed that it has been filed against them for non-compliance of order issued by the Waqf Board, non-depositing of the amount of contribution which was payable by the appellant and other accused being mutawalli and office bearer of Anjuman Islamia Committee, Jagdalpur and also because they did not perform their duties with regard to illegal possession, construction / allotment of waqf property and did not submit documents before the Waqf Board in respect of amount received by them. Therefore, relief has been sought by complainant to punish appellant / petitioner and other co-accused persons under Section 61 of the Act, 1995.

A perusal of FIR registered against the appellant / petitioner and other accused persons showed that it had been registered on the basis of written report filed by the Chief Executive Officer of Chhattisgarh State Waqf Board, Raipur, wherein it has been clearly stated that appellant and other office bearers of Anjuman Islamia Committee has misappropriated Rs.3,58,56,533/- during the period of 2011-12 to 2019-20 by manipulating / fabricating the documents, as they have withdrawn huge

amount from Banks and received huge amount of donation etc., but they did not make entry in cash book / ledger book, and thereby, they have committed fraud, embezzlement by manipulating in the documents, misappropriated crores of rupees of waqf property and cheated Waqf Board. As stated by learned counsel for the respondent No. 3, aforesaid crime has been registered against the appellant and other co-accused persons on the basis of written complaint filed by the Wakf Board, after enquiry conducted at the behest of Anjuman Islamia Committee, Jagdalpur, which is also demonstrated from the FIR itself.

After perusing the FIR and Private complaint the high court concluded that both the cases have been filed for different set of facts. Private complaint has been filed against the appellant and other accused persons to punish them under section 61 of the Act, 1995, as they have not complied with their duties as office bearer of Anjuman Islamia Committee in respect of waqf properties and FIR has been lodged against them for cheating, forgery, fabrication of false documents and thereby, commission of embezzlement of crores of rupees. Therefore, argument of counsel for the appellant that both the cases *i.e*., private complaint and FIR are based on same set of facts / incident or for the same offence, is not sustainable. In other words, doctrine of double jeopardy of appellant / petitioner does not come into play in this case.

The high court further noted that sub-section (3) of section 61 of the Act, 1995 provides that cognizance of an offence punishable under this Act could have been taken only on the basis of complaint made by the Board or an officer authorized by it, in this behalf. In this case, FIR has been lodged on the basis of written complaint filed by the Chief Executive Officer of the Chhattisgarh State Waqf Board, Raipur. Section 72 (6) (7) and (8) of the Act, 1995 provides provisions for assessment / reassessment of net annual income of the waqf by the chief executive officer with regard to annual contribution payable to the Board by the Mutawalli. This Section lays down provisions for internal matters between Mutwalli and Waqf Board in respect of annual contribution payable to the Waqf Board by the mutawalli. This provision nowhere provides an enquiry with regard to offence like cheating, embezzlement etc. in respect of waqf property. Section 108 A provides overriding effect of this Act, on any other law in respect of only those subject / affairs, which have been provided in this Act. There is no such provision in the Act, 1995, which deals with crime like cheating, forgery, fabrication of documents, embezzlement committed in respect of waqf property. Therefore, submission of counsel for the appellant / petitioner, that penalty in respect of any mischief committed in respect of the waqf property has been provided in the Act, 1995 and therefore lodging of the FIR against appellant / petitioner is against the procedure prescribed in the Act, 1995, is also not sustainable. The contents of FIR reveal that it had been lodged after enquiry made by Anjuman Islamia Committee, Jagdalpur, which prima facie showed misappropriation and embezzlement of huge amount of waqf property. It was not a case of only embezzlement of huge amount, but it is also a case of cheating and fabrication of false documents.

The high court further observed that in catena of judgments, Supreme Court has held that if the FIR prima facie disclosed the commission of an offence, the High

Courts should be reluctant to quash the FIR at the stage of investigation. The High Court finally keeping its reliance on the judgment of Supreme Court in *Neeharika Infrastructure Pvt. Ltd*. v. *State of Maharashtra* [134] quoted and observed:

> "As observed hereinabove, there may be some cases where the initiation of criminal proceedings may be an abuse of process of law. In such cases, and only in exceptional cases and where it is found that non-interference would result into miscarriage of justice, the High Court, in exercise of its inherent powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India, may quash the FIR/complaint/ criminal proceedings and even may stay the further investigation. However, the High Court should be slow in interfering the criminal proceedings at the initial stage, i.e., quashing petition filed immediately after lodging the FIR/complaint and no sufficient time is given to the police to investigate into the allegations of the FIR/complaint, which is the statutory right/duty of the police under the provisions of the Code of Criminal Procedure. There is no denial of the fact that power under Section 482 Cr.P.C. is very wide, but as observed by this Court in catena of decisions, referred to hereinabove, conferment of wide power requires the court to be more cautious and it casts an onerous and more diligent duty on the court. Therefore, in exceptional cases, when the High Court deems it fit, regard being had to the parameters of quashing and the self-restraint imposed by law, may pass appropriate interim orders, as thought apposite in law, however, the High Court has to give brief reasons which will reflect the application of mind by the court to the relevant facts."

Finally, after due considerations, high court did not find any substance in the arguments advanced by learned counsel for the appellant / petitioner worth interfering in the order passed by the learned Single Judge. Hence, this writ appeal was dismissed without cost.

IV CONCLUSION

The analysis of the reported cases in 2021 highlights a concerning issue where judges in the lower judiciary sometimes lack a proper understanding of the fundamentals of Muslim Law. One particular case involving extrajudicial divorce, specifically Khula and Mubaraat, saw a lower court expressing its inability to comprehend extrajudicial divorce beyond the eight grounds provided by the Dissolution of Muslim Marriages Act of 1939, which allow a woman to seek separation from an undesirable husband. However, the learned judges of the Kerala High Court took a comprehensive approach, delving into the original sources of Islamic law, to dispel the misunderstandings surrounding extrajudicial divorce, including Khula, Talaq-e-tafwiz, Mubaraat, and even Faskh, which is a judicial method of divorce. These judges left no stone unturned in providing an extensive and accurate understanding of the law of divorce. Their efforts in presenting an encyclopaedic interpretation of the law deserve commendation.

Likewise, in a divorce case where Talaq was pronounced in the form of Ahsan Talaq, the learned judge provided a detailed explanation and justified the husband's position in choosing such a method of divorce. The court also distinguished between the remedies available to a separated woman under the laws of maintenance and domestic violence. Consequently, maintenance for the child was granted, and the modified judgment from the second lower court was rightfully overturned by the high court. This serves as a testament to the wisdom and discernment displayed by the learned judges.

The cases concerning the maintenance of wives and children have been carefully deliberated upon and decided by various high courts. However, a significant issue arises in the context of maintenance for "X" wife, as it continues to be provided under two different legal frameworks: Section 125 of the Criminal Procedure Code (CrPC) and the Muslim Women (Protection of Rights on Divorce) Act of 1986. The constitutional bench judgment in the case of Danial Latifi is often referred to in order to justify the implications of both regimes. However, the maintenance ratio established in the Danial Latifi case is itself non-comprehensive and subject to debate. Considering the burdened judicial docket, the surveyor humbly suggests that the courts should consider establishing a new principle that requires complaints to be considered under a single legal framework, rather than obliging the complainant to seek maintenance under both frameworks. This would help reduce the exploitation of litigants and lessen the burden on the courts.

In one specific case concerning the custody of a child, it was determined that the right of custody lies with the mother for boys up to the age of seven and girls until marriage. The learned judge beautifully enforced this right, known as Hizanat, and also expressed the underlying spirit of Islamic law behind this provision, highlighting that mother and their relatives, by nature, possess a greater affection towards their minor children.

While the reported cases on property law are relatively few in number, they have been decided in accordance with their true spirit. These cases pertain to matters such as wills, inheritance, and waqf. The judges of the high court have duly considered the restrictions on bequeathing only one-third of the property as prescribed by the law of wills. They have also recognized the importance of inheritance and the distribution of shares among the heirs in accordance with Islamic inheritance laws. However, it is regrettable that due to the complexity of India's procedural laws, the implementation of succession and inheritance based on Islamic law is not always followed. This is primarily because lawyers, judges, and even legal scholars are not well-versed in the various categories and duration of Islamic law. Although this information is now available online, many individuals still fail to consult the easily accessible resources, disregarding the comprehensive textbooks on Muslim law that provide detailed information about the categories of heirs and their respective shares.

Regarding the administration of Waqf and its protection from encroachment, the judges have taken measures to safeguard Waqf properties. The Waqf Act of 1995 has established special jurisdiction for bodies such as the Waqf Tribunal to settle disputes related to Waqf, superseding the provisions of the Code of Civil Procedure.

The concluding remark made by the surveyor in the 2021 report suggests that the adjudication of Muslim law generally aligns with the spirit of the law, as judges strive to apply Muslim law to the parties involved. However, Muslim litigant and sometimes Muslim people in concern themselves often display reluctance in understanding the law in its true spirit, relying on fragmented knowledge from various sources. If Muslims were to fully understand and apply the spirit of the law, it would ensure the restoration of Muslim personal law. By doing so, they would become genuine promoters of Islamic law in its genuine content and spirit.

Last but not the least, it maybe respectfully submitted that while judges on one hand refer to original sources of Muslim law like the Holy Quran and Hadiths on the other hand, they quote sometimes non-established authors who are not well acclaimed nor they are well versed with the judicial process unlike the judicial authors.